

No. 72716-8-1

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

JOYCE SHOEMAKE,

Appellant,

v.

ELI LILLY & COMPANY,

Respondent.

2015 JUN 26 PM 12:31
COURT OF APPEALS DIV I
STATE OF WASHINGTON

RESPONDENT'S BRIEF

The Law Office of Gress & Clark


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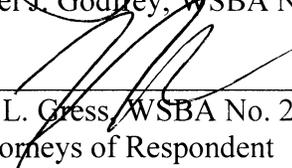

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I. INTRODUCTION

The respondent Eli Lilly & Company (“employer”), the defendant in the trial court litigation, presents this brief in response to the appellant Joyce Shoemaker’s (“claimant”) appellate brief submitted to this court on May 29, 2015.

The claimant appeals a Superior Court jury verdict from King County, WA that affirmed an January 23, 2012 Order from the Board of Industrial Insurance Appeals (“Board”) which had adopted the Proposed Decision and Order from an Industrial Appeals Judge. The Proposed Decision and Order affirmed a September 3, 2010 order issued by the Department of Labor and Industries (“Department”) which rejected the claimant’s industrial insurance claim on the basis that it was neither an industrial injury nor an occupational disease.

The claimant assigns a number of baseless procedural and evidentiary errors to the lower court. The argument in this brief shows that the trial court properly allowed Dr. Darby to testify, correctly excluded the Material Safety Data Sheets (“MSDS”) documents, correctly excluded portions the lay-witness testimony of Christy Kurts and Shelley Carpenter, and properly gave Jury Instruction No. 17.

The King County Superior Court verdict dated October 27, 2014 should be affirmed in its entirety.

II. STATEMENT OF THE ISSUES

- A. The testimony of Paul S. Darby, M.D., was properly allowed because it was relevant evidence and its probative value was not substantially outweighed by any perceived cumulative effect.
- B. Exhibit Nos. 16, 18, 32, 33, 34, and the corresponding expert testimony was properly excluded on the basis that it was inadmissible hearsay without the proper foundation to qualify as a business record.
- C. The testimony of Ms. Kurts and Ms. Carpenter was properly excluded, as it was not offered timely, was not relevant, was not offered in rebuttal, and its probative value was substantially outweighed by the prejudicial effect.
- D. The trial court correctly provided Jury Instruction No. 17 because it helped the jury determine what qualified as a mental health condition and failing to provide the instruction would have been a reversible error on appeal.

III. STATEMENT OF THE CASE

A. Procedural History:

The claimant started working for the employer in 1979 on a full-time basis. In 1991, the employer began a remodel of the south office building in which the claimant's office was located. On June 6, 1991 the claimant visited her family physician with complaints of numbness in her legs, feet, and hands, along with a headache, breathing trouble, and pain in her kidneys. She filed an application for industrial insurance benefits on December 16, 1991 alleging a chemical exposure or poisoning during the employer's remodel. On January 2, 1992 the Department issued an order allowing the claim and providing benefits. On January 14, 1992, the employer protested the claim and on June 30, 1993, the Department issued an order rejecting the claim as neither an industrial injury nor an occupational disease. On July 7, 1993, the claimant protested the Department's rejection of the claim and on July 22, 1996 the Department affirmed its earlier rejection.

On December 2, 1996, the claimant appealed to the Board and on December 16, 1996 the Board remanded the claim back to the Department for further action. The Department issued an order on December 30, 1996 affirming the June 30, 1993 order rejecting the claim. Next, the claimant filed another appeal to the Board on February 28, 1997 and the Board

issued an Order on Agreement of Parties (“OAP”) that reversed the December 30, 1996 rejection order and returned the claim to the Department to consider both the industrial injury and occupational disease claims in addition to allowing the employer to obtain further medical evaluations.

