

original

No. 36268-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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SIMPSON TIMBER COMPANY, *Appellant*,

v.

CINDY J. LEWIS, *Respondent*.

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APPEAL FROM THE SUPERIOR COURT FOR MASON COUNTY  
HONORABLE TONI A. SHELDON

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**BRIEF OF APPELLANT**

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## I. ASSIGNMENTS OF ERROR

### Assignment of Error No. 1

**The court erred in requiring Simpson Timber Company, the defendant, to present its evidence to the jury first.**

Issues Pertaining to Assignment of Error No. 1

1. When an industrial insurance claimant appeals to superior court a BIIA order denying her claim for occupational disease, does she bear the burden of presenting her evidence first?

Standard of Review for Assignment of Error No. 1

An assigned error in interpreting the law is reviewed *de novo*. *Potter v Dep't of Labor & Indus.*, 101 Wn. App. 399, 3 P.3d 229 (2000).

### Assignment of Error No. 2

**The court erred in instructing the jury on causation pursuant to jury instruction number 14.**

Issues Pertaining to Assignment of Error No. 2

1. Did the trial court err, in undertaking to instruct the jury on an aspect of the law, in failing to instruct the jury fully and accurately on that law?

2. Does Ms. Lewis, in prosecuting a claim for occupational disease from exposure to an alleged toxin in the workplace, need to

identify a toxin or set of toxins in the workplace to which she was exposed that could cause her alleged disease?

3. Did the trial court err, in undertaking to instruct the jury on the law, by commenting on the evidence?

Standard of Review for Assignment of Error No. 2

An assigned error in interpreting the law is reviewed *de novo*. *Potter v Dep't of Labor & Indus.*, 101 Wn. App. 399, 3 P.3d 229 (2000).

**Assignment of Error No. 3**

**The court erred in submitting the issue of causation to the jury.**

Issues Pertaining to Assignment of Error No. 3

1. Did the trial court err, in ruling on Simpson's motion for judgment as a matter of law, before the jury reached a verdict, that a legally sufficient evidentiary basis existed for a reasonable jury to find for Ms. Lewis?

2. Did the trial court err, in ruling on Simpson's motion for judgment as a matter of law, after the jury reached a verdict, that a legally sufficient evidentiary basis existed for a reasonable jury to have found for Ms. Lewis?

3. Does Ms. Lewis, in prosecuting a claim for occupational disease from exposure to an alleged toxin in the workplace, need to

identify a toxin or set of toxins in the workplace to which she was exposed that could cause her alleged disease?

4. Is an issue of fact created for resolution by a jury by testimony from a witness who expresses contradictory propositions of fact on that issue where the contradiction can not be resolved by a jury by evaluating of the credibility of the witness?

Standard of Review for Assignment of Error No. 3

An assigned error in failing to grant a motion for directed verdict or a motion for judgment as a matter of law is reviewed *de novo*. *Weyerhaeuser Company v Commercial Union Insurance Company*, 142 Wn.2d 654, 664, 15 P.3d 115, 122 (2000).

**Assignment of Error No. 4**

**The court erred in excluding from evidence the opinion of Drs. Montanaro and Martin about causation.**

Issues Pertaining to Assignment of Error No. 4

1. Does a BIIA order prohibiting a CR 35 examination of Ms. Lewis by a psychiatrist or psychologist entail the exclusion of testimony from Dr. Martin, who was a treating physician and not a CR 35 examiner, and Dr. Montanaro, who was a non-psychiatric CR 35 examiner, that they had ruled out all differential diagnoses on their list of differential

diagnoses, except certain probable disorders with a psychological etiology?

Standard of Review for Assignment of Error No. 4

An assigned error in excluding proffered evidence is reviewed on the standard of abuse of discretion. *Weyerhaeuser Company v Commercial Union Insurance Company*, 142 Wn.2d 654, 683, 15 P.3d 115, 131-132 (2000).

**Assignment of Error No. 5**

**The court erred in admitting into evidence photographs marked as exhibits 3 through 9.**

Issues Pertaining to Assignment of Error No. 5

1. Did the trial court abuse its discretion in admitting into evidence photographs unlawfully taken by Ms. Lewis while trespassing on Simpson's premises during the course of the litigation?

2. Did the trial court abuse its discretion in admitting into evidence photographs proffered by Ms. Lewis for the first time after the discovery deadline and after Simpson had rested its case?

3. Did the trial court abuse its discretion in admitting into evidence a unduly prejudicial photograph of a door to a side room off Ms. Lewis's workplace which had scratched or etched into it a crude skull and cross bones, where Ms. Lewis was unable to identify who placed the skull

and cross bones there and Simpson was not allowed to offer evidence of the circumstances for its presence there?

Standard of Review for Assignment of Error No. 5

An assigned error in admitting, over objection, proffered evidence is reviewed on the standard of abuse of discretion. *Weyerhaeuser Company v Commercial Union Insurance Company*, 142 Wn.2d 654, 683, 15 P.3d 115, 131-132 (2000).

## II. STATEMENT OF THE CASE

At relevant times, Cindy Lewis was a 51 year old, obese mill worker, raised in Shelton, Washington. [CP—CABR—Cindy Lewis 33/3-21]. Since 1973, upon graduating from high school, she had worked for Simpson Timber Company (Simpson) in its lumber mill in Shelton, Washington. [CP—CABR—Cindy Lewis 33/45-51; 34/23-29]. Thirty years later, on August 20, 2003, she left Simpson. [CP—CABR—Cindy Lewis 34/1-3; 37/19-24; 102/45-49]. On August 13, 2003, about a week before she left Simpson, she married John Lewis, a full time truck driver and landlord. [CP—CABR—Cindy Lewis 32/37; 103/1-7 & 9-11 & 13-17 & 19-24 & John Lewis 5/3-23].

Before she married, Ms. Lewis worked two jobs to support herself and her child. [CP—CABR—Cindy Lewis 35/23-36]. At Simpson, she worked the day shift, from about 5 am to 2:30 pm. [CP—CABR—Bollen

48/23-24; Hurst 128/51-52; J. Lewis 5/45-52; 6/43-46]. After she finished her shift at Simpson, she would begin working her other job as a waitress, from about 5 pm to 11 pm. [CP—CABR—Cindy Lewis 35/35-45]. Overall, for many years, she worked some 75 to 80 hours a week. [CP—CABR—Cindy Lewis 36/3-11].

While working for Simpson, Ms. Lewis was an unskilled worker, removing sawdust and scrap lumber in that section of the mill known as “North Planer.” [CP—CABR—Cindy Lewis 34/19-23 & 35-43; 40/45-51; 41/1-9; Miller 15/2-12; Bollen 50/7-10]. When performing this work, she was well protected, wearing overalls, ankle high boots, a hard hat, protective eye wear, sometimes a dust mask, and rubber gloves. [CP—CABR—Cindy Lewis 75/19-25 & 51; 76/1 & T.G. Martin 19/1].

On the floor above the level on which Ms. Lewis worked, rough lumber was finished—planed, sprayed with a fungicide, graded, and packaged. [CP—CABR—Bollen 48/9-12; Miller 18/19-21; 23/6-8]. At times, this fungicide would drip through the floor above into the room below and onto Ms. Lewis’s clothing and, she said, occasionally onto her skin. [CP—CABR—Cindy Lewis 68/33-37; 75/13-17; Miller 23/11-14]. When her overalls became damp from the dripping fungicide, she would change them and promptly wash any fungicide from her skin. [CP—CABR—Cindy Lewis 76/13-34].

