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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

BRIEF OF APPELLANT

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III. INTRODUCTION

This appeal concerns the on-the-job injury of Ms. Connie Kennelly, which was litigated pursuant to Washington's Industrial Insurance Act (the Act), Title 51 RCW. The Act is based on a compromise between workers and employers, which abolishes most civil actions arising from on-the-job injuries and replaces them with the exclusive remedy of industrial insurance benefits. Chapter 51.04 RCW. *Garibay v. State*, 131 Wn. App. 454, 457, 128 P.3d 617 (2005) *as amended* (Feb. 14, 2006). Because the right to worker's compensation benefits is defined by statute, courts must look to the provisions of the Act to determine whether an injured worker is entitled to compensation. *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996). All doubts as to the meaning of the Act are resolved in favor of the injured worker. *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 257, 26 P.3d 903 (2001).

IV. ASSIGNMENTS OF ERROR

(1) The trial court committed reversible error by including in its instructions to the jury a verbatim recitation of each of the Board

of Industrial Insurance Appeals' (Board) findings of fact, three of which were *not* material facts as required by the laws of this state.

(2) The trial court committed a prejudicial error of law when it did not advise the jury the Hospital's counsel misstated the law when, in closing arguments he stated: "What caused [Ms. Kennelly's] inability to work? Blindness *or* leg fracture? Counsel wants you to bundle them together and *put her on a pension for the rest of her life.*"¹

V. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Whether the Board's finding of fact #5, which states: "Other than the accommodation of a heel lift, Ms. Kennelly has no claim-related restrictions as of February 19, 2014[,]"² and was recited verbatim in the court's jury instruction #5 as subparagraph (4),³ is a material fact such that its inclusion in jury instruction #5 was required pursuant to RCW 51.52.115 and case law of this state?

¹ Aug. 16, 2017 Tr. at 60.

² CABR at 19.

³ CP at 81.

(2) Whether the Board's finding of fact #6⁴, 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[,]" and was recited verbatim in the trial court's jury instruction #5 as subparagraph (5),⁵ is a material fact such that its inclusion in jury instruction #5 was required pursuant to RCW 51.52.115 and case law of this state?

(3) Whether the Board's finding of fact #8⁶, which 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[,]" and was recited verbatim in the trial court's jury instruction #5 subparagraph (7)⁷ is a material fact such that its inclusion in jury instruction #5 was required pursuant to RCW 51.52.115 and the case law of this state?

(4) Whether the court committed reversible error when it overruled Ms. Kennelly's objection to Hospital counsel's brazen misstatement of the law after he told the jury if it found in favor of

⁴ CABR at 19.

⁵ CP at 81.

⁶ CABR at 20.

⁷ CP at 81.

Ms. Kennelly on her total disability claim they would “put her on a pension for the rest of her life[?]”

VI. STATEMENT OF THE CASE

The facts underlying this appeal are not in dispute. Ms. Kennelly is approximately 65-years old. She began working for Kennewick General Hospital (Hospital) in 1997 as the pathology office coordinator where she is known as a workaholic. At the time of her industrial injury she was working 80-100 hours per week, which included not only her Hospital duties but also the billing duties for Three Rivers Pathology. CABR at 12-13.

Ms. Kennelly has suffered from glaucoma and diabetic retinopathy for many years. She had to quit driving in 2010 and the Hospital provided her with a magnification device to perform her job. CABR at 13.

On May 21, 2011, Ms. Kennelly was working alone at the Hospital when she tripped as she left her office, landing on a cement floor. She suffered a severely fractured femur, which was repaired surgically with a plate and screw. Her period of recovery was long as initially her femur didn't heal correctly so she couldn't

put weight on it. As a result of her broken femur Ms. Kennelly's injured left leg is nearly 2 centimeters shorter than the right leaving her unable to ambulate on her own power. On occasion she falls when her left knee buckles. She cannot negotiate stairs or inclines without holding on to something for support. Because she was unable to ambulate during her rehabilitation she was prescribed a blood thinner to prevent clots. Approximately 4-months later she awoke unable to see. Her eye doctor immediately stopped the blood thinner; however, blood continued to accumulate in her eyes and took many, many months to heal. She is now totally blind in her left eye and legally blind in her right eye. Prior to her injury, mobility had never been a hinderance to her being able to work the extraordinary hours she put in. CABR at 13.

The Department of Labor & Industries (Department) initially paid her worker's compensation benefits but closed the claim when it determined she had reached maximum medical improvement regarding the femur damage. No award for temporary total or permanent total disability benefits was made. Ms. Kennelly appealed this decision to the Board of Industrial Appeals (Board) where an Industrial Appeals Judge (IAJ) determined the Department decision was correctly decided. Ms. Kennelly's appeal

to the full Board was denied, making the proposed decision and order final. The Board decision adopted the IAJ's findings and conclusions from her proposed decision and order. CABR at 1, 26-27, 33.

