71816-9

71816-9

NO. 71816-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN W. PALM,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

ROBERT W. FERGUSON
Attorney General

Paul Weideman
Assistant Attorney General
WSBA No. 42254
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-3820

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

A jury heard competing medical evidence about whether John Palm's work as an electrician caused various medical conditions in his shoulders, low back, and left knee. One medical expert testified that his age, obesity, and deconditioning caused these conditions. A treating physician testified that MRI images of Palm's shoulders and the findings in his left knee were typical of someone of his age. The jury, after weighing this evidence, concluded that Palm's work did not cause these conditions and that he did not have an occupational disease.

Palm asks this Court to grant him judgment as a matter of law because his medical expert had a more thorough knowledge of his work history. But this Court does not re-weigh evidence on appeal. Palm made these same arguments to the jury, which it rejected.

Additionally, the multiple proximate cause instruction allowed Palm to argue his theory that his work was at least a cause of his occupational disease. Thus, the trial court did not abuse its discretion in rejecting a proposed instruction that a worker is taken as he is.

Finally, the trial court did not abuse its discretion in allowing the Department to use a peremptory challenge after the jury was impaneled but before any evidence was taken or arguments made. This Court has

previously approved post-impanelment peremptory challenges, and Palm was not prejudiced by the trial court's decision. This Court should affirm.

II. ISSUES

1. Did the trial court abuse its discretion in denying judgment as a matter of law to Palm where a medical expert testified that his age, obesity, and deconditioning caused his conditions and where another medical expert testified that his conditions were consistent with other people of his age?

2. Did the trial court abuse its discretion in declining to give Palm's proposed instruction that a worker is taken as he is where the trial court gave a multiple proximate cause instruction that allowed Palm to argue his theory of the case?

3. Did the trial court abuse its discretion when it allowed the Department to exercise a peremptory challenge against Palm's friend after the jury had been sworn and impaneled where the Department did not exercise the challenge earlier due to a misunderstanding of local jury selection procedures?

III. STATEMENT OF THE CASE

A. John Palm Has Worked as an Electrician Since 1971 and Has a History of Being Overweight

John Palm was born in 1951 and has worked as an electrician since 1971. CP 144-45, 167.[1] According to his work history declaration, he worked as a residential/light commercial electrician from 1971 to 1974. CP 167. This required him to crawl under buildings, carry heavy loads, install overhead light fixtures, use a hacksaw, and perform fine

[1] The "CP" citations in the appellant's brief appear to be the sub numbers assigned by the trial court rather than to the clerk's papers. This brief cites to the clerk's papers. *See* RAP 10.4.

manipulation in odd positions. CP 167-68. From 1974 to May 2009, he worked primarily as an industrial electrician. CP 167. This involved heavy work activities, including cutting, carrying, and fitting heavy steel pipe. *See* CP 168-69.

Palm is 5 feet 9 inches tall and has a long history of being overweight. *See* CP 193, 247, 284. By his report, he weighed about 220 pounds from the early 1970s until about 1991, when he was age 40. CP 153. At that point, his weight increased to 235 pounds. CP 153. In his early 50s, his weight increased to the "mid-240s." CP 153. In October 2009, he weighed 260 pounds. CP 153. By March 2010, his weight had decreased to 220 pounds. CP 153.

Obesity is detrimental from an orthopedic standpoint. CP 285. Weight puts increased stress on weight-bearing joints, including the knees. CP 247, 285. A heavy or morbidly obese person will wear out his or her hips and knees sooner. CP 218. Excess weight in the arms also causes problems; it is akin to holding a five-pound weight at arm's length with the shoulder acting as the fulcrum. *See* CP 285.

B. In 2008, Dr. Gary Bergman Treated Palm's Left Knee and Shoulders and Determined, Based on MRIs, That Palm's Left Knee and Shoulder Conditions Were Typical of His Age

In September 2008, Palm visited Board-certified orthopedic surgeon, Dr. Gary Bergman, and reported left knee pain. CP 240, 242-43,

261. Palm reported three or four years of progressive left knee discomfort, including symptoms of catching and swelling. CP 243. Dr. Bergman observed a "little bit" of extra fluid in the knee joint and a small restriction in the knee's range of motion. CP 243.

In November 2008, Dr. Bergman administered a series of Orthovisc injections to the left knee to help restore the joint fluid's viscosity. CP 244-45. At Palm's next visit in July 2009, he reported that the injections had helped for a while but that his knee symptoms had returned. CP 246. Dr. Bergman noted that Palm weighed 261 pounds. CP 247.

Dr. Bergman testified that Palm had degenerative arthritis or osteoarthritis in his knees. CP 247. The cause of degenerative arthritis and osteoarthritis is "usually age dependent." CP 248. He also testified that obesity adds to the progression of arthritis on a weight-bearing joint. CP 247; *see also* CP 265.

As part of his treatment, Dr. Bergman also ordered arthrogram MRIs of both of Palm's shoulders. CP 249. The right shoulder MRI showed mild rotator cuff tendonitis, mild chondromalacia (thinning of the articular lining), a questionable labral tear, and a "chronic appearing AC separation with degenerative changes." CP 249-50. Dr. Bergman explained that age is the primary cause of tendonitis and chondromalacia.

CP 250. He testified that the labrum is a soft tissue support in the shoulder that "can start to fray and tear a little bit" as people get older. CP 250. And he testified that arthritic changes in the acromioclavicular (AC) joint are not uncommon even at a young age. CP 251. The findings on the left shoulder MRI were similar, including arthritic changes at the acromioclavicular joint, subacromial, subdeltoid bursitis, and rotator cuff tendinitis without full thickness tear. CP 251-52.

