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No. 63008-3-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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BRUCE JOHNSON,

Plaintiff/Appellant,

v.

CHEVRON, U.S.A., INC. and GREG MILLER,

Defendants/Respondents,

---

ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Julie Spector)

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Respondent Chevron's Answering Brief<sup>1</sup> advocates for a legal standard where employers owe no duty to accommodate employees' disabilities other than to send them home, or to comply with only those accommodations specifically requested by the employee's primary care physician, with no interaction or support from the employer. This is not the standard in Washington.

Chevron knew Appellant Bruce Johnson had chronic back pain, caused by his employment with Chevron, and did nothing to accommodate him except to send him home or place him on light duty. Chevron made no effort to work with Johnson or his physicians to find an accommodation so that Johnson could continue on the job as a tanker truck driver. Once Chevron disallowed the use of Johnson's requested accommodation, the ergonomic fuel hose drainer, it made no further effort to find an alternative accommodation.

The Answering Brief additionally ignores the standard at summary judgment by supplying Chevron's own version of the facts. Not only is this version rife with improper, uncited commentary (*e.g.* "Johnson quickly found something else to complain about"), but it ignores the

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<sup>1</sup> Defendants/Respondents Chevron, U.S.A., Inc. and Greg Miller are hereinafter collectively referred to as "Chevron."

standard at summary judgment that the facts are viewed in the light most favorable to the nonmoving party. Answering Brief (Ans. Br.) 5, *see* Appendix (App.) 1. It is improper for Chevron to attempt to draw inferences in its own favor.

Chevron ignores Ninth Circuit and Washington case law which find that it is error to include the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), burden-shifting framework in the jury instructions. In Washington, courts have established the “substantial factor” test as the proper standard for instructing the jury and note that the *McDonnell Douglas* or direct evidence methods “drop from the case” after summary judgment. The additional element added to Jury Instructions Nos. 11 and 12 created prejudicial error which calls for reversal.

Lastly, the trial court’s numerous improper rulings before, during, and after trial significantly hurt Johnson’s ability to prove his case at summary judgment and trial, and to pursue his case on appeal. The deposition misconduct and last minute document dump; the trial court’s rejection of admissible evidence at summary judgment; the admission of extrinsic evidence to attack Johnson’s credibility at trial; and the enormous cost judgment initially taxed against Johnson all created prejudicial barriers to the truth seeking process.

## II. ARGUMENT

### A. Dismissal Of Johnson's Failure To Accommodate Claims Was Improper Because Johnson Was Able To Establish A *Prima Facie* Case Both Before And After April 20, 2005, And Numerous Questions Of Fact Remained For The Jury

The Answering Brief argues that dismissal of Johnson's WLAD failure to accommodate claims was proper because, prior to his final back injury in April 2005, his back problems did not substantially limit his ability to perform his job, and after his final injury, he was not able to perform the essential functions of his job. Ans. Br. 14. The Opening Brief highlights in detail the ways in which Johnson's back injury substantially limited his ability to perform his job, how Johnson and his doctors repeatedly made Chevron aware of the substantial limitations of Johnson's injuries, and how Johnson repeatedly requested accommodation for his back pain. Op. Br. 8-18, 32-37, *see also* App. 1.<sup>2</sup> Additionally, the Opening Brief describes how Johnson was able to perform the essential functions of his job after his April 2005 back injury. *Id.* Indeed, he performed substantially the same job after leaving Chevron, with the same level of back pain. *Id.*, CP 990.

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<sup>2</sup> Appendix 1 is a chart which lists disputed facts related to Johnson's failure to accommodate claims, with the facts taken in the light most favorable to the nonmoving party, and with citations to the record at summary judgment which support Johnson's view of each disputed fact.

This section addresses specific issues raised by Chevron in the Answering Brief as they relate to the summary judgment dismissal of Johnson's failure to accommodate claims.

**1. Chevron Improperly Characterizes Johnson's Trip To California As A "Sales Presentation"**

In its "Counterstatement of the Facts," Chevron improperly tries to reframe the issues before the Court so that the facts are viewed in the light most favorable to itself. Chevron mischaracterizes Johnson's May 2004 trip to California as a "sales presentation" and states that "Johnson wanted to sell his tool to Chevron." Ans. Br. 6. The nature of Johnson's trip to California is disputed. On appeal, the standard of review is *de novo* and this Court engages in the same inquiry as the trial court, viewing the facts and inferences in the light most favorable to the nonmoving party. *King v. Rice*, 146 Wn. App. 662, 668, 191 P.3d 946 (2008).

Johnson never claimed that he went to California to market the tool or to make a sales presentation. CP 957, 976-983, 1033-36, App. 1. During his deposition, Johnson testified that his supervisor, Defendant/ Respondent Greg Miller, initiated the contact with Chevron's headquarters in California and told Johnson that the tool needed to be certified by Chevron in order for Johnson to use it. *Id.* Johnson testified that he believed he was going down to California to demonstrate the effectiveness

of the tool in order to have it certified by Chevron so that he could use the tool as an accommodation for his back pain disability. *Id.*

Chevron again mischaracterizes the facts regarding Johnson's tool when it states that Johnson contacted Dr. Blair and asked him to "endorse" the tool as a marketing tactic. Ans. Br. 15-16. The quoted word, "endorse," is taken out of context in the Answering Brief. The document cited states that Johnson "would like letter for employer endorsing reasonable accommodations for use of ergonomic tool that helps him lift and carry." CP 205. Clearly Johnson saw the tool as an accommodation for his chronic back pain and was requesting that Dr. Blair approve the tool as an accommodation. He was not seeking a product endorsement.

At trial, Nolan Thornberry, a Chevron employee who met with Johnson in California during the tool assessment, testified that Johnson took him aside during the trip and advised Thornberry of his right to accommodation for his disability. RP 12/15/08 at 66-67. Thornberry testified that he was confused as to why Johnson would bring up his right to accommodation during the ergonomic testing of the tool. *Id.* This suggests that, although the Chevron staff in California may have believed they were performing an assessment of the tool for use by all drivers, Johnson believed the trip to California was for the purpose of seeking accommodation by having the tool certified. This was a jury question.

**2. Johnson Provided Substantial “Medical Documentation” Of His Back Pain Disability Per RCW 49.60.040(25)(d) And Was Able To Demonstrate A Nexus Between His Disability And The Need For Accommodation**

Chevron relies heavily on *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004), to argue that Johnson was not entitled to any accommodation because no doctor, prior to April 20, 2005, found that accommodation was medically necessary. Ans. Br. 14, 19. Indeed, *Riehl* dealt directly with the issue of whether an employee must “show accommodation is a medical necessity in an accommodation claim” and whether the employer must “provide only medically necessary accommodation.” *Riehl*, 152 Wn.2d at 144.

The *Riehl* plaintiff suffered from posttraumatic stress disorder (PTSD), which the Court found to be a “not obvious” disability, therefore requiring documentation along the lines of a doctor’s note to prove the nexus between the disability and the need for accommodation. *Id.* at 148-49. The Court stated:

Where the disability and the need for accommodation is obvious, such as a broken leg, the medical necessity burden will be met upon notice to the employer, and the inquiry will not be if accommodation is needed, but rather what kind of accommodation is needed. However, in the case of depression or PTSD, a doctor’s note may be necessary to satisfy the plaintiff’s burden to show some accommodation is medically necessary. Although a doctor may not be able to prescribe a specific form of accommodation, a letter or

note will provide a sufficient nexus between the disability and the need for accommodation.

*Id.* at 148.

Unlike the plaintiff in *Riehl*, Johnson's disability was obvious. His chronic back pain was readily apparent, like a broken leg. Miller witnessed Johnson limping around the workplace and holding his back. CP 176 (Miller Dec., par. 12). Johnson sustained four industrial back injuries, or flare-ups, between 2000 and 2005, while working for Chevron. *Id.* Chevron required numerous Physical Capacities Evaluations (PCEs) and Independent Medical Examinations (IMEs). *See id.* Johnson's back pain was so obvious that the question should not have been "if accommodation is needed, but rather what kind of accommodation is needed." *Riehl*, 152 Wn.2d at 148.

The *Riehl* court upheld the "medical necessity" requirement strictly on grounds of *stare decisis*, finding no change in the text of the law since *Hill v. BCTI Income Fund-I*, 97 Wn. App. 657, 986 P.2d 137 (1999), was decided. *Id.* at 147. However, given the Washington State Legislature's codification of a new standard for qualifying for a reasonable accommodation in employment, it is arguable whether or not the requested accommodation must continue to be "medically necessary." *See Op. Br.* 30-31 (discussing the Legislature's rejection of *McClarty v. Totem*

*Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), and the new two-pronged requirement for qualifying for accommodation in RCW 49.60.040(25)(d)).

Johnson satisfies the criteria established by the Washington State Legislature in RCW 49.60.040(25)(d) to qualify for an accommodation in employment. His impairment was known to exist in fact by Chevron, and was also shown through numerous PCEs and IMEs. App. 1. It was shown through correspondence between Chevron human resources, Miller, Jerry Holmes, Crawford, and Johnson's union. *Id.* And, though he need only satisfy one of the two additional prongs to the test, Johnson is able to satisfy both prongs. Johnson's disability, at times, had a substantially limiting effect on his ability to perform his job. *Id.* Johnson also put Chevron on notice of his disability and was able to establish through medical documentation that there was "a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect." RCW 49.60.040(25)(d), App. 1. Johnson satisfies the test recently established by the Legislature and he thus qualified for an accommodation in employment.

Alternatively, the issue of whether or not the tool was "medically necessary" is at least a question of fact. Dr. Blair testified that neither Chevron nor Crawford worked with him to determine what

accommodations Johnson needed to perform his job of injury. CP 1085-86, App. 1. Dr. Blair admitted that he was not familiar with the legal definition of “disability” as it pertains to Washington law or the legal requirements to reasonably accommodate a disabled worker. CP 1085-86, 1332-34, App. 1. On October 27, 2004, Dr. Blair released Johnson back to work with “reasonable accommodations,” stating that Johnson would occasionally benefit from the use of the “handmade tool” to assist him in his job. CP 207, App. 1. Only after Chevron began pressuring Dr. Blair by giving him an ultimatum did Dr. Blair release Johnson to work without any accommodations. CP 1074, App. 1. Chevron informed Dr. Blair that Johnson could return to work only without any accommodation; if Johnson needed the ergonomic tool, then Johnson could not return to work. *Id.* As of at least February 13, 2006, Dr. Amin considered the tool to be medically necessary. CP 964, 3015.

### **3. The Accuracy Of Chevron’s Job Analysis Was A Question Of Fact For The Jury**

Chevron repeatedly refers to the job analysis it prepared for the job of Professional Truck Driver, which describes the frequency of certain on-the-job activities, as evidence that Johnson could not perform the essential functions of his job after April 20, 2005. CP 179, App. 1, Ans. Br. 3, 21-23. This job analysis was given to and used by various doctors performing

PCEs and IMEs to determine whether Johnson could return to work without accommodation. *Id.* However, the sufficiency of the job description, specifically the requirement that the worker be able to frequently lift 46 pounds, was called into question by Johnson's disability expert, Jacqueline Johnson, and Dr. Amin. CP 839 (Amin Dec.), CP 964, CP 1078, CP 842 (J. Johnson Dec., par. 6-16), App. 1. Ergonomist Ian Chong's study of the tool found that the weight of a full fuel hose was approximately 15-18 lbs. CP 925, App. 1.

During trial, Chevron employee Willie Jones testified as to the frequency of some of the activities related to being a tanker truck driver. RP 12/10/08 at 115:13-117:1. Jones' testimony indicates a much lower frequency to some of the weight lifting requirements than listed in the job analysis. *Id.* The dispute over the requirements of the job description created a question of fact that should have gone to the jury.

#### **4. The Trial Court Abused Its Discretion By Not Allowing Johnson To Revive His Accommodation Claim At Trial Pursuant To CR 15**

Chevron argues that the trial court was correct in refusing to allow Johnson to amend the pleadings at trial because Chevron never expressly or impliedly agreed to the revival of Johnson's accommodation claim. Ans. Br. 32. However, Chevron's consent or acquiescence was not necessary in order to amend the complaint. CR 15(b) states, in part:

If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation on the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

In *Green v. Hooper*, 149 Wn. App. 627, 637, 205 P.3d 134 (2009), Division III stated that “CR 15(b) provides authority for amending a complaint to add a new cause of action as a basis for recovery even when one party objects.” The purpose of CR 15(b) is “to allow the pleadings to conform to the evidence and issues actually litigated before the court in order to avoid the necessity of a new trial and a multiplying of lawsuits.” *Id.* 636. The standard of review is manifest abuse of discretion. *Id.*

The trial court abused its discretion by not allowing Johnson to amend his complaint at trial to include a WLAD failure to accommodate claim in light of the evidence produced. *See Op. Br. 37.* Chevron’s consent was not required and Chevron would not have been prejudiced by the addition of a failure to accommodate claim because discovery had been fully conducted. It was necessary to amend the complaint to conform to the evidence actually litigated before the court and doing so would have conserved judicial resources by avoiding the necessity of a new trial.

**5. Johnson Properly Opposed Chevron's Motion To Strike The Accommodations Expert, And A *De Novo* Standard of Review Applies To Trial Court Decisions Made In Conjunction With Summary Judgment**

Chevron argues that Johnson never opposed its motion to strike the declaration of expert Jacqueline Johnson and therefore failed to preserve the issue for appeal. Ans. Br. 27. What Chevron neglects to mention, however, is that its motion to strike the expert declaration was included within its Reply in Support of Their Second Motion for Partial Summary Judgment. CP 3641. The reply was filed on November 3, 2008 for a November 7, 2008 oral argument on the summary judgment motions. Not only did Johnson have no further opportunity to respond to Chevron's summary judgment reply, but the motion to strike failed to comply with King County Local Rule 7(4)(A). The motion was not noted for hearing by the court, and if the note date was intended to be the same as the summary judgment oral argument, then it was not filed six days before it was to be considered by the court as required by KCLR 7(4)(A).