Ms. Kennelly appealed the Board decision to the Benton County Superior Court where a six-person jury trial was conducted. (CP 3) During the discussions regarding the proposed jury instructions Ms. Kennelly argued that although she agreed RCW 51.52.115 required the court to instruct the jury on the Board's *material* findings, Board findings #5, #6 and #8 were not material findings.⁸ Her amended proposed jury instruction #5 left out the language of those three non-material findings, stating instead:

This is an appeal from the findings and decision of the Board of Industrial Insurance Appeals. The Board made the following material findings of fact:

Connie R. Kennelly sustained an industrial injury on May 21, 2011, when she tripped over a chair while working in the basement of Kennewick General Hospital, severely fracturing her left femur. A blood thinner prescribed to prevent clots while she was unable to walk due to the left leg fracture caused hemorrhaging in her eyes, which had no lasting effect.

As of May 16, 2014, Ms. Kennelly's left lower extremity condition proximately caused by the industrial injury was

⁸ Aug. 16, 2017 Tr. at 5-7.

fixed and stable and did not need further proper and necessary treatment.

Ms. Kennelly is approximately 65 years [sic] old with an executive secretary and legal secretary degree. She has work experience in medical transcription, medical billing, medical reception, and as a medical secretary and manager. She has advanced diabetic retinopathy in both eyes, advanced glaucoma, vitreous hemorrhages, and exposure keratopathy related to thyroid disease.

Ms. Kennelly was able to perform and obtain gainful employment on a reasonably continuous basis as of February 19, 2014.

...⁹

The Hospital argued it was “not fair” for the court to give as a jury instruction less than the entire verbatim recitation of each of the Board’s findings #2-8.¹⁰ Further it argued “[i]t didn’t comply with the law[]” if the court failed to do so.¹¹ The second statement is in direct contradiction of the law of this state. The trial court declined to give Ms. Kennelly’s proposed instruction instead choosing to give the Hospital’s proposed instruction, which included, verbatim, the Board’s findings #2-8.¹²

At the end of the trial the jury unanimously agreed with the Board's decision that “Ms. Kennelly was able to perform and attain

⁹ CP at 59.

¹⁰ Aug. 16, 2017 Tr. at 8.

¹¹ *Id.*

¹² *Id.* Tr. at 9.

[sic] gainful employment on a reasonably continuous basis as of February 19, 2014.”¹³ Ms. Kennelly timely filed a notice of appeal with this court. CP at 98-102.

VII. ARGUMENT

A. Summary

Ms. Kennelly contends she was prejudiced by three jury instructions that informed the jury on nonmaterial findings that were previously entered by the Board. The Board's findings #5, #6 and #8, which are numbered subparagraphs #4, #5 and #7 in the court's instructions to the jury are *not material* to the issue the jury was to consider, which was whether Ms. Kennelly was a totally disabled worker as of February 19, 2014. RCW 51.52.115 states: “[w]here 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.” The court, over Ms. Kennelly's objection on two different occasions, erroneously included three *non-material* facts in jury instruction #5, which was prejudicial to Ms. Kennelly. The court also committed reversible error when it

¹³ *Id.* at 65.

overruled Ms. Kennelly's objection to the Hospital's blatant misstatement of the law during closing arguments.

B. Standard of Review

The court of appeals reviews legal errors in jury instructions de novo. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015) (citations omitted). The court's decision on whether to give a particular instruction is reviewed for abuse of discretion. *Fergen v. Sestero*, 182 Wn.2d at 802-803. A trial court abuses its discretion in refusing to give a jury instruction if it bases its ruling on an erroneous view of the law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Jury instructions are generally sufficient if they are: (1) supported by the evidence; (2) allow each party to argue its theory of the case; and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Bodin v. City of Stanwood*, 130 Wash.2d 726, 732, 927 P.2d 240 (1996). If any of these elements are absent, the instruction is erroneous. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289, 294 (2012). "An erroneous instruction is reversible error only if it prejudices a party." *Id.* Prejudice will be presumed if the instruction contains a clear misstatement of law. Prejudice must be

established by the party challenging the instruction if the instruction is merely misleading. *Keller v. City of Spokane*, 146 Wash.2d 237, 249–50, 44 P.3d 845 (2002). An error is prejudicial if it presumably affects the outcome of the trial. *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 23, 914 P.2d 67 (1996). When establishing whether a jury instruction could have confused or misled the jury, the reviewing court examines the instructions in their entirety.” *Intalco Aluminum Co. v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 663, 833 P.2d 390 (1992) citing *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 573, 761 P.2d 618 (1988).