Subsequently, the Department issued an order on September 3, 2010 that again rejected the claim as neither an industrial injury nor an occupational disease. On September 24, 2010, the claimant protested that order and the Department affirmed the claim rejection on September 30, 2010. The claimant appealed to the Board on October 20, 2010 and a hearing was eventually held before an Industrial Appeals Judge (“IAJ”). On November 22, 2011, the IAJ published a Proposed Decision and Order that affirmed the Department’s rejection of the claim as neither an industrial injury nor an occupational disease. The claimant filed a Petition for Review and on January 23, 2012, the Board denied the petition and adopted the Proposed Decision and Order.

The claimant filed an appeal of the Board’s January 23, 2012 order in King County Superior Court on February 1, 2012. During pre-trial litigation, the trial court heard a motion for summary judgment filed by the claimant, a cross-motion for summary judgment filed by the employer, and motions in limine filed by the employer and the claimant. The trial

court denied both motions for summary judgment and denied the claimant's motion in limine by allowing Dr. Darby's testimony, excluding the MSDS documents and corresponding testimony, and excluding portions of the testimony of Shelley Carpenter and Christy Kurts. Finally, the trial court heard argument regarding the formulation of the jury instructions and ultimately allowed Jury Instruction No. 17. Following the trial, the jury returned a verdict in favor of the employer and the trial court issued an order dated October 27, 2014 affirming the Board's January 23, 2012 order. The claimant has now appealed to the Washington State Court of Appeals, Division One.

B. Summary of Evidence Presented:

During the Board hearing, the claimant testified on her own behalf, in addition to Judy Monihan, Murray Lorance, Christy Kurts, Dorothy Dixon, Shelley Carpenter, Dr. David Buscher, Dr. Jordan Firestone, and Dr. Harriet Amman. During the Superior Court trial, the testimony of Shelley Carpenter and Christy Kurts were excluded as well portions of Dr. Firestone's and Dr. Amman's testimony regarding the MSDS documents. The employer presented testimony from Lorreta Fosnes, Kenneth Wiscomb, Dr. John Caner, Dr. Garrison Ayars, Dr. Dennis Stumpp, Dr. John E. Hamm, and Dr. Paul S. Darby. Rather than recount

the entirety of the trial testimony, the evidence relevant to this appeal is summarized below.

The employer's south building began a remodel in 1991 and the claimant's office was on the second floor of that building. The claimant testified that during the remodeling, the construction crews scraped up floor tiles, took out carpet, sanded floor surfaces, constructed walls, painted, and carpeted floors. (Hearing Transcript 06/10/14, at 6-23). The claimant stated she remembered distinct smells associated with the carpet, paint, and vinyl adhesives. *Id.* at 15. She also indicated that she developed symptoms during this time period ranging from numbness in her extremities, pain in her kidneys, headaches, dizziness, and trouble breathing. *Id.* at 24-26.

Shelley Carpenter worked for the employer from 1984 to 1992 and was experiencing the same remodel exposure as the claimant. *Id.* at 152. She testified that the claimant was often sick during the time of the remodel. *Id.* at 155. Christy Kurts also worked for the employer. She also testified about the smells in her work area and how she filed an industrial insurance claim for her symptoms. *Id.* at 131. Both of these witnesses testified in colloquy during the Board hearing regarding their individual symptoms, but those portions were excluded at the superior court trial.

Dr. Firestone is board certified in neurology as well as occupational and environmental medicine. *Id.* at 160. He performed a forensic review of the claimant's medical records and he concluded that she was potentially exposed to harmful chemicals based on the description of the remodeling, her symptoms, and his own knowledge of the materials being used. *Id.* at 174-180. Dr. Buscher, a family physician, was the claimant's treating physician prior to and during the remodeling period. He acknowledged she had extensive pre-existing conditions, but was concerned that her exposure to the remodeling was causing her symptoms. (Hearing Transcript 06/11/14, at 103-107). He diagnosed the claimant with multiple chemical sensitivity. *Id.* at 103.

