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

VINCENT A. SCERRI,

Appellant.

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	INTRODUCTION	5
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	5
	1. Should the Court vacate the jury verdict and grant a new trial, after the jury delivered a verdict completely at odds with the medical testimony presented at trial?	5
III.	STATEMENT OF THE CASE	5
	Summary of Facts	5
	Medical Witnesses	8
IV.	DISCUSSION.....	13
	1. Standard of review for a new trial.	13
	2. The appellant’s Motion to Vacate Verdict and for a New Trial should have been granted, as there is no substantial evidence or reasonable inference to sustain the verdict in this matter.	14
V.	CONCLUSION.....	19

TABLE OF AUTHORITIES

STATE CASES

<i>Getzendaner v. United Pac. Ins. Co.</i> , 52 Wn.2d 61, 322 P.2d 1089 (1958).....	14
<i>Olpinski v. Clement</i> , 73 Wn.2d 944, 442 P.2d 260 (1968).....	14
<i>Richards v. Overlake Hosp. Medical Ctr.</i> , 59 Wn. App. 266, 796 P.2d 737 (1990).....	14
<i>Severns Motor Co. v. Hamilton</i> , 35 Wn.2d 602, 214 P.2d 516 (1950).....	14
<i>Potts v. Laos</i> , 31 Wn.2d 889, 200 P.2d 505 (1948).....	14
<i>Brammer v. Lappenbusch</i> , 176 Wash. 625, 30 P.2d 947 (1934).....	13
<i>Reynolds Metal Co. v. Elec. Smith Constr. & Equip. Co.</i> , 4 Wn. App. 695, 483 P.2d 880 (1971)	15
<i>Brown v. Superior Underwriters</i> , 30 Wn. App. 303, 632 P.2d 887 (1980).....	15
<i>Guijosa v. Wal-Mart Stores</i> , 144 Wn.2d 907, 32 P.3d 250 (2001)	15
<i>Washburn v. Beatt Equip. Co.</i> , 120 Wn.2d 246, 840 P.2d 860 (1992).....	16
<i>Bingaman v. Grays Harbor Comty Hosp.</i> , 103 Wn.2d 831, 699 P.2d 1230 (1985).....	16
<i>Palmer v. Jensen</i> , 132 Wn.2d 193, 937 P.2d 597 (1997)	19
<i>McUne v. Fuqua</i> , 45 Wn.2d 650, 277 P.2d 324 (1954).....	19
<i>Ide v. Stoltenow</i> , 47 Wn.2d 847, 289 P.2d 1007 (1955).....	19
<i>Krivanek v. Fibreboard Corp.</i> , 72 Wn. App. 632, 865 P.2d 527 (1993)...	19
<i>Lanegan v. Crauford</i> , 49 Wn.2d 562, 304 P.2d 953 (1956).....	19

RULES

CR 5918

OTHER SOURCES

Philip A. Trautman, *Motions Testing the Sufficiency of Evidence*, 42
Wash. L. Rev. 787, 811 (1967).....18

I. INTRODUCTION

This appeal originates from a jury trial in Pierce County, which was an administrative appeal from a Board of Industrial Insurance Appeals (“BIIA”) Proposed Decision and Order dated June 28, 2017, and a final Decision and Order dated August 23, 2017. The BIIA concluded that claimant Vincent Scerri – who had passed away in the course of his claim’s adjudication with the Department of Labor & Industries (“Department”) – was not a totally and permanently disabled worker at the time of his death. Despite a preponderance of medical testimony to the contrary, the jury entered a verdict affirming the final BIIA decision.

The issue in this appeal is whether the jurors delivered a verdict so completely contrary to the medical evidence presented to them, that the interests of justice demand the vacation of their verdict and the remanding of the case for a new trial.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Should the Court vacate the jury verdict and grant a new trial, after the jury delivered a verdict completely at odds with the medical testimony presented at trial?

III. STATEMENT OF THE CASE

On May 28, 2008, Claimant Vincent A. Scerri was injured while in the course of his employment as a maintenance supervisor with American

Capital Homes, Inc. (CP at 31). Mr. Scerri was carrying a heavy bucket of paint up a flight of stairs, while wearing a heavy tool belt. (CP at 31).