In August 2002, Simpson changed the its brand of fungicide from an undescribed product to Mycostat-P and then, in August 2003, to Mycostat P<sub>20</sub>. [CP—CABR—Miller 17/12 & 21-23; 18/19-21; 20/11-25; Bollen 56/20-24]. The difference between Mycostat-P and Mycostat-P<sub>20</sub> was described as minor. [CP—CABR—Miller 20/15-25]. Mycostat-P and Mycostat P<sub>20</sub> are described by the Material Safety Data Sheets (MSDS) as constituted of 20% propiconazole and 80% solvents. [CP—CABR—Lee 20/24-25; 21/1-2]. The solvents were described generally as alcohols. [CP—CABR—A. Montanaro 28/17-25]. The MSDS did not identify the solvents with particularity because they are proprietary. [CP—CABR—Lee 12/5-10; 15/9-12; 17/8-11]. Ms. Lewis “suspected” (but did not know) that one of the solvents was xylene. [CP—CABR—Lee 17/12-20]. Based on a review of the proprietary list of ingredients from the manufacturer, Simpson denied that any of the solvents in Mycostat was xylene. [CP—CABR—Miller 18/22-24; 19/1-11 & 23-26; 20/1-10; 33/12-13].

In about mid-August 2002, says Ms. Lewis, she developed an odd assortment of symptoms. [CP—CABR—Cindy Lewis 39/23-27 & 29-35; 87/17-32]. These symptoms were, as reported by her, weight gain; lethargy; a rash on her arms and chest; bleeding from her ears; difficulty communicating with people; a bloody nose; a bad cough; occasional dis-

coordination when walking; hypersensitive skin; ringing in ears; digestive discomfort; headaches; tingling skin; and vague memory dysfunction. [CP—CABR—Cindy Lewis 38/33-49; 39/1-51; 40/3-13]. No one, except Ms. Lewis’s husband, witnessed any of these problems other than her weight gain, occasional lethargy, and a slight blotchiness on her chest. [CP—CABR—Henden 74/25-26; Magee 117/26-29; J. Lewis 10/47-51; 11/9-11 & 15 & 41-43; 12/35-37; Stewart 109/39]. Ms. Lewis denied having such symptoms before mid-August 2002. [CP—CABR—Cindy Lewis 87/37-43]. When she had these symptoms, she was, she said, “like a zombie.” [CP—CABR—Cindy Lewis 81/31]. At the hearing before the BIIA, she testified that as a result of her condition, “I’m not me anymore.” [CP-CABR—Cindy Lewis 85/13].

For these symptoms, Ms. Lewis began seeing a wide variety of health care providers. On August 29, 2002, she saw her primary care physicians, Mark Trucksess, M.D., a family practice physician, and then Waldo Dagan, M.D., an internist, at Olympic Physicians, PLLC. [CP—CABR—Cindy Lewis 87/45-52; 90/33-41; Burton 16/25; 17/1]. She related to them that she had recently discontinued hormone replacement therapy and had been taking an antidepressant for her menopausal symptoms. [CP—CABR—Cindy Lewis 87/45-51; 88/1-24; 89/15-27].

Drs. Trucksess and Dagan, in an effort to identify what ailed Ms. Lewis, referred her to a variety of respected specialists. On September 16, 2002, they referred her to James McDonnell, a neurologist. [CP—CABR—Burton 15/19-25]. He found her to be neurologically normal. [CP—CABR—Burton 16/1-5]. On September 18, 2002 and October 2, 2002, they referred her to Donn Livingstone, an eye, ear, nose and throat specialist. [CP—CABR—Burton 16/6-11]. He found her to be normal. [CP—CABR—Burton 16/21-25].

As of March 2003, Ms. Lewis had not mentioned to any of these health care providers an exposure to toxins. [CP—CABR—Burton 18/8-18]. About this time, in relating to her history to her physicians, Ms Lewis began associating her symptoms with her exposure to Mycostat-P. [CP—CABR—Cindy Lewis 73/43-51; 74/1-21; T.G. Martin 53/4-25; 54/1-7]. Based on this history, Dr. Dagan began exploring the possibility that Ms. Lewis had an occupational disease from exposure to Mycostat-P.

On April 2, 2003, Ms. Lewis filed an accident report with Simpson. [CP—CABR—Bollen 51/5-6].

On April 28, 2003, Dr. Dagan referred Ms. Lewis to Robert Huck, M.D., a well respected pulmonologist. [CP—CABR—Burton 19/3-8]. He found her to be pulmonologically normal, and opined that she did not have

occupationally induced lung disease. [CP—CABR—Burton 19/15-25; 20/1-18].

On July 11, 2003, Dr. Dagan referred her to Thomas G. Martin, M.D., a well respected occupational medicine specialist at the Occupational Medicine Clinic at University of Washington. He examined her with an associate named Austin Sumners, M.D. [CP—CABR—T.G. Martin 8/3; 12/10-11 & 18-15; 34/7-9]. Both found her to be physically normal, and opined that she did not have an occupationally induced disorder. [CP—CABR—T.G. Martin 30/13-25; 31/1; 32/12-19; 33/5-6]. Dr. Martin noted particularly that, apart from the non-specific symptoms of dizziness, she did not have symptoms consistent with exposure to Mycostat-P, according to data in the National Library of Medical Toxicology. [CP—CABR—T.G. Martin 18/1-9; 19/21-25; 20/1-15; 31/23-25; 32/1-11]. He noted that the fungicide propiconazole is safe and similar to the fungicide used clinically to treat patients with fungal infections. [CP—CABR—T.G. Martin 17/22-25]. Nor were her symptoms consistent with exposure to xylene. [CP—CABR—T.G. Martin 30/13-25; 31/1; & 6-12; 47/8-16; 51/10-14; 60/9-14].

On August 21, 2003, Dr. Dagan referred Ms. Lewis to Kevin Connolly, a neurologist. [CP—CABR—Burton 25/21-25]. He found her

to be neurologically normal. [CP—CABR—Cindy Lewis 97/31-39; Burton 26/4-9].

On September 26, 2003, Ms. Lewis filed an industrial insurance claim, alleging a chemical exposure during 2002 and 2003 while working for Simpson. [CP—CABR--PDO 17/4-5]. On October 6, 2003, the Department of Labor and Industries (DLI) issued an interlocutory order allowing her claim pending further investigation and, on March 31, 2005, issued an order allowing her claim. [CP—CABR--PDO 1/29-30; 17/7-8].

On December 15, 2003, Ms. Lewis had apparently directed herself to a naturopath named Jennifer Booker, N.D., who treated her with various alternative naturopathic therapies. Then, on February 16, 2004, based on a recommendation from her union, Ms. Lewis had Dr. Booker refer her to David Buscher, M.D., a self-proclaimed specialist in “environmental medicine,” but without board certification by the American College of Certified Medical Examiners (ACCME).<sup>1</sup> [CP—CABR—Cindy Lewis 97/41-47; Buscher 7/21-24; 34/23-25; 35/1-11]. He treated her with an odd assortment of non-medically standard treatments, including supplemental oxygen, ingestion of a powder to “de-toxify her body,” and

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<sup>1</sup> Dr. Buscher is the same Dr. Buscher who testified that Ms. Ruff, who failed to prove that she was exposed to toxic chemicals, had “chemical sensitivities syndrome” in the case of *Ruff v Department of Labor & Industries*, 107 Wn. App. 289, 28 P.3d 1 (2001).

placement of vials of substances under her tongue to combat potential food allergies. [CP—CABR—Cindy Lewis 98/9-51; 99/7-19 & 51-52; 100/1-8; 101/1-5 & 31-33]. These treatments were described by Brent Burton, M.D., a board certified specialist in occupational medicine and toxicology, as “medical quackery.” [CP—CABR—Burton 34/1-25; 35/1-6; see also A. Montanaro 33/3-25; Buscher 18/9-11]. Dr. Buscher then referred her to Philip Ranheim, M.D., a family practice physician but not her treating physician, who first saw her April 26, 2005, presumably to lay a foundation for him to testify as a forensic witness. [CP—CABR—Ranheim 7/12; 24/22-25; 25/1-3].