Dr. Amman, is a board certified toxicologist who focuses on indoor air quality and the health effects of the industrial exposures to chemicals and solvents. She testified that she had reviewed the MSDS documents and that could cause symptoms of the type the claimant experienced. *Id.* at 12. However, this opinion was based on the assumption that the MSDS documents were the same products used.

Dr. Stumpp is a board certified occupational doctor who performed a records review after the claimant failed to attend two scheduled independent medical examinations. (Hearing Transcript 06/12/14, at 57). He testified that the claimant had multiple subjective complaints that pre-

existed the alleged exposure and found no evidence that her condition was caused or exacerbated by her working conditions. His testimony largely focused on her symptoms prior to the work exposure, whether they changed following the work exposure, and whether there was proximate relation to her occupational exposure and any ongoing symptoms. He concluded that her symptoms and conditions were unrelated to the work exposure. *Id.* at 61.

Dr. Darby is board certified in occupational and environmental medicine with a specific focus in toxicology. *Id.* at 208-211. He indicated that the condition Dr. Buscher diagnosed as multiple chemical sensitivity as an idiopathic environmental intolerance and that medical literature does not provide any reliable basis to diagnose multiple chemical sensitivity. *Id.* at 215-216. He described how, on a weekly basis, he works with patients who are exposed to various substances and the overriding characteristic in the patients is the fear of exposure. He explained that Dr. Buscher's practices were outside the mainstream of evidence-based medicine, highly unorthodox, and encourages a faulty belief system in his patients. *Id.* at 222. Dr. Darby further indicated that stress tends to trigger physical manifestations of mental health conditions as evidenced by her pre-existing conditions. *Id.* at 235. He testified that, based on the types of products used during the remodel, the chances of experiencing toxic

exposure would be essentially zero. Dr. Darby indicated that if there was any exacerbation, it would be temporary in nature and that any lingering symptoms were a result of her pre-existing somatization disorder. *Id.* at 241. As a result, he concluded that her symptoms were not proximately related to her work conditions. *Id.*

IV. ARGUMENT

A. Standard of Review

RCW 51.52.115 provides that the Board's findings and decision shall be “prima facie” correct. This was interpreted to mean that there is a presumption on appeal that the findings and decision are correct until the trier of fact determines they are incorrect by a preponderance of the evidence. *Allison v. Department of Labor and Industries*, 66 Wn.2d 263, 401 P.2d 982 (1965). The trial court reviews the Board's decision de novo and may substitute its own findings and decision for the Board if it finds that a “fair preponderance of credible evidence” that the Board's findings and decision were incorrect. *McClelland v. ITT Rayonier, Inc.*, 65 Wn.App. 386, 390; 828 P.2d 1138 (1992).

The Court of Appeals does not sit in the same position as the trial court and Board, as such, it only reviews “whether substantial evidence supports the trial court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings.”

Rogers v. Dep't of Labor & Indus., 151 Wn.App. 174, 180; 210 P.3d 355 (2009) (quoting *Watson v. Dep't of Labor & Indus.*, 133 Wn.App. 903, 909; 138 P.3d 177 (2006)). Moreover, the Court of Appeal's review is the same as the trial court's and is based solely on the evidence presented to the Board. *Dep't of Labor & Indus. v. Avundes*, 95 Wn.App. 265, 269–70, 976 P.2d 637 (1999).

Finally, the claimant cites RCW 51.52.010 and points out that injured workers are the intended beneficiaries of the Industrial Insurance Act and its provisions must be liberally construed with all doubts resolved in favor of the injured worker. The employer understands that the liberal interpretation applies to statutory construction of the Industrial Insurance Act. However, the claimant alleges four errors by the trial court and none of those errors are based on provisions within the Industrial Insurance Act, nor do they require any statutory construction. The alleged errors are procedural and evidentiary in nature. Accordingly, the aforementioned liberal interpretation does not apply to any issue or assignment of error within this appeal.