Johnson's opposition to the motion to strike was made known during the summary judgment oral argument, which was not transcribed. Chevron made a tactical decision to include the motion to strike within the reply and it failed to comply with the local rules. Chevron also argues that Johnson's motion for reconsideration did not include opposition to the

motion to strike. On the contrary, the motion for reconsideration relied on “the pleadings filed in connection with defendants’ motions for partial summary judgment, and the pleadings and evidence filed in this case.” CP 1529. Johnson properly opposed the motion to strike.

Furthermore, the Opening and Answering Briefs erroneously refer to the standard of review for the trial court’s decision to strike the expert declaration as *abuse of discretion*. Op. Br. 38, Ans. Br. 27-29. Johnson has since determined that the correct standard of review on appeal of a ruling made in conjunction with a motion for summary judgment is *de novo*. In *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), the Supreme Court stated:

An appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court, including evidence that had been redacted. The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.<sup>3</sup>

Expert Johnson’s 7-page declaration and 10-page report contain a great deal of information in addition to what Chevron labels as “pure legal conclusions.” Ans. Br. 28, CP 840-858. Ms. Johnson is qualified as an

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<sup>3</sup> Just this month, this Court reaffirmed *Folsom v. Burger King* in *Bloome v. Haverly*, -- P.3d --, 2010 WL 60108, \*3-4 (Wash.App.Div. 1) (Jan. 11 2010) (applying *de novo* review to the trial court’s decision not to strike certain declarations submitted during summary judgment).

expert in the field of workplace accommodation and disability services based on her knowledge, experience, training, and education. CP 840, ER 702. Chevron does not deny this. The trial court gave no reason on the record for excluding the evidence. To the extent that the trial court felt that portions of Ms. Johnson’s declaration and report contained improper legal conclusions, it should have redacted them and retained the rest.

**6. This Court Should Consider All Evidence Presented To The Trial Court Before It Issued Its Formal Order Granting Chevron’s Motions For Summary Judgment**

Although the Answering Brief argues that Johnson “concedes” the standard of review is abuse of discretion, since the decision to deny the additional evidence presented before the formal order on summary judgment was made in conjunction with the summary judgment ruling, the standard of review is *de novo*. Ans. Br. 29, CP 1455-1460, *Folsom*, 135 Wn.2d at 663. The additional evidence was presented to support Johnson’s response to the second summary judgment motion and thus the trial court’s order denying the request to consider additional evidence was one that was made in conjunction with summary judgment. The additional evidence was presented before the trial court issued its formal order on summary judgment and should have been considered by the court.<sup>4</sup>

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<sup>4</sup> Chevron attempts to distinguish *Bremmeyer v. Peter Kiewit Sons Co.*, 90 Wn.2d 787, 789-90, 585 P.2d 1174 (1978), by stating that, in that case, the additional materials were

**B. Jury Instructions Nos. 11 and 12 Caused Prejudicial Error By Improperly Inserting An Element Of The *McDonnell Douglas* Burden-Shifting Framework Into The Instruction**

In the Answering Brief, Chevron argues that “[i]f Johnson was required to prove up ‘comparator’ evidence to survive a motion for summary judgment as a matter of law prior to trial, then it cannot be error for the trial court to require him to prove the same element at trial.” Ans. Br. 35. Chevron’s analysis is incorrect. The Ninth Circuit Court of Appeals has expressly held that it is error to include the shifting burden elements of a disparate treatment *prima facie* case in the jury instructions. *Sanghvi v. City of Claremont*, 328 F.3d 532, 540 (9th Cir. 2003). As described below, the Supreme Court has stated that adding a shifting burden element to the jury instruction creates needless confusion. *Kastanis v. Edu. Employees Credit Union (EECU)*, 122 Wn.2d 483, 490-95, 859 P.2d 26 (1994), *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 856 P.2d 746 (1993).

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submitted with a motion to reconsider. Ans. Br. 32 n.14. As noted above, the motion for reconsideration filed in this case concerned all “pleadings filed in connection with defendants’ motions for partial summary judgment,” and thus included the request for the court to consider additional evidence. Furthermore, Chevron’s contention that Johnson did not “appeal from the court’s denial of” the motion for reconsideration is incorrect; the motion for reconsideration was identified within the first assignment of error. Ans. Br. 32 n.14, Op. Br. 4 (citing CP 2137). Lastly, Chevron points to RAP 9.12 to argue that this Court is limited to “only those materials considered by the trial court,” but the Rule refers to “evidence and issues called to the attention of the trial court.”

Chevron cites *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 856 P.2d 746 (1993), and *Pannell v. Food Services of America*, 61 Wn. App. 418, 810 P.2d 952 (1991), to support its proposition that “Washington courts have upheld instructions that set out the entire *McDonnell Douglas* framework.” Ans. Br. 35-6. Chevron’s statement is misleading.<sup>5</sup> As the court indicated in *Hill*, although the *Pannell* court technically approved the shifting burden jury instruction, it was challenged on different grounds (the fact that it did not include the now-inapplicable “determining factor” and “but for” language). *Hill*, 71 Wn. App. at 144 n.5. *Pannell*, 61 Wn. App. at 436-37.

In *Hill*, the non-prevailing defendant employer objected to the inclusion of the burden-shifting framework in the jury instructions. While Division II found that the inclusion of the burden-shifting element was harmless in that case, because the plaintiff had established sufficient evidence to prove her claims without the instruction, the court stated:

GTE raises an excellent argument for not instructing the jury on the shifting burden of production...[O]nce all the evidence is in, issues of the plaintiff’s prima facie case, the employer’s burden to rebut with a legitimate

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<sup>5</sup> Chevron cites *Kirby v. City of Tacoma*, 124 Wn. App. 454, 468, 98 P.3d 454 (2004), in an attempt to compare the “differently treated” element in it and the instant case. Ans. Br. 36. This only serves to confuse the arguments. *Kirby* applied the element at summary judgment, and as Chevron points out, Johnson does not comment on how the element would apply at summary judgment, just that it was improper to include it in the jury instructions.

nondiscriminatory reason for its actions are irrelevant; it creates needless confusion to instruct the jury on these burdens.

*Hill*, 71 Wn. App. at 144 (citing *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 523-26 (1992)). Likewise, once Johnson made it to trial on his disability and race disparate treatment claims, his need to prove that he was treated differently than non-similarly situated employees became irrelevant and it was confusing to instruct the jury in this regard.

Most importantly, the law has been further clarified since *Hill* and *Pannell*. The Supreme Court in *Kastanis v. EECU*, 122 Wn.2d 483, 859 P.2d 26 (1994), established the framework for analyzing a discrimination claim at summary judgment, and then at trial. First, the Court noted that a *prima facie* case of discrimination can be established at summary judgment by either direct evidence of discrimination, or by applying the flexible framework of *McDonnell Douglas*. *Id.* at 490-91. The Court went on to clarify that:

The *McDonnell Douglas* standard and the direct evidence method are merely alternative ways of establishing a *prima facie* case. Once the plaintiff has established a *prima facie* case and the defendant has produced evidence of a nondiscriminatory reason for its action, the burden-shifting scheme “drops from the case”. This is so whether the plaintiff has established a *prima facie* case by meeting the requirements under *McDonnell Douglas* or the direct evidence method. The plaintiff then bears the burden of proving the ultimate fact – that the defendant intentionally discriminated against the plaintiff.

*Id.* at 491-92 (citing *Texas Dep't of Comm'ty Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981)). The *Kastanis* court agreed with the court in *Hill* by noting “the difficulties involved when the shifting burdens relevant to establishing a prima facie case of discrimination are included as instructions to the jury.” *Id.* at 490. Ultimately, the appeals court found that the trial court *did not err in refusing* to include a separate jury instruction requiring the plaintiff to prove pretext. *Id.* at 495.

The Ninth Circuit has expressly found error in including an element of the burden shifting framework in the jury instructions. In *Sanghvi v. City of Claremont*, 328 F.3d 532, 540-41 (9th Cir. 2003), the Ninth Circuit stated: “Having considered the views and observations of this and other circuits, we conclude that it is error to charge the jury with the elements of the *McDonnell Douglas* prima facie case. The technical elements of the presumptions and shifting burdens have significant potential to confuse juries.”

As in *Kastanis*, once Johnson made it to trial on his disparate treatment race and disability claims, the *McDonnell Douglas* requirements “dropped from the case” and he was only required to prove that Chevron intentionally discriminated against him. The Washington Pattern Jury Instructions accurately reflect the elements of a disparate treatment claim

that the plaintiff must prove at trial. WPI 330.01 (2005), Op. Br. 22-24, 40-43. Including the “substantial factor,” pretext, *and* comparator/non-similarly situated elements significantly confused the jury, improperly added to Johnson’s burden of proof at trial, and inaccurately reflected the state of the law in this area.

In *MacKay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995), the Supreme Court stated:

When the record discloses *an error in an instruction* given on behalf of the party in whose favor the verdict was returned, the error is presumed *to have been prejudicial*, and to furnish ground for reversal, unless it affirmatively appears that it was harmless....A harmless error is an error which is *trivial, or formal, or merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case*.

*Id.* (emphasis in original) (citations omitted). Here, the trial court erred in including the additional comparator element in Jury Instructions Nos. 11 and 12. This error benefited Chevron and is presumed to be prejudicial. The error significantly prejudiced Johnson because it added an additional, improper element to his claims, which he had not anticipated during trial. The error was not trivial, formal, or merely academic. This Court should find reversible error in Jury Instructions Nos. 11 and 12.

**C. The Trial Court Abused Its Discretion When It Admitted Evidence Related To Johnson's Patent And Statements Johnson Made To Subsequent Employers**

In the Answering Brief, as at trial, Chevron continues its unfounded and prejudicial argument that Johnson's patent was "obtained by fraud." Ans. Br. 44, RP 12/9/08 at 202-10, 1/14/09 at 137. Chevron's attempt to draw a connection between the legitimacy of the patent and Johnson's efforts to show pretext, through testimony related to the sale of the tool and Chong's ergonomic report, are equally baseless. Discussing the safety and use of the tool does not open the door to discussions that the patent was fraudulently obtained. As noted in the Opening Brief, admitting testimony and evidence related to the patent application was not harmless error; it was not relevant, unduly prejudicial, and only served to confuse and distract the jury from the matter before it. Op. Br. 44-46.

It was an abuse of discretion to permit testimony and evidence at trial related to statements Johnson made to subsequent employers. Chevron argues that it offered Fewell's testimony "to refute Johnson's claim that he was medically cleared to perform his job" and to contradict Johnson on this material fact. Ans. Br. 42-43. But it did not have this purpose or affect. Fewell testified that he had no independent memory of meeting Johnson and that according to his notes the two discussed Johnson's back injuries and back surgery. RP 12/16/08 at 191-95. Johnson *was* medically cleared to

perform his job at Praxair and Fewell's testimony did nothing to refute this. Johnson testified that his statements on the medical form were accurate at the time – that he was not currently suffering upper or lower back pain. RP 12/9/08 at 220. The subsequent medical form and Fewell's testimony were extrinsic evidence offered to attack Johnson's credibility and they should have been excluded under ER 608(b).<sup>6</sup> Even if offered for a purpose other than attacking credibility, the evidence should have been excluded under ER 401 as not relevant, or if relevant, under ER 403 because the subsequent statements improperly suggested some sort of impropriety on the part of Johnson and thus were misleading to the jury. *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999).

**D. The Trial Court Abused Its Discretion In Denying Johnson's Motion In Limine Regarding Chevron's Misconduct at the Rice And Jones Depositions And In Refusing To Grant Sanctions For Discovery Misconduct**

For the reasons stated in the Opening Brief and Johnson's Fifth Motion in Limine, it was an abuse of discretion for the trial court to refuse to sanction Chevron for its misconduct during the Chris Rice and Willie Jones depositions. Op. Br. 27-28, 46-48, CP 1611, 1757. Chevron notes, as did the trial court, that Johnson should have addressed the deposition misconduct

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<sup>6</sup> Although Chevron argues it did not offer Fewell's testimony as extrinsic evidence to attack Johnson's credibility, in closing, Chevron argued just that. Appendix 2. Chevron improperly offered the evidence for one purpose at trial and then argued it proved a different purpose in closing. 75A Am. Jur. 2d Trial § 516 (2009).

with Special Master Alsdorf. Ans. Br. 39-40, 46. However, when Johnson contacted the trial court regarding misconduct at the Miller deposition, Johnson was instructed to address the issue in a motion in limine. CP 1760. It was proper for Johnson to assume that objections to deposition misconduct were to be addressed in a motion in limine, not to the special master.

With regard to the late document production, Chevron argues that Johnson failed to note how “the ruling affected his ability to oppose Chevron’s motions for summary judgment” or prejudiced him at trial. Ans. Br. 46. By describing in detail what the late disclosed documents stated and how they would have affected various depositions, Johnson fully explained how he was prejudiced by the late disclosure. CP 1096-1101. Because the documents were not produced until right before trial, and after key depositions had been taken, Johnson was prevented from obtaining further discovery regarding the late produced documents, which in turn directly affected Johnson’s ability to prepare for summary judgment and trial. It was an abuse of discretion to deny Johnson’s request for sanctions regarding the discovery misconduct.

**E. The Remaining \$6,000 In Costs Is Excessive In A Civil Rights Case**

The \$6,450.11 remaining in costs, taxed at the maximum allowable interest rate of 12 per cent per annum, is excessively high for a civil rights case. CP 3537, 3541. “Costs have historically been very narrowly defined.”

*Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987).

Chevron failed to justify the remaining costs in the following ways.

Chevron taxed \$2,890.98 against Johnson for costs associated with serving papers. CP 2905. In its CR 54(d) Memorandum of Costs and Disbursements, Chevron stated that it sent 32 notices of deposition or trial subpoenas. CP 2910. Chevron did not further itemize these notices by cost or name of individual served. *Id.* The costs requested by Chevron equate to approximately \$90 per notice.

Chevron charged Johnson \$1,886.14 for obtaining reports and records admitted at trial under RCW 4.84.010. *Id.* This included costs for *photocopying* the reports and records. *Id.* Chevron did not further itemize or explain which records or reports were admitted into evidence and the costs for each. *Id.* Additionally, the Court in *Nordstrom* found that the costs for photocopying were not recoverable as “costs” under RCW 4.84.010.

*Nordstrom*, 107 Wn.2d at 743.