Dr. Bergman testified the changes in both shoulders were degenerative. *See* CP 253. The MRI findings were typical in Palm's age group and were "findings of just the aging process." CP 253. Dr. Bergman, who was 54, testified that he would expect to see the same findings if his shoulders were imaged even though he had not worked as an electrician. CP 253. The right shoulder MRI was "very typical of a 58-year-old." CP 250. Bergman testified that "a gentleman this age, with these types of shoulder symptoms, these types of MRI findings can develop in folks of all different types of walks and occupations." CP 255. It would be the exception to perform an MRI on a 50-year-old and not have findings like tendonitis and bursitis. CP 264.

With regard to his left knee, Dr. Bergman testified that there was "some wearing of the knee, particularly the lateral side." CP 254. The

findings in Palm's knee were "pretty common" for someone his age. CP 264.

On cross-examination, Dr. Bergman stated that he knew Palm was an electrician because he stated this on the patient information sheet. CP 261. He did not discuss the specifics of Palm's work as an electrician with him. CP 261, 265. At the time he treated Palm, he did not have a lot of detail about what Palm did at his job. CP 265.

C. Dr. David Karges, a Board-Certified Orthopedic Surgeon, Concluded That Palm's Age, Obesity, Living and Deconditioning Caused His Shoulder, Left Knee and Low Back Complaints

On June 1, 2009, Palm filed a workers' compensation claim. *See* CP 147. Dr. David Karges, a Board-certified orthopedic surgeon, performed an independent medical examination. CP 271-72, 275. He reviewed medical records, including diagnostic studies, and reviewed an occupational history. CP 276-78. He performed a physical examination. CP 278.

Dr. Karges opined that Palm's long-standing complaints about both shoulders, knees, and low back were primarily the result of age, living, exogenous obesity, and deconditioning. CP 278. He did not think that Palm's occupation as a journeyman electrician caused any of his problems as an occupational disease. CP 280.

Dr. Karges noted Palm's longstanding weight problems and that he weighed 250 pounds at the time of the exam. CP 284. He explained the effect of excess weight on the joints. *See* CP 284-85. Every time weight is put on the foot, about three to five times the body weight compresses the knee cap against the groove. CP 284.

Dr. Karges testified that an MRI of the left knee revealed some degenerative joint disease, which Dr. Karges believed was connected to aging. CP 281. Dr. Karges opined that the main factor affecting Palm's knees was his "longstanding overweight problem." CP 283.

Dr. Karges stated that the MRI studies of Palm's shoulders were "almost normal" for his age. CP 281; *see also* CP 297. Additionally, an MRI of his lumbar spine showed changes compatible with his age. CP 296.

On cross-examination, Dr. Karges stated that he was not sure that he had Palm's three-page work history declaration. CP 306. He testified that his IME report did not indicate the number of years that Palm had worked as an electrician but that Palm had told him "he'd worked as an electrician for virtually all of his working life, 15, 16 years at the time, I think." CP 306. Dr. Karges did not know some of the specific details in Palm's work history declaration, such as the amount of weight he lifted, whether he installed pipes in trenches, and how often he carried heavy

pipes on his shoulders. *See* CP 306-08. On redirect, Dr. Karges stated that nothing that he was asked on cross-examination made him to want to change his testimony on direct examination. CP 308.

D. Palm Presented the Medical Opinion of Dr. Thomas Gritzka To Support His Claim of Occupational Disease

In September 2009, the Department rejected Palm's claim for occupational disease. *See* CP 67, 123. He appealed this decision to the Board of Industrial Insurance Appeals. CP 76-77.

On January 27, 2010, Dr. Thomas Gritzka, a Board-certified orthopedic surgeon performed a forensic evaluation of Palm. CP 177, 179. He testified that the work activities as Palm described them, including overhead work, carrying heavy loads on his shoulders, and using his arms in unusual positions, presented stresses to Palm's shoulder joints and were of a type that would cause wear and tear on the shoulder. CP 216. He testified that heavy carrying and pipe handling "would be stressful to the low back" and that Palm's kneeling activities at work probably "were probably injurious to his left knee." CP 217-18.

Dr. Gritzka noted that Palm had generalized osteoarthritis in his shoulders, left knee, and low back. CP 218. He testified that genes, smoking, and body weight could contribute to osteoarthritis. *See* CP 218-19. In Palm's case, his "age, history of smoking, being overweight, and

then his work exposures are probably the things that caused him to have generalized osteoarthritis, most severe in his shoulders, left knee, and low back." CP 219. He noted that Palm had not smoked for over 13 years so this had a minor overall effect. CP 219.

On cross examination, Dr. Gritzka noted that age was a risk factor for his osteoarthritis and that he probably had some influence from his genes as well. CP 227. He observed that Palm was overweight and "his weight probably played a role" in his problems. CP 219.

E. The Board Concluded That Palm Did Not Have an Occupational Disease Because His Shoulder, Low Back, and Left Knee Conditions Were Caused by Age, General Living, Exogenous Obesity, and Deconditioning

The Board concluded that Palm did not sustain an occupational disease. CP 127. The Board found that Palm's conditions involving his left and right shoulder, his left knee, and his low back were not proximately caused by distinctive conditions of his employment but by "age, general living, exogenous obesity, and deconditioning." CP 127.[2]

---

[2] The Board originally ruled in 2010 that Palm did not have an occupational disease. CP 29-30. In its decision, the Board sustained the Department's hearsay objection to Palm's work history declaration, which the industrial appeals judge had admitted as an exhibit. CP 26. Palm appealed the Board's decision to superior court, which reversed the Board's hearsay ruling and remanded to the Board to issue a new decision that considered the information in Palm's work history declaration. CP 115-16. The Board's decision and order on remand from superior court appears at CP 123-28.

F. After the Jury Was Sworn and Impaneled, the Trial Court Allowed the Department To Exercise a Peremptory Challenge Against Palm's Friend

Palm appealed the Board's decision to superior court. CP 406. Before voir dire, the trial court did not explain to counsel the process for exercising peremptory challenges. *See* RP (6/11/13) at 1-31; *see also* RP (6/11/13) at 133; CP 403.