B. The testimony of Paul S. Darby, M.D., was properly allowed because it was relevant evidence and its probative value was not substantially outweighed by any perceived cumulative effect.

Relevant evidence is defined under Evidence Rule 401 as anything that makes the existence of a material fact more or less likely. Relevant

evidence is presumed admissible under Evidence Rule 402 and WAC 263-12-125. The admission or exclusion of expert testimony is discretionary with the trial court. *Maehren v. Seattle*, 92 Wn.2d 480, 488; 599 P.2d 1255 (1979). The trial court correctly allowed Dr. Darby's testimony to be allowed into the record on the basis that there was a difference in the substance of the testimony of Dr. Stumpp and Dr. Darby, in that Dr. Darby's testimony had a specific focus regarding environmental toxicology. (Hearing Transcript 06/05/2014, p. 19). The claimant relies on two arguments for the exclusion of Dr. Darby's testimony.

First, the claimant cites Civil Rule 16(a)(4) and the case of *Vasquez v. Markin*, 46 Wn.App. 480; 731 P.2d 510 (1986) to argue that Dr. Darby's testimony was improperly allowed. Rule 16(a)(4) allows the trial court to mandate a pretrial conference to consider limiting the number of expert witnesses. However, in the *Vasquez* case, the court held that the trial court was correct to exclude expert testimony because the party seeking the additional witness did not properly follow the direction of a pretrial order directing the parties to list their witnesses by a certain date and the proposed new witness did not raise any new issues. Here, Dr. Darby was listed on all pre-trial pleadings, was never hidden from the claimant, and provided testimony that was unique to the issues. Moreover, the court reviews a trial court's admission of expert testimony for an abuse

of discretion. *State v. Russell*, 125 Wn.2d 24, 69; 882 P.2d 747 (1994).

Here, there was no prejudicial surprise or unfairness associated with Dr. Darby's testimony for which the trial court to exclude it as a procedural matter.

The claimant also argues that Dr. Darby's testimony should be excluded pursuant to Evidence Rule 403 because its probative value is substantially outweighed by considerations of cumulative evidence. However, according to the Washington Supreme Court, utilization of ER 403 is considered to be an extraordinary remedy with a presumption favoring admissibility of evidence under this rule. *Carson v. Fine*, 123 Wn.2d 206, 223-226; 867 P.2d 610 (1994). While Dr. Darby and Dr. Stumpp may have agreed that the claimant's condition was not related to her work exposure, that agreement does not make the testimony prejudicially cumulative. As the claimant concedes in its opening brief, Dr. Darby specifically testified regarding a pre-existing somatization disorder. Indeed, in order to qualify as "unfairly prejudicial" under ER 403, evidence must be "more likely to cause an emotional response than a rational decision by the jury." *Lockwood v. AC & S, Inc.*, 109 Wash.2d 235, 257; 744 P.2d 605 (1987). Here, there was no danger that the testimony of Dr. Darby's specific medical conclusions regarding

toxicology and the claimant's pre-existing somatization disorder would cause an emotional response rather than a rational decision by the jury.

Finally, the trial record reflects that the claimant did not properly preserve its objection to Dr. Darby's testimony at the beginning of the perpetuation deposition before the Board. (Hearing Transcript 06/05/14, at 16). Pursuant to WAC 263-12-117(2)(a), all objections must be raised at the time of the deposition and, if not raised, are deemed waived. Here, the claimant made an initial pre-hearing motion to exclude the testimony of Dr. Darby in front of the Industrial Appeals Judge. However, claimant's counsel did not raise any objection to Dr. Darby's testimony at the time of the deposition. *Id.* at 15-16. As such, the objection to Dr. Darby's testimony should be deemed waived as of that point in time. Regardless of the Court's view of the claimant's perseverance of its objection, the trial court did not abuse its discretion in allowing the testimony of Dr. Darby as discussed above. The claimant's two-pronged argument for requesting the exclusion of Dr. Darby's testimony fails under both theories. The trial court's ruling should be affirmed.