C. Analysis

Ms. Kennelly argues that her proposed instruction #5, *supra*, which excluded the Board's findings of fact #4, #5 and #7, was the proper instruction for the court to give the jury since it clarified the sole issue the jury was asked to determine: whether she was a totally disabled worker as of February 19, 2014. It was reversible error for the court to include every Board finding in its jury instruction #5 because it heightened the potential for juror confusion as none of the three challenged findings were material to her disability determination.

When a trial court instructs the jury as to the Board's findings, only those containing ultimate facts should be permitted, not those containing evidentiary or argumentative facts. *Gaines v. Department of Labor & Indus.*, 1 Wn. App. 547, 551-52, 463 P.2d 269 (1969). Examples of findings of ultimate facts include: (1) a finding on the identity of the claimant and their employer; (2) the claimant's status as an employee or dependent under the Act; (3) the nature of the accident; (4) the nature of the injury or occupational disease; (5) the nature and extent of disability; (6) the causal relationship between the injury or the disease and the disability; and (7) other ultimate facts upon which the existence or nonexistence of such facts effects the outcome of the litigation. *Gaines*, 1 Wn. App. at 552. Additionally, as held by the court in *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 459 P.2d 651, 653 (1969):

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 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.

Id. at 80.

(1) Subparagraph #4

Subparagraph #4 of the court's jury instruction #5 merely informs the reader that Ms. Kennelly required a heel lift to even out the nearly two-centimeter discrepancy between her left and right legs after the femur break healed. It is not a material fact; it is merely evidentiary. Neither party disputes Ms. Kennelly was prescribed a heel lift in an attempt to correct her gait. However, this is not an ultimate fact that will assist the jury in its determination of Ms. Kennelly's disability status. The court's decision to include subparagraph #4 in jury instruction #5 was erroneous and an abuse of discretion because RCW 51.52.115 and the *Gaines* case and its progeny require the court instruct the jury on only ultimate material facts.

(2) Subparagraph #5

Ms. Kennelly next asks this court to consider whether subsection 5 of jury instruction #5 is a material fact that allowed both parties to argue their theories of the case, was not confusing and when read in its entirety properly informed the jury of the applicable law. She argues it is not.

Subparagraph #5, at its most basic is a correct statement of the evidence. However, the finding is incomplete, misleading and confusing for the jury because it does not include “the other factual elements required to establish total disability” as required by the *Gaines case supra*. Nor does the finding allow Ms. Kennelly to argue her theory of the case. On this basis alone, the jury instruction is erroneous pursuant to *Anfinson, supra*. More egregious yet, under the specific facts of this case subparagraph #5 equates to a comment on the evidence. The court’s subparagraph #5 (which repeats verbatim the IAJ’s finding) merely presents the opinion testimony of two employer-retained forensic examiners that formed their opinion based *solely* on Ms. Kennelly’s healed femur fracture. CP at 81. However, no such factual finding was included by the IAJ regarding Ms. Kennelly’s treating provider’s opinion which specified that when considering her eye injuries *plus* the damage to her leg, she could no longer safely ambulate to and from work and does not have the vision to perform her work.¹⁴ CP at 29. Only one set of facts made it into the findings and the other was

¹⁴ The exhibit is found in the CABR but it is not page numbered. It is located in the Exhibit portion immediately following Connie Kennelly’s deposition testimony. The letter is authored by Dr. Arthur Thiel and is listed as an exhibit to his deposition of March 12, 2015 but for reasons unknown the letter is not located with Dr. Thiel’s deposition testimony in the CABR.

completely disregarded, which constitutes a comment on the evidence because it is clear the IAJ displayed her bias as to which set of opposing facts she believed. This is a mistake of constitutional magnitude. See, Const. art. 4, § 16, of the state constitution. An impermissible comment on the evidence is one that conveys to the jury a judge's personal attitude about the merits of the case or allows the jury to surmise from what the judge said or did not say that the judge personally believed or disbelieved the specific testimony in question. *Hamilton v. Dep't of Labor & Indus.* 111 Wn.2d 569, 571, 761 P.2d 618, 619 (1988). "A judge's comment on the evidence is deemed prejudicial unless the record affirmatively shows the contrary." *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945, 951 (1993) (citation omitted). During trial the jury heard the testimony of Ms. Kennelly's treating physician *and* the Hospital's witnesses. Yet, only the opinion of the Hospital's witnesses made it into the jury instruction purporting to be the Board's finding, which is presumed correct. It is likely the jury concluded the court, at a minimum, tacitly agreed the Hospital's witnesses' testimony was the truth since there was no contrary evidence in a finding of fact for their consideration. Because a comment on the evidence is presumed prejudicial, the court's

judgment on the jury's verdict must be reversed and a new trial granted.