During voir dire, juror 20 stated that she had a close acquaintance with Palm. RP (6/11/13) at 33-34. Initially, she stated that the acquaintance would make it difficult or impossible for her to be fair to both sides. RP (6/11/13) at 34. Upon further questioning by the trial court, however, she agreed that she would not be reluctant to make the right decision. RP (6/11/13) at 34-35. Later, when questioned by Department's counsel, juror 20 stated that she was "a very fair person" who "can see both sides." RP (6/11/13) at 97.

After voir dire, the parties took turns exercising peremptory challenges, with Palm going first. RP (6/11/13) at 125-26. The challenged jurors stood up and left the box but were not replaced in the box by prospective jurors from the gallery. *See* RP (6/11/13) at 134; CP 382. Palm exercised all three peremptory challenges. RP (6/11/13) at 125-26. Department's counsel elected not to exercise his third peremptory, apparently not realizing that juror 20 was the 12th juror:

> THE COURT: And the Department's third and final. As to the first 12.
>
> [DEPARTMENT'S COUNSEL]: Thank you, okay.
>
> THE COURT: Wa[i]ves the third. Okay. Now, I'll have the bailiff indicate where the 12th juror is.
>
> THE BAILIFF: The 12th juror is No. 20.
>
> THE COURT: Okay. So we have the presumptive alternate, then, would be No. 21. Each party has a right to one challenge as to an alternate.
>
> [DEPARTMENT'S COUNSEL]: I don't understand. Could you say that again, please?
>
> THE COURT: Yes. We have the 12, the 12th would be No. 20, and, then, there is – we'll have one alternate and you each have one challenge as to the alternate.

RP (6/11/13) at 126-27.

Palm challenged the presumptive alternate, juror 21. RP (6/11/13) at 127. Department's counsel then attempted to exercise a peremptory challenge against juror 20:

> [DEPARTMENT'S COUNSEL]: Oh, No. 20, we challenge No. 20. Because you called No. 20, correct?
>
> THE COURT: No.
>
> THE BAILIFF: You stay right there.
>
> THE COURT: Twenty would be one of the first 12.
>
> [DEPARTMENT'S COUNSEL]: I'm sorry.

> THE COURT: So the presumptive alternate would now be No. 22.
>
> [DEPARTMENT'S COUNSEL]: No problem.

RP (6/11/13) at 127.

When the Department did not challenge juror 22, the trial court swore and impaneled the jury. RP (6/11/13) at 127-28. After the jury was impaneled, the parties had an off-the record discussion with the trial court, which led the trial court to make further inquiries of juror 20:

> THE COURT: Okay. We had a little bit of a discussion off the record with counsel and I wanted to inquire based on that discussion of No. 20. I talked to you early on about your acquaintance with the plaintiff. So, I am going to pose that question again, whether you think that you could be fair and impartial to both sides, because you did say it's a pretty close acquaintance and you might even feel awkward sitting where you are sitting right now because of that acquaintance, so, ah, if you don't mind addressing that.
>
> JUROR NO. 20: As I said earlier, I'm confident I can be fair, however, if the ruling went against my friend, John, would I wonder if he would always wonder if my vote was the one that did him in and that would concern me as far as a future relationship.
>
> THE COURT: Would that cause you to or influence you to change your decision or opinion - -
>
> JUROR NO. 20: No.
>
> THE COURT: - - in any way or under any circumstance.
>
> JUROR NO. 20: No.

RP (6/11/13) at 128-29.

After another discussion with counsel off the record, the trial court decided to give each party an additional peremptory challenge because it had not explained the jury selection process:

> Counsel . . . for the Department said that he misunderstood and he intended to use challenges to Juror No. 20 because of her previous responses. I asked her a couple of questions on the record. They were consistent with what she said earlier in voir dire and probably emphasized if nothing else why [Department's counsel] chose not to use a challenge for cause. But he still had concerns.
>
> I was – it appeared clear to me that [Department's counsel] had not understood how the selection process generally goes in Whatcom County, and for that, I take responsibility because I didn't bother to tell you, gentlemen, maybe it's something we should have addressed or I should have addressed. I should never assume that counsel is familiar with that, even if counsel is local and practices sometime, sometimes in this or the other courts in this county.
>
> So I made the decision to grant each party an additional peremptory challenge and I think that brings us up to the point where we are now.

RP (6/11/13) at 132-33.

Department's counsel stated that he believed that peremptory challenges could only be used on jurors seated in the box. RP (6/11/13) at 134. He explained that he was "not aware that I was to use a peremptory on someone who had not been seated and that's why I – I looked at where things were and I said okay, I'm okay with that." RP (6/11/13) at 134. He further stated, "That person hadn't been called in and there was no reason to think that No. 20 would come in." RP (6/11/13) at 134. Palm objected

to the trial court's decision to give an additional peremptory and noted that he had used a peremptory challenge on a juror in the gallery. RP (6/11/13) at 130.

The Department exercised the additional peremptory to challenge juror 20, and Palm exercised his additional peremptory to challenge juror 22. RP (6/11/13) at 129-30. The jury was then re-impaneled. RP (6/11/13) at 130.

G. The Superior Court Gave an Instruction on Multiple Proximate Cause but Declined to Give Palm's Proposed Instruction That a Worker Is Taken as He Is With All His Pre-Existing Frailties and Bodily Infirmities.

The trial court gave a proximate cause instruction, which stated that there may be more than one proximate cause of a condition:

> The term "proximate cause" means a cause which in a direct sequence produces the condition complained of and without which such condition would not have happened.
>
> There may be one or more proximate causes of a condition. For a worker to recover benefits under the Industrial Insurance Act, the work conditions must be a proximate cause of the alleged condition for which entitlement to benefits is sought. The law does not require that the work conditions be the sole proximate cause of such condition.

CP 448.