- C. Exhibit Nos. 16, 18, 32, 33, 34, and the corresponding expert testimony was properly excluded as inadmissible hearsay without the proper foundation to qualify as a business record.
- i. *The MSDS documents and letters from Ms. Nance Haydock-Keck are inadmissible hearsay.*

At the Board hearing and during the Superior Court trial, the claimant attempted to introduce several Material Safety Data Sheets (MSDS) documents into evidence as Exhibits 16, 18, 32, 33, and 34. These exhibits were excluded by the Board and the trial court on the basis that they were hearsay without an exception. Pursuant to ER 801 and 802, hearsay is an out of court statement offered as evidence to prove the truth of the matter asserted and is inadmissible unless an exception is provided within the rules. The trial court properly concluded that Exhibits 16, 18, 32, 33, and 34 were hearsay without exception and, therefore, inadmissible. (Hearing Transcript 06/05/14, at 33).

The claimant argues that Exhibits 33 and 34 were self-authenticating business records. That assertion is an incorrect application of law-to-fact. Further, the claimant's brief fails to cite any case-law to substantiate its argument. To be admissible as a business record, a document must satisfy RCW 5.45.020, which states:

“A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.”

In its analysis, the trial court is entitled to consider the type of record at issue. *State v. Iverson*, 126 Wn.App. 329, 340; 108 P.3d 799 (2005). The ruling of a trial judge in admitting or excluding business records is to be given much weight and will not be reversed unless there has been a manifest abuse of discretion. *State v. Ziegler*, 114 Wn.2d 533, 538; 789 P.2d 79 (1990) citing *Cantrill v. American Mail Line, Ltd.*, 42 Wash.2d 590, 608, 257 P.2d 179 (1953). Here, the MSDS documents (and letters from Ms. Nance Haydock-Keck) were not made or produced in the regular course of business, they were not properly authenticated by a witness, nor was there any testimony regarding the mode of preparation of these exhibits.

The claimant allegedly made a verbal request to Steve Hansen, who communicated it to Nance Haydock-Keck, who supplied a letter indicating the attached MSDS documents were the ones she requested. A second letter from Ms. Haydock-Keck indicated that “the paint used in the bathroom was the paint described in the MSDS [she] sent in the August 25, 1992, letter.” The letters from Ms. Haydock-Keck, who did not testify, are out-of-court statements meant to provide evidence that the MSDS documents correspond to the paints she was exposed to during the remodeling in 1991. However, there are multiple levels of hearsay within the letters including statements from Mr. Hansen, the painting contractor,

the internal maintenance staff, and Ms. Haydock-Keck herself. Moreover, the MSDS documents are hearsay, as they are out-of-court statements meant to provide information regarding the substance of paint fumes that the claimant was allegedly exposed to. The letters and corresponding MSDS documents are clearly hearsay.

The letters and MSDS documents do not qualify as business records because they were not prepared in the “regular course of business” of the employer as RCW 5.45.020 requires. The purpose of the business records statute is to “permit the admission into evidence of systematically entered records made in the usual course of business without the necessity of identifying, locating and producing as witnesses each individual who made the original entries in the records.” *City of Seattle v. Heath*, 10 Wn.App. 949, 955; 520 P.2d 1392 (1974). Here, the letters were specifically created in response to an out-of-the-ordinary request from the claimant, meaning they were not regularly prepared in the course of business. The MSDS documents lacked foundational testimony because no witness testified as to their source, information, or method of preparation. Most importantly, there was no testimony to confirm whether these were actually the MSDS reports for the paint that the claimant was exposed to during the employer’s remodel. Accordingly, the exhibits and any corresponding testimony were properly excluded by the trial court.