In August 2004, Ms. Lewis was scheduled to have an independent medical examination with Brent Burton, M.D., MPH, a board certified specialist in occupational medicine and medical toxicology, who until 1997, when he entered private practice, was medical director of occupational medicine at the Oregon Health Sciences University. [CP—CABR—Burton 7/1-6; 10/1-9]. When Ms. Lewis failed to appear for that examination, Dr. Burton was asked to and did perform a thorough review of her medical records. [CP—CABR—Burton 10/1-9]. From that review, he opined, consistently with Dr. Martin, that Ms. Lewis’s constellation of symptoms was inconsistent with a medical condition or with exposure to a toxin or with exposure to Mycostat-P, which is not a neurotoxin, or with

the exposure to xylene, which even in significant doses produces only symptoms consistent with short term alcohol intoxication. [CP—CABR—Burton 27/6-9; 27/10-14; 28/21-25; 29/21-24; 30/1-13; 37/2-8; 37/9-25; 38/1-15; 42/2-15 & 24-25; 43/1-10 & 17-25; 44/1-25; 48/2-5; 50/3-9].

On May 2, 2005, Simpson appealed the DLI order allowing Ms. Lewis's claim to the Board of Industrial Insurance Appeals (BIIA). [CP—CABR--PDO 1/28].

On September 1, 2005, Ms. Lewis had an independent medical examination with Dr. Anthony Montanaro, a board certified internist, allergist and immunologist at the Oregon Health Sciences University, where he is a full professor of medicine and Chief of the Division of Allergy and Immunology. [CP—CABR—A. Montanaro 5/15-17; 6/6-7; 10/1]. Dr. Montanaro opined, consistently with Drs. Martin and Burton, that Ms. Lewis did not have symptoms consistent with exposure to a toxic chemical or with exposure to Mycostat-P or Mycostat-P<sub>20</sub> or with exposure to xylene. [CP—CABR—A. Montanaro 27/13-24; 28/1-5; 29/1-6; 29/7-21; 30/12-18; 31/1-11; 32/24-25; 33/1-2; 34/5-20; 36/2-5].

On March 27, 2006, the BIIA, after a hearing, issued an order denying Ms. Lewis's claim. [CP—CABR--PDO 1/30-31]. On May 23, 2006, Ms. Lewis appealed that order to superior court for a jury trial. On March 7, 2007, trial began in Shelton, Washington. The trial court

required Simpson to present its evidence first. The trial court would not admit into evidence testimony from Drs. Martin and Montanaro that the origin of Ms. Lewis's symptoms was psychological. The trial court also reversed the IAJ in admitting into evidence photographs which Ms. Lewis had taken unlawfully of Simpson's premises after the discovery deadline and after Simpson had put on its evidence.

After all the evidence was presented, because Ms. Lewis failed to proffer evidence that she was exposed to a toxin, Simpson moved for, but the court denied, judgment as a matter of law. On March 9, 2007, the jury returned a verdict for Ms. Lewis, overturning the order of the BIIA, and judgment was thereafter entered in favor of Ms. Lewis. Simpson then filed and argued a post trial motion under CR 50 for judgment as a matter of law, which the trial court also denied. Simpson then filed its Notice of Appeal.

### **III. ARGUMENT**

#### **Summary of Argument On Assignment of Error No. 1**

The trial court erred in requiring Simpson, the defendant in superior court, to present its evidence first. Ms. Lewis, the plaintiff in superior court, had the burden of proof on the issues of injury and causation. As the party with the burden of proof (burden of persuasion) on a issue, Ms. Lewis had the initial burden of producing her evidence on

those issues. *Ruse v Dep't of Labor & Indus.*, 90 Wn. App. 448, 453, 966 P.2d 909, 911 (1998), *affirmed*, *Ruse v Dep't of Labor & Indus.*, 138 Wn. 2d 1 (1999).

### **Argument On Assignment of Error No. 1**

The party with the burden of proof (burden of persuasion) on a issue has the initial burden of producing its evidence on that issue. *Ruse v Dep't of Labor & Indus.*, 90 Wn. App. 448, 453, 966 P.2d 909, 911 (1998), *affirmed*, *Ruse v Dep't of Labor & Indus.*, 138 Wn. 2d 1 (1999) (“It is Mr. Ruse who has the burden of producing evidence which supports his claim”).

In superior court, Ms. Lewis bore the burden of proof—that is, the burden of persuading the trier of fact about the existence of all elements of her claim. She had appealed an order of the Board of Industrial Insurance Appeals (BIIA) to superior court. As a result, in superior court, she was the plaintiff; Simpson was the defendant. Because Ms. Lewis, as plaintiff, had the burden of persuasion on the elements of her claim, she also had the burden of presenting her evidence first before Simpson had to present its evidence in its defense.

Contrary to this law, the trial court required Simpson, as defendant, over its objection, to present its evidence first. [RP—60/12-25; 61-64/1-21]. The trial court decided that the order of witnesses in superior court

would be exactly the same as the order of witnesses before the BIIA.<sup>2</sup> [RP-62/11-25; 63/1-2]. It reasoned that changing the order of witnesses from what it was at the BIIA might confuse the jury. [RP-62/11-21]. This concern was abstract and not based on any identified particular evidence.

This error is not harmless. If Ms. Lewis fails to present evidence sufficient to establish a *prima facie* case, then Simpson, if it so moves, is entitled to a judgment as a matter of law. CR 50(a)(1). Simpson, as defendant, should not have its evidence considered in evaluation of that motion; that is, it should not have to risk establishing, through its own witnesses and documents, Ms. Lewis's *prima facie* case. See CR 50(a)(1).

Before and after the verdict, Simpson did move for judgment as a matter of law. Simpson could not so move before it introduced its evidence because the trial court required Simpson to present its evidence first. In evaluating Simpson's motion, the trial court indicated that it considered alternatively (1) only the evidence Ms. Lewis introduced and

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<sup>2</sup> Before the BIIA, the order of witnesses was determined by the fact that Simpson had appealed an order of the Department of Labor and Industries to the BIIA. In that circumstance, Simpson has the burden of proceeding with evidence to prove its *prima facie* case for the relief sought by the appeal. RCW 51.52.050; WAC 263-12-115(2)(a) and (c). Once Simpson establishes a *prima facie* case, the burden shifted to Ms. Lewis to prove her claim for industrial insurance benefits. *Olympia Brewing Company v. Dep't of Labor and Indus., et al.*, 34 Wn.2d 498, 505-507, 208 P.2d 1181, 1185-1186 (1949), *overruled on other grounds* in *Windust v. Dep't of Labor and Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958); *In Re Guttromson*, BIIA Sign Dec. 55,804 (1981).

(2) the entire record. [RP 77-94]. The trial court then denied the motion. [RP 94/22-25; 95-96/1-8].

The problem with this approach is that the trial court, despite its reassurances to the contrary, could not consider only Ms. Lewis's evidence after first having heard Simpson's evidence in its defense. By way of illustration, suppose plaintiff alleges that John Doe beat his dog on Main Street at 1:00 am Saturday September 1, 2007. Plaintiff then offers evidence that his dog was beaten on Main Street at 1:00 am Saturday September 1, 2007, but fails to offer evidence that it was defendant who beat the dog. Defendant moves for judgment as a matter of law. What result?

Now suppose, defendant introduces evidence that it was he who was seen beating a dog on Main Street at 1:00 am Saturday September 1, 2007, but denies that it was plaintiff's dog. If defendant had to introduce its evidence in its defense before plaintiff introduced his evidence, and then at the conclusion of the evidence, moved for judgment as a matter of law, what would be the result? Simpson does not believe it is reasonable to believe that, despite reassurances, the trial court--dog lover or not--

would be able to consider *only* plaintiff's evidence and fairly grant defendant's motion for judgment as a matter of law.<sup>3</sup>

### **Summary of Argument On Assignment of Error No. 2**

The trial court erred in providing a misleading jury instruction on the issue of causation—namely, in jury instruction 14 that “plaintiff [Ms. Lewis] did not need to identify the *precise* chemical in the work place that caused her disease.” This jury instruction, in the context of the evidence, is inconsistent with Washington law that Ms. Lewis identify some toxin in the workplace to which she was exposed that to a reasonable degree of medical probability caused her injury or occupational disease. *Ruff v Dep't of Labor & Indus.*, 107 Wn. App. 289, 28 P.3d 1 (2001).

