FILED
COURT OF APPEALS
DIVISION II

2016 DEC 19 AM 9:31

STATE OF WASHINGTON

BY _____
DEPUTY

NO. 49246-6-II

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

NEIL R. BECK, *APPELLANT,*

v.

GLACIER NORTHWEST, INC., *RESPONDENT.*

REPLY BRIEF OF APPELLANT

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ARGUMENT

At page 3 of the Brief of Respondent, Glacier Northwest, Inc., under Statement of the Case B. Factual Context Supplementary to Appellant's Statement of the Case, second paragraph, the statement is made that counsel for the appellant adamantly refused to allow his witness, Dr. Gritzka, to review the surveillance video. Commencing at page 99, line 21, through page 102, line 2, in the deposition of Thomas Gritzka, MD, on cross examination, the question is asked as to whether Dr. Gritzka had reviewed a surveillance video of Neil Beck.[1] Mr. Beck's counsel objected on the basis that the surveillance video was not in evidence and the witness who did the surveillance had not been identified as a witness. At page 100, line 19, the option was given to counsel to recall Dr. Gritzka to testify on further cross examination, but was never pursued.

Commencing at page 5 of respondent's brief, the statement is made that the Brief of Appellant did not provide a fair statement of the case. Pursuant to RAP 10.3(a)(5), the Statement of the Case is to be a statement of the facts and procedure relevant to the issues presented for review without argument, appellant's brief does this succinctly and completely for

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[1] Respondent's Brief references pages 436-38 for the testimony from the Certified Appeal Board Record, CP 6, which would be an added pagination not in the original record from the Board. Since testimony is provided on appeal from an exhibit rather than the testimony read to the jury, additional pagination should not be considered.

the appellate court's fair consideration of the facts and procedure, and respondent's brief does not offer an alternative statement of the case other than for procedure. If the court were to consider respondent's Appendix B, which in the Proposed Decision and Order of the Industrial Appeals Judge who heard the case, the Court should consider Mr. Beck's Petition for Review at CP 6, CABR, pages 43-64.)

Respondent's brief at page 5, last paragraph, cites *Port of Seattle v. Pollution Control*, 151 Wn.2d 568, 90 P.3d 659 (2004) for the rule that the court should not substitute their judgement for the PCHB's with regard to findings of fact. This appeal is not governed by the Administration Procedure Act, RCW 34.05, but a separate statute, RCW 51.52.115, Court Appeal – Procedure at Trial - Burden of Proof. *Port of Seattle v. Pollution Control*, 151 Wn.2d at 58.

The respondent's brief at page 8, and again at page 11, argues that Mr. Beck was a hostile patient and attempted to intimidate Dr. Earle prior to Dr. Earle's termination of their doctor-patient relationship. The issue is not whether Dr. Earle had good cause to terminate the relationship, but whether the doctor did in fact terminate the relationship. Consider the testimony of Stacy Beck, the wife of Mr. Beck and a registered wound care

nurse, who was present for the appointment with Dr. Earle on October 4, 2012, with their young son, Matthew:

> Q. Did you go to the appointment with a Dr. Guy Earle with Mr. Beck on October 4th, 2012?
>
> A. Yes.
>
> Q. And were you there in the examination room with Dr. Earle?
>
> A. Yes.
>
> Q. What happened?
>
> A. Well, we got in there. Matthew was also with us too. But we got there, and the doctor walked in and said hi.
>
> And then Neil handed a pamphlet describing a Laser Spine Institute in Texas and wanted to discuss that with the doctor and wanted to get a referral for an MRI so that the Laser Spine Institute could evaluate the MRI and say whether he was a candidate or not.
>
> And as soon as he showed the pamphlet to Dr. Earle, Dr. Earle pretty much got pretty agitated and upset and ended up terminating the doctor-patient relationship. That was the result of all that. Because Dr. Earle had a plan of care that involved Neil getting off pain medications through physical therapy, and Neil wanted to look at other options, and Dr. Earle was not willing to work this way.

CABR 6, Stacy Beck – May 29, 2014, Direct, page 131, line 23, through page 132, line 17).

