

FILED

MAY 29 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO 35625-6-III

Superior Court No. 15-2-02311-7

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

CONNIE KENNELLY,

Appellant

v.

KENNEWICK GENERAL HOSPITAL, et al

Respondents

REPLY BRIEF OF APPELLANT

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I. TABLE OF CONTENTS

I.	TABLE OF CONTENTS	i
II.	TABLE OF AUTHORITIES	ii
III.	REBUTTAL.....	1
IV.	ARGUMENT	2
V.	CONCLUSION.....	8

II. TABLE OF AUTHORITIES

Cases

<i>Fochtman v. Dep't of Labor & Indus.</i> , 7 Wn. App. 286, 499 P.2d 255 (1972).	6
<i>Gaines v. Dep't of Labor & Indus.</i> , 1 Wn. App. 547, 463 P.2d 269 (1969)	3, 4
<i>Leeper v. Dep't of Labor & Indus.</i> , 123 Wn.2d 803, 872 P.2d 507 (1994).	6
<i>State v. Barry</i> , 183 Wn.2d 297, 352 P.3d 161, 165 (2015)	7
<i>Stratton v. Dep't of Labor & Indus.</i> , 1 Wn. App. 77, 459 P.2d 651 (1969).	3, 4
<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983)	7

Statutes

RCW 51.08.160.....	8
RCW 51.52.115.....	2

III. REBUTTAL

Ms. Kennelly, a woman that worked 80-100 hours per week at age 65, was injured at work on May 21, 2011. She candidly admits she has acute vision difficulties which contributed to the terrible fall resulting in her severely fractured left femur. Ms. Kennelly has been a workaholic her whole life – that’s just the type of person she is. The experience of trying to work cooperatively with Kennewick General Hospital (Hospital) to settle her claim and get back to work, if she’s qualified, has been demoralizing for her. She wants for herself what the Hospital says it wants for her, to get back to work at a job for which she is well-qualified and has a passion for, or to be fairly compensated otherwise.

Respondent contends Appellant’s appeal is “untenable,” “borderline frivolous” and “unmoored.” Resp. br. at 1, 6, 18. Ms. Kennelly disagrees, contending the arguments set forth in Appellant’s brief are not indefensible, invalid or flawed, but well-reasoned and grounded in law and fact. She does agree with the Respondent however that she *is*, without apology, challenging “a

continuous string of unfavorable decisions,”¹ and asserting the legal theories that allegedly support the decisions are flawed.

IV. ARGUMENT

“Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each *material* issue before the court.” RCW 51.52.115 (emphasis added). Ms. Kennelly renews her argument that she was prejudiced by the superior court’s refusal to give her proposed Jury Instruction No. 5, which excluded non-material facts that were contained within the Board’s Findings of Fact, specifically: (a) her heel lift requirement; (b) her ability to perform sedentary work based *solely* on the fact her broken femur had achieved maximum healing; and (c) the 10 percent PPD rating as determined by the Board.

The Respondent spends much time pointing out that the industrial injury did not cause Ms. Kennelly’s poor eyesight, and that the Board determined there was no medical testimony to counter Dr. Hopp’s opinion that her impaired vision is not due to the industrial injury. This is a red herring. There is no counter testimony because no one holds that opinion. Ms. Kennelly fell and shattered her femur

¹ Respondent’s br. at 1.

because her poor vision prevented her from noticing the chair in her pathway when she left her office in a darkened basement. Her poor eyesight was not caused by the industrial injury, but it will continue to be a significant factor for her safety as she ambulates and will likely significantly impact her ability to obtain and maintain continuously available gainful employment.

The Respondent also cites and quotes *Gaines*² quite liberally in its brief. Although *Gaines* does discuss the circumstances of when and how to use Board findings in jury instructions, that is about the only similarity it has with the facts of Ms. Kennelly's case. Respondent attempts to re-frame Ms. Kennelly's appellate arguments by claiming: "*Gaines* does not stand for the proposition that the Superior Court would be precluded from giving 'non-material' Findings of Fact to the jury. *Gaines* stands for the proposition that *not giving* material Findings is error." Resp. br. at 9. Ms. Kennelly does not disagree with these last two sentences. But this is another red herring. Appellant's arguments on appeal come from *Stratton*³, which states:

It is necessary to restrict the jury's consideration to Board findings on [m]aterial issues, because the court is also required to advise the jury that it shall presume the findings

² *Gaines v. Dep't of Labor & Indus.*, 1 Wn. App. 547, 463 P.2d 269 (1969).

³ *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 80, 459 P.2d 651 (1969).

and decisions of the Board are prima facie correct. If the presumption of correctness applied to [a]ll Board findings, both material and immaterial, *confusion would reign*.

So, while it is agreed *Gaines* does not stand for the proposition that the court is precluded from giving non-material, so-called Board findings to the jury, *Stratton* does.

The Respondent applies the same arguments for each of the three non-material findings in jury instruction issues Ms. Kennelly raised: (a) the heel lift requirement; (b) her ability to perform sedentary work based *solely* on the fact her broken femur had achieved maximum healing; and (c) the 10 percent PPD rating as determined by the Board. It argues they each are material, thus mandatory in a jury instruction and even if they are not, their inclusion was not prejudicial.