### **Argument On Assignment of Error No. 2**

Ms. Lewis, as plaintiff, has the burden to prove that as a result of her employment with Simpson, she acquired an occupational disease. That proof entails proof of causation. Proof of causation entails proof of both general and specific causation. *Intalco Aluminum Corp. v Dep't of Labor & Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992), *rev. den.*, 120 Wn.2d 1031, 847 P.2d 481 (1993); *Ruff v Dep't of Labor & Indus.*, 107 Wn. App. 289, 28 P.3d 1 (2001).

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<sup>3</sup> Regarding the inability of people to not consider all the evidence, please refer to D. Wegner, *White Bears & Other Unwanted Thoughts*, 99-120 (Penguin Books 1989).

“General causation” concerns the question: As a matter of scientific fact, can a particular agent cause a particular pattern of signs and symptoms in humans? See, e.g., *Grant v Boccia*, 135 Wn. App. 176, 181-182, 137 P.3d 20, 23-24 (2006); *Ruff v Dep’t of Labor & Indus.*, 107 Wn. App. 289, 28 P.3d 1 (2001). General causation is of the following form: *It is generally accepted in the scientific community that chemical W in doses greater than X causes disease Y in humans when exposed through means Z. E.g., Intalco Aluminum Corp. v Dep’t of Labor & Indus.*, 66 Wn. App. at 656 (“While studies of the effects of pot room exposures on the human neurologic system had never been done, animal studies revealed that aluminum exposure could cause symptoms similar to those exhibited by the claimants”); *Ruff v Dep’t of Labor & Indus.*, 107 Wn. App. at 306 (“Medical experts and literature reject the theory that exposure to chemicals in the air causes porphyria”).

So, in sum, as a matter of law, by virtue of the holdings of *Intalco* and *Ruff*, Ms. Lewis has the burden of proving, by way of *general* causation, (1) that an agent exists on the premises where he worked (2) that can cause at specified doses or owing to a particular hypersensitivity (3) an injury or disease in humans of the kind she alleges she has.

“Specific causation” concerns the question: Given proof of general causation, as a matter of clinical fact, was the claimant exposed to

that particular agent and did claimant have the particular pattern of signs and symptoms identified as resulting from exposure to that agent. See *Intalco Aluminum Corp. v Dep't of Labor & Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992), *rev. den.*, 120 Wn.2d 1031, 847 P.2d 481 (1993); *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 477, 745 P.2d 1295, 1301 (1987); *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431, 435 (1995) (Medical testimony must establish that the claimed work-related physical condition is causally related to the industrial exposure); *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 601, 676 P.2d 538, 541, *rev. den.*, 101 Wn.2d 1023 (1984) (Medical testimony that the work exposure might have, or could have, caused the worker's condition is insufficient). Specific causation is of the following form: *That chemical W in the workplace in doses greater than X through means Z caused disease Y in claimant. E.g., Intalco Aluminum Corp.*, 66 Wn. App. at 649 ("Numerous toxins, including aluminum, benzene solubles, petroleum pitch volatiles, and carbon monoxide were in the atmosphere in the pot room"); *Ruff*, 107 Wn. App. at 306 ("No one knows what chemicals Ruff was exposed to during the week-long building remodel").

So, in sum, as a matter of law, by virtue of the holdings of *Intalco* and *Ruff*, Ms. Lewis has the burden of proving, by way of *specific* causation, (3) that she, in fact, was more probably exposed to that toxin in

the workplace than in places outside the workplace encountered *in everyday life or all employments in general*, (4) in doses established to result in the identified disease, and (5) she has, in fact, that injury or disease. It is insufficient for Ms. Lewis merely to prove (1) that when she worked for Simpson, she got some unspecified gunk on her clothing; (2) she later developed an assortment of non-specific symptoms; and (3) that she did not have these symptoms before she began working for Simpson.

Over Simpson's objection,<sup>4</sup> the trial court instructed the jury on an aspect of the issue of causation as follows:

[1] "The Worker's Compensation Act does not require the claimant to identify the precise chemical in the work place that caused his or her disease."  
[2] "However, evidence is not sufficient to prove causation unless, from the facts and circumstances and the medical testimony given, a reasonable person can infer that a causal connection exists."  
[CP Plaintiff's Proposed Jury Instruction No. 12; Trial Court's Jury Instruction No. 14; RP 101/17-18; RP 102/4-25; 103/1-6].

This jury instruction Ms. Lewis apparently cobbled together from

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<sup>4</sup> The record is somewhat confusing about jury instruction number 14. The trial court's jury instruction number 14 was Ms. Lewis's proposed jury instruction number 12. [CP-- Plaintiff's Proposed Jury Instruction No. 12; Trial Court's Jury Instruction No. 14;]. The trial court ruled it would instruct the jury using Ms. Lewis's proposed jury instruction number 12, which the trial court renumbered as 14. [RP—101/17-18]. Simpson took exception to Ms. Lewis's proposed jury instruction number 12. [RP—103/3-6].

two separate statements in *Intalco*. The first sentence [1] adapts this statement from *Intalco*: “Because the claimant is only required to demonstrate that conditions in the workplace more probably than not caused his or her disease or disability and because we are to construe the Act liberally in favor of the claimant, we hold that the workers' compensation statute does not require the claimant to identify the precise chemical in the workplace that caused his or her disease.” *Intalco v Dep't Labor & Indus.*, 66 Wn. App. at 658. The second sentence [2] adapts this statement from *Intalco*: “The evidence is sufficient to prove causation if, from the facts and circumstances and the medical testimony given, a reasonable person can infer that a causal connection exists.” *Intalco v Dep't Labor & Indus.*, 66 Wn. App. at 655. In essence, this second sentence is merely a restatement of the instruction on circumstantial evidence. “The term ‘circumstantial evidence’ refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.” WPI 1.03 (4<sup>th</sup> edition).

Restated more precisely, this jury instruction provides as follows:

*What the First Sentence In Isolation Instructs:* Ms. Lewis need not identify any particular chemical in the workplace that caused her symptoms. That is, Ms. Lewis need not identify a chemical in the workplace that caused her symptoms.

*What the Second Sentence in Isolation Instructs:* If a reasonable person can infer causation from the evidence, the evidence is sufficient to prove causation. Whatever the jury decides is “reasonable” is reasonable.

*What the Two Sentences in Conjunction Instruct:* If you, the jury, believe that you can infer causation from the evidence, then something in the workplace caused Ms. Lewis’s symptoms--even if she has not identified any particular chemical in the workplace capable of causing her symptoms.

*What the Two Sentences Instruct In the Context of the Evidence:* Ms. Lewis did not contend that some unidentified chemical in the workplace caused her symptoms. She alleged that a particular chemical or mix of chemicals known as Mycostat-P or Mycostat-P<sub>20</sub> was toxic in that one or more of its constituents (the fungicide propiconazole or one the solvents) caused her symptoms. Based on this jury instruction, if the jury found that Ms. Lewis failed to prove that Mycostat-P or Mycostat-P<sub>20</sub> (either the fungicide or the solvents) was toxic, it could still decide in her favor on the basis that some unidentified substance in the workplace caused her symptoms. That is, by virtue of this jury instruction, to prove causation, Ms. Lewis need merely establish that whatever specific conditions existed on Simpson’s premises while Ms. Lewis worked there is of no particular concern—that is, all she needed to prove causation was

that (1) Ms. Lewis got some fungicide on her clothes at work; (2) that Simpson changed its brand of fungicide in 2002 and again in 2003; and (3) that she said she had symptoms that she did not have before 2002.