Palm proposed a "lighting up" instruction that read:

> If an industrial injury lights up and makes active a pre-existing infirmity or condition which was not causing symptoms prior to the date of injury, the resulting disability is to be attributed to the injury and not to the pre-existing

> condition. Under such circumstances, the worker may recover for the full disability proximately caused by the industrial injury regardless of any pre-existing condition.
>
> In the event of an aggravation of a pre-existing condition, where the pre-existing condition was symptomatic prior to the injury, the resulting disability is to be treated under the industrial insurance act, however, the law provides that certain benefits may be reduced in proportion to the pre-existing condition.
>
> 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.

CP 333. At the instruction conference, Palm agreed that "[t]here is no lighting up" in this case, and he stated that the third paragraph of the instruction was "really the only part that [he was] interested in." RP (6/12/13) at 161. The trial court declined to give the instruction, and Palm took exception. RP (6/12/13) at 167, 171-72.

In closing argument, Palm's counsel relied on the proximate cause instruction to emphasize that Palm's work only had to be a cause, and not the sole cause, of his back, knee, and shoulder conditions:

> The instruction itself is easy to miss. It says a cause. It says there may be one or more proximate causes.
>
> The work conditions don't have to be the only cause. It does not require that the work conditions are the sole proximate cause. This tiny little word "a" is one letter long, but the concept is huge because what it tells you is that a person can have other things wrong with them. They can have other things in their life that might affect them if

> the work conditions, if they are a cause, they, if the work conditions are a cause of a medical treatment. That's an occupational disease. And, you know, it makes sense because as people we all, almost everybody has imperfections, except perhaps the Greek Gods and Goddesses of the world and those are few.
>
> If the worker[s'] 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 (6/13/13) at 182-83; *see also* RP (6/13/13) at 219-220.

In closing, Palm also challenged the basis for Dr. Karges's opinion. RP (6/13/13) at 198-200. He noted that Dr. Karges only had medical records going back three years and two months; that he believed that Palm had worked for 15 or 16 years; that he did not have the three-page work history declaration; and that he did not know specific work details reported in declaration. RP (6/13/13) at 198-99. Palm also argued that Dr. Bergman had only a cursory understanding of his job. RP (6/13/13) at 201-02.

H. A Jury Found That Palm Did Not Have an Occupational Disease, and the Trial Court Denied His Motion for a New Trial

The jury's verdict, which was unanimous, affirmed the Board's decision. CP 455.[3] After entry of judgment, Palm moved for judgment as a matter of law or, in the alternative, a new trial.[4] CP 390-401. The trial court denied the motion. CP 402-03. With respect to the Department's peremptory challenge against juror 20, the trial court entered a finding explaining that it allowed the additional challenge in order to afford both parties a fair trial:

> An apparent misunderstanding of local jury selection procedures resulted in this civil jury having been sworn at a time when Defendant's counsel believed that the Court was still accepting peremptory challenges. In order to afford both parties a fair trial, the Court deemed it appropriate to allow the Defendant to exercise its challenge and the Court further granted an additional peremptory challenge to each party.
>
> Defendant's counsel notified the Court of the misunderstanding immediately: no arguments had been made, no testimony had been taken, and the jury pool was still present. The Court determined that there was no actual or potential prejudice to either party, and that the right to exercise peremptory challenges was more important than the formality of the timing of the oath.

---

[3] The polling of the jury was not included in the verbatim report of proceedings filed with this Court. The Department has filed a supplemental statement of arrangements to have the polling of the jury transcribed and made part of the appellate record.

[4] Before entry of judgment, Palm moved for judgment notwithstanding the verdict or, in the alternative, a new trial. CP 358-72. The trial court struck the motion because a judgment had not been entered and it was premature. CP 384-85.

> The Court noted that it would have likely ruled differently had this been a criminal matter as with the administration of the oath Jeopardy would attach.

CP 403. Palm now appeals. CP 472-73.

IV. STANDARD OF REVIEW

In an appeal from a superior court's decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). This Court reviews the decision of the trial court rather than the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. This Court limits its review to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

Judgment as a matter of law is not appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences, substantial evidence exists to sustain a verdict for the nonmoving party. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). When undertaking substantial evidence review, the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the factfinder. *Fox v. Dep't of Ret. Sys.*, 154 Wn.

App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Rather, the appellate court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006); *Gagnon*, 110 Wn. App. at 485. "Where there is substantial evidence, we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently." *Korst*, 136 Wn. App at 206.

This Court reviews a trial court's refusal to give a proposed instruction for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996); *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). Trial court error on jury instructions requires reversal only if it is prejudicial, that is, only if the error affects the trial's outcome. *Stiley*, 130 Wn.2d at 498-99. Palm cites the de novo standard for "alleged errors in a trial court's instructions to the jury" but that standard of review pertains to legal errors in jury instructions, not to the trial court's refusal to give an instruction. *See* App. Br. 26.

Jury instructions are sufficient if they (1) allow each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Raum v.*

City of Bellevue, 171 Wn. App. 124, 142, 286 P.3d 695 (2013), *review denied*, 176 Wn.2d 1024 (2013).

This Court reviews the trial court's decision to allow a party to exercise a peremptory challenge after the jury is sworn and impanelled for abuse of discretion. *See State v. Williamson*, 100 Wn. App. 248, 250, 253, 996 P.2d 1097 (2000). A party must show prejudice to justify reversal if the jury selection process substantially complies with the applicable statutes or rules. *Id.* This Court presumes prejudice in jury selection procedures only if there has been a material departure from those statutes or rules. *State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

V. ARGUMENT

A. Because Substantial Evidence Supports the Jury's Verdict That Palm Did Not Have an Occupational Disease, the Trial Court Did Not Abuse Its Discretion When It Denied Palm's Judgment as a Matter of Law

The testimony of two medical experts supports the jury's verdict. Dr. Karges testified that Palm's age, obesity, and deconditioning were the causes of his shoulder, low back, and left knee conditions. CP 278. He did not believe that Palm's occupation as an electrician caused Palm's complaints. CP 280. Similarly, Dr. Bergman, who treated Palm, testified that changes in Palm's shoulders were degenerative, and that the MRIs of his shoulders and the findings in his knee were typical of someone his age.

