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COURT OF APPEALS
DIVISION II
09 JAN 30 AM 8:06
STATE OF WASHINGTON
BY _____
DEPUTY

NO. 38391-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CHUNYK & CONLEY/QUAD C., Respondent,

vs.

PATRICIA BRAY, Appellant,

BRIEF OF APPELLANT PATRICIA BRAY

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I. Introduction

This matter comes before the Court of Appeals on review of the jury verdict finding in favor of the employer, which reversed the decision and order of the Board of Industrial Insurance Appeals (BIIA). The BIIA decision had found that injured worker Patricia Bray, a licensed registered nurse, was entitled to time loss for a four-year period from April 1, 1999 through May 30, 2003 due to the effects of her industrial injuries. The BIIA affirmed a Department of Labor and Industries decision ordering the employer ot pay time loss because the worker was unable to work due to the industrial injuries for that time period. The sole issue below was whether there was sufficient evidence to support the findings of the BIIA. In reversing the BIIA, the jury found there was not sufficient evidence. The central question presented by this proceeding is, was she able to work due to the effects of the industrial injury. The Department of Labor and Industries said no; the Board of Industrial Insurance Appeals said no. The Mason County jury said yes. A significant fact in that determination should be, what are the industrial injuries and what conditions flow from them? The DLI and BIIA knew what the industrial injuries were, because that issue had been resolved in earlier proceedings; furthermore the parties

stipulated to the accepted conditions at the BIIA hearing. The jury was not permitted to know this information because the trial judge failed to so instruct them.

II. Assignments of Error

No. 1 - The trial court erred in granting the employer's motion to strike claimant's testimony from the Certified Appellate Board Record on how the accepted conditions impacted her non-work life, as distinguished from her work life.

No. 2 - The trial court erred in refusing to give Patricia Bray's proposed jury instruction #8, advising the jury of the accepted conditions in her industrial insurance claim, or otherwise permitting the parties' stipulation on accepted conditions to be presented to the jury.

No. 3 - The trial court erred in giving instruction # 5, which included a phrase which injects an incorrect statement of the an issue of law specifically that the claimant had returned to pre-injury status.

No. 4 - The jury verdict was not supported by substantial evidence.

No. 5 - The trial court erred in refusing to grant a new trial pursuant to CR 59.

No. 6 - Patricia Bray should be awarded attorney fees on appeal

pursuant to RCW 51.52.130.

Issues Pertaining to Assignments of Error

Was it error for the trial court to refuse to permit the jury to consider injured worker Patricia Bray's testimony about how the injury limited her day-to-day activities, as distinguished from her work activities, to more ably permit the jury to understand the limitations of her disabling conditions and therefore her ability to work? (Assignment of Error #1).

Was it error to refuse to give injured worker Patricia Brays's proposed instruction # 8, which would have advised the jury that the conditions accepted as connected to this industrial insurance claim were Reflex Sympathetic Dystrophy and depression, and which would have prevented the jury from speculation about an issue not before them, namely whether RSD and depression were proximately caused by the industrial injury, an issue which was res judicata in this appeal? (Assignment of Error #2).

Was it error for the trial court to give instruction #5, which introduced an concept irrelevant to eligibility for time loss, namely return to pre-injury status, and therefore invited the jury to speculate?

(Assignment of Error #3).

Was there substantial evidence to support the jury's verdict, which found there was insufficient evidence to support the Board of Industrial Appeals findings and conclusions that the injured worker was unable to work from April 1, 1999 through May 30, 2003 due to the effects of the industrial injury accepted conditions? (Assignment of Error #4).

Did the trial court err in refusing to grant a new trial pursuant to CR 59? (Assignment of Error #5).

If successful in this appeal, claimant should be awarded her costs and attorney fees pursuant to RCW 51.52.130.

