

FILED
Court of Appeals
Division II
State of Washington
8/15/2018 3:17 PM
No. 51170-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JENNIFER MAPHET, Appellant,

v.

CLARK COUNTY, Respondent.

EMPLOYER/RESPONDENT'S REPLY TO BRIEF OF
DEPARTMENT/CROSS-APPELLANT

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I. ARGUMENT IN REPLY TO BRIEF OF
DEPARTMENT/CROSS-APPELLANT

The employer submits this reply to the Department of Labor and Industries' (Department) counter-assignments of error on cross-appeal. The Department contends that the Superior Court erred when it failed to grant the Motions for Judgment as a Matter of Law and when it presented the question of whether the disputed surgery was necessary and proper to the jury. The Department argues that the employer conceded that the surgery was medically necessary and proper and therefore there is insufficient evidence to support the jury's verdict on that issue. These arguments fail.

1. The trial court did not err when it denied the Motions for Judgment as a Matter of Law.

This issue is discussed in extensive detail in the employer's opening brief. The employer would refer this Court to the employer's arguments and discussion contained therein. However, it is necessary to specifically address the following aspects of the Department's brief on this issue.

First, the Department asserts that the employer is arguing that it may provide authorization for unrelated treatment and may act outside

of Revised Code of Washington (RCW) Title 51. Department Brief of Respondent, at 19. That is a mischaracterization of the employer's position. In support of its argument, the Department cites to a portion of the employer's opening brief in which it is stated, "Employers agree every single day to pay for treatment that they should not technically be required to pay for, either because it is more cost-effective than fighting the worker, doctor, and Department on the issue, or because it simply seems like the right thing to do for a loyal employee." *See*, Department's Brief of Respondent, at 18; *See, also*, Employer's Brief of Respondent, at 39. Anytime the employer is faced with a decision to pay for a medical bill or authorize a treatment service, the employer has been presented with a request for authorization or a bill for treatment by a qualified medical provider. That medical provider submits the request based on their medical opinion that the service should be covered under the claim. The fact that employers approve or pay for such treatment, even if they may disagree with the medical provider, does not mean the employer is acting outside the scope of the Industrial Insurance Act. Employers are constantly faced with multiple medical opinions that may conflict with each other. The fact that an employer may choose not to dispute the treating doctor's opinion or not to initiate litigation and delay treatment for the worker

does not mean they are acting outside the scope of the Industrial Insurance Act.

Second, the Department in its brief goes into extensive detail regarding the definitions of “authorization” and “acceptance” contained in Washington Statute and Administrative Rule. *See*, Department’s Brief of Respondent, at 17-21. The Department argues as though the elements of these definitions that it so greatly emphasizes are established by the Board testimony and evidence. They are not. In fact, the Department does not point to a shred of testimony or other evidence in the Board record throughout its discussion of these rules.

Further, the testimony of Katie DeFrang never should have been a part of the Board record regarding the disputed surgery and should not be considered by this Court. Ms. DeFrang was called to testify regarding a claim processing penalty issue in a separate Board appeal. The industrial appeals judge consolidated the penalty appeals with the appeal of the disputed knee surgery over the employer’s objection. The testimony of the employer’s third-party claim processor never would have been considered relevant to the medical question of whether the employer was responsible for a knee surgery. Ms. DeFrang never would have been called to testify on that issue.

Had the industrial appeals judge granted the employer's motion, Katie DeFrang's testimony never would have been presented in the medical case because it is completely irrelevant. As such, it should not be considered by this Court, as discussed in depth in the employer's opening brief.

Third, there is no legal basis to support the Department's argument that the word "liability" within Evidence Rule (ER) 409 is limited to the question of whether an injury occurred in the first place. Department's Brief of Respondent, at 36. The rule states that certain evidence is "inadmissible to prove liability." Any limitations on the scope of the meaning of the word "liability" are promulgated by the Department with no legal support. The employer's liability for an injury that occurs during the scope and course of employment does not settle all questions regarding the scope of the employer's liability. Questions of liability are examined throughout the course of the workers' compensation claim to determine what conditions and types of treatment are covered as related to the injury. These questions of liability are subject to ER 409. Notably, the Department argues that the trial court properly ruled that ER 409 does not apply in this case. *See*, Department's Brief of Respondent, at 34. That is false. The trial

court excluded all evidence of payment for treatment on the very basis of ER 409. CP, Order Regarding Motions in Limine, at 169.

Lastly, the Department misinterprets *Hull v. PeaceHealth Medical Group*, No. 74413-5-I, 2016 WL 5373820 (September 26, 2016 (unpublished)). The Department argues that *Hull* reaffirms that an employer is responsible for the conditions it accepts and any secondary conditions resulting from the treatment. Department's Brief of Respondent, at 25. However, the *Hull* Court excluded evidence that the employer paid for Ms. Hull's thoracic outlet surgery and looked at the question of proximate cause. *Id.* at 10. If the question for the *Hull* Court was whether the employer paid for the thoracic outlet surgery, or "accepted" the surgery, the issue would have been established as a matter of law and the Court would not have based its decision on medical facts. The Court conducted an actual analysis of whether the *medical evidence* showed that the surgery itself was related to the industrial claim and whether the downstream consequences were related to the surgery. *Id.* at 7-8. The Court did not say that, as a matter of law, the employer's agreement to pay for the surgery automatically made the employer responsible for Ms. Hull's subsequent complications. The Court had to engage in an analysis of the medical evidence on the question of proximate cause.