The trial court erred in giving this jury instruction. First, the first sentence of this jury instruction is an incorrect statement of the law. It does not instruct the jury that Ms. Lewis must prove that at least some chemical exists in the workplace to which Ms. Lewis was exposed capable of causing her symptoms. *Intalco* did not eliminate the need for claimant to establish that he or she was exposed to a toxin in the workplace. In *Intalco*, the claimants identified a set of toxins in the workplace. Each member (or toxin) of that set of toxins was capable of causing the claimants' symptoms. When claimants could not single out which member or toxin of that set of toxins was responsible for their symptoms, the court held that each claimant did not need "to identify the *precise* chemical [in that set of toxins] in the workplace that caused his or her disease." *Intalco Aluminum Corp.*, 66 Wn. App. at 658. But this holding does not support the notion that claimant need not identify particular toxins in the workplace capable of causing his or her symptoms. *Ruff*, 107 Wn. App. 306 ( "No one knows what chemicals Ruff was exposed to during the week-long building remodel"). By analogy, assume claimant was injured by a single gunshot. It was proven that three people in the

workplace shot at him just before he sustained his gunshot wound. It must be assumed that one of those three people shot him. To establish that his injury arose from the workplace, claimant need not prove which of the three people (which *precise* member of the set) in fact shot him. But claimant does need to prove that someone shot at him.

Secondly, the jury instruction is unduly confusing and misleading. The first sentence of that jury instruction does not convey the context of *Intalco* that makes the first sentence of the jury instruction meaningful—namely, that the precise toxin need not be identified if the claimant has already identified a set of toxins capable of causing her symptoms. It informs the jury that given the evidence, if the jury thinks it “reasonable” to infer that something in the workplace caused Ms. Lewis’s symptoms, then the workplace caused her symptoms even if she has not identified (1) any toxin in her workplace (2) to which she was exposed (3) capable of causing her symptoms. The second sentence of that instruction is more a statement of the legal standard governing the court in evaluating the legal sufficiency of the facts to support a verdict. The jury is not the arbiter of what is legally “reasonable” or unreasonable. The reviewing court is.

Finally, this jury instruction--cherry-picked and cobbled together--comments on the evidence. Washington Constitution Article IV, §16; *State v Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006). It is,

essentially, Ms. Lewis’s encapsulated argument—conveniently packaged for, endorsed by, and expressed through the trial court--why Ms. Lewis should prevail. *See State v Lane*, 125 Wn.2d 825, 838, 889 P.2d 929, 935-936 (1995). The trial court is telling the jury that it does not need to concern itself with the contradictory and speculative statements by Mr. Lee about whether Mycostat contains the solvent xylene; it does not even need to concern itself with whether Ms. Lewis identified a toxin in the workplace capable of causing her symptoms; indeed, to find for Ms. Lewis all it needs is to believe is that Ms. Lewis’ s symptoms arose from some unspecified aspect of her work.

This error is presumed harmful. *Jackman*, 156 Wn.2d at 743. It was harmful. In this trial, this issue was the central issue. The trial court essentially told the jury, through this cobbled together jury instruction, that it need not concern itself with identifying any chemical toxin in the workplace—contrary to the holding of *Ruff*--and that if it considered the evidence sufficient to infer causation that was sufficient for a verdict for Ms. Lewis.

### **Summary of Argument On Assignment of Error No. 3**

The trial court erred in submitting the case to the jury because there was insufficient evidence that anything in her workplace, including the alleged toxin, “Mycostat-P,” was toxic. What *purported* evidence there

was issued from Mr. Lee, who testified that he did not know *to a reasonable degree of probability* what was in Mycostat-P, but speculated based on some information on the Internet that it *might* contain xylene and toluene.

### **Argument On Assignment of Error No. 3**

Judgment as a matter of law should be granted when “a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or to have found for that party on that issue.” CR 50(a)(1); *e.g.*, *Hawley v. Sharley*, 40 Wn.2d 47, 50, 240 P.2d 557, 558 (1952); *Shumaker v Charada Investment Company*, 183 Wash. 521, 524, 49 P.2d 44, 46 (1935).

Pursuant to CR 50, Simpson moved the court for judgment as a matter of law on three occasions—namely, (1) after Ms. Lewis rested her case; (2) after both Simpson and Ms. Lewis rested their cases; and (3) after the jury returned its verdict. [RP 77/9-25; 78-94; 105-117]. On all occasions, the trial court denied these motions. [RP 94/22-25; 95/1; 117/15-25; 118/1].

In evaluating the legal merits of Simpson’s motion for judgment as a matter of law, the court should do so on the basis of Ms. Lewis’s evidence alone and not in conjunction with Simpson’s evidence. [In this regard, please refer to the discussion under Assignment of Error Number

1].

In this case, Ms. Lewis’s evidence does not provide a legally sufficient evidentiary basis for a reasonable jury to find for her.” CR 50(a)(1). Ms. Lewis had the burden of proving causation. That proof entails proving both general and specific causation. [In this regard, please see discussion under Assignment of Error Number 2]. Ms. Lewis has the burden of proving, by way of *general* causation, (1) that a toxin exists on the premises where she worked (2) that can cause injury or disease in humans of the kind she alleges she has and, by way of *specific* causation, (3) that she, in fact, was exposed to that toxin and (4), as a result, has that injury or disease.

In her attempt to prove “specific causation,” Ms. Lewis proffered and relied solely upon the expert testimony of David Buscher, M.D. and Philip Ranheim, M.D. and Laurence Lee. Both Drs. Buscher and Ranheim testified that xylene and toluene caused Ms. Lewis’s symptoms. That testimony rested on the *assumption* that Mr. Lee established that Mycostat P contained xylene or toluene. That assumption was unfounded.

**David Buscher, M.D.**

Dr. Buscher examined Ms. Lewis and found her to be normal, except for mild swollen mucus membranes and her subjective complaint of tender muscles. [CP—CABR—Buscher 10/1-6]. On the issue of

specific causation, he opined: “More probably than not, Ms. Lewis’ health problems as described are due to exposures to toxic substances at work ... ,” specifically, the solvents of toluene and xylene. [CP—CABR—Buscher 31/15-17; 44/22-25]. Dr. Buscher *assumed* that the solvents of toluene and xylene were present in an antifungal agent called Mycostat. [CP-- CABR--Buscher 44/22-25; 45/1-10].

Asked why an exposure to said solvents would cause Ms. Lewis’s symptoms, Dr. Buscher testified, “Well, I don’t know. I don’t think we can know for sure. It depends.” [CP--CABR--Buscher 29/13-15]. Asked why Ms. Lewis’s symptoms have persisted for years while irritation to her co-workers would last only a few hours, Dr. Buscher replied, “Like I say, I can’t explain it....” [CP--CABR--Buscher 30/1 & 18-25]. Asked whether Ms. Lewis’s symptoms are necessarily caused by a chemical exposure, Dr. Buscher replied, “No.” [CP--CABR--Buscher 48/13-25; 49/1-8]. He essentially reached his conclusion on specific causation on the basis of the fallacy “*post hoc, ergo propter hoc*”—that before Mycostat was used, Ms. Lewis did not complain of her symptoms, after it was introduced into the workplace, she did complain of her symptoms; therefore, something in her workplace caused her symptoms. [CP—CABR—Buscher 31/21-24].

Dr. Buscher acknowledged that the MSDS for Mycostat did not list any harmful chemical. [CP—CABR—Buscher 12/24-25]. He further

acknowledged that in Washington a MSDS is not required to list non-toxic solvents. [CP—CABR—Buscher 38/6-12]. The sole reason Dr. Buscher believed that Mycostat contained the solvents of toluene and xylene was that he believed Mr. Lee had identified toluene and xylene as being in Mycostat. In short, Dr. Buscher *assumed* that Mr. Lee knew what was in Mycostat. [CP--CABR--Buscher 20/6-19; 45/1-7].

Q: “So once the Mycostat was introduced, it is your opinion that that is what caused these symptoms; correct?”

A: “That’s what I understand, yes.”

Q: “And the reason you say that, that’s based on your understanding that the solvents of toluene and xylene were present in the Mycostat; correct?”

A: “That’s what I understand; that’s correct.”

Q: And you got that from that report from Mr. Lee, from the industrial hygienist’s report, correct?”

A: “Yes.”

