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COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON

CONNIE KENNELLY,

Appellant,

v.

KENNEWICK GENERAL HOSPITAL, AND WASHINGTON STATE
DEPARTMENT OF LABOR & INDUSTRIES,

Respondents.

BRIEF OF RESPONDENT
KENNEWICK GENERAL HOSPITAL

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I. INTRODUCTION

The Appellant's brief is an untenable attempt to reverse not only an unfavorable Jury Verdict, but also to undermine a continuous string of unfavorable findings since the issuance of the Department closing order that is the subject of this appeal. The Claimant's attempt to reverse the superior court Judgment, the Board of Industrial Insurance Appeals' Decision, and the Department closing order should be denied.

The Appellant errantly roots her present appeal in her allegations of reversible error by the superior court when it included statutorily required findings of fact in Jury Instruction No. 5, and allegedly "committed a prejudicial error" by not giving a curative instruction to the Jury as a result of the ostensible misstatement of law by the Respondent in closing argument.

The Respondent, Kennewick General Hospital, will first argue that the findings of fact bewailed by the Appellant were not only within the superior court's wide discretion, but were *mandatory* under RCW 51.52.155. Next, the Respondent will argue that it never misstated the law during closing argument, that the Appellant waived objection to the Respondent's closing argument, and that Jury Instruction No. 1 would have cured any prejudice even if there had been misstatements of law during

closing argument. The Respondent will also argue that no prejudice resulted or was credibly plead by the Appellant.

II. STATEMENT OF ISSUES

1. Whether the Superior Court acted properly and within its wide discretion by including Finding of Fact Nos. 5, 6, and 8 in Jury Instruction No. 5.
2. Whether Kennewick General Hospital's closing argument appropriately argued the facts and law before the Superior Court.

III. STATEMENT OF THE CASE

On May 25, 2011, the Appellant filed a workers' compensation claim regarding a fractured left femur, arising out of an incident occurring on May 21, 2011. Certified Appeal Board Record (CABR) at 11, 32. The Appellant received medical treatment for her fractured femur, which "healed solidly." *Id.* at 13.

On May 16, 2014, the Department of Labor and Industries (Department) closed this claim, with wage replacement (time-loss) benefits paid through February 18, 2014, and a permanent partial disability (PPD) award of 10% amputation value of the left leg above the knee joint. *Id.* at 11, 33.

On May 22, 2014, Ms. Kennelly filed a Notice of Appeal with the Board of Industrial Insurance Appeals (Board) of the May 16, 2014 Department closing order. *Id.* at 26, 33. The Appellant's Notice of Appeal

expressly asked the Board to reverse the Department closing order, provide further time-loss benefits, “treatment, and allowance for her eyes,” a higher PPD award, “or in the alternative, permanent total disability.” *Id.* at 22. The Board granted Ms. Kennelly’s appeal, and on August 28, 2015, the Board’s Industrial Appeals Judge (IAJ) issued a Proposed Decision and Order (PD&O) affirming the Department’s claim closing order. *Id.* at 20, 33.

The IAJ identified five issues presented by Ms. Kennelly. The first issue was whether Ms. Kennelly was entitled to further necessary and proper treatment under this claim. The second issue was whether Ms. Kennelly was entitled to have Kennewick General Hospital pay for further medical bills. The third issue before the Board was whether the Appellant was temporarily and totally disabled due to “the residual impairment proximately caused by the industrial injury,” and therefore entitled to further wage replacement benefits. The fourth issue was whether the Appellant was entitled to further award for permanent partial disability. The final issue presented to the Board was whether Ms. Kennelly was totally and permanently disabled, and therefore entitled to a pension. *Id.* at 12.

The Board noted that two to three years prior to the industrial injury under this claim, the Appellant had undergone cataract surgery on both of her eyes, and that she also had glaucoma in both eyes for which she had

shunts inserted prior to the industrial injury. *Id.* at 13. In October of 2011, Ms. Kennelly awoke unable to see, and her physician promptly took her off the blood thinner medication that she had been prescribed in June of 2011 following rehabilitation for her left leg condition. *Id.* The Board found that Ms. Kennelly was now totally blind in her left eye. *Id.* Ms. Kennelly alleged that her visual impairment was proximately caused by her industrial injury and the medical care she received under this claim.