Chevron charged Johnson \$1,417.27 in statutory witness fees under RCW 4.84.010 and 4.84.090. CP 2911. However, Chevron failed to provide proof that each witness reported its mileage at the close of each day’s session to the clerk. CP 2908-2912, 2942-2946.

This Court should find that taxing costs of over \$6,000 against the plaintiff in a civil rights case is excessive, especially without supporting

documentation. Public policy supports the eradication of discrimination in employment and courts should not permit additional barriers to plaintiffs in civil rights litigation by allowing for excessive costs judgments to be taxed against plaintiffs. RCW 49.60.010, 49.60.030(2).

**F. Chevron Acted Unreasonably In Pursuing The Erroneous Cost Bill And Attempting To Garnish Johnson's Wages, Which Warranted Sanctions**

In the Answering Brief, Chevron again relies on the erroneous research of the associate “attorney responsible for preparing the cost bill,” thus shirking responsibility from the attorney that signed it, Portia Moore. Ans. Br. 49, CP 2907, 3514, 3545. CR 11 sanctions are imposed upon the person who signed the offending pleading and Ms. Moore had a duty to verify the accuracy of the research. She failed to do so.

Furthermore, Chevron argues that, after receiving Commissioner Neel’s ruling on Johnson’s Motion for Supersedeas Without Bond, it graciously “waited another *four* weeks before filing a writ of garnishment.” Ans. Br. 50. This hardly suggests good faith considering the Commissioner clearly indicated to Chevron in her ruling that Chevron lacked authority for the deposition costs it taxed against plaintiff.

Commissioner Neel stated:

There is authority supporting Johnson’s argument that Chevron did not meet its burden of demonstrating that it was entitled to the amount it requested for deposition costs.

See, e.g., Estep v. Hamilton, 148 Wn. App. 246, 201 P.3d 331 (2008); Herried v. Pierce County Pub. Transp. Benefit Author Corp., 90 Wn. App. 468, 957 P.2d 767 (1979); Kiewit-Grice v. State, 77 Wn. App. 867, 895 P.2d 6 (1995).  
But that is not the issue before me.

CP 3252.

This was not the first time Chevron had been directed to *Kiewit-Grice v. State*, 77 Wn. App. 867, 895 P.2d 6 (1995), in the dispute over the cost bill. Johnson had twice previously cited the case in his objections. CP 2939, 3310-11, 3335-36. This was not “new case law authority” cited in the CR 60 motion as Chevron states in the Answering Brief. Ans. Br. 12.

Chevron failed to conduct a reasonable inquiry into its taxation of costs against Johnson, thus causing unnecessary delay and a needless increase in the cost of litigation. CR 11. The cost bill additionally was not warranted by existing law. CR 11. The trial court abused its discretion by not granting Johnson’s motion for CR 11 sanctions. CP 3368, 3616.

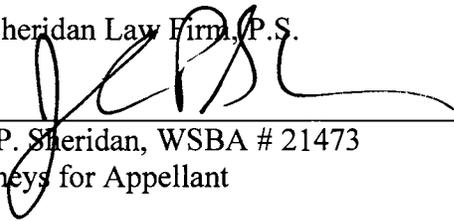
### III. CONCLUSION

Bruce Johnson respectfully requests that this Court vacate the jury verdict as well as the trial court’s summary judgment ruling and remand the case for a new trial.

Respectfully submitted this 27th day of January, 2010.

The Sheridan Law Firm, P.S.

By:

  
\_\_\_\_\_  
John P. Sheridan, WSBA # 21473  
Attorneys for Appellant

## DECLARATION OF SERVICE

Courtney Jordt states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, and am a legal assistant for Appellant's attorney of record. I make this declaration based on my personal knowledge and belief.

2. On January 27, 2010, I caused to be delivered via legal messenger to the following attorney:

Portia R. Moore  
Lane Powell PC  
1420 Fifth Avenue, Suite 4100  
Seattle, Washington 98101-2338  
Attorney for Chevron, U.S.A.,  
Inc. and Greg Miller

a copy of REPLY BRIEF OF APPELLANT.

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

DATED this 27th day of January, 2010, at Seattle, King County, Washington.

  
\_\_\_\_\_  
Courtney Jordt  
Legal Assistant

# APPENDIX 1



	<b>Disputed Issues of Fact Re: Johnson's Failure to Accommodate Claims; Inferences Drawn in the Light Most Favorable to Non-Moving Party</b>	<b>Citation to the Record at Summary Judgment</b>
1.	<p>Johnson went down to California because Miller told him the tool had to be certified by Chevron in order for Johnson to use the tool as an accommodation for his back pain disability.</p>	<p>Miller's notes from 4/26/05 describe how Johnson told him that he never wanted any money from Chevron related to the tool; he just wanted to be able to use it and to help others with back problems. CP 957.</p> <p>Johnson testified at his deposition that he went down to California because Miller told him the tool had to be certified in order to use it at work. CP 976-983.</p> <p>Miller testified at his deposition that he told Johnson that Johnson could not use the tool until it was certified by Chevron. CP 1033-36.</p>
2.	<p>Chevron's job analysis, "GO-308," which required the worker to be able to frequently lift 46 lbs., inaccurately reflected the duties and essential functions of the job.</p>	<p>GO-308 requires: "<b>Frequently</b> lifts 46 lb from ground to waist height – to drain fuel from 27 ft. long hose with fitting 15-20 times per shift." Frequently is defined as 34-66% of the time. CP 179.</p> <p>Dr. Amin's declaration explains that Johnson was able to perform the essential functions of his job between 2005-08, except for periods of specific injury. He states that he listed the 46 lb. requirement on medical forms because that was the limit required by Chevron, but Johnson may have been able to lift more. CP 839.</p> <p>On February 13 and March 13, 2006, Dr. Amin noted that Johnson was able to perform occasional lifting of up to 46 lbs. as required by his usual and customary work duties, with reasonable accommodation. CP 964, 1078.</p> <p>The Functional Job Analysis prepared by Crawford's agent lists the essential functions of the job as: "Drive truck to deliver fuel. Fills underground fuel tanks at delivery site." CP 966.</p> <p>Plaintiff's accommodation expert, Jacqueline Johnson, in her declaration and report, refuted the requirement that the worker must <i>frequently</i> lift 46 lbs. CP 842-58.</p> <p>Ergonomist Ian Chong's study of the tool found that the weight of a full fuel hose was approximately 15-18 lbs. CP 925.</p>
3.	<p>Chevron failed to offer the office clerk position to Johnson when the position was available and Johnson</p>	<p>During his deposition Miller, described the duties of the office clerk position, the vacancies in the position throughout 2005-07, and the fact that Johnson had previously assisted the office clerk for a period of several months. CP 1038-54; 1067-70.</p>

	was qualified for the position.	
4.	Chevron's one-week job search was inadequate.	<p>When Chevron determined that Johnson was permanently unable to return to his job of injury, HR employee Christopher Rice sent out an email which described Johnson as much more disabled than he was. Another email was sent by a different HR employee over a year later. CP 614-21.</p> <p>Citing the EEOC's Enforcement Guidance, expert J. Johnson's report found that Chevron's 6-day job search was inadequate and misrepresented Johnson's abilities. CP 855-56.</p>
5.	Chevron failed to consider any additional accommodations once it determined that Johnson could not use the ergonomic tool.	<p>Emails between Miller and Holmes indicate that Chevron's only accommodation is to remove the injured worker from the job. CP 907.</p> <p>In a July 8, 2005 letter, Johnson's union asked Chevron that Johnson be given any reasonable modification or accommodation as required by the Americans with Disabilities Act. CP 933.</p> <p>During his deposition, Johnson testified that before he was introduced to the ergonomic tool by a coworker, he had asked management to look into accommodations for his back pain, but management failed to do so. CP 987.</p> <p>Expert J. Johnson found that, once Chevron determined Johnson could not use the tool, it "failed to suggest any equally effective accommodations in lieu of the ones they would not provide or allow." CP 852.</p>
6.	Chevron failed to engage in the interactive process for determining whether accommodation is necessary with Johnson's primary care physicians, Dr. Blair and Dr. Amin.	<p>Dr. Blair testified that he did not know what the legal definition of a disability was and that no one from Crawford or Chevron contacted him to discuss to meaning of the term "disability" under Washington law. CP 1085-86.</p> <p>Dr. Amin stated: "Chevron never contacted me to engage in an interactive process to discuss accommodations that would help [Johnson] at work." CP 839.</p> <p>In a November 9, 2004 letter, Crawford gave Dr. Blair two options: 1) Johnson could return to work without any accommodation, including the use of the tool, or 2) Johnson could return to work, but with occasional accommodation using the ergonomic tool. However, the letter stated that Chevron "will not allow [Johnson] to return to work with [the second] option." CP 1074.</p> <p>Expert J. Johnson found that Chevron had failed to engage in the interactive process with Johnson with regard to his request for reasonable accommodation. CP 850-52.</p>

7.	Johnson provided medical documentation from Dr. Blair and Dr. Amin which adequately demonstrated his need for accommodation.	<p>On March 15, 2005, Dr. Blair sent Chevron a letter which stated: "Mr. Johnson continues to suffer from back and bilateral leg pain but is able to do his job of injury. However, it would be in Mr. Johnson's best interests that he be allowed to use the tool that he has developed himself as it is my understanding that he is able to do his job of injury more effectively and with less subjective complaints than when not using the tool. Further, any other accommodations such as modifications of work shifts or schedules would be potentially helpful to him but, as previously stated, Mr. Johnson is capable of doing his job of injury." CP 941.</p> <p>On February 13 and March 13, 2006, Dr. Amin noted that Johnson was able to perform occasional lifting of up to 46 lbs. as required by his usual and customary work duties, with reasonable accommodation. CP 964, 1078.</p> <p>Dr. Blair wrote a prescription stating: "Johnson would benefit from use of ergonomic tool for his job to help him lift and carry." CP 205.</p> <p>Dr. Blair signed a release on 10/28/04 which stated: "Generally can perform job on a daily basis without any accommodation. Will occasionally benefit from use of 'handmade tool' to assist with job." CP 207.</p>
8.	The fact that Johnson performed essentially the same job as he performed for Chevron, with accommodation and with the same level of pain, for two years after his employment with Chevron suggests that Johnson was able to perform the essential functions of his job with Chevron.	<p>Johnson testified at his deposition that he performed essentially the same job as he performed for Chevron, with accommodation and with the same level of pain, after leaving Chevron. CP 990-94.</p> <p>Johnson's medical documentation from January 3, 2008 also notes that Johnson was performing the same type of job, with accommodation, after leaving Chevron and without further injury. CP 691.</p>
9.	Johnson's disability had a substantially limiting effect on his ability to perform his job.	<p>Miller describes how, during the summer of 2003, Johnson was seen limping and grabbing his back and was complaining about back pain. CP 176.</p> <p>Dr. Blair wrote a prescription stating: "Johnson would benefit from use of ergonomic tool for his job to help him lift and carry." CP 205.</p> <p>Dr. Blair signed a release on 10/28/04 which stated: "Generally can perform job on a daily basis without any accommodation. Will occasionally benefit from use of 'handmade tool' to assist with job." CP 207.</p>

<p>AND/OR</p> <p>There was a reasonable likelihood that if Johnson engaged in the job functions without accommodation that it would aggravate his impairment to the point that it would create a substantially limiting effect.</p>	<p>In a 2008 declaration, Dr. Amin stated that several tools were medically necessary for Johnson to help prevent aggravation or re-injury and that engaging in the job functions without accommodation would aggravate the impairment. CP 839.</p> <p>In a December 2004 email, Miller writes that Johnson had slipped a note under his door, which stated that Johnson was “scared to really explain daily pain level in back and legs thinking I could be pulled off my job.” CP 899.</p> <p>In a May 2005 email, Holmes states: “We both agree that Johnson cannot continue to get hurt, recover and get hurt again, the liability for him and the company is too high.” CP 901.</p> <p>In a May 2005 email, Miller states that Johnson told him “this newest injury was not caused by anything specific and that his back is always sore to some degree.” CP 903.</p> <p>In a June 2005 note, Miller states that Johnson requested a modified work schedule and the ability to not have to switch trucks as an accommodation for his back pain. CP 939.</p> <p>Miller’s notes from April 2005 indicate that Johnson requested a modified work schedule and explained to Miller that he has good days and bad days with his disability and that he would like accommodation on days that he is in pain. CP 957.</p> <p>Miller testified at his deposition that he knew Johnson had good days and bad days with his back and that Johnson felt the ergonomic tool helped to alleviate some of his back pain. CP 1026-27.</p> <p>Miller testified at his deposition regarding the note Johnson slipped under his door in December 2004 and how Miller sent an email to Chevron HR employee Chris Rice about it. CP 1037.</p> <p>Miller testified at his deposition regarding April 2005 notes he took concerning Johnson and stated that he tried to accommodate Johnson when he could. CP 1061.</p> <p>Dr. Blair testified that Johnson felt that using the tool alleviated some of the pain he experienced and made his job easier, that Chevron did not want Johnson to use the tool, and that Dr. Blair felt that Johnson did not blame his injuries on the fact that Chevron would not allow him to use the tool. CP 1083-84.</p>
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10.	Chevron acted improperly when it failed to consider the Chong report, which established the safety and benefits of the tool.	<p>Chong's ergonomic report described the methodologies and findings of his study of the ergonomic tool and the benefits Chong found in using the tool. CP 923-31.</p> <p>Miller's April 2005 notes describe how Johnson paid for his own ergonomic study of the tool (the Chong report) and that Johnson would be sending a copy of the report to Chevron. CP 957.</p> <p>Miller testified during his deposition that he cannot recall doing anything with the information he received in the Chong report. CP 1030-32.</p>
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# **APPENDIX 2**

Documentation related to Assignment of Error 6 – Statements to Subsequent Employers

<b>Report of Proceedings Citation</b>	<b>Exhibit Number/Witness</b>	<b>Objection:</b>	<b>Evidence Admitted for:</b>
RP 12/9/08 at 214-16	323	ER 401, 403	First document admitted to show that Johnson knows how to fill out medical forms.
RP 12/9/08 at 216-21	512	ER 401, 403	Second document admitted minutes later for impeachment of Exhibit 323, to show that Johnson knows how to fill out medical forms.
RP 12/9/08 at 221-23	516	Foundation, ER 401, 403	Third document admitted minutes later for impeachment of Exhibit 323, to show that Johnson knows how to fill out medical forms.
RP 12/16/08 at 176-78	Witness Fewell	ER 608	Plaintiff objects to witness because now it appears the documents and witness are being used as extrinsic evidence in violation of 608; the judge states that the witness may testify to show prior inconsistent statement under ER 613. However, nothing is inconsistent in the testimony.
RP 12/16/08 at 182-88; 191-95	515	ER 402, 802, 608, 404	Fourth document not admitted through Fewell, but Fewell permitted to testify as to its content even though Fewell has no memory of meeting with Johnson.
RP 1/14/09 at 137-141		75A Am. Jur. 2d <u>Trial</u> § 516 (2009)	During closing argument, defense counsel improperly argued the extrinsic evidence admitted for impeachment served another purpose – that Johnson lied on his medical forms.