When he reached the top of the stairs, he was hit by severe low back pain that radiated into his right leg. (CP at 256).

Mr. Scerri was working at the time of the injury and his industrial insurance claim with the Department of Labor & Industries (“Department”) was allowed. (CP at 59). While his claim was open, the Department accepted responsibility for the following: displaced lumbar intervertebral disc at L5/S1, without myelopathy; adjustment disorder with anxiety; major depressive disorder; and, pain disorder related to psychological factors. (CP at 31).

Mr. Scerri’s claim related medical treatment included several surgical procedures in 2010, including a microdiscectomy at L5/S1, L4/L5 and S1 laminectomies with bilateral foraminotomies, and a posterior spinal fusion at L4/L5; chiropractic care, physical therapy, electrodiagnostic studies, epidural steroid and trigger point injections (CP at 257-277). Mr. Scerri also participated in pain management and work hardening programs. (CP at 280).

Mr. Scerri also underwent extensive treatment for his claim-related psychological injuries, including counseling and medications for depression and anxiety. (CP at 136).

Tragically, Mr. Scerri passed away on July 11, 2015, after falling at home and sustaining blunt force trauma to the head and a subdural hematoma. (CP at 284). The death was not related to his industrial injuries. (CP at 35).

On February 16, 2016, the Department issued an order closing his claim with permanent partial disability awards for the lumbar spine injuries (Category 3) and his psychiatric conditions (Category 2). (CP at 65). On April 26, 2016, the Department issued an order denying pension benefits to Mr. Scerri's surviving widow Cindy, asserting the industrial injuries were not a cause of Vincent's death, and that he was not permanently and totally disabled at the time of his death. (CP at 60).

Ms. Scerri disputed both orders, with the matter eventually heard before the Board of Industrial Insurance Appeals. The BIIA affirmed the Department's denial of Ms. Scerri's survivor benefits. (CP at 10).

Ms. Scerri appealed the BIIA decision to Pierce County Superior Court, where trial was held before a jury of twelve (12). Both parties presented ample medical testimony in the matter, from two orthopedists, a neurologist, an endocrinologist, and a physician's assistant. The testimony of the orthopedists and neurologist was explicit: Vincent Scerri required no further and necessary proper medical treatment for his industrial injury. The endocrinologist testified as to Mr. Scerri's diabetes, that it pre-existed

the industrial injury and was not worsened or aggravated by it. The physician's assistant was momentarily equivocal in his opinion on further treatment, though his ultimate opinion was that no further and necessary medical treatment was needed by Mr. Scerri.

Despite a clear preponderance of medical evidence, the jury returned a verdict that answered the following question in the affirmative: "Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Scerri's conditions due to his industrial injury were not fixed and stable, and he was in need of further necessary and proper medical treatment?" (CP at 844).

Ms. Scerri timely filed a motion to vacate the jury verdict and for a new trial, with oral argument, as the verdict reached by the jury could not be supported by the testimony presented at trial. The motion was denied in its entirety. Mr. Scerri's widow now appeals.

MEDICAL WITNESSES

John O'Brien, PA-C

John O'Brien, PA-C treated Mr. Scerri for his industrial injuries from February 22, 2013, to June 5, 2015. (CP at 191, 217). He was the only witness who actually treated Mr. Scerri, doing so over a crucial period that was post-operative and pre-death. Mr. O'Brien's unique position in this case allowed him to develop an opinion not only on the

chronic low back pain Mr. Scerri endured, but also on the alcoholism that existed long-prior to the industrial injury. Mr. Scerri's accepted conditions on the claim, added on top of his alcoholism-induced tremors and vomiting, rendered Mr. Scerri permanently and totally disabled:

Q. What is your opinion about whether or not further treatment was likely to see improvement in Mr. Scerri's case?

A. On a more-probable-than-not basis I would have to say that further treatment would not result in any improvement.

Q. Do you have an opinion, on a more-probable-than-not basis, as to whether Mr. Scerri was a permanently and totally disabled worker?

