

No. 41205-5-II

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

MICHAEL HENDERSON,

Appellant,

v.

GLACIER NORTHWEST, INC., ET AL.,

Respondant.

APPELLANT'S REPLY BRIEF

Karla E. Rood, WSBA# 42091
Vail, Cross & Associates
819 Martin Luther King Jr. Way
P.O. Box 5707
Tacoma, WA 98415-0707
(253) 383-8770
Attorney for Michael Henderson

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. ADDITIONAL ARGUMENTS	1
A. THE STANDARD OF REVIEW WAS MET BY PRESENTING ARGUMENT AS TO THE MERITS OF THE EVIDENCE BEFORE JUDGE AREND AND JUDGE STOCKMAN	1
B. FAILING TO REQUIRE THE DEPARTMENT OR SELF-INSURED EMPLOYER TO DEFEND THEIR ORDER WITH THE EVIDENCE THEY HAD AT THE TIME THE ORDER WAS ISSUED WAS AN ABUSE OF DISCRETION	2
II. CONCLUSION	3

TABLE OF AUTHORITIES

	<u>Pages</u>
A. Table of Cases	
Washington Cases	
<i>Lenk v. Department of Labor and Industries</i> , 3 Wash.App. 977, 478 P.2d 761 (1970).	2

I. ADDITIONAL ARGUMENTS

Comes now the appellant, Michael Henderson, Plaintiff below, by and through his attorney of record, Karla E. Rood of the Law Offices of David B. Vail and Jennifer Cross-Euteneier & Associates, and hereby offers this Reply Brief in support of his appeal.

A. THE STANDARD OF REVIEW WAS MET BY PRESENTING ARGUMENT AS TO THE MERITS OF THE EVIDENCE BEFORE JUDGE AREND AND JUDGE STOCKMAN.

By presenting argument as to the merits of the evidence first before Judge Stockman, and then before Judge Arend, Mr. Henderson met the standard of review as abuse of discretion is implicit in the improper rulings. Judge Stockman abused her discretion in allowing the Employer to benefit from the Department's administration of a separate issue, (reopening Mr. Henderson's back claim), that was irrelevant to the litigation at hand, when Glacier would not have been able to obtain the evidence any other way.

Judge Arend and Judge Stockman relied on improper reasons for allowing the testimony of Dr. Michael Barnard, thus abusing their discretion. Mr. Henderson's argument that "allowing the testimony of Dr. Barnard as akin to allowing a CR 35 examination to have taken place

without the appropriate motion and without the appropriate evidentiary showing by the Employer to satisfy the statutory requirements,” is not a new objection that needed to be preserved at the administrative and superior court levels, rather, it is an explanation of the prejudicial nature of the testimony. Allowing the testimony of Dr. Barnard was inherently prejudicial given the way in which the opinions and conclusions were obtained, as outlined in Mr. Henderson’s opening brief.

B. FAILING TO REQUIRE THE DEPARTMENT OR SELF-INSURED EMPLOYER TO DEFEND THEIR ORDER WITH THE EVIDENCE THEY HAD AT THE TIME THE ORDER WAS ISSUED WAS AN ABUSE OF DISCRETION.

Judge Stockman stated that the basis for her ruling allowing Dr. Barnard to testify was that, “I want a full and complete record and I want the best evidence before me.” (Certified Appeals Board Record, hereinafter CABR, 6/21/2006 at pp. 14-15). However, this ruling did not result in Judge Stockman hearing the best evidence to adjudicate the matter at hand. The Board of Industrial Insurance Appeal’s (Board) scope of review is limited to those issues which the Department has previously decided. *Lenk v. Department of Labor & Industries*, 3 Wash.App. 977, 982, 478 P.2d 761 (1970). Thus, the Board’s decision should be based in part on the evidence which the Department used to issue its orders while

the Department and the Self-Insured Employer had the duty to administer the claim.

The Department decided Mr. Henderson's claim and issued its orders based on the evidence that was in the Self-Insured and Department file at the time. In order for the Employer to defend those orders, it should be required that the Employer use the evidence which was used to support the issuance of that order. In doing so, the Industrial Appeals Judge would then have the best evidence to adjudicate whether the order was properly issued. Allowing the Employer to present evidence which it had obtained after the appeal had been filed without the Employer making a showing of good cause subverted the purpose of review by the Board, was inherently prejudicial to Mr. Henderson, and was an abuse of discretion by Judge Stockman. Judge Arend failed to correct Judge Stockman's incorrect allowance of Dr. Barnard's testimony when she denied Mr. Henderson's motion to strike Dr. Barnard's testimony.

II. CONCLUSION

In conclusion, Mr. Henderson's case should be remanded to Superior Court so that he may receive a new trial in front of a jury with the testimony of Dr. Barnard stricken from the record. Mr. Henderson has not been afforded a fair adjudication of his case at any lower level, due to the

erroneous decision of the Board to allow the testimony of Dr. Barnard, an improper witness; an error which was compounded by the Superior Court in denying Mr. Henderson's motion to strike. Mr. Henderson's rights were further affected at Superior Court due to the irregularity that resulted from two jurors sharing a close familial relationship. In order that the Act may be construed in favor of the injured worker, Mr. Henderson's case must be remanded so that a proper trial may take place.

Dated this 22nd day of June, 2011.

Respectfully submitted,

VAIL, CROSS & ASSOCIATES

By: 
KARLA E. ROOD
WSBA# 42091
Attorney for Appellant

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 22nd day of June, 2011, the document to which this certificate is attached, Appellant's Reply Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Steve Vinyard
Assistant Attorney General
P.O. Box 40121
Olympia, WA 98504-0121

Ronald Wayne Atwood
Ronald W. Atwood PC
333 SW 5th Ave.
Portland, OR 97204-1701

DATED this 22nd day of June, 2011.


LYNN M. VENEGAS, Secretary