III. Statement of the Case

Patricia Bray, an R.N., had worked in nursing for over 30 years. She was employed by self-insured employer Chunyk and Conley/Quad C, at one of their dementia nursing homes in Tacoma. (Certified Appeal Board Record, hereafter CABR, Decision and order, P. 3, paragraph 2; SCOMIS 1). Her specialty area was performing detailed patient evaluations required by the government and known as Minimum Data Sets (MDS assessments (CABR June 14, 2007 proceedings, p. 16, l. 10-11) which documented every aspect of the patient's health and well being

(CABR June 14, 2007 proceedings, p. 10-15). In July 1997, she broke her right wrist in an employer-sponsored softball game. She lost no time from work from this injury, which was not handled as an on-the-job injury. (CABR June 14, 2007 proceedings, p. 25, l. 19-26, p. 26, l. 1-26). However, a month later on August 25, 1997, during the course of her employment, she struck her casted wrist on two large falling binders and "saw stars." (CABR June 14, 2007 proceedings, p. 27, l. 11-25.) She sought medical treatment and was diagnosed with Reflex Sympathetic Dystrophy (RSD), now known at Complex Regional Pain Syndrome, or CPRS. RSD is an unusual condition characterized by extreme sensitivity to any stimulation and extreme pain with resulting limitation in function of the extremity. (CABR June 14, 2007 proceeding, p. 31, l. 4; deposition of Dr. Hassan, p. 12, l. 6-26, p. 13, l. 1-5.) Ms. Bray filed an industrial insurance claim but continued to work. She treated with extensive physical and occupational therapy, medication and a nerve block and wore an outrigger splint to pull her fingers out of flexed position for most of the time she remained on the job with the employer. (CABR June 14, 2007 proceedings, p. 31, l. 25-26, p 32 l. 1–26, p. 33, l. 7). During the course of her claim she also developed a recurrence of depression, something she

had experienced and been treated for periodically in the past. (CABR June 14, 2007 proceedings, p. 48. l. 19-23.) Both the RSD and later the depressive conditions were accepted by the Department of Labor and Industries as causally connected to the industrial accident. (CABR June 13, 2007 proceedings, p. 71, l. 25-26, p. 72, l. 1-7.) The worker quit her job with Chunyk and Conley approximately a year after the industrial injury. Ms. Bray testified before the BIIA that she quit rather than being fired as a result of her decreased ability to do the job properly due to the industrial injury. (CABR June 14, 2007 proceedings p. 45, l. 12-16.) She testified that while she had no difficulty performing the job before the industrial injury, that changed after the industrial injury: she began receiving reprimands for her work performance, working off the clock because she could not get her job done (CABR June 14, 2007 proceedings, p. 43, l. 4-26). She testified her department received a negative audit under her watch for which she felt responsible in January 1998. (CABR June 14, 2007 proceedings, p. 47, l. 4-26.) She testified she received a severe reprimand as a result. (CABR June 14, 2007 proceedings p. 43, l. 24.) She testified she could not get her job done during work hours and her arm prevented her from performing adequately. (CABR

June 14, 2007 proceedings, p. 43, l. 15-26; p. 44, l. 1-26, p. 45, l. 1-19.) She testified that her injuries then, and later, made it difficult and later impossible to work because they slowed her down, her concentration was shot, she was distracted by pain, she experienced forgetting, she was awkward, distressed, couldn't open pill bottles, couldn't roll patients to perform her assessments or undress them, or get them in and out of a wheelchair without the assistance of another, could not concentrate or remember and couldn't learn new information, all necessary for her job. (CABR June 14, 2007 proceedings, p. 38, l. 17-25; p.40, l. 1-26; p. 43, l. 2-20.) This was corroborated in part by testimony of the employer witness Kathy Stone, the injured worker's former supervisor, who testified that Ms. Bray began employment in June 1997, was there a year (CABR June 13, 2007 proceedings, p. 6, l. 17-19), was excellent at her tasks (CABR June 13, 2007 proceedings p. 7, l. 11), that she maintained adequately after the industrial injury (CABR June 13, 2007 proceedings p . 14, l. 12-14) but she also admitted that toward the end of the worker's year stay, the supervisor discovered "several incomplete forms (CABR June 13, 2007 proceedings p. 16, l. 12-24) and that she discovered the injured worker had a "nest" under her desk where she was sleeping after work hours (CABR

June 13, 2007 proceedings P. 36, l. 25, P. 37, l. 1-37). She agreed that she disciplined Ms. Bray for taking files home against company rules. (CABR June 13, 2007 proceedings, p. 39, l. 3-18.)

Ms. Bray testified she quit before she was fired. She took another job in another nursing home in the summer of 1998 in Montesano. (CABR June 14, 2007 proceedings p. 45, l. 18-21.) She was moved and promoted in that job to Director of Nursing in Cathlamet (CABR June 14, 2007 proceedings p. 48, l. 2) where she worked for 5 weeks and was fired in approximately February 1999. (CABR June 14, 2007 proceedings p. 50, l. 21.) She then sought a home care aid placement for room and board and was fired. She did not work after April 1, 1999. (CABR June 14, 2007 proceedings p. 52, l. 4-26, p. 53, l. 1-9.)