The IAJ noted that it was “undisputed” that Ms. Kennelly’s leg condition was at maximum medical improvement, needing no further necessary and proper treatment under this claim. *Id.* at 14. The IAJ also noted that “There is no medical testimony to counter Dr. Hopp’s opinion that her impaired vision is not due to the industrial injury.” *Id.*

The PD&O continued, “it is undisputed that Ms. Kennelly’s glaucoma, thyroid eye disease, and diabetic retinopathy are not due to the industrial injury, but were preexisting.” *Id.* at 16. “There is no evidence that the industrial injury caused Ms. Kennelly’s vision to worsen...even temporarily as a consequence of the hemorrhaging...the Department is not responsible for the worsening of Ms. Kennelly’s vision.” *Id.* at 17-18.

And lastly, “even Dr. Thiel is of the opinion that, but for the vision problems, the femur fracture would not prevent Ms. Kennelly from returning to sedentary work...Ms. Kennelly has not proven by a

preponderance of the evidence that she was temporarily totally disabled during” times relevant under the Board appeal. *Id.* at 18.

The Board’s PD&O affirmed the May 16, 2014 Department closing order, declined to allow the Appellant’s preexistent eye conditions and their sequelae under this industrial injury claim, denied total disability benefits, and denied further treatment. *See id.* at 19-20.

On September 10, 2015, Ms. Kennelly’s attorney filed a one-and-a-half-page Petition for Review to the Board of the PD&O. *Id.* at 5-6. The Appellant argued, in pertinent part, that the IAJ “erred in entering findings of fact numbers 5, 6, & 7.” *Id.* at 5.

On September 25, 2015, the Board issued an Order Denying Petition for Review, thereby adopting the PD&O as the Decision and Order of the Board. *Id.* at 1. Ms. Kennelly appealed the Board Decision to the Superior Court of Benton County. CP at 1.

On appeal to the superior court, Ms. Kennelly “narrowed the issues on appeal to only include time loss compensation and a pension.” *Id.* at 95. The jury returned a verdict affirming the Board’s Decision, finding that the Appellant was able to perform and obtain gainful employment on a reasonably continuous basis as of February 19, 2014. *Id.* at 94. Judgment was entered accordingly. *Id.* at 95-96.

IV. ARGUMENT

The Appellant's claim was properly closed with a PPD award for her left femur fracture that had healed "strongly." The Board of Industrial Appeals rendered its Proposed Decision and Order, recognizing Ms. Kennelly's evidence as inadequate to establish her rights to further benefits under this claim, and having failed to rebut the expert witness testimony presented by the Kennewick General Hospital. Indeed, the Board itself found no basis to grant review of the PD&O and adopted the IAJ's Decision as that of the Board.

Then, the Appellant presented her case to a six-person jury in superior court. After hearing all the evidence and argument by the Parties, the jury returned a verdict in favor of Kennewick General Hospital and affirmed the Board's Decision. Now, the Appellant seeks to undermine the Department's, Board's, and Superior Court's unanimous position that this claim has run its course and was properly closed.

The Appellant's argument that she was somehow prejudiced by the inclusion of Finding of Fact Nos. 5, 6, and 8 in Jury Instruction No. 5 is untenable and borderline frivolous, as is Ms. Kennelly's exaggerated and out-of-context attack on Kennewick General Hospital's closing argument. The Court should affirm the Superior Court's Judgment and Order and uphold the Department's May 16, 2014 claim closing order.

- A. The Board's Finding of Fact No. 5 is a "material fact" that was properly included in Jury Instruction No. 5, and even if it wasn't, no prejudice to the Appellant resulted therefrom.**

The Superior Court giving Board Finding of Fact No. 5 to the jury was mandatory under RCW 51.52.115. And even if the Superior Court was not required *by law* to give this Finding to the jury, the court did not abuse its wide discretion in doing so. And critically, zero prejudice to the Appellant has been shown.