A. I do.

Q. What is that opinion?

A. Yes.

Q. Why do you say that?

A. The magnitude, severity of the pain disorder, which I diagnosed, which was a direct result of complications of his surgery for his displaced lumbar disk disorder resulted in so many manifestations, as I have described, for example, the tremulousness, the involuntary vomiting, et cetera, that I cannot envision even on a part-time basis any employer entertaining continued employment for someone who unpredictably throws up, even on his way to work.

(CP at 225-226).

H. Richard Johnson, MD

H. Richard Johnson, MD performed a forensic records review of the claim after Mr. Scerri's death. (CP at 253). Dr. Johnson's opinion was that the extensive treatment and surgery provided Mr. Scerri was insufficient to return him to pre-injury status, therefore no further curative treatment was recommended. Dr. Johnson concluded that Mr. Scerri was permanently and totally disabled by his low back injuries alone:

A. It is my opinion based on a comprehensive review of the medical records and the serial documentation of ongoing dysfunction in his low back and right lower extremity that this patient was not capable of employment on a regular continuous basis in any work category, and therefore, based on his age, training, education, work experience and ongoing positive physical findings that correlated with imaging studies that he met the criteria of the State of Washington for permanent and total disability.

Q. Why do you say that, sir? You've already hit that, but I need to ask that question.

A. The patient's persistence of low back pain radiating into the right lower extremity affected his ability to function even in a light-duty category because of limitations in his ability to sustain even a sitting position, let alone that of standing. His lifting was impaired, and although he had good days as well as bad days, as the records would indicate, that because of the persistence of these symptoms and their resultant functional impairment rendered him unable to work on a regular continuous basis.

(CP at 287-288).

Mary Higley-Carbone, MD

Mary Higley-Carbone, MD is an endocrinologist who performed a forensic records review of Mr. Scerri's claim at the request of the Department. (CP at 460). She testified that Vincent Scerri's "out of control" diabetes mellitus predated the industrial injury, and that Mr. Scerri suffered from peripheral neuropathy in both legs. (CP at 463). She did not say that a peripheral neuropathy and a radiculopathy are mutually exclusive; to the contrary, she conceded that she has had patients with back injuries who have both. (CP at 466).

On the topic of the frequent vomiting that John O'Brien, PA-C testified would preclude Mr. Scerri from gainful employment, Dr. Higley-Carbone offered a number of possible causes for the condition: diabetes-induced nerve damage to the stomach; diabetes-induced gastroparesis (a condition that causes the stomach not to empty); an ulcer; or alcoholic gastritis (CP at 468). Though she did not know what the exact cause was, she agreed with Mr. O'Brien when she testified "You can't work if you're throwing up all the time" (CP at 468).

**Mark Holmes, MD
David Smith, MD**

Neurologist Mark Holmes, MD and orthopedist David Smith, MD testified concerning the medical examination they performed together on

Mr. Scerri at the Department's request. (CP at 323). Their opinion was that Mr. Scerri, on the date of death, suffered from a diabetic neuropathy, not a radiculopathy. (CP at 338). They also opined that Mr. Scerri was capable of gainful employment and was only partially disabled (CP at 351), though in delivering their opinions they highlighted only the portions of Mr. Scerri's care and their exams that support their position (negative straight-leg raising, EMG that showed diabetic neuropathy) while ignoring the rest of the record (major surgical procedures, Mr. Scerri's pain diagram at the examination, his antalgic gait at the exam). Neither of these doctors could account for Mr. Scerri's frequent vomiting, nor did they take it into account when opining that Mr. Scerri has the capability to be retrained for gainful employment.

Neither Dr. Smith nor Dr. Holmes's testimony supports the BIIA's decision that Mr. Scerri was in need of further and necessary treatment for his industrially related injuries on the date of death:

Q. Okay. Based upon your education, training, experience, your examination of Mr. Scerri on February 3rd, 2015, did you form an opinion on a more-probable-than-not basis whether Mr. Scerri was in need of further, necessary and proper medical treatment?