CP 249-50, 252-53, 264. Because substantial evidence supports the jury's verdict, the trial court did not abuse its discretion when it denied Palm's judgment as a matter of law.

A worker who has an occupational disease is entitled to workers' compensation benefits. RCW 51.32.180. An occupational disease "arises naturally and proximately out of employment." RCW 51.08.140. A worker is entitled to benefits if the employment either causes a disabling disease, or aggravates a preexisting disease so as to result in a new disability. *Ruse*, 138 Wn.2d at 7.

An occupational disease must "[come] about as a matter of course as a natural consequence or incident of distinctive conditions" of the worker's employment. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). The causal connection between the work and the disability must be established by medical evidence that "*but for* the aggravating condition of the job, the claimed disability would not have arisen." *Ruse*, 138 Wn.2d at 7; *see also Dennis*, 109 Wn.2d at 477.

Viewing the facts and all reasonable inferences in the light most favorable to the Department, the jury had substantial evidence before it to conclude that Palm's work did not cause his shoulder, left knee, and low back conditions. Dr. Karges testified that he believed that the primary cause of Palm's conditions were his age, living, exogenous obesity, and

deconditioning. CP 278. He did not believe that Palm's occupation as a journeyman electrician caused any of these conditions as an occupational disease. CP 280.

With regard to Palm's shoulders, Dr. Karges characterized the MRI studies of Palm's shoulders as "almost normal" for his age. CP 281. Dr. Bergman agreed with this assessment, noting that the right shoulder MRI was "very typical of a 58-year-old" and that he would expect to see the same findings in his own shoulders as a 54-year old man even though he had not worked as an electrician. CP 250, 253. The shoulder findings were typical in Palm's age group and were just part of the aging process. CP 253. According to Dr. Bergman, the changes in both shoulders were degenerative. *See* CP 254. He testified age was "the most important part of the equation" for Palm. CP 253, 264. Dr. Bergman stated that it would be a "far reach" to say that Palm's shoulder conditions were directly related to his work as an electrician. CP 255.

With regard to Palm's left knee, Dr. Karges testified that the main factor affecting Palm's knees was his "longstanding overweight problem." CP 283. Dr. Karges testified extensively about Palm's longstanding weight problems and the harmful effect that excess weight can have on the joints, including increased compression on the knee while walking, running, or jumping. *See* CP 283-85. Dr. Bergman agreed that Palm's

weight would have an effect on his knee problems because every pound puts more stress on the knee; obesity adds to the progression of arthritis on a weight-bearing joint. CP 247. He testified that the findings in Palm's knee were "pretty common" for someone his age. CP 264. Dr. Gritzka agreed that Palm was overweight and "his weight probably played a role" in his problems. CP 219.

With regard to the low back, Dr. Karges stated that a lumbar spine MRI showed changes compatible with Palm's age. CP 296. He opined that Palm's complaints about his low back were primarily caused by age, living, obesity, and deconditioning. CP 278.

This extensive medical testimony supports the jury's verdict in this case. An order granting judgment as a matter of law should be limited to circumstances in which there is no doubt as to the proper verdict. *Schmidt*, 162 Wn.2d at 493. Here, the jury had significant evidence before it that Mr. Palm's conditions were not caused by work, but by Palm's longstanding weight problems, his age, his living, and his deconditioning. This substantial medical evidence supported its verdict.

All of Palm's arguments about why he is entitled to judgment as a matter of law disregard the correct standard of review. He identifies several reasons why the jury should have given Dr. Karges's opinion less weight, including his unfamiliarity with the specific tasks on the job, his

belief that Palm's work was similar to a residential electrician, and his belief that Palm had worked as an electrician for 15 or 16 years. App. Br. 22-24. Similarly, he argues that Dr. Bergman's opinion should be disregarded because he did not know what Palm's conditions of employment were. App. Br. 24-25. He made similar arguments to the jury, which rejected them. RP (6/13/13) at 197-202. All of these arguments pertain to the amount of weight that the jury should have given these doctors' testimony. But at this stage, this Court cannot reweigh the evidence, re-balance the testimony, or substitute its own judgment for that of the jury. *Fox*, 154 Wn. App. at 527; *Korst*, 136 Wn. App. at 206; *Gagnon*, 110 Wn. App. at 485.

The jury was entitled give more weight to Dr. Bergman as the only testifying physician who treated Palm and to Dr. Karges, who testified about the impact of several non-work factors on Palm's conditions. *See* CP 452 (jury should give special consideration to testimony given by attending physician). That the jury placed greater weight on this medical evidence than Palm would does not entitle him to a new trial.

Palm also attacks Dr. Karges's opinion on the basis that he testified that an occupational disease requires a repetitive task. App. Br. 21-22. But the trial court instructed the jury on the meaning of occupational disease, and a jury is presumed to follow the court's instructions. CP 449;

Lewis v. Simpson Timber Co., 145 Wn. App. 302, 318, 189 P.3d 178 (2008). In any event, Dr. Karges's opinion is that Palm's condition is caused by age, obesity, living, and deconditioning, an opinion that does not require a legal knowledge of workers' compensation law. To the extent that Palm is arguing that Dr. Karges's opinion should given less weight on this basis, he made this argument to the jury, which rejected it, and this Court does not re-weigh evidence on appeal. *See* RP (6/13/13) at 221-22.

Finally, the doctrine of liberal construction provides no basis to reverse the jury's verdict. *See* App. Br. 15. Under that doctrine, the court liberally construes the terms of the Industrial Insurance Act. RCW 51.12.010; *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996). Liberal construction "does not apply to questions of fact but to matters concerning the construction of the statute." *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). Liberal construction does not apply when the court is reviewing the sufficiency of the evidence to support the fact-finder's decision. *Raum*, 171 Wn. App. at 155 n.28. It applies only to the interpretation of ambiguous statutes. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). This case does not involve an ambiguous statute that requires construction but, rather, whether substantial evidence supported the jury's

verdict. Because substantial evidence supports the verdict, the trial court properly denied Palm's judgment as a matter of law.