RCW 51.52.115 provides that "the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court." In other words, providing the jury an instruction on the material findings of the Board is mandatory. This statute also provides that "the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same."

In *Gaines*, the Department argued that the superior court erred by *not* giving a jury instruction that *included* a Board Finding of Fact including physicians' credibility determinations of the claimant. *Gaines v. Dep't of Labor & Indus.*, 1 Wn. App. 547, 463 P.2d 269 (Div. I 1969). Division I explained,

Unlike the appellate rule of review in which findings must be accepted if supported by substantial evidence, the trier of the fact, be it court or jury, is at liberty to disregard board findings and decision if, notwithstanding the presence of substantial evidence, it is of the opinion that other substantial

evidence is more persuasive. **It is only if the substantial evidence presented by the record is evenly balanced that the findings control.**

Id. at 550 (citing *Scott Paper Co. v. Department of Labor & Indus.*, 73 Wn.2d 840, 440 P.2d 818 (1968); *Allison v. Department of Labor & Indus.*, 66 Wn.2d 263, 401 P.2d 982 (1965); *Groff v. Department of Labor & Indus.*, 65 Wn.2d 35, 395 P.2d 633 (1964)). Emphasis added.

The *Gaines* Court continued, “a written statement characterized as a finding by the board does not necessarily make it one. Thus, there must be substantial evidence to support the finding before it can be treated as such.” *Id.* (citing *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498, 208 P.2d 1181 (1949)). “To further protect the integrity of the jury's right and duty to review the board's findings and decision on a de novo basis, the superior court **is not required to** advise the jury of a board finding unless the finding is on a ‘material issue’ before the court.” *Id.* at 551 (citing *Stratton v. Department of Labor & Indus.*, 1 Wn. App. 77, 459 P.2d 651 (1969)). Emphasis added.

The *Gaines* Court candidly noted, “The dividing line between evidentiary or argumentative (subordinate) and ultimate findings of fact cannot be readily stated.” *Id.* at 552. However, Division I did offer examples of “findings of ultimate fact,” to include:

a finding on the identity of the claimant and his employer, the claimant's status as an employee or dependent under the act, the nature of the accident, the nature of the injury or occupational disease, the nature and extent of disability, the causal relationship between the injury or the disease and the disability, and other ultimate facts upon the existence or nonexistence of which the outcome of the litigation depends.

Id.

Ultimately, the *Gaines* Court held that the Finding of Fact complained of by the Department “is not the kind of finding required to be read to the jury.” *Id.* at 553. It is significant that Division I *did not* hold that reading this Finding of Fact to the jury would have been error, only that it was not mandatory.

Here, Ms. Kennelly appears to misapprehend existing law by alleging that the superior court erred by *giving* Finding of Fact No. 5 to the jury in Instruction No. 5. The Board’s Finding of Fact No. 5 provides, “Other than the accommodation of a heel lift, Ms. Kennelly has no claim-related restrictions as of February 19, 2014.” CABR at 19, CP at 81.

Giving Finding of Fact No. 5 to the jury was mandatory under RCW 51.52.115. *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.

The issue of claim-related work restrictions is incredibly material to the issues argued by the Appellant before the Board, and before the Superior

Court. In all stages of appeal, the Appellant sought reversal of the Department closing order, and to be given a finding of total permanent disability (TPD).

RCW 51.08.160 defines “permanent total disability” as 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.**” Emphasis added. Indeed, the Jury was provided Instruction No. 11, which provided in pertinent part, “Total disability requires consideration of the residuals of the worker’s industrial injury...and any pre-existing physical or mental restrictions.” CP at 88; *see also*, CP at 90.