- A. He would require treatment for his other medical conditions for sure, but not necessarily for the injury in 2008.

(CP at 352).

- Q. Okay. Would you recommend any additional treatment for Mr. Scerri based upon your education, training and experience and your review of the records and his examination on February 3rd, 2015?

- A. We felt that in terms of the industrially related condition, no further treatment was indicated, and therefore, the condition was fixed and stable.

(CP at 395-396).

IV. DISCUSSION

1. Standard of review for a new trial.

CR 59 states in relevant part:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

...

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

...

(9) That substantial justice has not been done.

The grant or denial of a new trial is a matter within the trial court's discretion. *Getzendaner v. United Pac. Ins. Co.*, 52 Wn.2d 61, 322 P.2d 1089 (1958) The court's discretion will be disturbed only for a clear abuse of that discretion. *Olpinski v. Clement*, 73 Wn.2d 944, 442 P.2d 260 (1968). Greater deference is owed the decision to grant a new trial than the decision to deny a new trial. *Richards v. Overlake Hosp. Medical Ctr.*, 59 Wn. App. 266, 796 P.2d 737 (1990). If the trial court, in the exercise of its sound discretion, is satisfied that substantial justice has not been done in a given case, it is its right and its duty to set the verdict aside. *Severns Motor Co. v. Hamilton*, 35 Wn.2d 602, 214 P.2d 516 (1950); *Potts v. Laos*, 31 Wn.2d 889, 200 P.2d 505 (1948); *Brammer v. Lappenbusch*, 176 Wash. 625, 30 P.2d 947 (1934).

2. The appellant's Motion to Vacate Verdict and for a New Trial should have been granted, as there is no substantial evidence or reasonable inference to sustain the verdict in this matter.

CR 59 (a) (1) allows a trial judge to grant a new trial where there was an irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial. CR 59 (a) (7) allows a new trial to be granted when there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that is contrary to law.

CR 59 (a) (9) allows a new trial where substantial justice has not been done.

Critical to this case are the physicians and medical providers' testimony, containing the opinions required at key junctures in an industrial injury claim. A licensed physician is required to sign a report of accident form and to provide an initial report (WAC 296-20-01002). A licensed physician is required for the rating necessary in a permanent partial disability award (RCW 51.32.112, WAC 296-20-2010). A licensed physician is required to determine whether an injured worker is permanently disabled (RCW 51.32.055). Therefore, the question of whether Mr. Scerri required further necessary and proper medical treatment for conditions related to his industrial injury (the question put to the jury) requires a physician's opinion to answer correctly.

Those opinions form the "substantial evidence" in this matter. "Substantial evidence" is that which is "sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Reynolds Metal Co. v. Elec. Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 483 P.2d 880 (1971); *Brown v. Superior Underwriters*, 30 Wn. App. 303, 632 P.2d 887 (1980); *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 32 P.3d 250 (2001). A court can not disturb a jury's award unless "it is outside the range of substantial evidence, shocks the conscience of the court, or was

the result of passion or prejudice.” *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992) (quoting *Bingaman v. Grays Harbor Comty Hosp.*, 103 Wn.2d 831, 699 P.2d 1230 (1985)).

There were eleven witnesses in this matter, their testimony added to four exhibits for the jury to consider. Despite the number of witnesses and exhibits, the jury verdict hinged on the answer from the five medical witnesses to the question “On the date of his death, was Mr. Scerri in need of further and necessary medical treatment for conditions related to his industrial injury?” The answer from all five was a resounding “No”:

H. Richard Johnson, MD

Q. Dr. Johnson, when Mr. Scerri passed on July 11th of 2015, do you have an opinion, sir, as to whether there was any further curative treatment that was going to be beneficial for him?

A. I do have an opinion.

Q. What is that opinion?

A. **That there was no further curative treatment with regards to the issue of his low back or lower extremity functional impairment.**

Q. Why do you say that, sir?

A. He had had a full course of conservative treatment and a full course with regards to operative treatment. **There was no indication for either additional conservative or operative treatment.**

(CP at 303, emphasis added).