2. The Compensable Consequence's Doctrine does not compel coverage of the disputed surgery.

Again, the employer relies on its discussion of this issue in its opening brief. However, the employer must directly reply to certain aspects of the Department's arguments. The Department argues that the Board decisions in *In re: Ladonia Skinner*, BIIA Dec. 14 10594 (2015) and *In re: David R. Green*, BIIA Decision and Order 13 11951 & 13 119510-A (2014) control in this case. Department's Brief of Respondent, at 28. However, the facts and rationale for the Board decisions in these two cases is ignored. The unchallenged final and binding authorization orders from the Department were vital to the Board's analysis in *Green* and that fact does not exist in this present case. This is discussed extensively in the employer's opening brief and the Department mischaracterizes the *Green* case.

In *Skinner*, the Board indicated it accepted the testimony of claimant's two expert witnesses that the medical condition was related to the industrial injury. The Board engaged in a proximate cause analysis based on the medical evidence. Furthermore, the Board specifically indicated since the employer had not challenged a Department order that closed the claim with a Category 2 impairment,

as a matter of law the permanent disability and thus the condition that led to that disability would be covered under the claim. Again, that case is inconsistent with the facts of this present case.

The Department further argues that negligent treatment cannot be an intervening cause. However, it is a question of fact for the jury to determine whether Dr. Greenleaf was treating a condition proximately related to the industrial injury. None of the cases cited by the Department support the contention that the Court may disregard the proximate cause analysis and rely simply on the employer's agreement to pay for treatment in order to establish liability for a medical condition or subsequent treatment.

3. The Department's assertion that there is insufficient evidence to support the verdict regarding necessary and proper treatment is not legally supported.

The Department argues that the jury should not have been presented with a question regarding whether the disputed surgery was necessary and proper treatment due to the statements made by the employer's attorney during closing argument. Department's Brief of Respondent, at 38. The Department essentially argues that counsel can erase the medical evidence by making an alternative statement during closing argument. This is a completely untenable position taken by the

Department. It is well-settled that a lawyer's arguments are not evidence and juries are instructed as such. If any statements are made by the lawyers that are inconsistent with the evidence, those statements are to be disregarded. 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.02 (6th ed.) The lawyer's arguments are certainly not tantamount to a formal stipulation of facts.

The only legal support that the Department could muster for this assertion is a criminal case, *State v. Silva*, 106 Wn. App. 586, 595-99, 24 P.3d 477 (2001). Department's Brief of Respondent, at 38. *Silva* is an ineffective assistance of counsel case. The criminal defendant was arguing that his lawyer's statements to a jury during closing argument amounted to ineffective assistance of counsel because they equated to an unauthorized guilty plea. *Id.* at 597. The Court disagreed, applying the criminal, constitutional, standard for ineffective assistance. The *Silva* Court found that the statements were made as a legitimate trial tactic for strategic purposes. *Id.*

Not only is the *Silva* case not at all analogous with this present case, it actually suggests the opposite of the Department's position. The criminal defendant was arguing what the Department argues here, that his lawyer's statements regarding his guilt took the question of guilt out of the hands of the jury and settled it, or conceded it. The

Silva Court found it unpersuasive to say that the lawyer conceded the defendant's guilt in closing argument to the extent that the question was removed from the jury. Even if this Court were to put aside the criminal, constitutional context of *Silva*, which has no applicability in this present case, *Silva* actually contradicts the Department's argument. The Department cannot put forth any legitimate support for its position. As a result, the trial court properly posed to the jury the question of whether the disputed surgery was necessary and proper treatment.

II. CONCLUSION

Based on the argument set forth above and in the employer's opening brief, the employer asks this Court to AFFIRM the trial verdict as commemorated in the order of Judge Stahnke issued on October 6, 2017. CP, Order, at 199. That order reversed the Board of Industrial Insurance Appeals' Decision and Order dated March 8, 2017, with regard to Board Docket No. 15 21036. As such, the jury found that the Department's September 25, 2015, order is reversed with fees and costs awarded to the plaintiff as the prevailing party. The employer further asks this Court to specifically find that evidence of authorizing or paying for treatment within an industrial claim is

inadmissible to show that the employer is responsible for a medical condition or specific treatment.

August 15, 2018

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Brett B. Schoepper", written over a horizontal line.

Brett B. Schoepper
Attorney for Respondent
Washington State Bar Association Membership Number 42177

A handwritten signature in cursive script, appearing to read "Kelly C. Walsh", written over a horizontal line.

Kelly C. Walsh
Of Attorneys for Respondent
Washington State Bar Association Membership Number 44100

III. APPENDIX

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.02 (6th ed.)

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses [, and the exhibits that I have admitted,] during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

[Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness, and of the value or weight to be given to the testimony of each witness. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I

have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

The comments of the lawyers during this trial are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

Washington State Court Evidence Rule 409

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

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CERTIFICATE OF MAILING

I hereby certify that I caused to be served the foregoing **Employer/Respondent's Reply Brief** on the following individuals on August 15, 2018, by mailing to said individuals true copies thereof, certified by me as such, contained in sealed envelopes, with postage prepaid, addressed to said individuals at their last known addresses to wit:

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And deposited in the post office at Beaverton, Oregon, on said date.

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

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1 by e-filing it on: August 15, 2018.

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August 15, 2018 - 3:17 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51170-3
Appellate Court Case Title: Clark County, et al., Res./Cross-Appellants v. Jennifer Maphet, App./Cross Respondent
Superior Court Case Number: 17-2-00719-0

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