By order dated May 3, 2006, the Department of Labor and Industries ordered the employer to pay time loss benefits to the injured worker for the time period April 1, 1999 through May 30, 2003. The employer protested that decision on July 3, 2006. The Department reaffirmed its order directing the employer to pay time loss by order dated August 9, 2006. The employer appealed that decision to the Board of Industrial Insurance Appeals. This appeal was litigated before the BIIA in

the spring of 2007 (CABR 3, BIIA Decision and Order dated 12/16/07, Findings of Fact 1). The sole issue on appeal was whether the Department was correct in ordering the employer to pay time loss for the time period April 1, 1999 through May 30, 2003.

During the proceedings before the BIIA, the industrial insurance appeals judge took judicial notice of the fact that the parties had litigated a previous appeal, which findings were res judicata and binding on the current appeal. Those findings were that the worker had suffered an industrial injury on August 25, 1997 while in the course of her employment with the employer, that the industrial injury was an aggravation of her the Colles' wrist fracture which had occurred July 27, 1997, that the aggravation was a proximate cause of reflex sympathetic dystrophy of her right arm, and that her industrial injury and resulting reflex sympathetic dystrophy proximately caused, in part, a depressive condition. (CABR 79, Proposed Decision and Order, p. 10.) In addition, the employer and worker stipulated at the BIIA that the accepted conditions under this claim were RSD and as an aggravation of the right wrist Colles' fracture and for the depressive condition for which she sought treatment, caused in part by the industrial injury and resultant

CRPS. (CABR June 13, 2007 proceedings p. 71, l. 25-26, p. 72, l. 1-7.)

The employer's witnesses at the BIIA in this chapter of appeals were retired orthopedic surgeon Dr. Birkeland who had seen Ms. Bray once in February 1998, a year before she ceased working; Dr. Schneider, psychiatrist, who saw her once in 2000, one year after she ceased working, and Dr. Friedman, psychiatrist, who saw her once in 2001, two years after she ceased working. The employer also called the worker's attending orthopedic surgeon, Dr. Douglas Hassan, and her attending treating psychologist, Dr. Steven Langer. The employer also called supervisors Kathy Stone, Kathy Williams, and the claims manager Ms. Moynihan.

Their testimony on the issue of injured worker's inability to work from 4/1/99-5/30/03 was as follows:

-- Dr. Hassan: She was unable to work as a nurse due to the accepted conditions from 4/1/99 through 5/30/02; and was unable to perform general work to work during that time period due to the psychological component of her accepted condition; and furthermore, she was unable to work due more to the depression from 5/30/02-5/30/03. (CABR, Deposition of Dr. Hassan, p. 28-29, p. 33.)

-- Dr. Langer: She was unable to work at anything during the

period in question due to the industrial injuries. (CABR, Deposition of Dr. Langer, p. 47.)

-- Dr. Schneider: Although he testified he saw no emotional condition alone that would have prevented Ms. Bray from working, he also testified that he could not answer whether her emotional condition coupled with her RSD would prevent her from working because he didn't know how bad her RSD was, and further that he deferred to Dr. Langer on the issue of Ms. Bray's inability to work. (CABR, deposition of Dr. Schneider, p. 53-55.)

-- Dr. Friedman: Although Dr. Friedman testified that her Global Assessment of Functioning (GAF) score of 50 indicated Ms. Bray had serious psychologist issues including suicidal ideation and would benefit from psychological treatment (CABR Deposition of Dr. Schneider, p. 56, 57), he did not see a reason she could not work; he also testified that someone with her depression **might** be able to work (emphasis added, CABR, Deposition of Dr. Friedman, p. 57) and that she could work at her former job when he saw her in 2001 (CABR Deposition of Dr. Schneider, p. l. 58, l. 1-9) although he did not know what her job duties were, Dr. Schneider found her primary (Axis I) psychiatric diagnoses to be major

depression, chronic, and pain disorder associated with psychological features and a medical condition (CABR Deposition of Dr. Schneider, p. 50).