Mark D. Holmes, MD

Q. Based upon your education, training, experience, your examination of Mr. Scerri on February 3rd, 2015, did you form an opinion on a more-probable-than-not basis whether Mr. Scerri was in need of further, necessary and proper medical treatment?

A. **He would require treatment for his other medical conditions for sure, but not necessarily for the injury in 2008.**

(CP at 352, emphasis added).

David Smith, MD

A. **We felt that in terms of the industrially related condition, no further treatment was indicated, and therefore, the condition was fixed and stable.**

(CP at 396, emphasis added).

Mary Higley-Carbone, MD

Q. Did the diabetes prevent Mr. Scerri from engaging in regular, continuous, full-time work prior to May 28, 2008?

A. No.

Q. Did the industrial injury that occurred on May the 28th, 2008, worsen or aggravate the complications that Mr. Scerri had from type 2 diabetes?

A. Not in my opinion.

(CP at 464).

John O'Brien, PA-C

Q. What is your understanding of what medical [sic] maximum improvement means?

A. My understanding of maximum medical improvement is at the point in the trajectory of a claim where no further improvement is expected. The patient may or may not be cured, but further treatment is unlikely to result in further improvement.

Q. What is your opinion about whether or not further treatment was likely to see improvement in Mr. Scerri's case?

A. **On a more-probable-than-not basis I would have to say that further treatment would not result in any improvement.**

Q. Do you have an opinion, on a more-probable-than-not basis, as to whether Mr. Scerri was a permanently and totally disabled worker?

A. I do.

Q. What is that opinion?

A. **Yes.**

(CP at 225, emphasis added).

The above testimony is presented in the light most favorable to the respondent; indeed, the majority of the above witnesses who testified about Mr. Scerri's injuries and treatment are the Department's witnesses. Further, neither party presented any witness who answered the question about a need for future treatment in the affirmative. Finally, there is no

reasonable inference that can be drawn from the medical testimony in support of the Board's decision that Mr. Scerri was in need of additional treatment for his claim related conditions or injuries when he passed away because each question elicited answers in the form of "yes" or "no."

As Mr. Scerri argues that the verdict was not based upon the evidence, appellate courts will look to this record to determine whether there is sufficient evidence to support the jury's verdict. *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997), citing *McUne v. Fuqua*, 45 Wn.2d 650, 277 P.2d 324 (1954); *Ide v. Stoltenow*, 47 Wn.2d 847, 289 P.2d 1007 (1955); Philip A. Trautman, *Motions Testing the Sufficiency of Evidence*, 42 Wash. L. Rev. 787, 811 (1967).

Most importantly, *Palmer* states that it is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence, relying on *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 865 P.2d 527 (1993) (trial court abused its discretion when it denied a new trial on the basis of inadequate damages in wrongful death case because damages were not within the range of substantial evidence) and *Lanegan v. Crauford*, 49 Wn.2d 562, 304 P.2d 953 (1956).

V. CONCLUSION

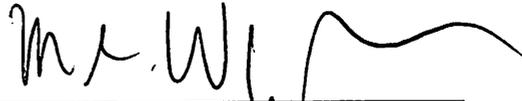
Put simply, there was no medical testimony or other evidence presented to the jury that Vincent Scerri's claim-related conditions were

not fixed and stable, and he was in need of further necessary and proper medical treatment on the date of his passing. To the contrary, the ultimate medical opinions rendered by all five medical witnesses stated unequivocally that no additional treatment was necessary. The verdict reached by the jury completely flies in the face of the testimony.

As a result, a substantial injustice has been done Mr. Scerri's widow. Appellant respectfully requests that the jury verdict in this matter be set aside, and the matter be remanded to the Superior Court for a new trial.

RESPECTFULLY SUBMITTED this 13th day of May, 2019.

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CERTIFICATE OF SERVICE

I certify that I served, or caused to be served, a copy of the foregoing BRIEF OF APPELLANT on the 13th day of May, 2019, to the following at the following addresses:

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