Moreover, at the time of the July 28, 2011 Board hearing, the Industrial Appeals Judge indicated he would leave the record open for the claimant to obtain a declaration or provide some additional testimony from the contractor involved with the building remodel in order to provide evidence that would allow the documents to pass the hearsay objection. The record shows that no additional testimony, declarations, or affidavits were offered that would overcome the employer's hearsay objection.

Finally, in the unlikely event that the MSDS documents were excluded in error, it was a harmless error. When evidence is treated improperly by the trial court, "the error is harmless if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403; 945 P.2d 1120 (1997). Here, the jury was clearly aware that the claimant was exposed to the remodeling taking place at her place of work based on the testimony of Dr. Amman and Dr. Firestone. There was admitted testimony regarding the types of products used and the types of conditions or symptoms that could develop depending upon the extent of exposure. In that context, the court should consider that the jury's verdict is factually consistent with *Potter v. Dept. of Labor & Industries*, 172 Wn.App 301 (2012), where the court indicated that remodeling is not a condition that arises "naturally and proximately" out of the claimant's employment. Even if the jury had

considered the MSDS documents, the outcome would not have changed and, as such, any potential error was harmless.

- ii. *Portions of the expert testimony of Dr. Firestone and Dr. Amman were not admissible.*

The claimant argues that because ER 703 permits an expert to express an opinion based upon facts or data that are not evidence, they should be allowed to testify regarding excluded Exhibits No. 16, 18, 32, 33, and 34. However, applying ER 703 to this situation, it is clear that the testimony does not fall within the rule's exception. Moreover, the testimony is confusing and is not relevant if the MSDS documents are probably excluded.

An expert can testify on inadmissible facts or data, if it is “of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” ER 703. Dr. Firestone acknowledged that the MSDS documents were “flawed and often contain outdated information.” While it is admittedly debatable whether the MSDS documents are of any scientific significance, the main issue is whether these types of documents can be *reasonably* relied upon. The word “reasonably” in ER 703 gives trial courts discretion in determining whether the underlying information is sufficiently reliable to form the basis of an expert's opinion. *In re Detention of McGary*, 175 Wn.App.

328, 340; 306 P.3d 1005 (2013) citing 5B Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, § 703.2 at 226 (5th ed. 2007). Here, the trial court correctly determined that since there was no testimony regarding whether the specific MSDS documents in question corresponded to the paint the claimant was exposed to, it would be unreasonable for any expert to rely upon such questionable data in forming an opinion as to the causation of physical symptoms. While it is potentially reasonable for experts to rely on MSDS documents in this general field, it is unreasonable for experts to rely on data where there is no evidence to establish that the claimant was exposed to the subject matter of these MSDS documents. As discussed subsection (i), the MSDS documents are inherently unreliable in these circumstances, as such, it would be improper for the claimant's experts to testify regarding their subject matter, much less correlate the unsubstantiated documents to the alleged injury.

D. The testimony of Ms. Kurts and Ms. Carpenter was properly excluded as it was not relevant, and its probative value was substantially outweighed by the prejudicial effect.

At trial, the claimant argued that the proposed lay testimony of Ms. Kurts and Ms. Carpenter was admissible as rebuttal testimony consistent with *Intalco Aluminum Corp. v. Dep't of Labor & Indus.* 66 Wn.App. 644; 833 P.2d 390 (1992). The trial court held that the portions

of the claimant's co-workers' proposed testimony was inadmissible because it was not rebuttal testimony consistent with *Intalco* and it was not relevant to whether the claimant suffered symptoms or conditions proximately related to the employer's remodel. (Hearing Transcript 06/05/14, at 41-42). Now, the claimant concedes that the testimony is different than that offered in *Intalco*, but is nonetheless admissible because it is relevant to the testimony of its own expert, Dr. Firestone. The proposed lay testimony from the claimant's co-workers is inadmissible for three reasons: First, it is not relevant. Second, its probative value is substantially outweighed by its prejudicial effect and the confusion it would cause upon admission. Third, it is not rebuttal testimony consistent with the *Intalco* decision.