Here, the Board’s finding that “Other than the accommodation of a heel lift, Ms. Kennelly has no claim-related restrictions as of February 19, 2014” is a finding of ultimate fact that was unequivocally material to the question of total disability. This Finding was not argumentative or passing on any witness’s credibility, as was the Finding at issue in *Gaines*. Further, Finding of Fact No. 5 was based on substantial evidence. *See, e.g.*, CABR at 18, CP at 94. Giving Finding of Fact No. 5 to the jury was mandatory under RCW 51.52.115, and in no universe amounted to an abuse of the trial court’s discretion.

Even if Finding of Fact No. 5 was not mandatory under the statute, which it was, the Superior Court did not abuse its discretion in giving this Finding to the jury. And critically, the Appellant has failed to carry her burden of establishing prejudice as a result.

The trial court's decision to give an Instruction is reviewed on an abuse of discretion standard. *Fergen v. Sestero*, 182 Wn.2d 794, 802, 346 P.3d 708 (2015). "An erroneous instruction is reversible error only if it is prejudicial to a party." *Id.* at 803. "The party challenging an instruction bears the burden of establishing prejudice." *Id.*

The Supreme Court of Washington has provided a three-part test for sufficiency of jury instructions:

(1) that the instructions permit the party to argue that party's theory of the case; (2) that the instruction(s) is/are not misleading; and (3) when read as a whole all the instructions properly inform the trier of fact on the applicable law. No more is required.

Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 809, 872 P.2d 507 (1994).

The inclusion of Finding of Fact No. 5 in Instruction No. 5 did not prevent the Appellant from arguing her theory of the case. Instruction No. 5 made clear that the enumerated Findings were those of the Board, and that "By informing you of these findings the court does not intend to express any opinion on the correctness or incorrectness of the Board's findings."

CP at 81-82. Instruction No. 6 further explained that the presumption of Board correctness can be overcome by a preponderance of the evidence. The Appellant was *in no way* prevented from arguing that she had other work limitations arising from this industrial injury, and indeed she did so.

Next, Instruction No. 5 was not misleading. The various Findings of the Board were clearly explained to be precisely that – a recitation of the Board’s findings, pursuant to RCW 51.52.115. When read in context of the other Instructions given to the jury, the jury was properly informed of the applicable law. Jury Instruction No. 5, including Finding of Fact No. 5, was sufficient under *Leeper*.

Lastly, even if the Superior Court erred in giving Finding of Fact No. 5 to the jury, no prejudice to the Appellant resulted. The Appellant argues that she was prejudiced on the basis that “it heightened the potential for juror confusion” because it was not “material to her disability determination.” *See Br.* at 10, 12. The Appellant is mistaken.

The Appellant, herself, cites *Gaines* for the proposition that only ultimate facts found by the Board should be included in the Instruction. *Id.* at 11. The Appellant also cites *Gaines* to assert that “the nature and extent of disability” and “other ultimate facts upon which the existence or nonexistence of such facts affects the outcome of the litigation” are all examples of Findings that are “ultimate facts.”

Here, Finding of Fact No. 5 (given as sub-4 of Instruction No. 5) provides the precise extent of work restrictions found to apply to the Appellant, and the Appellant's ability to work is central to the issue of whether she is totally and permanently disabled. The Appellant has failed to demonstrate any prejudice arising out of Finding of Fact No. 5 being given to the jury.

The trial court was required to give Board Finding of Fact No. 5 to the jury, pursuant to RCW 51.52.115. And even if the Superior Court was not required *by law* to give this Finding to the jury, the court did not err in doing so, and zero prejudice to the Appellant resulted. The Appellant's argument fails.

B. The Board's Finding of Fact No. 6 is a "material fact" that was properly included in Jury Instruction No. 5, and even if it wasn't, no prejudice to the Appellant resulted therefrom.

The Superior Court was also *required* by law to give Finding of Fact No. 6¹ pursuant to RCW 51.52.115. Hypothetically, even if the Superior Court were not obligated by the Legislature to give this Finding to the jury, the court did not abuse its wide discretion by including Finding of Fact No. 6 in its Instruction No. 5. Finally, Finding of Fact No. 6 did not, in any universe, prejudice the Appellant.