B. The Trial Court Did Not Abuse Its Discretion in Rejecting Palm's Proposed Instruction Because He Could Use the Multiple Proximate Cause Instruction to Argue His Theory

The jury instructions allowed Palm to argue his theory of the case and properly informed the jury of the applicable law with regard to causation. Palm's theory was that the distinctive conditions of his employment were a cause of his occupational disease. The multiple proximate cause instruction allowed Palm to argue that, even if there were other causes of his conditions, such as his weight and age, the distinctive conditions of his employment were at least a cause of his shoulder, left knee, and low back conditions. Indeed, Palm explicitly made this causation argument to the jury, which rejected it. Thus, the trial court did not abuse its discretion in rejecting Palm's proposed instruction that a worker is taken as he is with all his pre-existing infirmities.

Jury instructions are sufficient when they allow a party to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 809, 872 P.2d 507 (1994). Here, the multiple proximate cause instruction allowed Palm to argue that the distinctive conditions of his employment were a cause of his conditions.

As a preliminary matter, this Court should only consider whether the trial court abused its discretion in declining to give the third paragraph of Palm's proposed instruction. The first two paragraphs of the proposed involve the "lighting up" doctrine in workers' compensation law. *See* CP 333. At the instruction conference, Palm agreed that "[t]here is no lighting up" in this case, and he argued that the third paragraph of the instruction was "the only part that [he was] interested in." RP (6/12/13) at 161. Palm's arguments in his appellant's brief focus almost entirely on the language in the third paragraph, and his brief contains no specific argument about why the first two paragraphs should be included. *See* App. Br. 3, 26-29. Later in his brief, he argues that the instruction should have been given "either in the original form or as offered modified at hearing" but he makes no specific argument about the first two paragraphs of his proposed instruction. *See* App. Br. 28. Therefore, this court should limit its review to whether the trial court abused its discretion in failing to give the third paragraph as an instruction. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court does not consider unsupported arguments).

Here, the issue for the jury to resolve was whether an occupational disease caused Palm's conditions. The parties presented competing medical opinions about the cause of Palm's conditions. Palm did not need

his proposed instruction to argue his theory that Dr. Gritzka's medical testimony supported allowance of the occupational disease claim or that the testimony as a whole showed that the distinctive conditions of Palm's work caused his conditions. In fact, he did so in closing argument when he repeatedly focused on the word "a" in the multiple proximate cause instruction. RP (6/13/13) at 182-83, 219-20.

Because Palm was able to use the multiple proximate cause instruction to argue his theory of the case, he is incorrect when he asserts that "[w]ithout an instruction specifically directed at the pre-existing conditions, Mr. Palm was deprived of the legal substance to fully argue his case." App Br. 28. He used the multiple proximate cause instruction to argue his case, arguing for example that his age and weight did not preclude the jury from determining that he had an occupational disease:

> [T]his is all being blamed on Mr. Palm being old and heavy. You will recall that the instructions indicate that the work conditions must be "a" cause of his medical problems. They don't have to be the sole cause or the only cause or the major contributing cause. They have to be a cause and that's because we take our workers as they come. Some workers are heavy. Some workers are strong. Some workers are weak. Some workers are like he-man. They all get covered no matter what their situation is.

RP (6/13/13) at 219-20.

Palm asserts that the proximate cause instruction did not cure the omission of his rejected proposed instruction because "a different

instruction specifically advises the jury that the lawyers[']] comments are neither evidence nor the law." App. Br. 28; *see also* CP 436. But the proximate cause instruction is the law, not the "mere opinion of counsel open to be ignored." App. Br. 28. An instruction is not a lawyer's comment that can be disregarded. Rather, as the judge explained to these jurors, jury instructions are the law that the jury had to apply to the facts before it. CP 435. Palm makes no other argument as to why the proximate cause instruction did not allow him to argue his theory of the case. If a party can argue its theory under the instructions given as a whole, the trial court's refusal to give a requested instruction is not reversible error. *Flavorland Indus., Inc. v. Schumacker*, 32 Wn. App. 428, 436, 647 P.2d 1062 (1982).

Moreover, as Palm notes in his brief, this Court has explained that "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." App. Br. 19 (quoting *City of Bremerton v. Shreeve*, 55 Wn. App. 334, 340, 777 P.2d 568 (1989)). In other words, the multiple proximate cause instruction allowed Palm to argue, as he did, that he was to be taken as he is, with his pre-existing frailties and infirmities. The jury instructions allowed both parties to argue their theories of the case and the

refusal to give the instruction was not manifestly unreasonable. *See Harker-Lott*, 93 Wn. App. at 183, 186.

Nor was the trial court required to give the third paragraph of Palm's instruction because it quotes language directly from *Miller v. Department of Labor & Industries*, 200 Wash. 674, 682, 94 P.2d 764 (1939). *See* App. Br. 27. "The fact that certain language is used in an appellate court decision does not mean it must be incorporated into a jury instruction." *Braxton v. Rotec Indus., Inc.*, 30 Wn. App. 221, 227, 633 P.2d 897 (1981); *accord Turner v. City of Tacoma*, 72 Wn.2d 1029, 1034, 435 P.2d 927 (1967). Palm was able to argue his theory with the instructions as a whole.

Even if Palm's proposed instruction should have been given, there was no prejudice because, as explained above, the jury would have reached the same result even with the requested instruction. *See Harker-Lott*, 93 Wn. App. at 186. This Court considers the evidence and whether the instruction would have been likely to change the outcome of the trial. *Id.* at 188-89. This instruction would not likely have changed the trial's outcome because it does not address the primary dispute in this case: the cause of Palm's shoulder, left knee, and low back conditions. Palm argued to the jury that the distinctive conditions of his work were at least a cause of these conditions, which is the same argument that he would have

to make even if his proposed instruction was included. The jury rejected this argument, and substantial evidence supports its verdict. Palm cannot show prejudice.