Q: “And you are assuming that Mr. Lee knew what was in Mycostat in offering the opinions of what was in there; correct?”

A: “Correct.” [CP--CABR--Buscher 44/18-25; 45/1-7].

### **Philip Ranheim, M.D.**

Dr. Ranheim examined Ms. Lewis once on April 26, 2003. [CP--CABR--Ranheim 7/1-2]. He never treated her. [CP-- CABR--Ranheim 24/22-25]. Her examination was essentially normal, except she had a fungus infection in her toenails; a positive stress Romberg test; and slight asymmetry in her ankle reflexes. [CP—CABR—Ranheim 9/1-18]. On

the issue of specific causation, Dr. Ranheim opined that Mycostat caused Ms. Lewis's symptoms. [CP—CABR--Ranheim 28/2-5]. He based this opinion on the *assumption* that constituents of Mycostat included the solvents toluene and xylene. [CP—CABR--Ranheim 31/5-25; 32/11-8]. Dr. Ranheim agreed that the Material Safety Data Sheet (MSDS) for Mycostat did not refer to the solvents toluene or xylene. [CP—CABR--Ranheim 28/11-18; 29/8-11]. He assumed that Mycostat included the solvents toluene and xylene based on Mr. Lee's report. [CP--Ranheim 19/15-19; 31/5-25; 32/11-8]. If Mycostat did not contain toluene or xylene, that fact would undermine Dr. Ranheim's opinion on causation. [CP—CABR--Ranheim 21/ 4-10; 31/ /5-25; 32/11-8].

**Laurence Lee, CIH**

Both Drs. Buscher and Ranheim based their opinions on specific causation on the following chain of assumptions: First, they believed that Ms. Lewis's symptoms were the result of exposure to the solvents toluene and xylene. Secondly, they believed that Ms. Lewis was exposed to these two solvents when she was exposed to Mycostat in the belief that Mycostat contained these two solvents. Thirdly, they believed that Mycostat contained these two solvents on the belief that Mr. Lee had identified these two solvents as being, in fact, in Mycostat.

The foundation of the opinions of both Drs. Buscher and Ranheim on the issue of specific causation is, in fact, false. An opinion based on inaccurate data is without evidentiary value. *E.g.*, *Parr v Dep't of Labor & Indus.*, 46 Wn.2d 144, 145-146, 278 P.2d 666, 668 (1955); *Cyr v Dep't of Labor & Indus.*, 47 Wn.2d 92, 96, 286 P.2d 1038, 1040 (1955); *Berndt v Dep't of Labor & Indus.*, 44 Wn.2d 138, 148-149, 265 P.2d 1037, 1043 (1954).

Initially, Mr. Lee testified that he determined from an agricultural website that xylene was a solvent that can be and has been blended with propiconazole. [CP—CABR--Lee 17/15-20]. But, in the same breath, he then testified that he did not know what solvents were in Mycostat. [CP—CABR--Lee 15/17-20]. In fact, he could not testify *to a reasonable degree of probability* that the solvents xylene and toluene were constituents of Mycostat. That is, he could not say to a degree of probability greater than chance that xylene and toluene were constituents of Mycostat. So, when he initially said that xylene was a constituent of Mycostat, he was merely speculating.

He testified, as follows, seven (7) times that he did not know whether the solvents toluene and xylene were in Mycostat 20:

**First Time:**

A: “I found a website that had listed solvents that are used for these kinds of products, so that’s what has been listed. Now, how--given your question *on the more-probable-than-not basis*, I really don’t know what that solvents were. I never received confirmation from the manufacturer.” [Emphasis supplied.] [CP—CABR--Lee 15/17-20].

**Second Time:**

Q. “Now, in assuming that the 80% of solvents for the Mycostat 20, were you assuming that xylene was attached to that solvent?”

A. “I really have no ideas what was in that. As I said earlier, from an agricultural website, they listed solvents that are used and blended with propiconazole. And all of them listed here, included xylene, were listed there. But, I don’t know whether xylene is in that product or not.” [CP—CABR--Lee 17/12-20].

**Third Time:**

Q: “So is this report of January 12, 2004 written with the assumption that the information you got off the Internet indicating that xylene was one of the solvents was present in Mycostat 20?”

A: “I don’t know whether it was in it or not.”

**Fourth Time:**

Q: “That’s not what I’m asking. I’m asking whether you wrote this report as if you’re assuming that it was in there, based on what you reviewed on the Internet?”

A: “No.” [CP—CABR--Lee 18/2-10].

**Fifth Time:**

Q: “Where you say, ‘The solvents in Mycostat 20 most likely include,’ and then you list a series of items, you don’t know what is in Mycostat 20, do you?”

A: “No.”

**Sixth Time:**

Q: “So the statement, most likely, is probably inaccurate, isn’t it?”

A: “It’s most likely based on the review of industry information. I don’t know what the root of your question is: Do I know what’s in that? I don’t know.”

**Seventh Time:**

Q: “So you don’t know any of those items that you list, including mineral oil, petroleum (Stoddard) solvents, toluene, xylene, glycol ethers, and alcohols commonly found in paints, you don’t know whether on or any of those are Mycostat 20, do you?”

A: No, I do not.” [CP—CABR--Lee 21/21-25; 22/1-13].

Speculation is not a reasonable basis for an expert opinion where the opinion must be probable. There is no way to convert Mr. Lee’s repeated testimony that he does not know what solvents are in Mycostat 20 into a statement that he does know what solvents are in Mycostat 20.

Nor is there is a way to infer from Mr. Lee's testimony that Mycostat 20 has, as constituents, the solvents toluene and xylene. Without proof from Mr. Lee that Mycostat 20 contains the solvents toluene and xylene, what proof exists that Mycostat 20, in fact, contains the solvents toluene and xylene? The answer is, none. Given that Drs. Buscher and Ranheim base their opinions on specific causation on the *assumption* that Mr. Lee knew that Mycostat 20 contained as solvents toluene and xylene, how can those opinions be anything but speculation. Speculation has never been and, all who love justice should hope, shall never be an adequate basis for a verdict. Testimony that the work exposure might have, or could have, caused the worker's condition is insufficient to remove the causal relationship from the realm of speculation to the realm of reality. *See, e.g., Zipp v. Seattle Sch. Dist. No. 1*, 36 Wash. App. 598, 601, 676 P.2d 538, *rev. den.*, 101 Wash.2d 1023 (1984).

Robert Miller testified, without equivocation, that xylene is not used or found in "Mycostat" or "Microstat-P." [CP—CABR--Miller 17/12-26; 18/1-26; 20/11-25]. Nothing in Simpson's evidence supported directly or indirectly that Mycostat or Microstat-P contained xylene or toluene. So Simpson did not fill in the evidentiary gaps in Ms. Lewis's failed effort to establish her *prima facie* case.

Washington law does not sanction that Ms. Lewis might satisfy her burden of proof on the issue of specific causation by merely proving (1) that a toxic chemical might be in the workplace and (2) that if it were in the workplace, then Ms. Lewis might have been exposed to that chemical. *Intalco Aluminum Corp. v Dep't of Labor & Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992), *rev. den.*, 120 Wash.2d 1031, 847 P.2d 481 (1993); *Ruff v Dep't of Labor & Indus.*, 107 Wn. App. 289, 28 P.3d 1 (2001). In *Ruff*, Ms. Ruff argued that she satisfied her burden of proof by establishing that she was exposed unidentified chemicals in her workplace and that thereafter she developed a disease known as porphyria. She argued, as did Ms. Lewis in this case, that she need not establish what those chemicals were, citing to *Intalco*. The court disagreed, explaining:

*“Intalco \*\*\* is distinguishable \*\*\*. “\*\*\*.” “The Intalco court rejected the employer's claim that there was insufficient evidence to support the jury's finding of proximate cause between the claimants' disease and their workplace exposure because no physician could identify the specific toxic agent or agents in the pot room that proximately caused the claimants' disease. The court declined to require proof of the precise chemical that caused the claimants' disease because several neurotoxins were identified in the pot room, it was undisputed that the neurotoxins cause symptoms similar to that exhibited by the claimants, and their symptoms did not fit the diagnostic criteria of any known disease. In contrast, no one knows what chemicals Ruff was exposed to during the week-long building remodel.” Ruff, 107 Wn. App. at 305-306.*

#### **Summary of Argument On Assignment of Error No. 4**

The trial court erred in excluding from evidence the testimony of two of Simpson's expert witnesses about the psychological origin of Ms. Lewis' symptoms on the grounds that to do otherwise would be to violate the IAJ's original ruling disallowing an independent CR 35 psychiatric examination.