¹ Sub-5 of Instruction No. 5.

Ms. Kennelly untenably argues that the trial court judge erred by giving Finding of Fact No. 6 to the jury via Instruction No. 5. The Board's Finding of Fact No. 6 provides, "Ms. Kennelly is able to perform sedentary work when considering only the limitations proximately caused by the industrial injury as of February 19, 2014." CABR at 19, CP at 81.

Giving Finding of Fact No. 6 to the jury was mandatory under RCW 51.52.115. The Appellant's ability to perform sedentary work, and her lack of work restrictions under this claim are incredibly material to whether the Appellant was permanently and totally disabled. As noted above, the Appellant has consistently alleged TPD at all stages of appeal.

RCW 51.08.160 provides that a worker is TPD when he or she is no longer capable of "performing any work at any gainful occupation." Finding of Fact No. 6 makes clear that the Board found Ms. Kennelly to be capable of sedentary work, which is *not* an inability to perform "any work at any gainful occupation." Board Finding No. 6 is a finding of ultimate fact that was unequivocally material to the question of total disability. This finding was not argumentative or passing on any witness's credibility.

Further, Finding of Fact No. 6 was based on substantial evidence. The Board's Decision noted that Ms. Kennelly's attending physician, Dr. Thiel, testified that but-for Kennelly's vision problems, she would be able to work. CABR at 15. Dr. Miller testified that he agreed with

Dr. Thiel, and that the Appellant had no claim-related work restrictions. *Id.* Dr. Bauer also agreed that Ms. Kennelly could return to work, as far as claim related restrictions are concerned. *Id.*

Giving Finding of Fact No. 6 to the jury was mandatory under RCW 51.52.115, and in no universe amounted to an abuse of the trial court's discretion. Even if giving Finding of Fact No. 6 was not mandatory under the statute, which it was, the Superior Court did not abuse its discretion by doing so. And critically, the Appellant has failed to carry her burden of establishing prejudice resulting from this Finding being included in Instruction No. 5. *See Fergen*, 182 Wn.2d at 803.

A jury instruction is sufficient if it permits the parties to argue their theory of the case, the instruction is not misleading, and when read as a whole, they properly inform the jury of the applicable law. *Leeper*, 123 Wn.2d at 809.

The reasons Finding of Fact No. 6 were proper under *Leeper* closely parallel the reasons provided above for Finding of Fact No. 5. Instruction No. 5 made clear that the enumerated Findings were those of *the Board*, and that “[b]y informing you of these findings the court does not intend to express any opinion on the correctness or incorrectness of the Board’s findings.” CP at 81-82. Instruction No. 6 further explained that the presumption of Board correctness can be overcome by a preponderance of

the evidence. The Appellant was *in no way* prevented from arguing that the preponderance of the evidence was inconsistent with the Board Finding, including her attempt to get the jury to allow her vision problems under this claim, which would fundamentally undermine the Board's rulings.

Further, Instruction No. 5 was not misleading, particularly in light of the other Instructions given to the jury. The various Findings of the Board were clearly explained to be precisely that – a recitation of the Board's findings. When read in context of the other Instructions given to the jury, the jury was properly informed of the applicable law. Jury Instruction No. 5, including Finding of Fact No. 6, was sufficient under *Leeper*.

Even assuming *arguendo* that the Superior Court erred in giving Finding of Fact No. 6 to the jury, no prejudice to the Appellant resulted. The Appellant attempts to argue that Finding of Fact No. 6 is “incomplete, misleading and confusing...because it does not include ‘the other factual elements required to establish total disability.’” Br. at 13.

The Supreme Court's *Leeper* opinion only requires that “when read as a whole all the instructions properly inform the trier of fact on the applicable law. No more is required.” *Leeper*, 123 Wn.2d at 809. Here, “all the instructions” properly informed the jury of *all* elements required to establish total disability. Indeed, Instruction No. 11 expressly and clearly

instructed the jury on “all elements” required to establish total disability. *See* CP at 88. The Appellant’s argument is a non-starter.