In the last paragraph on page 8, respondent's brief argues that Appellant's proposed rule would result in absurd gamesmanship by seeking to diminish adverse testimony offered by the attending physician. If anything, gamesmanship is gained by opposing counsel being able to rely on Dr. Earle being an attending physician by giving the attending physician instruction when Dr. Earle was not Mr. Beck's *active* treating physician pursuant to WAC 296-20-01002. Dr. Earle only treated Mr. Beck for less than a month, two months later determining that he would return to work at his job of injury, and six months before claim closure by the Department of Labor and Industries on May 10, 2013.[2] The issue is should Dr. Earle be believed or should Dr. Gritzka, who saw Mr. Beck during the course of the claim on three occasions as an independent medical examiner. The giving of Instruction No. 5, the attending physician's instruction, gave a decisive unfair advantage to the employer in this case.

At page 10, respondent's brief argues that the Court of Appeals should weigh the evidence as to the credibility of Dr. Earle verses Dr. Gritzka. This is a factual issue to be decided by a jury, and the court should not entertain a discussion of who is the more creditable of the two medical experts to testify. The issue is was Mr. Beck prejudiced by

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[2] The issue on worker compensation appeals is what was the injured worker's condition on the date of claim closure. RCW 51.52.050.

respondent's counsel being able to argue that Dr. Earle was the only attending physician to testify, and Dr. Gritzka was not.

At page 12, respondent's brief claims that if appellant's proposed rule were adopted, every claimant represented by competent counsel whose attending physician discovered evidence exculpatory of employer liability would terminate his or her attending physician and object to testimony by that expert. Since Dr. Earle had treated Mr. Beck for a brief period of time, there is no basis by which his testimony could be excluded, but only the attending physician instruction should not be given. An attending physician who discovered exculpatory evidence would not be required to terminate their relationship with the patient, and the attending physician instruction could still be given in appropriate situations.

Citing *Hamilton v. Department of Labor & Industries*, 111 Wn.2d 569, 761 P.2d 618 (1988), the Supreme Court in *Clark County v. McManus*, 185 Wn.2d 466, 475, 372 P.3d 764 (2016) recognizes a requirement to provide a special consideration instruction, except in those cases where there are articulable reasons for not accepting the attending physician's testimony. *McManus* holds that special consideration should be given to the opinion of an attending physician unless specific reason for not accepting the attending physician's opinion are articulated. *Clark County v.*

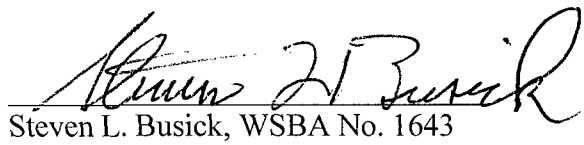
McManus, 185 Wn.2d at page 476. Here, the specific articulated reason for not giving the attending physician instructing is a treating physician who only treated the injured worker for a short period of time and then terminated the relationship, and was not the treating physician when he rendered his opinion, or on the date of claim closure, cannot be considered *actively* treating the worker, and is not the attending physician to allow giving the instruction on special consideration to that doctor's testimony.

Contrary to the argument at page 18 of respondent's brief, Mr. Beck is not arguing that he was prejudiced because Dr. Gritzka was not his attending physician. Mr. Beck is arguing that the error committed by the trial court is prejudicial, because Glacier Northwest is relying on the attending physician instruction, Instruction No. 5, to argue that Dr. Gritzka is not the attending physician and special consideration should not be given to his testimony. In *McClure v. Department of Labor & Industries*, 61 Wn. App. 185, 187, 810 P.2d 25 (1991), it was not prejudicial error to give an instruction on the law when neither party relied on the instruction in closing argument. But here, Glacier Northwest relied on the attending physician instruction, and Mr. Beck was prejudiced by the giving of the instruction to the jury.

CONCLUSION

Prejudicial error was committed by the trial court in giving the attending physician instruction, court's instruction No. 5, and the Judgment and Order on the jury verdict should be reversed and remanded to the trial court for retrial.

Dated: December 15, 2016.



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IN THE COURT OF APPEALS DIVISION I
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NIEL R. BECK, Appellant/Plaintiff, v. GLACIER NORTHWEST, INC., Respondent/Defendant.	No. 49246-6-II PROOF OF SERVICE

The undersigned states that on December 15, 2016, I served via US mail, as indicated below, Reply Brief of Appellant, as attached, addressed as follows:

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

Dated: December 15, 2016.

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