#### **Argument On Assignment of Error No. 4**

Over Simpson's objection, the trial abused its discretion in ruling to exclude certain portions of the testimony of Drs. Martin and Montanaro, mentioning psychiatric disorders. *Weyerhaeuser Company v Commercial Union Insurance Company*, 142 Wn.2d 654, 683, 15 P.3d 115, 131-132 (2000). [RP 30-51; 51/14-25; 52-54/1-5; CP 17—Defendant's Motion to Reconsider Evidentiary Rulings of Hearings Judge dated January 30, 2007].

After the BIIA hearing, Ms. Lewis moved to exclude testimony she characterized as "constituting an expression of psychiatric opinion by medical witnesses." [CP--CABR 18/24-25]. On March 27, 2006, the IAJ granted that motion in his Proposed Decision and Order (PDO). [CP--CABR 19/12-15, 18, 23-24, & 27-28]. That March order was predicated on a pre-hearing order dated November 9, 2005. That November order

was predicated on the IAJ's interpretation of a stipulation of the parties on July 27, 2005 (“[a]t this July 27, 2005 hearing, all parties stipulated to a CR 35 order that barred mental examination of the claimant”). [CP--CABR 2-6; 7/28-51; 8/1-51; 9/1-12; 18/27-30; 204/25-26; 205/1-3]. From this purported agreement, the IAJ concluded that “an expression of psychiatric opinion in the CR 35 examination violates the CR 35 order entered on August 1, 2005 which states that the agreement of the parties that there will be no mental examination.” [CP--CABR 205/1-3].

That stipulation the IAJ interpreted as applying to all medical witnesses, whether or not psychiatrists or psychologists and whether or not the witness had examined Ms. Lewis in a CR 35 examination. [CP--CABR 18/26-27]. Two of those medical witnesses were proffered by Simpson: Thomas G. Martin, M.D., board certified in medical toxicology, emergency medicine and occupational medicine; and Anthony Montanaro, M.D., board certified in allergy and rheumatology and immunology. [CP—CABR--T.G. Martin 4/22-25; A. Montanaro 7/1-2]. Very importantly, Dr. Martin was essentially a treating physician; he had examined Ms. Lewis, not as a CR 35 examination, but at the request of her primary physician. [CP—CABR—T.G. Martin 8/3; 12/10-11 & 18-15; 34/7-9].

What the trial court excluded was the following testimony by Drs.

Martin and Montanaro:

**Dr. Martin:**

① Q. “Explain the basis for your opinion that she does not have a medical condition that you would relate to exposure to chemicals at Simpson Timber Company.”

A. “Well, most the symptoms that she had had not been previously described with people exposed to the chemical that she was exposed to and which she expressed concern about. And the symptoms that she described are commonly seen in the occupational and environmental medicine clinic in patients that there is no obvious source for and sometimes they can be characterized, if certain symptoms are present, such as with the diagnosis of fibromyalgia, chronic fatigue, Gulf War syndrome and so forth, and so the problems with the cognitive, feeling confused, feeling spacey, musculoskeletal pain, weakness, fatigue, and so we didn’t think that her symptoms were related to the workplace exposures. **We thought more likely that it was some psychiatric diagnosis that was more probably the cause of her symptoms.**” [CP--CABR—T.G. Martin 27/7-25].

② Q. “Do you ascribe to that [multiple chemical sensitivities syndrome] as a true medical diagnosis?”

A. “I do not.”

Q. “ Will you explain why?”

A. “Well, I’ve reviewed the literature on the various articles that have been shown, that have been written to try to find the etiology and the pathophysiology of multiple chemical sensitivity, and it’s both my opinion and that of numerous authorities who reviewed this in the peer reviewed journals and several professional organizations that there is no well-defined mechanism for this illness, nor is there a consistent set of findings that

characterize it and that, as I said before, the signs and symptoms that are described often overlap with chronic fatigue syndrome and fibromyalgia and seem to be in many ways similar to those symptoms and those syndromes and **I believe probably are secondary more to somatoform disorder rather than a chemical exposure.**" [CP--CABR—T.G. Martin 28/8-25].

③ Q. "Your only diagnostic or potential assessments included fibromyalgia, correct?"

A. "No. Our diagnostic assessment was that her symptoms were not related to the workplace exposure, that was the primary diagnostic assessment, on a more probable than not basis. Now, oftentimes patients say then, well, what could it be due to? And sometime we will suggests some other possible diagnoses, **like depression** and/or fibromyalgia for somebody who has multiple aches and fatigue and extremity pain." [CP--CABR—T.G. Martin 39/21-25; 40/1-5].

④ Q. "So there isn't any medical explanation in these set of facts to explain the symptoms?"

A. "Yes, I haven't seen any to explain her symptoms."

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Q. "Well, I guess the medical reason would be what you put in there, fibromyalgia or possibly some type of somatoform disorder..."

A. "**Yes. I think more likely a somatoform disorder.**" [CP--CABR—T.G. Martin 60/15-24].

**Dr. Montanaro:**

Q. "Now, you say you have a good medical explanation for these symptoms. What is that?"

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A. "**I think my report is very clear that I think she suffers from a very significant depression and that she is relating symptoms that were quite**

**compatible with that, that she appeared quite depressed during the course of her evaluation. It would be very unusual for a patient to be crying throughout an examination if there weren't significant elements of depression.”** [CP--CABR—A. Montanaro 55/6-13].

A statement by a medical physician, in the process of formulating a differential diagnosis by exclusion, that identifies a psychiatric differential as a diagnosis by exclusion is not a “mental examination.” The IAJ, in striking the select testimony of Drs. Martin and Montanaro as set forth above has over interpreted the phrase “mental examination” in concluding that the examining physicians cannot identify the most likely origin or cause of Ms. Lewis’s presenting symptoms where they believe that the origin is in the mind not the body.

The parties agreed that no expert would undertake a CR 35 psychiatric, psychological or neuropsychological mental examination of Ms. Lewis. But when the IAJ ruled on Simpson’s Motion to Strike Additional Witnesses, he transformed that agreement, on his own initiative, into an order that “no expression of psychiatric opinion” be given. [CP--CABR 205/1-3]. That leap is unwarranted. The phrase “mental examination,” as conducted by a psychiatrist or psychologist or neuropsychologist, is not co-terminous with the phrase “an expression of a psychiatric opinion.” Nor is it co-terminous with the expression of

opinion of a physician who is not a psychiatrist, psychologist or neuropsychologist about what is, after the process of a differential diagnosis, the etiology of Ms. Lewis's symptoms.

Drs. Martin and Montanaro did not undertake a mental examination of Ms. Lewis. They undertook a physical examination only. They administered no psychological or neuropsychological tests. They did none of that which psychiatrists or psychologists or neuropsychologists do to elicit the contents of the "mind."

The error of excluding the testimony of Drs. Martin and Montanaro is not harmless. Simpson's experts were only allowed to explain what were *not* the etiologies of Ms. Lewis's symptoms; they could not explain what were the etiologies for those symptoms. Ms. Lewis's experts were allowed to explain what were the etiologies of those symptoms. When Simpson's experts testify that the symptoms Ms. Lewis has are not from a chemical exposure, but, unlike Ms. Lewis's experts, are not allowed to opine about the etiology of those symptoms, the jury is naturally left in doubt about what is the etiology of those symptoms and about basis for the physician's diagnosis in the first place. *See Ruff v Dep't of Labor & Indus.*, 107 Wn. App. 289, 306, 28 P.3d 1, 10 (2001) (where a differential diagnoses established that Ms. Ruff's symptoms more likely stemmed from panic disorder and depression). In that event,

the jury is apt to give more weight to the testimony of Ms. Lewis's experts.