Next, the Appellant argues that Finding of Fact No. 6 precludes her from arguing her theory of the case, which is demonstrably false. The Appellant presented no evidence to rebut Dr. Hopp’s testimony that her eye conditions were unrelated to her industrial injury. CABR at 17. Nor did Ms. Kennelly present evidence that the bleeding she experienced in her eyes caused temporary or permanent vision impairment. *Id.*

What prevented the Appellant from “arguing her theory of the case” was her failure to present evidence sufficient to prove her allegations, not Finding of Fact No. 6 being read to the jury in context of all the other jury instructions and argument by the Parties. The Appellant’s argument is untenable and without merit.

Next, Ms. Kennelly argues that Finding of Fact No. 6 “equates to a comment on the evidence,” and characterizes the Finding as “merely” presenting “the opinion testimony of two employer-retained forensic examiners.” Br. at 13. However, as already underscored by the IAJ, Ms. Kennelly utterly failed to establish a causal connection between her vision problems and her industrial injury, and her eye conditions were never accepted by the Board or the Jury.

Further yet, the Appellant argues that the Superior Court committed error “of constitutional magnitude” because “[o]nly one set of facts made it into the findings and the other was completely disregarded,” and therefore amounted to a “comment on the evidence.” Br. at 13-14. The Appellant’s argument is hyperbolic and lacking merit.

“Findings of fact” necessarily reflect only those facts that were material and significant to the finder of fact, in this case the IAJ. Reciting all evidence produced in the case, regardless of its relative merit or accounting in the Decision, is patently absurd and defies the entire purpose of enumerating the “Findings of Fact” material to the Board’s Decision as summarily stated at the end of the Board’s Decision.

Here, the Appellant’s line of argument is unmoored from the shores of law and reason. The Appellant *herself* cites *Gaines* to assert that “the nature and extent of disability” and “other ultimate facts upon which the existence or nonexistence of such facts affects the outcome of the litigation” are all examples of Findings that are “ultimate facts” and therefore required to be given to the jury under *Gaines*. Yet, Ms. Kennelly tries to argue that giving the jury a Finding of her being “able to perform sedentary work” is an error of “constitutional magnitude.” Such an argument is, at best, untenable and unmoored from established law.

The trial court was required to give Board Finding of Fact No. 6 to the jury, pursuant to RCW 51.52.115. And even if the Superior Court was not required *by law* to give this Finding to the jury, the court clearly did not abuse its discretion in doing so, and zero prejudice to the Appellant resulted. The Appellant's arguments should be rejected.

C. The Board's Finding of Fact No. 8 is a "material fact" that was properly included in Jury Instruction No. 5, and even if it wasn't, no prejudice to the Appellant resulted therefrom.

The Superior Court was statutorily required to give Finding of Fact No. 8 to the jury, and was also well within its broad discretion in giving Board Finding of Fact No. 8². The Appellant attempts to argue that this Finding "is utterly irrelevant to the issue before the jury," "serves only to confuse the jury," and is therefore "reversible error." Br. at 15. However, the Appellant's argument is again based upon an errant understanding of the law, and she failed to demonstrate any prejudice arising from this Finding being given.

Finding of Fact No. 8 provides, "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 knee joint with short thigh stump."

² Given as sub-7 in Instruction No. 5.

Here, the trial court was obligated under RCW 51.52.115 to provide the jury Finding of Fact No. 8 in its Instructions. Jury Instruction No. 11, not objected to by the Appellant, provides that “Total disability requires 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; *see also*, CP at 90.

The Appellant’s PPD rating of “10 percent the amputation value of the left leg above knee joint with short thigh stump” is contemplated in the required “consideration of the residuals of the worker’s industrial injury,” is material to the issue on appeal, and is supported by substantial evidence. *See Gaines*, *supra*.