First, the testimony of Ms. Kurts' and Ms. Carpenter's symptoms is facially irrelevant because it does not make the existence the claimant's symptoms any more or less probable. As discussed above in subsection B, "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. The claimant argues that the testimony regarding the co-workers' symptoms is relevant to Dr. Firestone's inquiry regarding causation. (Claimant's Brief, at 25). However, as the trial judge indicated,

the co-workers' symptoms have no logical bearing to the claimant's exposure to toxic chemicals. Moreover, if the co-workers' symptoms were admissible, then nothing would preclude the employer from calling every employee who did not experience any symptoms.

Second, in the unlikely event the proposed testimony is relevant, its probative value is substantially outweighed by its prejudicial effect and confusion it would cause if admitted. Pursuant to ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. When a trial court makes an ER 403 determination, the Court reviews whether it was an abuse of discretion. See: *State v. Yates*, 161 Wn.2d 714; 168 P.3d 359 (2007). Here, the co-workers' testimony would have surely prejudiced the jury's ability to solely determine the merits of the claimant's condition as it relates to the conditions of her employment. Moreover, the employer was unable to fully cross-examine the co-workers at the Board hearing regarding their alleged symptoms, as they were unwilling to sign a medical release. (Hearing Transcript 06/05/2014, at 40). As such, the admission of the proposed lay testimony would have confused the issues and unfairly prejudiced the jury's ability to decide the actual issue in dispute.

Third, the proposed testimony was not intended as a specific rebuttal to the employer's expert witnesses. Claimant argues that the trial court's comparison to *Intalco* is incorrect because the nature of the claimant's co-workers' proposed testimony was probative and relevant to the testimony of her expert witnesses and is, therefore, admissible similar to the testimony in *Intalco*. (Claimant's Brief, at 25). However, the claimant fails to properly analyze how the *Intalco* decision applies. In that case, an expert witness testified that the claimant's alleged symptoms were never previously found in any of the employer's 3,000 employees. The lay testimony was allowed solely for the limited purpose of rebutting that statement. *Intalco*, at 665. Here, at trial, the claimant specifically argued that the lay testimony was in rebuttal to the employer's expert witnesses. (Hearing Transcript 06/05/14, at 36). The employer properly pointed out that this was not true, as the employer's experts simply said the claimant's exposure was not substantial enough to cause the alleged condition. *Id.* at 39. If the proposed lay testimony were to rebut a specific detail of the employer's testimony, then it could potentially fit the *Intalco* framework. However, that is not the case. The claimant acknowledged that the proposed lay testimony is different than the testimony offered as rebuttal in *Intalco* because it is offered in support of its own experts' conclusions. (Claimant's Brief, at 25). The trial judge correctly held that this was not

actual rebuttal testimony consistent with the type of testimony allowed by the *Intalco* decision. (Hearing Transcript 06/05/14, at 42).

Accordingly, the trial court's exclusion of the proposed lay testimony of Ms. Kurts and Ms. Carpenter should be affirmed.

- E. The trial court correctly provided Jury Instruction No. 17 because it helped the jury determine what qualified as a mental health condition and failing to provide the instruction would have been a reversible error on appeal.

Over the claimant's objection, the trial court provided the jury with Instruction No. 17, which stated:

“Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an occupational disease. Examples of mental conditions or mental disabilities caused by stress that do not fall within occupational disease shall include, but are not limited to, those conditions and disabilities arising from work load pressures, subjective perceptions of employment conditions or environment, or fear of exposure to chemicals, radiation biohazards, or other perceived threats.”

