

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

Case No. 48256-8-II

LIBERTY MUTUAL,
Appellant,

v.

LISA K. JOHNSON,
Respondent.

Appellant's Reply Brief

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Argument and Authorities

A. The Superior Court's judgment should be reversed for lack of substantial evidence.

The Appellate Court is charged with reviewing superior court judgments to determine if they are supported by substantial evidence.¹ If the Appellate Court is convinced the judgment is wrong and there is no evidence, if believed, which would support the verdict, the Appellate Court may substitute its judgment for that of the jury.²

Ms. Johnson argues in her brief that Dr. Johansen's outlier opinion represents substantial evidence in this matter. However, Dr. Johansen's opinions are inconsistent with the majority of the medical community. His opinions are inconsistent with his objective findings, with the mechanism of the 2009 injury, and with the timing of Ms. Johnson's symptoms. Accordingly, those opinions are not substantial and the Superior Court judgment attributing Ms. Johnson's alleged thoracic outlet syndrome to the 2009 claim should be reversed.

Dr. Johansen's experience with thoracic outlet syndrome, as lauded by Ms. Johnson, serves to demonstrate just how unusual his opinion on this matter is compared to other medical providers. There is controversy in

¹ *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128 (1996).

² *Raum v. City of Bellevue*, 171 Wn. App. 124, 151 (2012) *review denied* 176 Wn.2d 1024 (2013).

the medical community with regard to the diagnosis of thoracic outlet syndrome.³ All other doctors who testified in this matter believe thoracic outlet syndrome is very uncommon.⁴ Dr. Johansen acknowledged he is the only individual in the state of Washington to surgically manage injured workers for alleged neurogenic thoracic outlet syndrome.⁵

The Department of Labor and Industries medical treatment guidelines require specific electro-diagnostic findings before performing thoracic outlet surgery.⁶ None of Ms. Johnson's electro-diagnostic studies demonstrated those findings.⁷ Despite normal electro-diagnostic findings, Dr. Johansen diagnosed neurogenic thoracic outlet syndrome and performed two *unsuccessful* surgeries for this condition.⁸ Thoracic outlet syndrome is a rare diagnosis, particularly when the cause is not congenital—such as in this case.⁹ Because of the rarity of this diagnosis, it follows that the reasonable medical experts—to include a vascular surgeon—would not encounter the condition often.

The “limited” experience these well-qualified doctors have with the condition, as alleged by Ms. Johnson, is not a reflection of their lack of

³ Neuzil Dep. 31:13-23;35:12-36:1, May 13, 2014; Almaraz Dep. 25:24-26:18, April 23, 2014.

⁴ *Id.*

⁵ Johansen Dep. 57:5-16, March 31, 2014.

⁶ *Id.*

⁷ *Id.* at 31:20-32:2; Johansen Dep. 67:20-68:21, March 31, 2014.

⁸ Johansen Dep. 88:10-92:18.

⁹ Neuzil Dep. 20:8-11.

expertise to address this issue. Rather, it underscores the rarity of the diagnosis and Dr. Johansen's rush to find and treat a condition that is seldom present. Dr. Johansen's questionable diagnosis, and the surgeries that did not result in success, do not make his unorthodox opinion somehow more persuasive than the testimony of three other medical experts.

Dr. Johansen's isolated opinion is not supported by substantial evidence, in light of the vast majority of well-reasoned expert medical opinion, the realities of human anatomy, and the convincing medical evidence in this case. The Superior Court's conclusion was based entirely on Dr. Johansen's outlier opinion, and should be reversed for lack of substantial evidence.

B. The Superior Court's judgment with regard to time loss compensation does not flow from the jury's verdict.

Ms. Johnson argues that the Superior Court's judgment remanding the issues of entitlement to medical expenses, time loss, and all other benefits to the Department is not an error. She argues that this direction from the Superior Court does not usurp the Department's authority because some discretion is left to the Department. However, this is not the standard, and Ms. Johnson misstates the issue.

The Court of Appeals may reverse a Superior Court judgment if the Superior Court's conclusions of law do not flow from the jury's findings.¹⁰ The judgment, as written by Ms. Johnson's attorney, does not flow from the broader question before the jury concerning compensability of a particular condition. The Department retains sole discretion regarding the issue of benefits, particularly which ones may be directed under this claim. As such, the Superior Court overstepped its authority in this case, and reached a conclusion in the judgment that is beyond the scope of this appeal and does not flow from the jury finding. Liberty Mutual again respectfully requests this conclusion be reversed.

C. The Superior Court erroneously limited the Special Verdict to only one issue, when two are in dispute on appeal.

As previously noted, the Board of Industrial Insurance Appeals' Decision and Order on appeal enumerated two distinct conclusions¹¹:

1. Ms. Johnson did not suffer neurogenic thoracic outlet syndrome proximately caused or aggravated by her work activities.
2. Ms. Johnson's conditions proximately caused by her work activities were fixed and stable and did not need proper and necessary treatment as of July 17, 2013.

Ms. Johnson challenged both conclusions of the Board in her Petition for Review.¹² The special verdict form selected by the Superior

¹⁰ *Young*, 81 Wn. App. at 128.

¹¹ CABR 32, BIIA Proposed Decision and Order, July 7, 2014.

¹² CABR 3, Claimant's Petition for Review, July 23, 2014.