Further, the Appellant was arguing for the jury to allow her preexistent eye conditions under this claim, thereby furthering her goal of obtaining a pension award. The extent of the limitations and disability arising from the Appellant’s left leg was only one, but critical, component of why Ms. Kennelly argued she should be awarded a pension. The 10% PPD award of the Appellant’s left leg being provided to the jury was contemplated within the rules laid down by *Gaines*, and Finding of Fact No. 8 was therefore mandatory under RCW 51.52.115.

Assuming *arguendo* that giving Finding of Fact No. 8 was not mandatory, the Superior Court did not abuse its discretion by doing so. A

jury instruction is sufficient if it permits the parties to argue their theory of the case, the instruction is not misleading, and when read as a whole they properly inform the jury of the applicable law. *Leeper*, 123 Wn.2d at 809. “An erroneous instruction is reversible error only if it is prejudicial to a party.” *Id.* at 803. “The party challenging an instruction bears the burden of establishing prejudice.” *Id.*

The Appellant’s arguments against Finding of Fact No. 8 fail on all bases. The Appellant’s 10% amputation value PPD award did not preclude her from arguing her theory of the case. Indeed, by establishing that the Appellant had a left lower extremity PPD award at the Board overtly furthers Ms. Kennelly’s pension arguments. Assuming Ms. Kennelly had been able to convince the jury that her eye conditions were related, the permanent leg disability would have undoubtedly played a central role in the Appellant’s argument.

Further, the 10% left leg PPD award did not mislead or confuse the jury, especially considering the other Instructions provided at the end of the trial. And the “jury is presumed to follow instructions.” *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010).

Instruction No. 11 clearly laid out the requirements for a finding of *total disability*, and provided that the jury was to consider “the residuals of the worker’s industrial injury” and a litany of other factors. CP at 88.

Instruction No. 14 also provided, in pertinent part, that “[a]ny determination on the extent of Ms. Kennelly’s disability must be supported by medical testimony.” *Id.* at 91.

And critically, the Verdict form given to the jury did not invoke “disability,” at all. The Verdict form simply asked, “Was the Board of Industrial Insurance Appeals correct in deciding Ms. Kennelly was able to perform and obtain gainful employment on a reasonably continuous basis as of February 19, 2014?”

Finding of Fact No. 8 was therefore not misleading, especially when read in context of all the other Instructions, and the Verdict form itself, provided to the jury. The Appellant’s arguments to the contrary fail.

Lastly, the Appellant has failed to carry her burden of establishing any prejudice resulting from Finding of Fact No. 8 being given to the jury. The Appellant misapprehends the relevant standards on appeal.

As an initial matter, the language of Finding of Fact No. 8 is quite unfavorable to Kennewick General Hospital. This Finding contains vivid and visceral language: “amputation value...above the knee joint with short thigh stump.” This language, invoking rather upsetting imagery, arguably does more to prejudice Kennewick General Hospital than it does the Appellant. Thus, the Appellant’s bemoaning of this Finding is shortsighted and apparently self-serving in this appeal context.

The Appellant's "strongest" argument in favor of prejudice here is that "Although to a legal practitioner" the difference between PPD and TPD may be easily discerned, "the same cannot be said *as definitively true* for a jury." Br. at 16. Emphasis added. Kennewick General Hospital does not bear the burden to demonstrate a *lack* of prejudice, however, and certainly not on a *definitive* basis.

The Appellant bears the burden to *establish* prejudice, and Ms. Kennelly has utterly failed to establish any prejudice whatsoever. *See Leeper*, 123 Wn.2d at 803. Rhetorical speculation, such as that argued by Ms. Kennelly, does not rise to the level of establishing prejudice, and the Appellant's argument thereby fails.

D. Kennewick General Hospital did not "misstate" the law during closing argument as alleged by the Appellant, and even if it had, no prejudice to the Appellant resulted therefrom.

The Appellant concludes her brief to this Court by errantly attempting to argue that Kennewick General Hospital "misrepresented the law" during closing argument. Kennelly points to Kennewick General Hospital asking the jury what caused the Appellant's inability to work, "Blindness or leg fracture." Br. at 16. The Appellant also attempts to split hairs by claiming that "a pension...does not just automatically last 'for the rest of her life'." The Appellant appears to side-step the truism that pensions arise from a finding of *permanent total disability*.