C. The Trial Court Did Not Abuse Its Discretion When It Allowed the Department To Use a Peremptory Challenge To Remove Palm's Friend From the Jury

The trial court did not abuse its discretion when it allowed the Department to use a peremptory challenge to remove Palm's friend from the jury after impanelment. As the trial court found, the Department's counsel apparently misunderstood local jury selection procedures. CP 403. The trial court accepted responsibility for not informing the parties of these procedures, and it reasonably addressed this misunderstanding by allowing the Department to use a peremptory challenge against Palm's friend. *See* RP (6/11/13) at 132-33. The trial court did not abuse its discretion in denying the motion for a new trial on this basis.

In a civil case, RCW 4.44.210 governs the procedure for exercising peremptory challenges. This statute addresses the order of peremptory challenges but is silent with regard to whether a peremptory challenge may be exercised after impanelment:

> 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. 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. A refusal to challenge by either party in the said order of alternation shall not prevent the adverse party from using the full number of challenges.

RCW 4.44.210.[5]

This Court has previously approved the exercise of peremptory challenges after impanelment, even when the impaneled jury has begun taking testimony. In a criminal case involving attempted murder and kidnapping charges, the jury had been sworn and the State's first witness had begun to testify when a juror informed the court that she knew the alleged victim. *Williamson*, 100 Wn. App. at 250, 252. The trial court refused to remove the juror for cause but allowed the State to exercise an unused peremptory challenge to remove the juror. *Id.* at 252.

This Court affirmed the trial court's ruling allowing the late peremptory challenge. *Williamson*, 100 Wn. App. at 250, 255. As this

---

[5] Department's counsel did not intentionally decline to exercise a peremptory challenge against juror 20. Rather, as the trial court explained, Department's counsel intended to challenge juror 20 because of her responses during voir dire. RP (6/11/13) at 132-33. He did not challenge juror 20 with his third peremptory challenge because he mistakenly believed that peremptory challenges could only be used on jurors seated in the box. RP (6/11/13) at 134. As soon as Department's counsel believed that he had the opportunity to challenge juror 20, i.e. during the selection of alternates, he did so. *See* RP (6/11/13) at 127.

Court explained, neither RCW 4.44.210 nor the relevant superior court criminal rule "prohibits a peremptory challenge to an impaneled and sworn juror based on unforeseen circumstances." *Id.* at 254. This Court observed that a trial court has broad discretion over the jury selection process, and the trial court's decision to allow the late peremptory challenge was subject to an abuse of discretion standard. *Id.* at 250, 253, 255. Because the trial court substantially complied with RCW 4.44.210 and the criminal rule, it did not abuse its discretion. *See id.* at 255. Nor could the defendant show prejudice "by the loss of the challenged juror or the substitution of another." *Id.* at 255.

Likewise, in this case, the trial court did not abuse its discretion when it allowed the Department to use a peremptory challenge that it had intended to use during voir dire but did not because of an apparent misunderstanding of local jury selection procedures. *See* CP 403. The Department brought this understanding to the trial court's attention immediately and before opening argument and testimony. CP 403. Thus, the trial court was notified of and able to correct the confusion even earlier than in *Williamson* when the jury had begun to hear testimony. *See Williamson*, 100 Wn. App. at 252; CP 403. The trial court acted reasonably when it concluded that the parties' right to exercise peremptory

challenges was more important that the formality of the timing of the jury oath. CP 403.

Furthermore, like the defendant in *Williamson*, Palm cannot show prejudice by the loss of the challenged juror or the substitution of another. Although he may have preferred to have his friend on the jury panel, a party does not "have the right to be tried by a particular juror or jury." *Williamson*, 100 Wn. App. at 255. Additionally, after allowing the Department's late peremptory challenge, the trial court gave Palm an additional peremptory challenge, which he exercised against the prospective juror who replaced juror 20. RP (6/11/13) at 129-30. Finally, the jury's verdict was unanimous. In a civil case, because a unanimous jury is not required, the replacement (or retention) of one juror on a jury that returns a unanimous verdict does not affect the overall result. *See Portch v. Sommerville*, 113 Wn. App. 807, 812, 55 P.3d 661 (2002).

Palm is incorrect that RCW 4.44.290 "outlines the only reason a sitting juror may be replaced." App. Br. 4. That statute governs how a trial court should handle an occasion when a juror becomes unable to perform his or her duty after the jury is formed:

> 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. In that case, unless the parties agree to proceed with the other jurors: (1) An alternate juror may replace the discharged juror and the jury instructed to start

> their deliberations anew; (2) a new juror may be sworn and the trial begin anew; or (3) the jury may be discharged and a new jury then or afterwards formed.

RCW 4.44.290. This statute does not say that a juror may only be replaced if he or she is unable to perform his or her duty. Rather, it explains how a trial court should handle that particular situation. It does not limit the trial court's broad discretion over jury selection when other situations arise, such as here when the trial court did not inform the parties of local jury selection procedures. *See Williamson,* 100 Wn. App. at 255. Moreover, as discussed above, this Court has explicitly approved the exercise of peremptory challenges to discharge jurors after impanelment even when there is no showing that the challenged juror cannot perform his or her duties, as in the a situation where the juror knows the victim in a criminal proceeding. *Id.* at 250, 255.

Because there was no material departure from any statute regarding jury selection in this case, Palm must show prejudice. This Court presumes prejudice only if there has been a material departure from the jury selection statutes. *See Tingdale*, 117 Wn.2d at 600. There was no material departure from RCW 4.44.290 because that statute does not apply to the present case. Palm identifies no statute that a trial court may only allow a party to exercise peremptory challenges before impanelment. *See* App. Br. 29-33. Indeed, case law supports the trial court's ability to allow

a party to exercise a peremptory challenge after impanelment. *See Williamson,* 100 Wn. App. at 250, 252, 255.