1 physical.

2 Q Of course you are familiar with filling out  
3 medical forms, and you know how to fill them out  
4 correctly; isn't that right, sir?

5 A Yes.

6 Q Let's take a look at exhibit number 323.

7 A Yes.

8 Q Do you recognize that document, sir?

9 A Yes.

10 Q And does your signature appear on this  
11 document?

12 A Yes.

13 Q And you in fact filled out that form on or  
14 about January 15th of 2003?

15 A Yes.

16 MS. MOORE: I'd move for the admission of  
17 323.

18 MR. SHERIDAN: Objection. 401 and 403.

19 MS. MOORE: It's a health form that he  
20 filled out, your Honor.

21 THE COURT: I just want to see. It's  
22 admitted.

23 MS. MOORE: Go ahead and put it up.

24 Q (BY MS. MOORE) Mr. Johnson, this is a health  
25 form that you filled out January 15th of 2003, all

1 right?

2 A Yes.

3 Q Correct? And this is a -- for commercial  
4 driver fitness determination; is that correct?

5 A Yes.

6 Q And this is kind of right after you had your  
7 back surgery; is that right?

8 A Yes.

9 Q And now, this is important because this form  
10 asks, have you had any injuries or illness in the  
11 last five years? And what do you mark?

12 A Yes, I see that.

13 Q You marked yes. And that's correct, right?

14 A Yes.

15 Q You had injuries or illness. Let's go down.  
16 And this asks you to describe, and you say you had  
17 a back injury; is that correct?

18 A Yes.

19 Q And in here, it also asks you to describe what  
20 you had, and under chronic low back pain, what do  
21 you mark?

22 A Yes and no.

23 Q Do you mark yes, that you had chronic back  
24 pain?

25 A Yes.

1 Q And then you sign it, right?

2 A Yes.

3 Q So you know how to fill out the forms  
4 properly, right?

5 A Sure.

6 Q Okay. So let's look at what you did when you  
7 went for your medical exam for Praxair. Look at  
8 exhibit number 512. And just so the jury  
9 remembers, you worked for Praxair for a short  
10 period of time before you went to work for APP; is  
11 that correct? Is that correct, Mr. Johnson?

12 A Yes.

13 Q And so Praxair, because you went to work for  
14 Praxair first, you had to get certified, you had to  
15 get the medical certificate saying that you could  
16 drive; is that correct?

17 A Yes.

18 Q So that's why you had to have the physical,  
19 correct?

20 A Yes.

21 Q And then once you got that little form saying  
22 that you could drive, you could take that to APP  
23 and then you didn't have to have another physical,  
24 right?

25 A That's not true, ma'am.

# Medical Examination Report FOR COMMERCIAL DRIVER FITNESS DETERMINATION

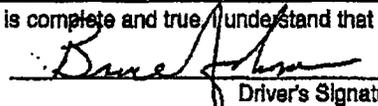
649-F (6045)

BY  
 OR  
 JAN 15 2003  
 REVERIFIED

<b>1. DRIVER'S INFORMATION</b> Driver completes this section.							
Driver's Name (Last, First, Middle) <b>JOHNSON Bruce Wayne</b>		Social Security No. <b>435-41-9400</b>	Birthdate <b>322 66 M/D/Y</b>	Age <b>36</b>	Sex <input checked="" type="checkbox"/> M <input type="checkbox"/> F	<input type="checkbox"/> New Certification <input checked="" type="checkbox"/> Recertification <input type="checkbox"/> Follow Up	Date of Exam <b>1/15/03</b>
Address <b>34213-31 Ave SW</b>		City, State, Zip Code <b>FEDERAL WAY WA 98003</b>	Work Tel: <b>(206) 628 2964</b> Home Tel: <b>(206) 215 9851</b>		Driver License No. <b>JOHNSB D341D2</b>		License Class <input type="checkbox"/> A <input type="checkbox"/> C <input type="checkbox"/> B <input type="checkbox"/> D <input type="checkbox"/> Other
							State of Issue <b>WA</b>

<b>2. HEALTH HISTORY</b> Driver completes this section, but medical examiner is encouraged to discuss with driver.																																																																																																																																						
<table border="0"> <tr><td>Yes</td><td>No</td></tr> <tr><td><input checked="" type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr><td colspan="2">Any illness or injury in last 5 years?</td></tr> <tr><td><input type="checkbox"/></td><td><input checked="" type="checkbox"/></td></tr> <tr><td colspan="2">Head/Brain injuries, disorders or illnesses</td></tr> <tr><td><input type="checkbox"/></td><td><input checked="" type="checkbox"/></td></tr> <tr><td colspan="2">Seizures, epilepsy</td></tr> <tr><td></td><td><input type="checkbox"/></td></tr> <tr><td colspan="2">medication _____</td></tr> <tr><td><input type="checkbox"/></td><td><input checked="" type="checkbox"/></td></tr> <tr><td colspan="2">Eye disorders or impaired vision (except corrective lenses)</td></tr> <tr><td><input type="checkbox"/></td><td><input checked="" type="checkbox"/></td></tr> <tr><td colspan="2">Ear disorders, loss of hearing or balance</td></tr> <tr><td><input type="checkbox"/></td><td><input checked="" type="checkbox"/></td></tr> <tr><td colspan="2">Heart disease or heart attack; other cardiovascular condition</td></tr> <tr><td></td><td><input type="checkbox"/></td></tr> <tr><td colspan="2">medication _____</td></tr> <tr><td><input type="checkbox"/></td><td><input checked="" type="checkbox"/></td></tr> <tr><td colspan="2">Heart surgery (valve replacement/bypass, angioplasty, pacemaker)</td></tr> <tr><td><input type="checkbox"/></td><td><input checked="" type="checkbox"/></td></tr> <tr><td colspan="2">High blood pressure <input type="checkbox"/> medication _____</td></tr> <tr><td><input type="checkbox"/></td><td><input checked="" type="checkbox"/></td></tr> <tr><td colspan="2">Muscular disease</td></tr> <tr><td><input type="checkbox"/></td><td><input checked="" type="checkbox"/></td></tr> <tr><td colspan="2">Shortness of breath</td></tr> </table>	Yes	No	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Any illness or injury in last 5 years?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	Head/Brain injuries, disorders or illnesses		<input type="checkbox"/>	<input checked="" type="checkbox"/>	Seizures, epilepsy			<input type="checkbox"/>	medication _____		<input type="checkbox"/>	<input checked="" type="checkbox"/>	Eye disorders or impaired vision (except corrective lenses)		<input type="checkbox"/>	<input checked="" type="checkbox"/>	Ear disorders, loss of hearing or balance		<input type="checkbox"/>	<input checked="" type="checkbox"/>	Heart disease or heart attack; 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<p>For any YES answer, indicate onset date, diagnosis, treating physician's name and address, and any current limitation. List all medications (including over-the-counter medications) used regularly or recently.</p> <p><i>Back injury - (Medication for cold, &amp; Pain, (Advil)</i></p>																																																																																																																																						

I certify that the above information is complete and true. I understand that inaccurate, false or missing information may invalidate the examination and my Medical Examiner's Certificate.

  
 Driver's Signature

**1/15/03**  
 Date

**Medical Examiner's Comments on Health History** (The medical examiner must review and discuss with the driver any "yes" answers and potential hazards of medications, including over-the-counter medications, while driving.)

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Exhibit **5**  
 Witness **Bettis**  
 Date **1/15/03**  
 Buell Realtime Reporting  
 (206) 287-9000

BETTIS0026

EXHIBIT 323

## TESTING (Medical Examiner completes Section 3 through 7)

**3. VISION** Standard: At least 20/40 acuity (Snellen) in each eye with or without correction. At least 70° peripheral in horizontal meridian measured in each eye. The use of corrective lenses should be noted on the Medical Examiner's Certificate.

**INSTRUCTIONS:** When other than the Snellen chart is used, give test results in Snellen-comparable values. In recording distance vision, use 20 feet as normal. Report visual acuity as a ratio with 20 as numerator and the smallest type read at 20 feet as denominator. If the applicant wears corrective lenses, these should be worn while visual acuity is being tested. If the driver habitually wears contact lenses, or intends to do so while driving, sufficient evidence of good tolerance and adaptation to their use must be obvious. Monocular drivers are not qualified.

Numerical readings must be provided.

ACUITY	UNCORRECTED	CORRECTED	HORIZONTAL FIELD OF VISION
Right Eye	20/ <u>15</u>	20/ <u>15</u>	Right Eye °
Left Eye	20/ <u>15</u>	20/ <u>15</u>	Left Eye °
Both Eyes	20/ <u>10</u>	20/ <u>10</u>	°

Complete next line only if vision testing is done by an ophthalmologist or optometrist

Applicant can recognize and distinguish among traffic control signals and devices showing standard red, green and amber colors?  Yes  No

Applicant meets visual acuity requirement only when wearing:

Corrective Lenses

Monocular Vision:  Yes  No

Date of Examination \_\_\_\_\_ Name of Ophthalmologist or Optometrist (print) \_\_\_\_\_ Tel. No. \_\_\_\_\_ License No./State of Issue \_\_\_\_\_ Signature \_\_\_\_\_

**4. HEARING** Standard: a) Must first perceive forced whispered voice ≥ 5 ft., with or without hearing aid, or b) average hearing loss in better ear ≤ 40 dB

Check if hearing aid used for tests.  Check if hearing aid required to meet standard.

**INSTRUCTIONS:** To convert audiometric test results from ISO to ANSI, -14 dB from ISO for 500 Hz, -10 dB for 1,000 Hz, -8.5 dB for 2,000 Hz. To average, add the readings for 3 frequencies tested and divide by 3.

Numerical readings must be recorded.

a) Record distance from individual at which forced whispered voice can first be heard.	Right Ear	Left Ear
	<u>10</u> Feet	<u>0</u> Feet

b) If audiometer is used, record hearing loss in decibels. (acc. to ANSI Z24.5-1951)

Right Ear			Left Ear		
500 Hz	1000 Hz	2000 Hz	500 Hz	1000 Hz	2000 Hz
Average:			Average:		

### 5. BLOOD PRESSURE / PULSE RATE

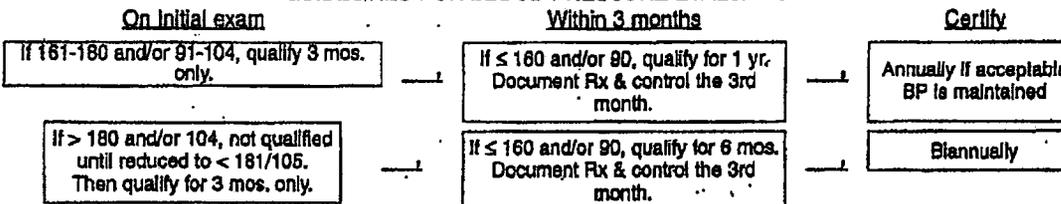
Numerical readings must be recorded.

Blood Pressure	Systolic	Diastolic
	<u>100</u>	<u>72</u>

Driver qualified if ≤ 160/90 on initial exam.

Pulse Rate	<input checked="" type="checkbox"/> Regular	<input type="checkbox"/> Irregular

#### GUIDELINES FOR BLOOD PRESSURE EVALUATION



Medical examiner should take at least 2 readings to confirm blood pressure.

### 6. LABORATORY AND OTHER TEST FINDINGS

Numerical readings must be recorded.

Urinalysis is required. Protein, blood or sugar in the urine may be an indication for further testing to rule out any underlying medical problem.

Other Testing (Describe and record)

URINE SPECIMEN	SP. GR.	PROTEIN	BLOOD	SUGAR
	<u>1.010</u>	<u>-</u>	<u>-</u>	<u>-</u>

BETTIS0027

**7. PHYSICAL EXAMINATION**

Height: 71 (In.) Weight: 182 (lbs.)

The presence of a certain condition may not necessarily disqualify a driver, particularly if the condition is controlled adequately, is not likely to worsen or is readily amenable to treatment. Even if a condition does not disqualify a driver, the medical examiner may consider deferring the driver temporarily. Also, the driver should be advised to take the necessary steps to correct the condition as soon as possible particularly if the condition, if neglected, could result in more serious illness that might affect driving.

Check YES if there are any abnormalities. Check NO if the body system is normal. Discuss any YES answers in detail in the space below, and indicate whether it would affect the driver's ability to operate a commercial motor vehicle safely. Enter applicable item number before each comment. If organic disease is present, note that it has been compensated for.

See *Instructions to the Medical Examiner* for guidance.