#### **Summary of Argument On Assignment of Error No. 5**

The trial court erred in admitting photographs (Ex 3 through 9) for several reasons. First, Ms. Lewis trespassed on Simpson's property to take the unauthorized photographs. Secondly, the photographs were introduced, in violation of the IAJ's discovery deadline, after Simpson had completed its case in chief. Finally, the photographs were unduly prejudicial in depicting a skull and cross bones on the door to the so-called chemical room.

#### **Argument On Assignment of Error No. 5**

Over Simpson's objection, the trial court admitted seven photographs of Simpson's premises into evidence, and in doing so, abused its discretion.<sup>5</sup> [RP 71/24-25; 72/1; CP—CABR—Cindy Lewis: Ex 3 through 9].

1. After Ms. Lewis had left Simpson's employ, and shortly before testifying before the BIIA in late 2005, she entered Simpson's premises

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<sup>5</sup> In response to Simpson's objection, the IAJ ruled to exclude the photographs because (1) Simpson had already presented its case as far as its lay witnesses and so could not comment on whether the photographs accurately depicted Simpson's premises in 2003 when Ms. Lewis worked there and (2) the photographs depicted Simpson's premises differently from how the premises appeared when Ms. Lewis worked there. [CP--CABR--Cindy Lewis 53/41-50; 54/1-12].

without permission to take photographs for use at the hearing. [CP—CABR—Cindy Lewis: Ex 3 through 9; CP--CABR--Cindy Lewis 45/31-51; 46/1-12; 48/21-43; 49/45-51; 50/1-37; 51/31-36; 52/13-27].

Entering upon Simpson's premises unlawfully to take photographs for use in court is akin to unlawfully entering the office of Simpson's counsel to purloin a privileged document to use in court. The sanction for such conduct should be an inability to use that unlawfully gained evidence in court. CR 37 allows the trial court to exclude evidence as a sanction for discovery violations.

2. Simpson became aware of the photographs well after the discovery deadline and after it had rested its case when Ms. Lewis, during her testimony before the BIIA, offered them into evidence. [CP—CABR—Cindy Lewis 50/47-51; 51/1-51; 52/1-29; 53/41-51; 54/1-12]. This tactic is an excellent example of “trial by ambush,” a devious practice the Washington Civil Rules are designed to eliminate. Introduction at trial of this previously undisclosed evidence is unfairly prejudicial to Simpson. *Cf.* ER 403.

The trial court should have excluded that evidence as a sanction. CR 35; *see Eagle Group, Inc. v Pullen*, 114 Wn.App. 409, 417-418, 58 P.3d 292, 297-298 (2002).

3. Clearly, the only reason Ms. Lewis wanted the jury to see the

photograph of the so-called “poison room” with the crudely rendered skull and cross bones scratched on the upper half of its door was in the hope that it would unduly prejudice the jury against Simpson. [CP—CABR—Cindy Lewis: Ex 8; CP—CABR—Cindy Lewis 48/21-45]. Ms. Lewis could not establish who created the skull and cross bones on that door—whether it was a disgruntled employee or someone with authority at Simpson. She could not establish when it was scratched onto the door. She could not establish why it was on the door—for instance, was rat poison kept there? Of course, because the photograph was introduced into evidence after Simpson had rested its case, Simpson had no opportunity to rebut or explain the presence of the skull and cross bones on that door and whether it had any relevance to Ms. Lewis’s allegations. For all the trial court knew, Ms. Lewis may have staged the photograph to bolster her claim.

The trial court should have refused to admit that photograph under ER 403. ER 403 provides that “although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *See State v Ortiz*, 34 Wn.App. 694, 697, 664 P.2d 1267, 1269 (1983); *Kirk v Washington State University*, 109 Wn.2d 448,

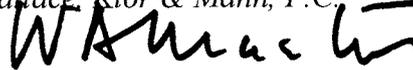
462, 746 P.2d 285, 293 (1987) (Evidence posing the risk of creating unfair prejudice is evidence more likely to arouse an emotional response than a rational decision among jurors).

#### IV. CONCLUSION

For the preceding reasons, this court should reverse the rulings of the trial court, vacate the judgment entered in favor of Ms. Lewis and enter judgment in favor of Simpson.

Respectfully submitted this 6<sup>th</sup> day of September 2007.

*Wallace, Klor & Mann, P.C.*



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## V. APPENDIX

### WASHINGTON STATUTES

RCW 51.52.050

Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, which shall be addressed to such person at his or her last known address as shown by the records of the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia:

PROVIDED, That a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal: PROVIDED, That in an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

## WASHINGTON REGULATIONS

WAC 263-12-115(2)(a) and (c)

”(2) *Order of presentation of evidence.*

(a) In any appeal under either the Industrial Insurance Act, the Worker and Community Right to Know Act or the Crime Victims Compensation Act, the appealing party shall initially introduce all evidence in his or her case-in-chief except that in an appeal from an order of the department that alleges fraud the department or self-insured employer shall initially introduce all evidence in its case-in-chief.”

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”(c) After the party with the initial burden has presented his or her case-in-chief, the other parties may then introduce the evidence necessary to their cases-in-chief. In the event there is more than one other party, they may either present their cases-in-chief successively or may join in their presentation. Rebuttal evidence shall be received in the same order. Witnesses may be called out of turn in contravention of this rule only by agreement of all parties.”

## CONSTITUTIONS

Washington Constitution Article IV, Section 16

“§16 CHARGING JURIES. Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

## COURT RULES

CR 35

Physical and mental examination of persons.

(a) *Examination*

(1) *Order for examination* When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to

produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

”\*\*\*.”

CR 37

Failure to make discovery: Sanctions.

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(b) *Failure to comply with order*

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(2) *Sanctions by court in which action is pending* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under rule 35(a) requiring him to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

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(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for production or inspection* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

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CR 50(a)(1)

Judgment As A Matter Of Law In Jury Trials; Alternative Motion For New Trial; Conditional Rulings.

(a) *Judgment as a matter of law*

(1) *Nature and effect of motion* If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable

finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.

ER 403

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

#### **OTHER AUTHORITIES**

WPI 1.03 (4<sup>th</sup> edition)

“The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.” \*\*\*

**CERTIFICATE OF SERVICE**

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I hereby certify I filed that ABC Legal will process serve the BRIEF OF APPELLANT on the Court of Appeals of the State of Washington - Division II delivering the original on September 7, 2007, addressed as follows:

**ORIGINAL TO:** David C. Ponzoha  
Appellate Court Clerk  
Court of Appeals - Division II  
950 Broadway, Suite 300  
MS TB-06  
Tacoma, WA 98402-4454

I further certify that I served the foregoing BRIEF OF APPELLANT on the following parties on September 6, 2007, by mailing to said parties to this action a true copy thereof, certified by me as such, with postage prepaid, addressed to said parties at their last-known addresses as follows, and deposited in the post office at Lake Oswego, Oregon on said day:

**TRUE COPY TO:** Clerk of the Court  
Mason County Superior Court  
419 N. 4<sup>th</sup> St., Floor 2  
Shelton, WA 98584-0340

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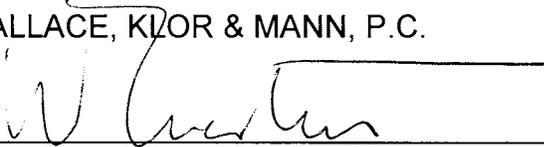
BY \_\_\_\_\_  
Clerk of the Court  
Mason County Superior Court  
Shelton, WA 98584-0340

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Bill Johnson  
Workers Compensation Administrator  
Simpson Investment Company  
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DATED: September 6, 2007

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and Simpson Investment Company