-- Dr. Birkeland, defense orthopedic surgeon saw Ms. Bray February 1998 when she was still working and he was still practicing. (CABR Deposition of Dr. Birkeland, p. 5, l. 16-19, p. 6, l. 8-9, p. 18, l. 4-5). He testified that he had semi-retired in 1993 when he began seeing patients only once a week but referred them to his partners if they wanted treatment; that he performed no surgeries after 1992 (CABR Deposition of Dr. Birkeland p. 19, l. 1-25). He testified that he surrendered his license in 2005 (CABR Deposition of Dr. Birkeland, p. 18, l. 18-25). He testified that he saw her one time for an IME, (CABR Deposition of Dr. Birkeland p. 21, l. 13-14), that she was sent to him with a diagnosis of RSD which he did not challenge or dispute at the time (CABR Deposition of Dr. Birkeland p. 33, l. 13-23). He testified that, in preparation for his testimony, he had reviewed nothing more than his own 2/98 report and 3/98 addendum since he wrote those reports, and that he had reviewed no other records. (CABR Deposition of Dr. Birkeland p. 23, l. 1-4). He testified that in his 2/98 report he found Ms. Bray's RSD was caused

partially by the bump on the cast and found that she was medically unstable and would benefit from treatment (CABR, Deposition of Dr. Birkeland, p. 15, 16); then he recanted that testimony entirely in his 3/98 addendum after input from the employer's representative (CABR, Deposition of Dr. Birkeland, p. 37). He testified in deposition, nine years after he evaluated her, that he had absolutely no recollection of her as a patient. (CABR Deposition of Dr. Birkeland p. 22, l. 21-23.) He testified his assessment after the 2/98 exam was that she was not medically fixed and stable in her RSD and would benefit from treatment. A month later he issued an addendum in response to request from the employer which challenged the causal connection between the RSD and the industrial injury, an issue not before this tribunal. (CABR Deposition of Dr. Birkeland p. 37, l. 2-24.) P. 22, l. 21-23). At his deposition, he testified that he now believed she no longer had evidence of RSD in 2/98 (CABR, Deposition of Dr. Birkeland, p. 17, l. 15-18) despite the fact that he saw her hand was retracted into a claw (CABR, Deposition of Dr. Birkeland, p. 35). He testified that he rejects the diagnosis of RSD generally for most people, even though he had no special training in RSD: "with my expertise in everything I can say that." (CABR Deposition of

Dr. Birkeland p. 30, l. 14-23.) Finally, Dr. Birkeland testified untruthfully about his fee arrangements (CABR, Deposition of Dr. Birkeland, p. 43-45,) where in response to a question of whether his fee for an exam was $500, he said it was $150-$175 and his court testimony was $500/hour. When presented with a transcript of his testimony in another proceeding where he testified in 1997 that his fee was $1000/hour for court testimony, he agreed that was true. On the ultimate issue of whether Ms. Bray could work, he testified that "she was working full time at the time I saw her...at that point I would not have seen any problem with her working full time ongoing from the time I saw her." (CABR Deposition of Dr. Birkeland, p. 18, l. 1-8.)

The employer also put on the testimony of the worker's supervisor Karen Williams to rebut the worker's testimony that her own poor work resulted in a bad nursing home survey in 1998. Ms. Williams testified in detail about the bad annual audit of 1997, before Ms. Bray worked there, and the good audit in 1999, after she had been gone, but was not asked questions and did not testify regarding the audit which Ms. Bray testified about, occurring in 1998. (CABR deposition of Williams, p. 25, l. 13-23.)

In addition to her two treating providers, the worker testified on her own behalf and presented testimony of her partner Von Wilson on the issue of her limitations and her inability to work.

The Board found that Ms. Bray was unable to work due to the effects of her industrially accepted conditions from April 1, 1999 through May 30, 2003, which normally would compel the employer to reimburse her time loss. The Board and jury had the benefit of numerous exhibits including photos of the braced splinting device worn by Ms. Bray and the detailed MDS data sheets which she completed.

The employer appealed the Board decision to the Mason County Superior Court. The matter was tried to a 6-person jury for four days in July-August 2008. As is customary in appeals from BIIA cases, the attorneys read to the jury the testimony and depositions that had been admitted as evidence in the BIIA proceedings.

Although the employer and worker attorneys had stipulated before the Board exactly what conditions had been accepted as industrial injuries, and although the acceptance of RSD and depression as related to the industrial injury was res judicata, the trial judge refused to grant a jury

instruction which spelled out to the jury exactly what were the accepted conditions.