BODY SYSTEM	CHECK FOR:	YES*	NO	BODY SYSTEM	CHECK FOR:	YES*	NO
1. General Appearance	Marked overweight, tremor, signs of alcoholism, problem drinking, or drug abuse.		<input checked="" type="checkbox"/>	7. Abdomen and Viscera	Enlarged liver, enlarged spleen, masses, bruits, hernia, significant abdominal wall muscle weakness.		<input checked="" type="checkbox"/>
2. Eyes	Pupillary equality, reaction to light, accommodation, ocular motility, ocular muscle imbalance, extraocular movement, nystagmus, exophthalmos, strabismus uncorrected by corrective lenses, retinopathy, cataracts, aphakia, glaucoma, macular degeneration.		<input checked="" type="checkbox"/>	8. Vascular System	Abnormal pulse and amplitude, carotid or arterial bruits, varicose veins.		<input checked="" type="checkbox"/>
3. Ears	Middle ear disease, occlusion of external canal, perforated eardrums.		<input checked="" type="checkbox"/>	9. Genito-urinary System	Hernias.		<input checked="" type="checkbox"/>
4. Mouth and Throat	Irremediable deformities likely to interfere with breathing or swallowing.		<input checked="" type="checkbox"/>	10. Extremities - Limb impaired. Driver may be subject to SPE certificate if otherwise qualified.	Loss or impairment of leg, foot, toe, arm, hand, finger. Perceptible limp, deformities, atrophy, weakness, paralysis, clubbing, edema, hypotonia. Insufficient grasp and prehension in upper limb to maintain steering wheel grip. Insufficient mobility and strength in lower limb to operate pedals properly.		<input checked="" type="checkbox"/>
5. Heart	Murmurs, extra sounds, enlarged heart, pacemaker.		<input checked="" type="checkbox"/>	11. Spine, other musculoskeletal	Previous surgery, deformities, limitation of motion, tenderness.		<input checked="" type="checkbox"/>
6. Lungs and chest, not including breast examination.	Abnormal chest wall expansion, abnormal respiratory rate, abnormal breath sounds including wheezes or alveolar rales, impaired respiratory function, dyspnea, cyanosis. Abnormal findings on physical exam may require further testing such as pulmonary tests and/or xray of chest.		<input checked="" type="checkbox"/>	12. Neurological	Impaired equilibrium, coordination or speech pattern; paresthesia, asymmetric deep tendon reflexes, sensory or positional abnormalities, abnormal patellar and Babinski's reflexes, ataxia.		<input checked="" type="checkbox"/>

BETTIS0028

\*COMMENTS: 11 Patient has had Back Surgery - possible return to driving in 3 months 2007

Note certification status here. See *Instructions to the Medical Examiner* for guidance.

- Meets standards in 49 CFR 391.41; qualifies for 2 year certificate
- Does not meet standards
- Meets standards, but periodic evaluation required
- Due to \_\_\_\_\_ driver qualified only for:
  - 3 months
  - 6 months
  - 1 year
  - Other
- Temporarily disqualified due to (condition or medication): \_\_\_\_\_
- Return to medical examiner's office for follow up on \_\_\_\_\_

- Wearing corrective lenses
- Wearing hearing aid
- Accompanied by a \_\_\_\_\_ waiver/exemption
- Skill Performance Evaluation (SPE) Certificate
- Driving within an exempt intracity zone
- Qualified by operation of 49 CFR 391.64

Medical Examiner's Signature: Robert Bettis  
 Medical Examiner's Name (print): ROBERT BETTIS  
 Address: 7315-2126 St SW  
 Telephone Number: 425-773-5424

If meets standards, complete a Medical Examiner's Certificate according to 49 CFR 391.43(h). (Driver must carry certificate when operating a commercial vehicle.)

1 Q And then you sign it, right?

2 A Yes.

3 Q So you know how to fill out the forms  
4 properly, right?

5 A Sure.

6 Q Okay. So let's look at what you did when you  
7 went for your medical exam for Praxair. Look at  
8 exhibit number 512. And just so the jury  
9 remembers, you worked for Praxair for a short  
10 period of time before you went to work for APP; is  
11 that correct? Is that correct, Mr. Johnson?

12 A Yes.

13 Q And so Praxair, because you went to work for  
14 Praxair first, you had to get certified, you had to  
15 get the medical certificate saying that you could  
16 drive; is that correct?

17 A Yes.

18 Q So that's why you had to have the physical,  
19 correct?

20 A Yes.

21 Q And then once you got that little form saying  
22 that you could drive, you could take that to APP  
23 and then you didn't have to have another physical,  
24 right?

25 A That's not true, ma'am.

1 Q Well, you could take the little card that you  
2 got as a result of your physical from Praxair and  
3 you took that over to APP; is that right?

4 A Every company is different, ma'am. That's not  
5 true.

6 Q Let's take a look at exhibit number 512, sir.

7 A I don't have that book up here.

8 Q You don't have 512. You should have it up  
9 there.

10 THE COURT: You should. It's up there.

11 THE WITNESS: Okay. Yes.

12 Q (BY MS. MOORE) Okay. Do you recognize the  
13 document that's been marked as exhibit number 512,  
14 sir?

15 A Yes.

16 Q And take a look at the second page of this  
17 document. Does your signature appear on this  
18 document, sir?

19 A Yes.

20 Q And did you sign this document on or about  
21 July 17th, 2007?

22 A Yes.

23 Q And is this part of a medical examination form  
24 that you signed?

25 A Yes.

1 Q And you were required to go and have a medical  
2 exam as part of your post-employment offer for  
3 Praxair; is that correct?

4 A Yes.

5 Q And you filled out this form at that time; is  
6 that correct?

7 A Yes.

8 MS. MOORE: I'd move for the admission of  
9 512.

10 MR. SHERIDAN: Objection. 401, 403.

11 THE COURT: It's admitted. It's for  
12 impeachment.

13 MS. MOORE: Let's go ahead and publish  
14 this.

15 Q (BY MS. MOORE) So you met with -- do you  
16 remember where you went to have this exam, sir?

17 A I think it was the same place, Healthsouth,  
18 Tacoma, I mean in Fife.

19 Q So it was a medical clinic in Tacoma?

20 A Yes.

21 Q And so this was your post-offer employment  
22 medical examination; is that correct?

23 A Yes.

24 Q And so they asked you a bunch of questions; is  
25 that correct?

1 A Yes.

2 Q And you told them about the back surgery that  
3 you had; is that correct?

4 A Yes.

5 Q Let's go to the next page. That's your  
6 signature on the form; is that correct?

7 A Yes.

8 Q And then did you fill out this portion of the  
9 form, sir?

10 A Yes.

11 Q So this is you filling out this portion of the  
12 form, right?

13 A Yes.

14 Q Let's look. And this portion of the form asks  
15 you to mark any problems that you had; is that  
16 correct?

17 A Yes.

18 Q So let's look at what it says down here, and I  
19 know that this is very, very hard for the jury to  
20 read. Very good. Since the last exam, have you  
21 had any other illnesses or surgeries that we have  
22 not asked you about? And what did you mark, sir?

23 A No.

24 Q Let's go back. Let's go here. They're asking  
25 you about health problems; is that correct?

1 A Yes.

2 Q What did you mark under pain in upper back?

3 A No.

4 Q What did you mark under pain in lower back?

5 A No.

6 Q What did you mark under kidney or bladder  
7 trouble?

8 A No.

9 Q Go back. Were those correct statements, sir?

10 A Yes, at that time.

11 Q So you didn't tell the person who's performing  
12 the medical exam on you that you had chronic back  
13 pain; is that correct?

14 A On that first page, I did.

15 Q Can you answer my question. Did you tell the  
16 person who was performing the physical exam that  
17 you had chronic back pain, yes or no?

18 A I don't remember. I don't even remember if he  
19 even asked me that.

20 Q Well, it asked you that on the form.

21 A I know. But I end up going through that form  
22 just checking no. Yes, I did check no, but I just  
23 went through that whole form just checking no.

24 Q Did you tell the person performing the medical  
25 exam on you that you had suffered a back injury on

1 March 22nd -- on May 22nd, 2004?

2 A I don't recall that.

3 Q Did you tell the person who was performing the  
4 medical exam that you had suffered a back injury on  
5 April -- on April 20th, 2005?

6 A I don't remember that, ma'am.

7 Q Let's take a look at exhibit number 516. Do  
8 you recognize that document, sir?

9 A Yes, ma'am.

10 Q And what is this?

11 A Another medical -- occupational medical  
12 physical.

13 Q This is another --

14 A Examination, I'm sorry.

15 Q This is another medical form that you filled  
16 out as part of your medical exam; is that correct?

17 A Yes.

18 Q And does your signature appear on this  
19 document?

20 A Yes.

21 Q And you signed it on or about August 20th of  
22 2007; is that correct?

23 A Yes, ma'am.

24 Q And this is part of your physical for Praxair?

25 A I'm not for sure it's Praxair or APP.



Post Offer/Pre-Placement Medical Examination Form (PX 1B)

PERSONAL DATA				APPLICANT, PLEASE COMPLETE THROUGH SECTION F															
Name (Last)	JOHNSON	(First)	DRUEE	(Middle Initial)	A	(Maiden)													
Street Address		City/State	Zip Code	Date of Birth	Sex <input checked="" type="checkbox"/> F <input type="checkbox"/> M		Home Phone #												
34213 31 Ave SW		Federal Way WA	98003	3/22/66			253-859851												
Marital Status <input type="checkbox"/> Single <input checked="" type="checkbox"/> Married <input type="checkbox"/> Separated <input type="checkbox"/> Divorced <input type="checkbox"/> Widow				Social Security Number															
				435-41-9400															
Position Accepted		Company		Type of Work to be Performed															
DRIVER		PRAXAIR																	
Person to Notify in An Emergency				Relationship															
Margaret Johnson				Wife															
Address		Home Phone		Business Phone															
34213 31 Ave SW		253 859851		253.350.1342															
Personal Physician		Address		Phone															
<p>Information requested herein will not be used in any manner contrary to any law, rule, or regulation. It is obtained only for medical examination purposes to ensure safe job placement in consideration of specific job demands and exposures.</p>																			
<b>A. Work History</b>																			
Previous Occupation(s) - Prior To Working For Praxair																			
<p>Have You Ever Worked With/Around</p> <table border="0"> <tr> <td>Asbestos</td> <td><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</td> <td>Solvents</td> <td><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</td> <td>Radiation</td> <td><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</td> <td>Dust</td> <td><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</td> <td>Chemicals</td> <td><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</td> <td>Extreme Noise</td> <td><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</td> </tr> </table> <p><input type="checkbox"/> Others - Explain:</p>								Asbestos	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Solvents	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Radiation	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Dust	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Chemicals	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Extreme Noise	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Asbestos	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Solvents	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Radiation	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Dust	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Chemicals	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Extreme Noise	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No								
<p>If yes to any of the above, please list the type of exposure and dates when you were exposed:</p> <p>I HAVE WORK AROUND HAZARD FOR ABOUT 22 years with different companies.</p>																			
Employer's Responses				Reviewer's Comments															
<b>B. Medical History</b>																			
Did you experience any significant childhood illness? (List)																			
NO																			
Have you ever undergone surgery? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No (List any type of surgery and date)																			
BACK SURGERY 2002 L-5, S-1 laminectomy																			
Do you or have you had any major adult illnesses (example, diabetes or high blood pressure)? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No (List type of illness and date it began.)																			
Are you taking any medication now? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If yes, list medications.)																			
NONE																			
Do you have allergies to any medication? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If yes, list medication(s) and reaction you suffer.)																			

Revised: June 2004

Exhibit 15  
 Witness B. JOHNSON  
 Date 7/25/08  
 Buell Realtime Reporting  
 (206) 287-9056

OCCMED0036

**C. Family History**  
 Parent's ages: Mother 55 Father 64 If expired, cause of death: \_\_\_\_\_  
 Number of siblings: Brothers 3 Sisters 3  
 Are there any major illness in your family?  Yes  No  
 Have you ever suffered any of the illnesses/injuries listed below? If so, list date.

	Yes	No	Date		Yes	No	Date
Eye injuries	<input type="checkbox"/>	<input checked="" type="checkbox"/>		Allergies	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
Ear injuries	<input type="checkbox"/>	<input checked="" type="checkbox"/>		Liver/Kidney Disease	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
Bone Fractures	<input type="checkbox"/>	<input checked="" type="checkbox"/>		Blood Disorders	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
Knee injuries	<input type="checkbox"/>	<input checked="" type="checkbox"/>		TB/Lung Disease	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
Head injuries	<input type="checkbox"/>	<input checked="" type="checkbox"/>		Diabetes	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
Car Accidents	<input type="checkbox"/>	<input checked="" type="checkbox"/>		High/Low Blood Pressure	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
Lost Consciousness	<input type="checkbox"/>	<input checked="" type="checkbox"/>		Mental Illness	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
				Heart Trouble	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
				Cancer	<input type="checkbox"/>	<input checked="" type="checkbox"/>	

**D. Wellness**  
 How do you consider your dietary habits? Good  Bad  Fair   
 Do you have difficulty sleeping?  Yes  No  
 Do you exercise regularly?  Yes  No  
 Do you have any hobbies? (List) Family Activities, Church, Traveling, Reading

**E. Social History**  
 Do you smoke? No. Per Day 0 No. Of Years 0 Do you drink alcoholic beverages? Yes  No  If so, how often? Occasionally  Regularly