Court ignored the second issue presented in this case. Contrary to Ms. Johnson's assertion that this second issue was unnecessary, the special verdict form presented to the jury was misleading about the issues in this case. The jury was asked to determine whether the Board reached the correct determination in all respects. The issue of whether Ms. Johnson was medically fixed and stable as of July 17, 2013 is part of that determination.

The Superior Court incorrectly excluded from the Special Verdict a second question regarding the terminal date on which Ms. Johnson became fixed and stable. A special verdict form is sufficient if it allows the parties to argue their theories of the case, does not mislead the jury, and properly informs the jury of the law to be applied.¹³ The special verdict does not flow from the jury's verdict.

D. The Superior Court erroneously excluded expert witness testimony that provided a different perspective regarding the alleged conditions.

Liberty Mutual maintains that it was an abuse of discretion for the Superior Court to exclude the testimony of Dr. Harris, a board-certified orthopedic surgeon. Dr. Harris evaluated Ms. Johnson twice during her claim. The Board considered Dr. Harris's testimony in this matter, and

¹³ *Hue v. Farmboy Spray Co.*, 127 Wash.2d 67, 92, 896 P.2d 682 (1995).

based the findings of fact and conclusions of law in the Decision and Order at least in part on this testimony.¹⁴ The question before the jury was whether the Board correctly decided this case. The jury could not reach that decision without fully evaluating all evidence reviewed by the Board. Exclusion of Dr. Harris's testimony resulted in an incomplete record presented to the jury and was an abuse of discretion by the Superior Court.

E. The Superior Court provided improper and misleading jury instructions.

Regarding each individual jury instruction, Liberty Mutual will refrain from reiterating the argument presented in the Brief for Appellant. However, a reply is warranted regarding Jury Instruction No. 14. Specifically, Liberty Mutual joins with the position presented by the Department of Labor and Industries in the Brief of Respondent.

Instruction No. 14, regarding the mandate to liberally construe the Industrial Insurance Act, fails to articulate that an injured worker is still held to a strict burden of proving every element of a case.¹⁵ This instruction fails to provide that clarification and creates confusion regarding the burden of proof in this matter by stating "the benefit of the

¹⁴ CABR 28, BIIA Proposed Decision and Order, July 7, 2014.

¹⁵ *Clausen v. Dep't of Labor & Indus.*, 15 Wash. 2d 62, 129 P.2d 777 (1942) (In interpretation of the compensation act, the act should be liberally construed in favor of those who come within its terms, but those claiming rights under the act should be held to strict proof of their right to receive benefits provided by the act.).

doubt belongs to the injured worker.” This oversimplifies the statutory language and fails to provide important clarification in this context.

As noted by the Department, this instruction is not read in isolation and other instructions provided to the jury noted the burden of proof in this matter. However, even when read in conjunction with these, Instruction No. 14 manages to shift the burden to Liberty Mutual. This is reversible error.¹⁶ Ms. Johnson must still prove all elements of her case, it and the suggestion that the law should be construed by the jury and in favor of Ms. Johnson misstates that burden.

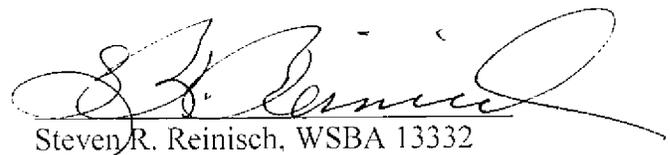
Conclusion

The Superior Court’s judgment attributing thoracic outlet syndrome to this claim is incorrect and should be reversed, as should be the judgment that the case is remanded for specified benefits outside the authority of the Superior Court to dictate. Further, the determinations by the Superior Court regarding the special verdict form and certain jury instructions misled the jury as to the issues on appeal and the applicable law. Liberty Mutual continues to respectfully request:

¹⁶ See *Hastings v. Dep’t of Labor & Indus.*, 24 Wn.2d 1, 163 P.2d 142 (1945).

1. The Superior Court judgment with regard to the compensability of thoracic outlet syndrome be reversed for lack of substantial evidence;
2. The Superior Court judgment remanding the issue of enumerated benefits to the Department of Labor and Industries be reversed because it does not flow from the jury's findings;
3. The Superior Court determination to disregard the issue of medical fixity be reversed for clear error;
4. The Superior Court determination regarding the above-enumerated jury instructions be reversed as improper and misleading to the jury; and
5. This Court affirm the August 8, 2014 order of the Board of Industrial Insurance Appeals.

Respectfully submitted,


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1 **CERTIFICATE OF MAILING**

2 I hereby certify that I caused to be served the foregoing **Appellant’s Reply**
3 **Brief** on the following individuals on August 9, 2016 by mailing to said individuals true
4 copies thereof, certified by me as such, contained in sealed envelopes, with postage prepaid,
5 addressed to said individuals at their last known addresses, to wit:
6

7 Mr. Matthew Johnson
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13 And deposited in the post office at Portland, Oregon on said date.

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

15 Mr. David Ponzoha, Clerk/Administrator
16 Washington State Court of Appeals – Division Two
17 950 Broadway, Ste. 300
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18 by e-filing it on the 9th day of August, 2016.

19 **REINISCH WILSON WEIER, P.C.**

20 
21 TRACEY AMUNDSON, Secretary to
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23 of Attorneys for Employer
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