(3) Subparagraph #7

Instruction #5, subparagraph #7 discusses the Board's finding regarding Ms. Kennelly's permanent *partial* disability award. The finding, as written, is a true factual statement but it is utterly irrelevant to the issue before the jury, which was Ms. Kennelly's *total* disability status. Compare RCW 51.08.160:

Permanent total disability is the "loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently *incapacitating the worker from performing any work* at any gainful occupation."

with RCW 51.32.080 (Permanent *partial* disability involves a permanent injury or disease that *does not* prevent the injured worker from working.) Permanent partial disability benefits are often referred to as a "lump-sum" benefit because it is a one-time award. *Sims v. Department of Labor and Industries*, 195 Wn. App. 273, 278, 381 P.3d 89, *review denied* 186 Wn.2d 1031, 385 P.3d 121 (2016). See also, *Ellis v. Department of Labor and Industries*, 88 Wn.2d 844, 851, 567 P.2d 224 (1977) which states:

Permanent total disability is claimant's inability to perform gainful employment on a reasonably continuous basis while permanent partial disability refers to the degree of loss of bodily function. *These two concepts are separate and distinct and may not be merged.*

Id. at 851 (emphasis added). As noted above, subparagraph #7 is not a false statement but its inclusion serves only to confuse the jury. Although to a legal practitioner permanently totally disabled would be seen as different than permanently partially disabled, the same cannot be said as definitively true for a jury of lay persons. The court including a non-material finding of fact in the jury instructions is confusing and contrary to law, thus, reversible error.

(4) Hospital's Closing Statement

In its closing statement the Hospital misrepresented the law when it argued to the jury: "Proximately caused. What proximately caused her inability to work? Blindness *or* leg fracture? Counsel [for Ms. Kennelly] *wants you to bundle them together and put her on a pension for the rest of her life.* Ms. Kennelly immediately objected as this is not a correct statement of the law. In response the court summarily stated: "Go ahead and I'll overrule and will move forward." Aug. 16, 2017 Tr. at 59-60. The jury had already

been instructed by the court in jury instruction #11 that the legal standard for total disability “require[d] consideration of the residuals of the worker’s industrial injury, age, training, education, prior work experience *and* any pre-existing physical or mental restrictions.” CP at 88 (emphasis added). Additionally, RCW 51.32.160 (1)(a)(2) makes it abundantly clear that a pension is *always* subject to review and does not just automatically last “for the rest of her life.” Accordingly, defense counsel’s statement was completely wrong on these two points yet the court overruled Ms. Kennelly’s objection. Because Ms. Kennelly was not given any opportunity to explain her objection or ask for a curative instruction, the court’s decision was a prejudicial error of law, which is subject to reversal.

VIII. ATTORNEY FEES

If successful in their appeal, Kennelly requests an award of attorney fees as allowed under RAP 18.1 and RCW 4.84.010.

IX. CONCLUSION

The appropriateness of a jury instruction is governed by the facts of each case. *Housel v. James*, 141 Wn. App. 748, 759, 172 P.3d 712 (2007). Under the specific facts of this case the trial court

committed reversible error in instructing the jury, both as to instructions given and those it failed to give.

As set forth above, the court's jury instruction #5 included three Board findings that weren't material to the issue the jury was asked to determine i.e. total disability. Subparagraph #4 is an evidentiary fact even though there is no disagreement as to its truthfulness. According to the *Gaines* case cited above, evidentiary facts are not appropriate material findings. The trial court abused its discretion when it included subparagraph #4 in its instruction #5. Subparagraph #5 is incomplete, misleading and confusing for the jury and does not allow Ms. Kennelly to argue her theory of the case. Furthermore, under the specific facts of this case it is an improper comment on evidence, a reversible constitutional error. Subparagraph #7 is also a true factual statement but since the issue the jury was considering was *total* disability, a jury instruction regarding Ms. Kennelly's permanent *partial* disability was immaterial and potentially confusing to the jury. Prejudice should be presumed as the jury returned an unfavorable verdict. Finally, the court, over Ms. Kennelly's objection, allowed the Hospital to tell the jury two blatant lies with no corrective action allowed. None of these errors were harmless because the jury was, in essence,

invited to speculate on facts that weren't even material to the issue of disability. This is prejudicial error that requires reversal of the court's judgment on the jury's verdict.

Respectfully submitted this 21st day of February 2018.



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