**Review of Systems**

System	Yes	No	System	Yes	No
<b>Eyes</b>			<b>Pulmonary System (Lungs)</b>		
Not seeing properly	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Tuberculosis	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Cataract removal	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Asthma	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Red or runny eyes	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Emphysema	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Pain in eyes	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Cough up phlegm or blood	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Contact lenses	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Bronchitis	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Eyeglasses	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Wheezing	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Glaucoma	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Shortness of breath	<input type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Nose, Ears, and Hearing</b>			<b>Cardiovascular System (Heart)</b>		
Difficulty in hearing	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Heart murmur	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Perforated ear drum	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Swallowing of snakes	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Sinus trouble	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Pain or pressure in chest	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Frequent colds or flu	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Thumping, skipping, or racing heart	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Frequent nose bleeds	<input type="checkbox"/>	<input checked="" type="checkbox"/>	High blood pressure	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Loss of sense of smell	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Heart attack	<input type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Mouth</b>			<b>Joints and Bones</b>		
Sores on lips, tongue, or mouth	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Tom cartilage	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Bleeding gums or mouth	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Arthritis	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Wear dentures	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Bursitis	<input type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Throat and Neck</b>			Neck or shoulder pain	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Frequent hoarseness	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Pain in upper back	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Hard to swallow	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Pain in lower back	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Frequent sore throat	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Broken bone(s)	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Thyroid problems	<input type="checkbox"/>	<input checked="" type="checkbox"/>			
<b>Skin</b>			<b>Men Only</b>		
Dermatitis	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Since your last exam, have you had or experienced:		
History of skin disorder	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Prostate disease or trouble	<input type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Emotional</b>			Pain, swelling, or lumps in testicles	<input type="checkbox"/>	<input checked="" type="checkbox"/>
History of Mental Illness	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Problems with infertility	<input type="checkbox"/>	<input checked="" type="checkbox"/>
History of depression	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Problems with maintaining an erection	<input type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Other Illnesses</b>					
Diabetes	<input type="checkbox"/>	<input checked="" type="checkbox"/>			
Cancer or leukemia	<input type="checkbox"/>	<input checked="" type="checkbox"/>			
Anemia	<input type="checkbox"/>	<input checked="" type="checkbox"/>			
Marked weight loss/gain	<input type="checkbox"/>	<input checked="" type="checkbox"/>			
Since last exam, have you had any other illness or surgery that we have not asked about?	<input type="checkbox"/>	<input checked="" type="checkbox"/>			
			<b>Women Only</b>		
			Have you had or experienced:		
			Fibroids of uterus	<input type="checkbox"/>	<input checked="" type="checkbox"/>
			Ovarian cyst	<input type="checkbox"/>	<input checked="" type="checkbox"/>
			Lumps in breast	<input type="checkbox"/>	<input checked="" type="checkbox"/>
			Irregular periods	<input type="checkbox"/>	<input checked="" type="checkbox"/>
			Miscarriage	<input type="checkbox"/>	<input checked="" type="checkbox"/>
			Unexpected vaginal bleeding or spotting	<input type="checkbox"/>	<input checked="" type="checkbox"/>
			Unusually painful menstrual periods	<input type="checkbox"/>	<input checked="" type="checkbox"/>
			Menopause	<input type="checkbox"/>	<input checked="" type="checkbox"/>
			Pap smear exam	<input type="checkbox"/>	<input checked="" type="checkbox"/>
			Have you had difficulty becoming pregnant?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	

**F. Employee Medical Declaration** I certify that the foregoing information is true and complete to the best of my knowledge. I understand that I may be requested at the option of the employer to undergo a physical examination prior to my placement, and I consent to such examination. I authorize any of the doctors, clinics, or hospital to furnish a health status report concerning only my fitness for duty and for the purpose of processing my application for this employment.  
 Date: JUL 17 2007 Signature: Dave Jones

JANSON, BRUCE

B. Physical Examination:			
General appearance and body build <i>well kept / medium build</i>		Height (without shoes) <i>71</i>	Weight (without shoes) <i>191</i>
Blood Pressure <i>130/80</i>		(If over 140/90 repeat after 5 minutes of rest) B/P after 5 minutes	
Heart rate <i>90</i>	Rhythm	Resp. Rate	Hearing R L
Vision	Uncorrected	Corrected	Contact Lenses <input type="checkbox"/> Yes <input type="checkbox"/> No
Distance	Right 20/ <i>20</i> Left 20/ <i>20</i>	Right 20/ Left 20/	Color: <i>B115</i> Depth Perception: <i>119</i>
Near	Right 20/ <i>40</i> Left 20/ <i>30</i>	Right 20/ Left 20/	Peripheral Vision: <i>CU 210</i>
Clinical Evaluation			
Skin	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>	Chest	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>
Nodes	<input checked="" type="checkbox"/>	Breasts	<input checked="" type="checkbox"/>
Head-neck	<input checked="" type="checkbox"/>	Spine	<input checked="" type="checkbox"/>
Eyes	<input checked="" type="checkbox"/>	Heart	<input checked="" type="checkbox"/>
Ears	<input checked="" type="checkbox"/>	Lungs	<input checked="" type="checkbox"/>
Nose-mouth-pharynx	<input checked="" type="checkbox"/>	Abdomen	<input checked="" type="checkbox"/>
Neck	<input checked="" type="checkbox"/>	Hernia	<input checked="" type="checkbox"/>
Genitals	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>	Rectal	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>
Varicella's	<input checked="" type="checkbox"/>	Joint-muscles	<input checked="" type="checkbox"/>
Extremities	<input checked="" type="checkbox"/>	Neurological	<input checked="" type="checkbox"/>
Psychological	<input checked="" type="checkbox"/>		
Detail of abnormal findings <i>with normal ser - all exam otherwise</i>			
Laboratory Tests:		Detail of Abnormal Finding	
SMAC	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>	Additional Procedures: <input type="checkbox"/> Chest X-ray <input type="checkbox"/> Back X-ray <input type="checkbox"/> ECG <input type="checkbox"/> Audiometry <input type="checkbox"/> Spirometry <input checked="" type="checkbox"/> Other: Lab X-ray <i>TB / PPD</i>	Detail of Abnormal Finding <i>bilateral high freq. loss</i>
CBC	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>		
Urine:	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>		
Sugar	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>		
Albumin	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>		
Acetone	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>		
RBC	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>		
WBC	Normal <input checked="" type="checkbox"/> Abnormal <input type="checkbox"/>		
Conclusions: Summary/Problems/Diagnoses <i>None</i>			
Recommendations to Applicant: <i>None</i>			
Medically qualified for position?	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	Follow-up or re-examination?	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Examination findings discussed with individual?	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	Referred to personal physician?	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Date	<i>JUL 17 2007</i>	Signed	<i>[Signature]</i> P.A. M.D.

\*PLEASE COMPLETE PX 6000—AUTHORIZATION FOR EXAMINATION/HEALTH STATUS REPORT.

1 March 22nd -- on May 22nd, 2004?

2 A I don't recall that.

3 Q Did you tell the person who was performing the  
4 medical exam that you had suffered a back injury on  
5 April -- on April 20th, 2005?

6 A I don't remember that, ma'am.

7 Q Let's take a look at exhibit number 516. Do  
8 you recognize that document, sir?

9 A Yes, ma'am.

10 Q And what is this?

11 A Another medical -- occupational medical  
12 physical.

13 Q This is another --

14 A Examination, I'm sorry.

15 Q This is another medical form that you filled  
16 out as part of your medical exam; is that correct?

17 A Yes.

18 Q And does your signature appear on this  
19 document?

20 A Yes.

21 Q And you signed it on or about August 20th of  
22 2007; is that correct?

23 A Yes, ma'am.

24 Q And this is part of your physical for Praxair?

25 A I'm not for sure it's Praxair or APP.

1 MS. MOORE: I'd move for the admission of  
2 516.

3 MR. SHERIDAN: I would object on  
4 foundation, as well as 401 and 403.

5 THE COURT: It comes in as impeachment.  
6 It's overruled. It's admitted. You may publish.

7 MS. MOORE: Go ahead and publish this.

8 Q (BY MS. MOORE) Mr. Johnson, you signed this  
9 document, that's your signature, on or about August  
10 20th, 2007; is that correct?

11 A Yes.

12 Q And this is your handwriting that appears on  
13 this; is that correct?

14 A Yes.

15 Q What did you say to the question whether you  
16 had any injury or illness in the last five years  
17 right here, sir?

18 A Again I put no.

19 Q What did you say about chronic back pain, low  
20 back pain?

21 A I checked no.

22 Q And in fact, you didn't tell the doctor --  
23 actually he is a physician's assistant who did this  
24 was a Steven Fewell, F-E-W-E-L-L; is that correct?

25 A I don't remember our conversation, but I

1 thought, you know, they seen my scar in my back.

2 Q You didn't tell Mr. Fewell that you had  
3 chronic back pain; is that correct?

4 A I don't think we talked about that, ma'am. I  
5 don't recall.

6 Q And you didn't tell him about your back  
7 injuries; is that correct?

8 A Well, I didn't check those things. You know,  
9 I have a habit of just checking off things.

10 Q And as a result of this, sir, you were able to  
11 qualify for your medical examiner's certificate; is  
12 that right?

13 A I don't think so, ma'am. I think that is  
14 different.

15 Q Let me have you take a look at the document  
16 that's been marked as exhibit 514, sir.

17 A Yes.

18 Q And do you recognize that document?

19 A Yes.

20 Q And what is that document?

21 A It's your medical card that goes along with  
22 your CDL driving license.

23 Q Does your signature appear on this?

24 A Yes.

25 MS. MOORE: I'd move for the admission of



Occupational Medical Clinic of Tacoma, Inc. P.S.  
 4703 Pacific Hwy. E. • Tacoma, WA 98424  
 (253) 922-9570 • FAX 922-9587 • email: omctacoma@aol.com  
 www.occmcdtacoma.com

Medical Examination Report  
 FOR COMMERCIAL DRIVER FITNESS DETERMINATION

**1 DRIVER'S INFORMATION** Driver completes this section.

Driver's Name (Last, First, Middle) Johnson Bruce Duane Social Security No. 435-41-9400 Work Tel: 8198857 Date of Exam AUG 20 2007  
 Address 34213 31 Ave SW City, State, Zip Code \_\_\_\_\_  
 Driver License No. Johans8034102 State of Issue WA License Class  A  B  C  D  E Birthdate MM/DD/YY 03/23/66 Age 41 Sex  M  F  New Certification  Recertification  Follow Up

**2 HEALTH HISTORY**

Yes No  
 Any illness or injury in last 5 years?  
 Head/Brain injuries, disorders or illnesses  
 Seizures, epilepsy?  
 medication \_\_\_\_\_  
 Eye disorders or impaired vision (except corr. lenses)  
 Ear disorders, loss of hearing or balance  
 Heart disease or heart attack; other cardiovascular condition  
 medication \_\_\_\_\_  
 Heart surgery (valve replacement/bypass, angioplasty, pacemaker)  
 High blood pressure  
 medication \_\_\_\_\_  
 Muscular disease  
 Shortness of breath  
 Lung disease, emphysema, asthma, chronic bronchitis  
 Kidney disease, dialysis  
 Liver disease

Yes No  
 Digestive problems  
 Diabetes or elevated blood sugar controlled by:  
 diet  
 pills  
 insulin  
 Nervous or psychiatric disorders, e.g., severe depression  
 medication \_\_\_\_\_  
 Loss of, or altered consciousness  
 Fainting, dizziness  
 Sleep disorders, pauses in breathing while asleep, daytime sleepiness, loud snoring  
 Stroke or paralysis  
 Missing or impaired hand, arm, foot, leg, finger, toe  
 Spinal injury or disease  
 Chronic low back pain  
 Regular, frequent alcohol use  
 Narcotic or habit forming drug use

For any YES answer, indicate onset date, diagnosis, treating physician's name and address, and any current limitation. List all medications (including over-the-counter medications) used regularly or recently.

I certify that the above information is complete and true. I understand that inaccurate, false or missing information may invalidate the examination and my Medical Examiner's Certificate.

Bruce Johnson Driver's Signature Date AUG 20 2007

Medical Examiner's Comments on Health History (The medical examiner must review and discuss with the driver any "yes" answers and potential hazards of medications, including over-the-counter medications, while driving.)  
Sign - L-5, S-1 (lumbar) 2002  
leg is  
under

TESTING (Medical Examiner completes Section 3 through 7)

**3 VISION**

ACUITY	UNCORRECTED	CORRECTED	HORIZONTAL FIELD OF VISION
Right Eye	20/ 20	20/	Right Eye 70
Left Eye	20/ 26	20/	Left Eye 70
Both Eyes	20/ 20	20/	

Applicant can recognize and distinguish among traffic control signals and devices showing standard red, green and amber colors?

YES  NO

Applicant meets visual acuity requirement only when wearing:

Corrective Lenses

Monocular Vision:  YES  NO

**4 HEARING**  with hearing aids

a) Record distance from individual at which forced whispered voice can first be heard.

	Right Ear	Left Ear
	> 5 Feet	> 5 Feet

b) If audiometer is used, record hearing loss in decibels (acc. to ANSI Z24.5-1951)

	Right Ear			Left Ear		
	500 Hz	1000 Hz	2000 Hz	500 Hz	1000 Hz	2000 Hz
	Average			Average		

Exhibit 14  
 Witness B. Johnson  
 Date 7/25/09  
 Buell Realtime Reporting

OCCMED0020

Blood Pressure	Systolic 122	Diastolic 84	Pulse Rate 64	<input checked="" type="checkbox"/> Regular <input type="checkbox"/> Irregular
----------------	-----------------	-----------------	------------------	---

Reading	Category	Expiration Date	Recertification
140-159/90-99	Stage 1	year	1 yr if <= 140/90; One time cert for 3 mos if 141-159/91-99
160-179/100-109	Stage 2	One-time certificate for 3 months	1 yr. from date of exam if <= 14
>= 180/110	Stage 3	6 Mos. from date of exam if <= 140/90	6 months if <= 140/90

**LABORATORY AND OTHER TEST FINDINGS**

URINE SPECIMEN	SR GR. 1.010	PROTEN n	BLOOD n	SUGAR n
----------------	-----------------	-------------	------------	------------

MA Int. *[Signature]*

Other Testing:

**PHYSICAL EXAMINATION**

Height: 71 (in.) Weight: 199 (lbs.)