At trial, during oral argument regarding the jury instructions, the claimant indicated it agreed “with allowing an instruction regarding mental conditions or mental disabilities as said in RCW.” (Hearing Transcript 06/16/14, at 4). The claimant indicated his objection was only based upon the wording of the instruction, as it was allegedly a Department guideline. *Id.* at 5. However, as the employer indicated during argument, the wording from Instruction No. 17 was not merely a guideline, it was taken verbatim

out of the Washington Administrative Code. *Id.* at 5. The claimant now recognizes the source and accuracy of the instruction as coming from a Washington Administrative Code. On appeal, the claimant argues that the jury instruction was a prejudicial comment on the evidence in the context of the facts and the Industrial Insurance Act. This argument is insufficient to support a conclusion that providing Jury Instruction No. 17 was a reversible error. This is especially true, as the claimant's counsel previously admitted the jury should be instructed as to mental health and failed to provide any other alternatives.

The trial court correctly ruled that the instruction was appropriate because it gave the jury the content it needed to determine what qualified as a "mental condition." (Hearing Transcript 06/16/14, at 7). In the case *Stratton v. Department of Labor and Industries*, 1 *Wn.App.* 77, 459 *P.2d* 651 (1969), the court noted that the trial court is required to advise the jury only of the exact findings which pertain to each material issue before the court. Here, the employer presented several expert witnesses that testified as to the claimant's susceptibility to physical symptoms based on her preexisting somatization disorder. Essentially, whether the claimant's symptoms related to her somatization disorder were allowable under an occupational disease claim was an issue in dispute. As the trial court noted, the language of WAC 296-14-300 was necessary for the jury to

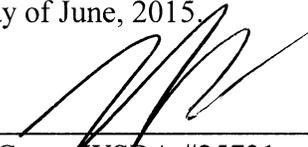
determine whether or not the claimant's preexisting somatization disorder qualified as mental health condition allowable as an occupational disease. In that context, it arguably would have been a reversible error to *exclude* Instruction No. 17 on the basis that the jury would have been without instruction as to the legal implication of the claimant's diagnosed somatization disorder. Put simply, Jury Instruction No. 17 helped the jury address whether the claimant's mental health condition qualified as an occupational disease.

Accordingly, the trial court's decision to include Jury Instruction No. 17 was the correct decision. The trial court's decision should be affirmed. Moreover, in the unlikely event that the trial court's decision was incorrect, the error was a harmless error and cannot be the basis for a remand.

V. CONCLUSION

Based on the analysis in the above, the employer contends that the trial court correctly included the testimony of Dr. Darby, correctly excluded the irrelevant portions of testimony from Ms. Kurts and Ms. Carpenter, correctly excluded the inadmissible MSDS documents, correctly limited the testimony of Dr. Firestone and Dr. Amman, and correctly included Jury Instruction No. 17. The King County Superior Court Verdict dated October 27, 2014 should be affirmed in its entirety.

Respectfully submitted this 25th day of June, 2015.



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**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

JOYCE E. SHOEMAKE,)	No.
)	
Appellant,)	
)	
v.)	
)	
ELI LILLY & CO.,)	PROOF OF MAILING
)	BRIEF OF RESPONDENT
)	
Respondent.)	
)	
)	
)	

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2015 JUN 26 PM 12:37

The undersigned states that on June 25, 2015, I deposited in the United States mail, with proper postage prepaid, Brief of Respondent as attached, addressed as follows:

Tara Reck
Foster Law Office
8204 Green Lake Drive North
Seattle, WA 98103

I further certify that I filed the original of the foregoing with:

1 Court Of Appeals
2 Division I
3 One Union Square
4 600 University Street
5 Seattle, WA 98101-1176

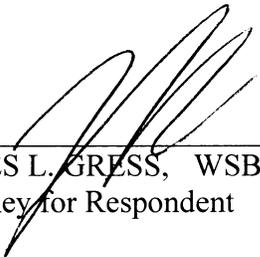
6 by mailing it by Federal Express (overnight) on June 25, 2015.

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

9 DATED: June 25, 2015.

10 Respectfully submitted,

11 **LAW OFFICE OF GRESS & CLARK, LLC**

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15 _____
16 JAMES L. GRESS, WSBA #25731
17 Attorney for Respondent
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