The jury returned a verdict that the Board decision was not founded on substantial evidence, with the effect that the worker lost her entitlement to time loss for that four year period. The worker's counsel filed a CR 59 motion for a new trial which was denied by order dated September 17, 2008, attached as an exhibit to the appeal.

IV. Argument

1. The trial judge's excision of claimant's testimony about how the injury limited her non- work life was error.

The BIIA judge had permitted the claimant to testify about how the accepted industrial condition of RSD and depression had limited her work life. He also permitted her to testify about how those conditions impacted her non-work life. In her testimony (CABR Transcript, June 14, 2007, p. 57, l. 13-26) Ms. Bray was asked:

> Q: Did the effects of your industrial injury have impact beyond your ability to work? Did it have an impact on the ability to do things you used to do for enjoyment?
>
> A: Absolutely.
>
> Q. And what sort of things did it affect?
> A? Well, I was athletic before. I loved to hike and kayak. I had to

> sell my kayak. No more softball games. I couldn't pass a volleyball game without crashing the party before, and that's out of the question. Can't play guitar. I can't play any of the instruments that I was–I was going to music camp every year and learning new instruments and having a blast with that, and I can't do any of those things any more.
>
> I pretty much slowed down to a stop. I watch television now. I can't even read. I used to be an avid reader, and I don't have the concentration to stay with a book.

Employer's counsel objected based on relevance, contending that the issue before the board was job duties, not personal enjoyment. The Board judge overruled the objection, noting "one may be an indication of the other." (CABR Transcript June 14, 2007, p. 57, l. 13-26, p. 58, l. 1-6.) The trial judge sustained the employer's objection and excised this testimony. (Mason County Superior Court RP, p. 1-4.)

The standard of review in the Court of Appeals of an evidentiary issue is abuse of discretion. The trial court abuses its discretion, so as to warrant reversal on appeal, when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. If the trial court applies the wrong legal standard, its decision is exercised on untenable grounds, warranting reversal. *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006) (quoting *Associated Mortgage Investors v. G.P.Kent Const. Co.*, 15 Wash.App. 223, 229, 548 P.2d 558

(1976). "[If] the trial court relies on unsupported facts or applies the wrong legal standard," its decision is exercised on untenable grounds or for untenable reasons; and if the court, despite applying the correct legal standard to the support facts, adopts a view that no reasonable person would take, the trial court's decision is manifestly unreasonable. *Mayer*, *supra* at 156 Wash.2d at 684, 132 P.3d 115, internal quotations marks omitted, cited at *Lewis v. Simpson Timber Co.* 145 Wash. App. 301, 189 P.3d 178 (Div. II, 2008).

The egregiousness of this ruling is highlighted by the fact that the transcript contained an offhand comment by treating psychologist Dr. Stephen Langer who noted that after therapy, the worker had improved her world view from always thinking everything was terrible to acknowledging that sometime she could experience pleasure: he gave the example that she had been able to take a cruise in 2002–five years after the industrial injury--which she was able to enjoy. (CABR Deposition of Dr. Langer, p. 42, l. 1-19.) Employer's counsel utilized this in closing argument, noting that if Ms. Bray could take a cruise, why could she not work? The information that the claimant had so dramatically limited her personal life activities would have given credence to her contention that

her injuries dramatically limited her work life activities. If the testimony had been that the worker was performing gymnastics in her off-work hours, such testimony would certainly be relevant to her ability to perform job duties. Her testimony about all the non-work activities she which she could no longer perform due to the industrial injuries is equally relevant to her ability to perform job duties. As such, the testimony was relevant; failure to permit that testimony was an abuse of discretion.

2. The trial court erred in refusing to give claimant's proposed jury instruction # 8, which provided as follows:

> Accepted Conditions Instruction
> (Stipulation of Parties)
> Findings of the Board of Industrial Insurance Appeals
>
> The accepted conditions resulting from Ms. Bray's industrial injury are:
> 1. Reflex Sympathetic Dystrophy (RSD), also know as Complex Regional Pain Syndrome (CPRS);
> 2. Depression; and
> 3. Aggravation to her pre-existing Colles' wrist fracture.

The trial judge heard argument and announced her decision to refuse worker's proposed instruction #8 at Mason County Superior Court Report of Proceedings. The instruction was properly excepted to by claimant's counsel. (RP 6-8.)