BODY SYSTEM	CHECK FOR:	YES*	NO
1. General Appearance	Marked overweight, tremor, signs of alcoholism, problem drinking, or drug abuse.		<input checked="" type="checkbox"/>
2. Eyes	Pupillary equality, reaction to light, accommodation, ocular motility, ocular muscle imbalance, extraocular movement, nystagmus, exophthalmos, strabismus uncorrected by corrective lenses, retinopathy, cataracts, aphakia, glaucoma, macular degeneration.		<input checked="" type="checkbox"/>
3. Ears	Scarring of tympanic membrane, occlusion of external canal, perforated eardrums.		<input checked="" type="checkbox"/>
4. Mouth and Throat	Irremediable deformities likely to interfere with breathing or swallowing.		<input checked="" type="checkbox"/>
5. Heart	Murmurs, extra sounds, enlarged heart, pacemaker, implantable defibrillator.		<input checked="" type="checkbox"/>
6. Lungs and chest, not including breast examination	Abnormal chest wall expansion, abnormal respiratory rate, abnormal breath sounds including wheezes or alveolar rales, impaired respiratory function, dyspnea, cyanosis. Abnormal findings on physical exam may require further testing such as pulmonary tests and/or xray of chest.		<input checked="" type="checkbox"/>
7. Abdomen and Viscera	Enlarged liver, enlarged spleen, masses, bruits, hernia, significant abdominal wall muscle weakness.		<input checked="" type="checkbox"/>
8. Vascular System	Abnormal pulse and amplitude, carotid or arterial bruits, varicose veins.		<input checked="" type="checkbox"/>
9. Genito-urinary System	Hernias.		<input checked="" type="checkbox"/>
10. Extremities-Limb Impaired. Driver may be subject to SPE certificate if otherwise qualified.	Loss or impairment of leg, foot, toe, arm, hand, finger. Perceptible limp, deformities, atrophy, weakness, paralysis, clubbing, edema, hypotonia. Insufficient grasp and prehension in upper limb to maintain steering wheel grip. Insufficient mobility and strength in lower limb to operate pedals properly.		<input checked="" type="checkbox"/>
11. Spine, other musculoskeletal	Previous surgery, deformities, limitation of motion, tenderness.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
12. Neurological	Impaired equilibrium, coordination or speech pattern; paresthesia, asymmetric deep tendon reflexes, sensory or positional abnormalities, abnormal patellar and Babinski's reflexes, ataxia.		<input checked="" type="checkbox"/>

\*COMMENTS: (1) will repeat ser - ul exam.

**CERTIFICATION STATUS**

OCCMED0021

- Meets standards in 49 CFR 391.41; qualifies for 2 year certificate which expires on 8/20/2009
- Does not meet standards
- Meets standards, but periodic evaluation required  
Due to \_\_\_\_\_ driver qualified only for:  
 3 months       1-year  
 6 months       Other expires on \_\_\_\_\_
- Temporarily disqualified due to (condition or medication): \_\_\_\_\_  
Return to medical examiner's office for follow up on \_\_\_\_\_

- Wearing corrective lenses
- Wearing hearing aid
- Accompanied by a \_\_\_\_\_ waiver/exemption
- Skill Performance Evaluation (SPE) Certificate
- Driving within an exempt intracity zone
- Qualified by operation of 49 CFR 391.64

MEDICAL EXAMINER'S SIGNATURE

*[Signature]*

- NICK W. URAGA M.D. (LICENSE 15616 WA)
- STEPHEN D. FEWELL PA-C (LICENSE PA10002988 WA)

1 Who's next so I can let her go?

2 MS. DANIELS: It's Stephen Fewell.

3 THE COURT: Fewell. Okay.

4 (Brief recess taken.)

5 THE COURT: I know you're all waiting for  
6 the ruling on this issue with the tape and Ms.  
7 Bottrel, but I want to get the next witness done,  
8 so let's bring out the jury.

9 MR. SHERIDAN: Before we do, your Honor, I  
10 just found out, I thought it was going to be Holmes  
11 but it's Fewell, and Fewell is I think an  
12 objectionable witness because they're seeking to  
13 put in extrinsic evidence regarding -- you remember  
14 Mr. Johnson filled out a form after he left  
15 employment, and he filled out a form and he didn't  
16 check a box yes, they said he should have checked.  
17 Well, so that's impeachment, so the 404 type  
18 impeachment.

19 THE COURT: Right.

20 MR. SHERIDAN: Now --

21 THE COURT: It's 613, isn't it?

22 MR. SHERIDAN: 613, yeah. Well, prior  
23 inconsistent. No, I don't think it was an  
24 inconsistent statement. I think they're trying to  
25 use specific instances of conduct to cross-examine

1 him, and they actually got the document cuz I  
2 didn't stand up and say the right objection, but  
3 now they want to actually call a live witness to  
4 use extrinsic evidence to him putting a yes rather  
5 than a no. And the rules don't put extrinsic  
6 evidence.

7 THE COURT: I agree it's a strange little  
8 rule that we have. It's already in.

9 MR. SHERIDAN: And the document, that's  
10 far enough. But to call in a witness, to basically  
11 emphasize, I can renew my objection. I've only  
12 waived my objection to the document, not to the  
13 witness.

14 THE COURT: Let me hear briefly from Ms.  
15 Daniels.

16 MS. DANIELS: This witness is relevant for  
17 two issues. One, Mr. Johnson keeps claiming that  
18 he's able to do the job that he was released to  
19 work for Praxair, P-R-A-X-A-I-R, and APP. He lied  
20 on the forms. He didn't reveal his ongoing back  
21 pain, chronic back issues, to Mr. Fewell, and Mr.  
22 Fewell is going to testify how that would have  
23 affected whether or not he would have released Mr.  
24 Johnson to go to work for these companies.

25 THE COURT: All right. It's admitted just

1 for impeachment purposes insofar as the document  
2 itself. I think -- is it already in? What is the  
3 exhibit number?

4 MS. DANIELS: There is a few, your Honor,  
5 and 516 was admitted on 12-9, and I'm sorry, I'm  
6 going slightly out of order. 512 was also admitted  
7 on 12-9. 515 has not been admitted, and there's  
8 one --

9 THE COURT: All right. I'm going to let  
10 Fewell testify. Whether or not I'm going to let  
11 him refer to the unadmitted as it stands so far  
12 exhibit --

13 MS. DANIELS: And your Honor, if I may  
14 help clarify the issue why this document, I need  
15 him to refer to it, but --

16 THE COURT: I'm listening.

17 MS. DANIELS: There is a notation on this  
18 document that Mr. Fewell will testify means they  
19 talked about Mr. Johnson's back injury, and Mr.  
20 Johnson had informed him that all issues were  
21 resolved, that he had no ongoing pain.

22 THE COURT: All right. For purposes of  
23 impeachment and a prior inconsistent statement, it  
24 is admissible.

25 Mr. Fewell can come in. Let's bring in the

1     A     It was purely an examination, a history  
2     taking, to determine if there is a history of  
3     condition and then a physical examination to see if  
4     there is objective findings of a condition that  
5     would preclude the gentleman from performing  
6     critical functions of the job he's being considered  
7     for.

8     Q     And on what information, if any, do you rely  
9     when you're conducting this type of examination?

10    A     On the history taken, and as far as the  
11    history, that's the information given to me by the  
12    questions I ask and then by the examination itself,  
13    what I objectively see in the examination.

14    Q     So from your own physical examination and from  
15    what the examinee would tell you about his medical  
16    history; am I understanding that correct?

17    A     Yes, that's correct.

18    Q     I'm going to hand you this binder, which  
19    contains some exhibits, and it looks like I've  
20    grabbed the wrong one. So pardon me. I need 516.  
21    Yes. Apparently I can't count this afternoon. I  
22    think that is the right one. 516. I'm going to  
23    ask you to first turn to exhibit 512, 512.

24             And this exhibit has been admitted as of  
25    December 9th, I believe.

1           And take a minute to review it, Mr. Fewell, if  
2 you need to, and tell me if you recognize this  
3 document.

4     A     Yes, I do.

5     Q     And what is this document?

6     A     This is part of the physical paperwork that is  
7 sent with the patient or the person from Praxair  
8 company, the company that we do physicals for, part  
9 of the information they fill out.

10    Q     And did you fill out this document?

11    A     No, I did not.

12    Q     So Mr. Johnson would have?

13    A     Yes.

14           MR. SHERIDAN: Objection. Leading.

15    Q     (BY MS. DANIELS) Who would have filled out  
16 this document?

17           THE COURT: Sustained on other grounds.

18    Q     (BY MS. DANIELS) Who would have filled out  
19 this document?

20    A     Presumably, unless the patient is incapable,  
21 the patient themselves would have filled this out.  
22 So I assume Mr. Johnson filled it out.

23    Q     And now, I'm going to direct your attention to  
24 exhibit 515, 515. And this has not been admitted.  
25 And do you recognize this document, Mr. Fewell?

- 1 A Yes, I do.
- 2 Q And what is this document?
- 3 A This is part of our documents that we provide  
4 for companies who do not have their own documents  
5 for the purposes of taking a history and doing the  
6 physical examination.
- 7 Q And does your signature appear at the bottom  
8 of page 2 of this document?
- 9 A Yes, it does.
- 10 Q And is that your handwriting that appears  
11 throughout this document?
- 12 A Not entirely. The top part where it says,  
13 vitals and vision down to audiometry, above the  
14 line that says audiometry, is the medical  
15 assistant. Below that is mine.
- 16 Q When you were examining Mr. Johnson, did you  
17 take an oral medical history from him?
- 18 A Yes.
- 19 Q Did Mr. Johnson ever tell you that he suffered  
20 from chronic back pain?
- 21 A No, he did not.
- 22 Q Did Mr. Johnson ever tell you that he was on  
23 long-term disability at the time of that  
24 examination?
- 25 A No, he did not.

1 Q Did Mr. Johnson ever tell you that he had  
2 conducted or had a PCE conducted, the conclusion of  
3 which that he was limited to light to sedentary  
4 work?

5 A No, he did not tell me that.

6 Q How do you know that you and he discussed  
7 those topics and he did not inform you of that  
8 information?

9 A Well, the one annotation that I make, when I  
10 see a history that's given to me on this form, to  
11 annotate that I've asked whether or not there's  
12 disability limitation, ongoing treatment or  
13 condition arising from a history that's given. If  
14 there is none, I write no sequelae, which I did  
15 annotate.

16 Q And that is your handwriting?

17 A Yes, that is my handwriting.

18 MS. DANIELS: I would move to admit  
19 exhibit 515, your Honor.

20 MR. SHERIDAN: Objection. 402, 802, 608  
21 and 404.

22 THE COURT: He can testify to it, but the  
23 exhibit will not be admitted.

24 Q (BY MS. DANIELS) So on this exhibit 515,  
25 there is a notation in your handwriting that says

1     what?

2     A     It's no sequelae or no sequela.

3     Q     What does no sequela mean?

4     A     Well, the exact definition or the definition  
5     is that there is no morbid condition arising out of  
6     an original condition. There's no further problem  
7     created.

8     Q     And what is the original condition to which  
9     you would be referring when you wrote no sequela in  
10    Mr. Johnson's notes?

11    A     The 2002 L-5, S-1 laminectomy that I annotated  
12    here.

13    Q     So you and Mr. Johnson had discussed his  
14    surgery?

15    A     Yes.

16    Q     And as a result of that conversation, you  
17    concluded what?

18    A     That he had no problems from that surgery or  
19    that injury that resulted.

20    Q     And he had not told you, if I'm correct, that  
21    he had ongoing lower back pain, chronic lower back  
22    pain?

23    A     No, he did not. Otherwise I would have acted  
24    on that information.

25    Q     Why would that information have been important

1 for you to know as part of this examination, if it  
2 was important?

3 A Well, that's the whole gist of this  
4 examination. It's incumbent upon me, as working or  
5 doing this for the employer, to find out if there's  
6 any condition or any disability or any treatment  
7 ongoing or anything that a person has that may  
8 preclude them from safely performing the critical  
9 functions of the job they're being considered for.  
10 If there is, then I investigate further to make  
11 that evaluation, to make that determination.

12 Q And that actually reminded me of another  
13 question. Did Mr. Johnson tell you that he was  
14 seeking further treatment under a workers  
15 compensation claim at the time that you conducted  
16 this examination?

17 A No, he did not.

18 Q And again would that information have been  
19 important for you to know?

20 A Absolutely.

21 Q For what reason?

22 A If somebody is under treatment for a  
23 condition, then they're not fixed and stable, and  
24 that means that they do not have a disability at  
25 that time, because they're still under treatment.

1 If they do not have a disability, in other words, a  
2 stated limitation that prevents them from doing  
3 whatever it is that has been determined that they  
4 cannot do, then I cannot provide reasonable  
5 accommodations for the company that's considering  
6 them for hire in the position they're considered to  
7 be hired for, because I don't know what the outcome  
8 is going to be. So I can't provide it.

9 Q If Mr. Johnson had given you the information  
10 that he was pursuing additional treatment under a  
11 workers compensation claim, had chronic lower back  
12 pain, was on long-term disability at the time of  
13 this examination, and was indeed suffering from  
14 chronic lower back pain, what would you have done?

15 A I would have requested records of those  
16 conditions so that I can review them and make a  
17 specific determination.

18 Q Did you do that in this instance?

19 A Well, no. I wasn't aware that there was any  
20 of those conditions pending in order to determine  
21 them.

22 MS. DANIELS: Thank you. I have no  
23 further questions.

24 THE COURT: Cross.

25 MR. SHERIDAN: Thanks very much.

1 Q And isn't it true you do about a hundred a  
2 month?

3 A A hundred physical examinations a month.

4 Q About a hundred. And isn't it also true that  
5 you wouldn't recognize Bruce Johnson from any of  
6 the other hundreds of patients you've seen, right,  
7 by looking at him?

8 A No. Well, that's true.

9 Q You agree with me. Isn't it also true that  
10 you have no memory of the two meetings that you had  
11 with Mr. Johnson, and you didn't remember at your  
12 deposition?

13 A Well, that's correct. No, I don't remember.

14 Q So when you're being asked these pointed  
15 questions about what did you do, what did you do,  
16 what you're doing is you're surmising based on  
17 either what's written in your notes or not written  
18 in that note, right?

19 A I'm surmising exactly on what's written in my  
20 note.

21 Q And it's also -- it's a practice, isn't it  
22 true, that at your office, nobody helps the  
23 patients fill out the forms?

24 A That's true. Unless they request.

25 Q And so in the forms that you've been

1 discussing, you have no reason to believe that  
2 anybody showed Mr. Johnson how to fill out the  
3 form, right?

4 A That's correct.

5 Q Okay. And now, Mr. Johnson indicated in the  
6 forms that he had back pain, right?

7 A Well, on this particular form, exhibit 515 --  
8 THE COURT: Which exhibit?

9 Q (BY MR. SHERIDAN) Let's take a look at 512.  
10 Oh, that he had back surgery, right?

11 A He indicated he had a history of back or neck  
12 problems and that he had a back surgery on this  
13 particular form.

14 Q A history of back and neck problems. Okay.  
15 But and you have no memory of what you discussed  
16 with him in that regard, because you don't recall  
17 the meetings, right?

18 A I don't have a verbatim memory, no, but I do  
19 know what I discussed with him, yes.

20 MR. SHERIDAN: Well, your Honor, can we  
21 have the original produced, please? Thanks very  
22 much. I would move to publish.