Furthermore, the statute governing the impanelling of juries is entirely silent on this subject. *See* RCW 4.44.120; *see also* CR 47(d). It states that the panel must be selected at random from citizens summoned for jury service "who have appeared and have not been excused." RCW 4.44.120. A trial court has significant discretion during jury selection, and this statute does not limit when the trial court may allow peremptory challenges. Palm must show prejudice and, as explained above, he cannot.

Palm is incorrect that the trial court's decision to allow the Department to use a peremptory challenge against Palm's friend affected the randomness of the jury. If this were true, the exercise of any peremptory challenge would violate the requirements that members of a jury panel must be randomly selected as well as the duty of trial judges to ensure random selection. *See Brady v. Fibreboard Corp.*, 71 Wn. App. 280, 282, 857 P.2d 1094 (1993) (citing RCW 2.36.010(6), (9), (12); RCW 2.36.050; RCW 2.36.063; RCW 2.36.065; RCW 2.36.080(1); RCW 2.36.130).

That is not the case. Parties are entitled to three peremptory challenges in civil cases. RCW 4.44.130. A party need give no reason for the challenge, and when a party exercises the challenge, the trial court

"shall exclude the juror." RCW 4.44.140. The exercise of a peremptory challenge is a statutory right which affects the composition, but not the randomness, of the jury.

The cases that Palm relies on to assert that the jury panel in this case was non-random are inapposite. Both *Tingdale* and *Brady* involve situations when the trial court dismissed potential jurors from the jury pool without the parties having an opportunity to question the jurors. *See Tingdale*, 117 Wn.2d at 597-98; *Brady*, 71 Wn. App. at 282. Thus, in *Tingdale*, the trial court excused three potential jurors prior to voir dire based solely on the clerk's subjective knowledge that the jurors knew the defendant. 117 Wn.2d at 597-98. Similarly, in *Brady*, the trial court excused 14 of 90 randomly selected jurors based on those jurors' responses to questionnaires, and these jurors were asked not to report to trial. *Brady* , 71 Wn. App. at 281. In both cases, the jurors were excused prior to voir dire. *Tingdale*, 117 Wn.2d at 597-98, 601; *Brady*, 71 Wn. App. at 281. These practices destroyed the randomness of the jury panel. *See Brady*, 71 Wn. App. at 283.

The problem in both *Tingdale* and *Brady* was that the trial court interfered with the selection of the jury pool. The trial courts in both cases pre-determined the composition of the jury pool based on subjective criteria and without the input of counsel. Neither involved a peremptory

challenge to a single juror, like in this case. Palm makes no claim that the citizens called for jury service in this case were not selected at random as in *Brady* or *Tingdale*.

Palm incorrectly characterizes *Tingdale* as holding that a "trial court procedure excluding any person from the jury pool who was acquainted with a defendant was deemed not-random and required a retrial." App. Br. 29. But the problem in *Tingdale* was the procedure that the court utilized, not the fact a juror was dismissed for being acquainted with a party. It was the trial court's "practice of excluding potential jurors prior to voir dire based on the clerk's subjective knowledge of the jurors' acquaintance with the defendant" that constituted an abuse of discretion. 117 Wn.2d at 602. There is no problem with exercising a peremptory challenge to excuse an acquaintance or friend of a party. No reason need be given for a peremptory challenge. RCW 4.44.140. Furthermore, excusing a party's friend from a jury panel does not make the panel non-random. The trial court properly exercised its discretion here; no new trial is warranted.

D. Palm Is Not Entitled to Attorney Fees

This Court should reject Palm's request for attorney fees. *See* App. Br. 33. Fees are awarded against the Department only if the worker requesting fees prevails in the action and if the accident fund or medical

aid fund is affected by the litigation. RCW 51.52.130; *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 427-28, 869 P.2d 14 (1994); *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011).

Because the trial court did not abuse its discretion in denying Palm's motion for judgment of law, he is not entitled to attorney fees on this basis. Nor did the trial court abuse its discretion in rejecting his proposed instruction or in allowing the Department to use a peremptory challenge against his friend. Even if this Court decides that prejudicial error was committed with respect to the jury instruction or peremptory challenge, the remedy would be remand for a new trial and Palm would not receive an award of attorney fees because such an order would not affect the accident fund or medical aid fund. Because the only relief of the litigation is remand for a new trial, the accident fund and medical aid fund are necessarily not affected. *See Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 29, 288 P.3d 675 (2012), *review denied*, 177 Wn.2d 1021 (2013) (worker did not prevail when only relief was remand to director).

VI. CONCLUSION

This Court should not disturb the jury's verdict. The jury heard substantial evidence that Palm's conditions were caused by age, obesity, living and deconditioning, and not by his the distinctive conditions of his employment. Therefore, the trial court properly denied Palm's motion for

judgment as a matter of law. The trial court also did not abuse its discretion in declining to give an instruction where the multiple proximate cause instruction allowed Palm to argue his theory of the case. Finally, the trial court did not abuse its discretion in allowing the Department to exercise a peremptory challenge against Palm's friend after the jury had been impaneled when there was a misunderstanding of local jury selection procedures.

RESPECTFULLY SUBMITTED this 5th day of November, 2014.

ROBERT W. FERGUSON
Attorney General

PAUL WEIDEMAN
Assistant Attorney General
WSBA No. 42254
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 389-3820

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 SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on November 5, 2014, she caused to be served the Brief of Respondent Department of Labor & Industries and this Certificate of Service in the below-described manner:

Via Legal Messenger:

Richard D. Johnson
Court Administrator/Clerk
Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-1176
//
//

Via First Class United States Mail, Postage prepaid to:

Odin Maxwell
Maxwell & Webb
PO Box 2118
Bellingham, WA 98227

DATED this 5th day of November, 2014.

JENNIFER A. CLARK
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740