Jury instructions are reviewed de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wash.2d 447, 453, 105 P.3d 378 (2005). "Even if an instruction is misleading, it will not be reversed unless prejudice is shown. A clear misstatement of the law, however, is presumed to be prejudicial." *Keller v. City of Spokane*, 146 Wash.2d 237, 249-50, 44 P.3d 845 (2002). "In determining whether an instruction could have confused or misled the jury, the court examines the instructions in their entirety." *Intalco Aluminum v. Department of Labor & Industries*, 66 Wash.App.644, 663, 833 P.2d 390 (1992), *Lewis v. Simpson Timber Co.* 145 Wash. App. 301, 189 P.3d 178 (Div. 2, 2008).

Proposed instruction #8 was essential to permit the jury to figure out what had been previously determined to be related to the industrial injury. This instruction is based on the stipulation of both parties before the Board judge that the Department had accepted those conditions

(Transcript 6/13/07 at p. 72; CABR p. 74). Not only did the parties stipulate to the accepted conditions at the BIIA; the accepted conditions of RSD and depression were res judicata. The BIIA acknowledged in the Proposed Decision and Order that the issues of proximate cause of depression and RSD were res judicata, having been litigated in an earlier appeal. (CABR p. 73, Judge's decision, p. 4, paragraph 4.) That earlier appeal resolved that the depression was related to the industrial injury and ordered the employer to pay for the depression treatment. The causal connection between depression/RSD and the industrial injury was not an issue in this particular appeal, and therefore was not an issue before this jury. To fail to clearly instruct the jury that RSD and depression were the accepted conditions in this claim permitted the jury to speculate about whether one of its tasks was determining if there was sufficient evidence to find that the industrial injury proximately caused either RSD or depression. Yet that was not the issue in this appeal; the issue in this appeal was whether the worker was unable to work and entitled to time loss. Had proximate cause been an issue, then jury instructions on pre-existing conditions and multiple proximate cause would have been appropriate to steer the jury. Without being told that depression and RSD

were accepted conditions, the jury might have speculated about whether there was substantial evidence to support the BIIA finding that the worker suffered RSD and depressive condition as a result of the industrial accident. The failure to clarify the nature of the accepted conditions, and the fact that re-litigation of those condition was off limits, was an error of such magnitude as to deprive the worker of a fair appeal. The failure to instruct had the capacity to seriously confuse and mislead the jury.

There was an additional reason that failure to give the worker's proposed instruction #8 had the potential to confuse the jury: Ms. Bray had suffered a non-industrial injury, specifically the broken wrist in the employer baseball game, only a month before the industrial injury. The RSD condition was superimposed on the already-broken wrist. Much of the testimony of the employer's IME doctors went to whether Ms. Bray's disability was related to the broken wrist or the subsequent RSD condition, and whether her depression related to the broken wrist as distinguished from the RSD condition. Because the RSD and depression had previously been accepted by the Department, and had been stipulated as the accepted conditions before the Board, permitting the jury to muck around in the testimony about whether her depression was caused by the RSD as

distinguished from the broken wrist permitted the jury to essentially re-weigh an already resolved issue: that RSD and depression were related to the industrial injury and were accepted conditions. This would be potentially confusing, but would also permit the jury to speculate on that which had been firmly resolved: that RSD and depression were accepted conditions.

Failure to tell the jurors which conditions were accepted invited them to speculate: was her depression related? Was her RSD related? Was it related to her broken wrist which was not part of the industrial injury? Should they have to decide whether the depression or RSD was due to wrist or not? If it was due to wrist, was it due to industrial injury? None of these issues was before the jury. To fail to instruct them that the causal relation of RSD and depression had already been resolved in the worker's favor permitted speculation and confusion.

3. The trial court erred in giving instruction # 5, which provides:

> Appellant Chunyk Conley or Quad C, the employer, claims that the findings and decision of the Board are incorrect in that Ms. Bray's aggravated wrist injury and depressive condition had returned to preinjury status and that she was able to perform gainful employment in her field from April 1, 1999 through May 30, 2003.

The issue of return to preinjury status is not a component of time loss analysis. Rather, time loss is granted when the worker has a condition which incapacitates the worker from obtaining or performing gainful employment. The standard for payment of time loss was correctly stated by the BIIA in its Decision and Order, finding 4: "...the residual effects of the claimant's August 25, 1997 industrial injury precluded her from obtaining or performing reasonably continuous, gainful employment in the competitive labor marker (sic), when considered in conjunction with the claimant's age, education, work history, and pre-existing disabilities." (CABR p. 1, Decision and order p. l. 21.)