23 THE COURT: You may do so.

24 MR. SHERIDAN: Thanks. Maybe they have a  
25 copy for the judge. Do you have a copy for the

1 judge?

2 THE COURT: Let's just move on. If you  
3 can just give the line number, page number, that  
4 would be helpful.

5 MR. SHERIDAN: Oh, sure.

6 Q (BY MR. SHERIDAN) Let me hand you your  
7 exhibit.

8 A Is it okay if I get some water?

9 Q Yeah. Sure. There is some right there. Take  
10 a moment.

11 A Okay.

12 Q Okay. All right. I'd like you to turn to  
13 page 50.

14 MS. DANIELS: I'm sorry. What was that?

15 MR. SHERIDAN: 5-0.

16 THE WITNESS: I have it.

17 Q (BY MR. SHERIDAN) At the top the question is  
18 asked, line 2, and then look at this form, if I had  
19 -- let's say I had, for example, back pain over a  
20 period of time but today I didn't have it, would I  
21 fill out the form yes or no, and you responded?

22 A I don't know.

23 Q And then when asked, so you have no specific  
24 recollection as you sit here today as to having  
25 discussed it, correct?

1 A What is the context?

2 Q Actually let me back up. Let me back up.

3 Okay. So then we'll just go through that page to

4 get to it, so it makes sense. Line 7, okay.

5 Nobody explains that, right? And you said?

6 A No, nobody explains it.

7 Q And then I said, it's fair to say that you

8 have no recollection of discussing this particular

9 document with Mr. Johnson, right? And you said?

10 A No, I did discuss this document with him.

11 Q No, I understand that is what you said. I'm

12 asking whether you have a specific recollection,

13 not whether you mean -- I mean there are notes here

14 showing you have. I'm sorry. So you have no

15 specific recollection as you sit here today as to

16 having discussed it, correct? And you said?

17 A I cannot picture him in my mind.

18 Q But you have notes under the medical

19 examiner's comments, and those are your notes,

20 right?

21 A Yes.

22 Q Okay. So that would be evidence that you did

23 discuss it and you talked about the fact that he

24 had a surgery, right?

25 A Correct.

1 Q All right. And do you recall talking to him  
2 about how he could basically do his job? Oh, I'm  
3 sorry. Don't have any recollection of talking to  
4 him at all, correct?

5 A That is true.

6 Q All right. And then you also have no  
7 recollection of having talked to him about things  
8 like medications, right?

9 A So we're not scripting this anymore?

10 Q No. We're just talking now.

11 A I don't have a specific verbatim recollection  
12 of that, no.

13 Q And you have no recollection of talking to him  
14 about whether he was depressed, right?

15 A Correct.

16 Q Okay. All right.

17 MR. SHERIDAN: Nothing further.

18 THE COURT: Any redirect?

19 MS. DANIELS: Yes, please. Apparently  
20 we're having a technical breakdown. There has been  
21 a cord --

22 MR. BEIGHLE: Walking on the power cord  
23 problem.

24 MS. DANIELS: A cord issue. We're good.

25

NAME JOHNSON, BRUCE

ADDRESS \_\_\_\_\_

DATE OF BIRTH 02/22/66 S.S.N. 435-41-9400

EMPLOYER \_\_\_\_\_ JOB TITLE \_\_\_\_\_

DATE AUG 20 2007



Occupational Medical Clinic of Tacoma, Inc. P.S.

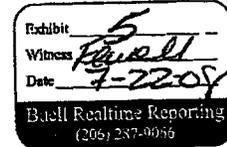
4703 Pacific Highway East • Tacoma, WA 98424  
(253) 922-9570 • FAX 922-9587 • email: omctacoma@aol.com

MEDICAL HISTORY

HAVE YOU EVER HAD THE FOLLOWING MEDICAL PROBLEMS?

- |    | YES                                 | NO                                  |   |
|----|-------------------------------------|-------------------------------------|---|
| 1  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Severe headaches or migraine                  |
| 2  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Loss of consciousness or fainting             |
| 3  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Epilepsy or neurologic disease                |
| 4  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Nervous or emotional disorder                 |
| 5  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Eye problems or wear corrective lenses        |
| 6  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Hearing problems or ear problems              |
| 7  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Difficulty breathing or lung problems         |
| 8  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Chronic cough or asthma                       |
| 9  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Heart problems                                |
| 10 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | High blood pressure                           |
| 11 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Abdominal problems                            |
| 12 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Black or bloody bowel movements               |
| 13 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Liver disease, jaundice or hepatitis          |
| 14 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Bloody urine or kidney problems               |
| 15 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Hernia  |
| 16 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Skin disorders                                |
| 17 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Fractures                                     |
| 18 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Problems or injury of the joints              |
| 19 | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | Back or neck problems ( <u>BACKS</u> )        |
| 20 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Arthritis or rheumatism                       |
| 21 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Allergies                                     |
| 22 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Diabetes, thyroid or other endocrine problems |
| 23 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Tumor or cancer                               |
| 24 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Alcohol or drug problems                      |
| 25 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Problems with fertility                       |
| 26 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Menstrual abnormality (women)                 |
| 27 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Are you pregnant now?                         |
| 28 | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Date last menstrual period _____              |

EXPLAIN "YES" ANSWERS BY ITEM



Use tobacco? Type, amount, years used \_\_\_\_\_

Use alcohol? Amount used per week or month \_\_\_\_\_

Take prescription medication? List \_\_\_\_\_

Had major surgery? List 2002 L5, S1 laminectomy w/ discectomy

Had other overnight or longer hospitalizations? List \_\_\_\_\_

Received compensation for medical problems or injuries? (work claims, MVA, etc.) OCT 2002  
List \_\_\_\_\_

Physician Notes:

*Dis of low back, hip, shoulder & neck.*

# PHYSICAL EXAMINATION

VITALS: SEX M HT 71" TEMP \_\_\_\_\_ RESP \_\_\_\_\_  
 AGE 41 WT 199 lbs P lat BP 122/84

VISION: Distant R20/ 20 L20/ 20 Near R20/ 40 L20/ 30  
 With correction: R20/ \_\_\_\_\_ L20/ \_\_\_\_\_  
 Color Vision  Normal  Abnormal  
 Can see signal colors  Cannot see signal colors  
 Tonometry R \_\_\_\_\_ L \_\_\_\_\_  
 Depth Perception 3/9 Peripheral \_\_\_\_\_ MA Int. AB

Audiometry  Screen  Complete Results normal high frequency loss  
(see attached audiometry)

- | NORMAL  | ABNORMAL FINDINGS |
|---|-------------------|
| <input checked="" type="checkbox"/> 1. Head               |                   |
| <input type="checkbox"/> 2. Eyes                          |                   |
| <input type="checkbox"/> 3. Ears                          |                   |
| <input type="checkbox"/> 4. Nose                          |                   |
| <input type="checkbox"/> 5. Throat                        |                   |
| <input type="checkbox"/> 6. Neck                          |                   |
| <input checked="" type="checkbox"/> 7. Lungs              |                   |
| <input checked="" type="checkbox"/> 8. Breasts            |                   |
| <input type="checkbox"/> 9. Heart                         |                   |
| <input type="checkbox"/> 10. Abdomen                      |                   |
| <input type="checkbox"/> 11. Genitals                     |                   |
| <input type="checkbox"/> 12. Hernia                       |                   |
| <input checked="" type="checkbox"/> 13. Rectal            |                   |
| <input checked="" type="checkbox"/> 14. Extremities       |                   |
| <input type="checkbox"/> 15. Spine                        |                   |
| <input type="checkbox"/> 16. Neurologic                   |                   |
| <input type="checkbox"/> 17. Skin                         |                   |
| <input type="checkbox"/> 18. Lymphatics                   |                   |
| <input type="checkbox"/> 19. Psychiatric                  |                   |
| <input checked="" type="checkbox"/> 20. Identifying Marks |                   |
- with original seen L-3-S-1 - ul exam otherwise*

URINALYSIS: SG 1.010 Reactions neg  
 PH 5.0

MEDICAL FINDINGS:  
 No significant findings  
 Medical problems NOT requiring limitations  
 Medical problems, job modification recommended. (See Employment Clearance)  
 Medical problems, job modification mandatory. (See Employment Clearance)  
 Other \_\_\_\_\_

Comments: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

\_\_\_\_\_  
 M.D. \_\_\_\_\_  
 PAC

NICK W. URAGA STEPHEND. FEWELL  
 OCCMED0023

1 he was capable of and qualified to drive a tanker  
2 truck. That's what he testified to on  
3 cross-examination.

4 We saw Mr. Johnson's willingness to say  
5 whatever he needed to regardless of whether the  
6 statement was accurate or not when he sought to get  
7 a patent on the tool he now claims to have  
8 invented. He signed a document under penalty of  
9 perjury saying that he was the sole inventor of  
10 this tool, despite having sat on the stand, telling  
11 you that he got this tool from Willie Jones. He  
12 knew that he did not invent this tool.

13 When Mr. Johnson applied for long-term  
14 disability benefits, an act he denies doing, by the  
15 way, he conceals the fact that he was part owner of  
16 Western Washington Safety Consultants, stating that  
17 his wife owned a safety consultant business.  
18 However, she is the sole operator of the business  
19 at this time. That's what Mr. Johnson said.

20 And when he decided that he was going to  
21 ignore the advice of numerous medical  
22 professionals, and resume working within the tanker  
23 truck driving field, the only way he could do so  
24 was by withholding critical information, and that  
25 is exactly what he did, ladies and gentlemen. He

1 filled out forms denying that he had pain in the  
2 upper back and in the lower back. That's July  
3 17th, 2007. A month later he denied that he had  
4 any injury, denied that he had any chronic back  
5 pain.

6 Mr. Fewell, the person who did the examination  
7 of Mr. Johnson, told you that he specifically asked  
8 Bruce Johnson about his back surgery and Mr.  
9 Johnson told him in August of 2007 that, and I  
10 quote, all problems relating to his back had been  
11 resolved. That's what Mr. Fewell testified to.  
12 Bruce Johnson told him all his back problems had  
13 been resolved in August of 2007. And how do we  
14 know that? Because Mr. Fewell told you that he  
15 marked that on the form when he wrote, no sequela,  
16 and all he have that form back when you go back in  
17 the jury room.

18 Now, we know, although Mr. Sheridan tells you,  
19 oh, Mr. Johnson fills out lots of forms and it's no  
20 big deal, he fills out lots of forms and some, you  
21 know, he just makes a mistake, we know that Mr.  
22 Johnson can fill out these forms properly, and how  
23 do we know that? Because he filled out the form  
24 properly in 2003. He filled out the form, saying,  
25 he had illness and injury and yes, he had back

1 pain. So he knows how to fill these forms out  
2 properly.

3           Given that Mr. Johnson clearly knew how to  
4 fill out these forms properly, denying that he had  
5 any type of back pain or back problem in July and  
6 August of 2003 is very curious indeed given that  
7 just three months earlier, in May of 2007, you saw  
8 what he testified to, because in May, May of 2007,  
9 remember that's his testimony under oath under  
10 penalty of perjury at his workers compensation  
11 hearing. This is where he says he can't do any of  
12 these jobs because of his back condition. He has  
13 restrictions because of lifting. Three months  
14 earlier, ladies and gentlemen.

15           That testimony is at exhibit 553. Mr.  
16 Sheridan asked you if they did nothing wrong, why  
17 are they lying? I would ask you the same question,  
18 ladies and gentlemen. So when you consider whether  
19 to believe Mr. Johnson's claims against Chevron and  
20 Greg Miller, I would ask you to consider Mr.  
21 Johnson's history of saying what he needs to get  
22 what he wants.

23           Remember, ladies and gentlemen, Bruce Johnson  
24 told Paul Gorsky, in September of 2003, before this  
25 lawsuit was filed, that he wanted financial

1 compensation from this company.

2 Ladies and gentlemen, Bruce Johnson has chosen  
3 to go back to work in a profession that ultimately  
4 will end up crippling him. Obviously it is Mr.  
5 Johnson's choice to choose to ignore the  
6 recommendations of numerous health professionals  
7 and pursue whatever livelihood he deems  
8 appropriate, but it is not Mr. Johnson's choice to  
9 force Chevron to ignore that advice, and it is not  
10 Mr. Johnson's choice to dictate to his employer the  
11 circumstances under which he will finally agree  
12 that it might be too dangerous to allow him to  
13 continue to operate a gasoline tanker truck on our  
14 state's highways.

15 Mr. Johnson's continual denial of the fact  
16 that he is no longer physically capable of  
17 performing the job of tanker truck driver, in the  
18 face of admissions of substantial pain and physical  
19 limitations, that he himself has made to his own  
20 doctors, is staggering. It is staggering. By  
21 bringing and maintaining these ugliest of claims  
22 against Chevron and Greg Miller simply because he  
23 cannot accept his own physical limitations and the  
24 limitations of his tool, Mr. Johnson diminishes and  
25 makes a mockery of legitimate claims of

1 discrimination. Don't let him do it, ladies and  
2 gentlemen. Don't let him do it. Thank you.

3 THE COURT: Thank you, counsel.

4 Members of the jury, if you'll give your final  
5 attention to Mr. Sheridan, who has some statements  
6 to make on rebuttal. Counsel.

7 MR. SHERIDAN: Thank you very much. Wow,  
8 they leave you with nothing. Now he's not even an  
9 inventor. Now he stole the product from somebody  
10 else. Of course there's not a shred of evidence to  
11 that. There's no legal action. There's nothing.  
12 It's just that they can't let him have any  
13 credibility. They'll attack anything. He is an  
14 inventor. He is an honest man. He is a person who  
15 has worked just as he should throughout his career,  
16 but you've heard a lot of spin.

17 Let's see if we can clean it up. All right.  
18 So pain. Let's begin with they said that he's  
19 asked to -- why would we deny the use of a tool  
20 nationwide so they can discriminate against one  
21 man? Let's go to exhibit 184 here. Make this big,  
22 if you can. Remember this one, exhibit 184? They  
23 -- somebody wanted in Portland to use the tool and  
24 they said, no, due to pending litigation, you  
25 can't. They are willing to discriminate against or