The Appellant fails to account for the fact that Kennewick General Hospital's closing argument had gone to great length, and in great depth, in arguing that the Appellant's eye conditions were unrelated to this claim, and that a central question before the jury was whether the Board was correct in finding that the appellant "is able to perform sedentary work...when considering only the limitations proximately caused by the industrial injury." August 16, 2017 Trans. 59-60.

The clear context of Kennewick General Hospital's objected-to argument was that the Appellant's eye conditions were not related to this claim, and the jury needed to consider whether it was the accepted and healed femur fracture causing her disability, or whether the eye conditions were the cause of her inability to work.

As already mentioned above, the Appellant's own attending physician testified that *but-for her eye conditions*, Ms. Kennelly was able to return to work. If the jury found the Appellant's eye conditions to be unrelated, whether the Appellant's disability was due to her healed leg fracture or her eye conditions is of tantamount importance.

The Appellant's objection to the closing argument of Kennewick General Hospital falls apart when the closing argument is read in context. Kennewick General Hospital did not "misrepresent" the law, and the Appellant's argument should be rejected.

Additionally, the Appellant claims that “Ms. Kennelly was not given any opportunity to explain her objection or ask for a curative instruction.” Br. at 17. However, there is zero indication that the Appellant was precluded from making her record. A review of the August 16, 2017 transcript would lead the reader to believe that the Superior Court Judge was accommodating and agreeable with the Parties. And indeed, a “curative instruction” was unnecessary in light of Jury Instruction No. 1.

Considering the Superior Court Judge’s apparent demeanor, it is highly dubious that *if the Appellant had* asked leave to make her record for appeal, that the request would have been met with the Judge’s scorn or have been disallowed. All the Appellant offered, on the record, was merely “Your Honor, objection. I’m sorry.” Trans. at 60. If there was a failing here, regarding preserving objections, the Appellant could clearly have done more to preserve the record and cannot now place the blame on the Superior Court Judge.

Lastly, Jury Instruction No. 1 would have cured any potential error on the part of the Respondent during closing argument, *even if it had misstated the law*. Jury Instruction No. 1 provided, in pertinent part,

As to the comments of the lawyers during this trial, they 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.

CP at 76. Emphasis added.

Thus, even if the Respondent *had* misstated the law during closing argument (which it did not), the very first Instruction given to the Jury would have cured any prejudice imagined by the Appellant to have resulted therefrom. In no universe did the trial court commit “prejudicial error” by not providing the Jury a specific curative instruction regarding the Respondent’s closing argument.

V. CONCLUSION

For the reasons stated above, the Superior Court did not abuse its discretion in giving Jury Instruction No. 5, nor was the Appellant prejudiced in any way by the Findings of Fact included in the Instructions. Further, the Appellant was not prejudiced by Kennewick General Hospital’s closing argument, she failed to pursue a colorable objection, and Jury Instruction No. 1 already served as a “limiting instruction” for arguments as characterized and alleged by the Appellant here. The Appellant waived her closing argument objections, but fails on the merits of her argument regardless.

Kennewick General Hospital respectfully requests that the Court affirm the Judgment and Order of the Superior Court, the Decision of the

Board of Industrial Insurance Appeals, and the Department order closing
this claim.

RESPECTFULLY SUBMITTED this 25 day of April, 2018.

A handwritten signature in blue ink that reads "R. Miller". The signature is written in a cursive style with a large, looping initial "R" and a small "z" or "r" before the name "Miller".

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NO. 356256-III

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III**

CONNIE KENNELLY,

Appellant,

v.

KENNEWICK GENERAL
HOSPITAL, and THE
DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON.,

Respondent.

CERTIFICATE OF SERVICE

I, Angeline Welch, under penalty of perjury pursuant to the laws of the State of Washington, declares that on April 24, 2018, she caused to be served Kennewick General Hospital's Brief of Respondent and Certificate of Service in the below described manner:

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