The difference between permanent disability and temporary disability is a matter only of duration. *Wilson v. Department of Labor and Industries,* 6 Wn.App. 902, 496 P.2d 551 (1972); *Leeper v. Department of Labor and Industries*, 123 Wn.2d 803, 872 P.2d 407 (1994), WPI 155.07. Return to preinjury status is not an element; testimony about return to preinjury status is not relevant. Such a jury instruction invites the jury to speculate and to consider an incorrect statement of the law. Such a clear misstatement of the law should be deemed prejudicial, *Keller v. City of Spokane, supra.*

4. The jury verdict was not supported by substantial evidence.

The sole issue in this appeal was whether the Board was correct in its unanimous opinion affirming the Department of Labor and Industries' order which granted Patricia Bray time loss from 4/1/99 through 5/30/03, based on the evidence that the accepted conditions of her industrial injury prevented her from being able to work. By statute, the jury was obligated to reaffirm the Board "if the Board has acted within its power and has correctly construed the law and found the facts". RCW 51.52.115. Furthermore, "(t)his title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment". RCW 51.12.010. Doubts must be construed in favor of the injured worker. *McIndoe v. DLI*, 144 Wash.2d 252, , 98 P.3d 903 (2001).

The Board of Industrial Insurance Appeals made findings of fact, which were presented to the jury in the jury instructions. Those findings were, in pertinent part:

> 2. On August 25, 1997, while in the course of her employment with Chunyk Conley Financial Services/Quad C, the claimant injured her right wrist when she was carrying two heavy binders containing patient charts. These were in her left arm. Her right wrist was in a cast because of an earlier right wrist Coles' fracture that occurred on July 29, 1997. The claimant lost control of the

> binders and instinctively put out her right arm. The charts then struck her right wrist cast. As a result of this traumatic event, the claimant sustained n aggravation fo her pre-existing Colles' fracture, right extremity reflex sympathetic dystrophy (also known as complex regional pain syndrome) and a depressive condition.
> 3. The claimant is 61 years old. She is a registered nurse with 35 years in the nursing profession. On the date of her August 25, 1997 industrial injury, she had a pre-existing right wrist Colles' fracture that was disabling.
>
> During the period from April 1, 1999 through May 30, 2003, inclusive, the residual effects of the claimant's August 25, 1997 industrial injury precluded her from obtaining or performing reasonably continuous gainful employment in the competitive labor market when considering in conjunction with the claimant's age, education, work history and preexisting disabilities.
> CABR p. 3,, Decision and Order, p. 2, pp. 2.

This finding correctly states the standard for award of time loss.

By statute, the Board of Industrial Insurance Appeals findings are prima facie correct; the party attacking the decision must support its challenge by a preponderance of the evidence. RCW 51.52.115 provides as follows:

> In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified...

The trier of fact may disregard the BIIA findings and conclusions, even

though there is substantial evidence to support them, if it believes that other substantial evidence is more persuasive. RCW 51.52.115. The role of the Court of Appeals of a superior court review of a BIIA decision is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review.

In this case, the evidence preponderated that Ms. Bray was unable to work due to the effects of the industrial injuries. The worker's orthopod Dr. Hassan testified that she was unable to work due to a combination of the RSD and depression. The worker's treating psychologist, Dr. Langer, who had particular expertise in RSD, testified that she was unable to work at anything due to the depression. These two doctors were her attending physicians and were entitled to special consideration, and a jury instruction was given to apprise the jurors of that consideration. The employer's psychiatrist Dr. Schneider first testified that based on depression alone, Ms. Bray could work; that he was unable to assess her inability to work when considering the effects of both RSD and depression, and finally actually deferred to Dr. Langer on the issue of Ms. Bray's ability to work.

Employer defense medical examiner Dr. Birkeland, who saw Ms. Bray more than a year before she ceased being able to work, gave the

opinion that at the time he saw her, when she was working, she was able to work, and he saw no reason why in the future she would not be able to. He did not have available to him, or did not review, any of the subsequent medical and psychological records of the doctors who continued to treat her. Dr. Friedman, while finding her suicidally depressed and in need of treatment, testified he didn't see why that would prevent her from working. The claimant testified about how she was staying late at the employer's job, working off the clock, sleeping under her desk, and not doing an adequate job in her very detailed work, so she quit before she was fired. She was hired by another firm, transferred, then suffered a series of firings. The evidence simply does not support the jury's determination that there was insufficient evidence to support the BIIA's findings.