Ms. Kennelly continues to take issue with the Board's Finding of Fact No. 5, which states: "Other than the accommodation of a heel lift, Ms. Kennelly has no claim-related restrictions as of February 19, 2014[,]"⁴ which was included in the court's Jury Instruction No. 5, subparagraph (4).⁵ The heel lift itself is a material fact such that its inclusion in Jury Instruction No. 5 was required pursuant to RCW

⁴ CABR at 19.

⁵ CP at 81.

51.52.115; however, it is what the finding omits that Appellant most strongly disagrees. There is nothing mentioned regarding her method of ambulation. Nothing is mentioned about her dependence on walking aids and a wheelchair to get where she needs to go. The Respondent says the heel lift is material and should have been included in a jury instruction, but the jury also needed *all* the material facts related to her ability to move around freely as she did prior to the industrial injury.

Board Finding of Fact No. 6⁶, which states: “Ms. Kennelly is able to perform sedentary work when considering only the limitations proximately caused by the industrial injury as of February 19, 2014,” which was included in the trial court’s Jury Instruction No. 5, subparagraph (5),⁷ is *not* a material fact that requires inclusion in a jury instruction. It is merely the conclusion of two defense examiners based on the question asked of them, i.e., does the healed femur break prevent Ms. Kennelly from performing sedentary work. No one, not even her attending physician, would answer this particularly-phrased question in the affirmative. Appellant’s healed broken leg does not, by itself, prevent her from obtaining and maintaining gainful

⁶ CABR at 19.

⁷ CP at 81.

employment, but that is only a small fraction of what the jury was asked to determine at trial. The jury was asked to determine if Appellant is a permanently totally disabled worker. Because of the myriad of factors that goes into the determination of total disability, it is critical that jury instructions containing Board findings include *only* material facts. This is even more important when one recalls the jury is instructed that Board findings are prima facie correct. That's powerful stuff. This subsection of Jury Instruction No. 5 had the ability to, and indeed did appear to, mislead the jury as to what their job was as jurors. At its most elemental, this jury instruction allowed the jury to improperly conclude that if the *Board* determined Ms. Kennelly could work at a sedentary job, she must not be totally disabled because Board determinations are prima facie correct. Case law has expanded the appropriate measure of disability into a study of the whole person, which includes strengths and weaknesses, age, education, training and experience, reaction to the injury, loss of function, and any other factors relevant to whether the worker is, as a result of the injury, disqualified from employment generally available in the labor market. *See Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 295, 499 P.2d 255 (1972). *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 814–15, 872 P.2d 507

(1994). The jury instruction was not material, was misleading, and injected confusion into the proceeding. The giving of the instruction was an abuse of discretion. Prejudice is presumed here because the instruction was given at the request of the Hospital and the jury found in favor of the Hospital. See, *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). “A court will presume prejudice only when the erroneous instruction was given on behalf of the party in whose favor the verdict was returned.” *State v. Barry*, 183 Wn.2d 297, 303–04, 352 P.3d 161, 165 (2015) (internal quotations and citations omitted).

In the same way and for the same reasons over the objection of Ms. Kennelly, Board Finding of Fact No. 8⁸ made it into the trial court’s Jury Instruction No. 5, subparagraph (7)⁹. It states: “On May 16, 2014, Ms. Kennelly had a permanent partial disability proximately caused by the industrial injury equal to 10 percent of the amputation value of the left leg above [the] knee joint with short thigh stump.” Just as argued above, this is a completely true piece of evidence from the record, but it is not a material fact that requires inclusion in Jury Instruction No. 5. The fact that Ms. Kennelly was awarded

⁸ CABR at 20.

⁹ CP at 81.

permanent partial disability benefits has *nothing* at all to do with the issue the jury was to address, which was whether Appellant was totally unable to perform any work at any gainful occupation (total disability status) pursuant to RCW 51.08.160. The inclusion of this non-material finding was misleading and injected uncertainty and confusion into the jury deliberation process, which was supposed to have only considered her permanent total disability status. It was an abuse of discretion for the court to give this instruction. For the reasons outlined above, the court's abuse of discretion in giving this instruction is presumed to have been prejudicial as the jury decided in favor of the Hospital.

V. CONCLUSION

Based on the arguments set forth above, Ms. Kennelly respectfully requests this court to determine that the trial court committed reversible error in admitting certain jury instructions, rejecting another, and for not allowing a record to be made when Ms. Kennelly's counsel objected to misinformation being disseminated during closing arguments. These constitute reversible error. For this

reason, Ms. Kennelly requests this matter be reversed and remanded back to the Benton County Superior Court for retrial.

Respectfully submitted this 24th day of May, 2018



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CERTIFICATE OF SERVICE

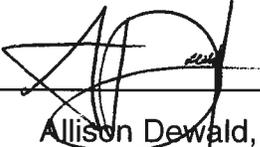
I certify that on the 24th day of May, 2018, I caused a true and correct copy of Reply Brief of Appellant to be served on the following individuals in the manner indicated below:

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