5. The trial court erred in refusing to grant a new trial pursuant to CR 59. The court ruled by order dated September 119, 2008, that there was substantial evidence to support the jury verdict and a new trial would not be granted.

The standard of review of denial of a new trial is abuse of discretion. *Fahndrich vs Williams, 147 Wash.App. 302, 194 P.3d 1005* (Div II, 2008). A court abuses its discretion when the jury verdict is

contrary to the evidence. A challenge to the sufficiency of the evidence, or a motion for nonsuit, dismissal, directed verdict, new trial, or judgment notwithstanding the verdict, admits the truth of the opponent's evidence and all inferences which can reasonably be drawn therefrom, and requires that the evidence be interpreted most strongly against the moving party and in a light most favorable to the opponent. *Davis v. Early Construction Co*, 63 Wn.2d 252, 254, 386 P.2d 958 (1963). In reviewing a ruling on a motion for a judgment as a matter of law the Court of Appeals engages in the same inquiry as the trial court. *Stiley v. Bloc*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996). A judgment as a matter of law requires the court to conclude as a matter of law "that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party." *Industrial Indem. Co. vs Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990). However, the court must "defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence..", *State v. Hernandez*, 85 Wash.App 672, 675, 935 P.2d 623 (1997).

Overturning a jury verdict is only appropriate when the verdict is

clearly unsupported by substantial evidence. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 108, 864 P.2d 937 (1994).

Because the standards of review and issues are the same, this section will discuss whether the trial court erred in its denial of both motions for judgment as a matter of law and the motion for a new trial. *Faust vs. Albertson*, 143 Wash.App. 272, 178 P.3d 358 (Div. I, 2008).

The medical testimony was substantially in support of Ms. Bray's inability to work.

In summary, the was substantial evidence that the worker was unable to work due to her industrial injury and the BIIA's findings; there was scant evidence which supported the jury's verdict that the Board was wrong in determining Ms. Bray was unable to work due to her industrial injuries. Dr. Birkeland's lithe flip-flops should simply be disregarded. Dr. Schneider's testimony clearly supported significant restrictions in her ability to perform tasks. Dr. Schneider deferred to Dr. Langer. Drs. Hassan and Langer all supported or adopted the opinion that Ms. Bray was unable to work due to the industrial injuries.

The totality of the issues in this proceeding–the failure of the trial court to instruct the jurors that RSD and depression were accepted

conditions and that the jury was not permitted to revisit that issue; that the inability to work standard did not turn on the worker attaining pre-injury status; and the substantial evidence supporting the BIIA's findings that the injured worker was unable to work due to the effects of her industrial injuries compel the setting aside of this jury verdict.

6. Should claimant be awarded attorney fees in this appeal?

RCW 51.52.130 provides in pertinent part :

> If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary...a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court...In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

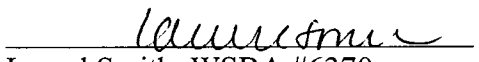
In this case, claimant was awarded benefits at the BIIA, specifically four years of back time loss. That award was reversed by the Mason County Superior Court; the benefits were taken away. If this court determines that the trial court was in error and remands s for an award of benefits or reinstatement of the Board decision, an award of attorney fees and costs is appropriate.

V. Conclusion

The jury verdict should be reversed or in the alternative a new trial should be granted. The worker, Ms. Bray, should be awarded her attorney fees.

Dated: January 29, 2009.

Respectfully submitted,



Laurel Smith, WSBA #6370
Attorney for Appellant Bray

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STATE OF WASHINGTON
BY_____
DEPUTY

NO. 38391-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CHUNYK & CONLEY/QUAD C., Respondent,

vs.

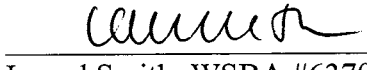
PATRICIA BRAY, Appellant,

CERTIFICATE OF MAILING

On January 29, 2009, at Rochester, Washington, I deposited in the United States mail a properly addressed, postage prepaid envelope, containing a copy of the Brief of Appellant Patricia Bray, directed to: D. Jeffrey Burnham, Johnson Graffe Keay Moniz & Wick, LLP,925 4th Avenue, Suite #2300, Seattle, WA 98104.

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

Dated: January 29, 2009, at Rochester, Washington.



Laurel Smith, WSBA #6370