No. 91963-1

NO. ~~44508-5-II~~ 45695-8

COURT OF APPEALS,
DIVISION II

OF THE STATE OF WASHINGTON

PATRICK J. MCMANUS, *APPELLANT,*

v.

CLARK COUNTY, *RESPONDENT.*

REPLY BRIEF OF APPELLANT

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ARGUMENT

Assignment of Error No. 1

The trial court erred in its introductory oral instruction in refusing to state that the Board of Industrial Insurance Appeals in its decision was affirming an order of the Department of Labor and Industries.

Issues pertaining to the first Assignment of Error

A. The Board of Industrial Insurance Appeals, being an appeal board designated by RCW 51.52.050 to hear appeals from orders of the Department of Labor and Industries, should the trier of fact be advised as to how case came to them for their consideration?

B. Is the fact that the Board of Industrial Insurance Appeals adopted an order of the Department of Labor and Industries a fact that should be stated to the trier of fact?

Commencing at page 13 of respondent's brief, Clark County cites *Stratton v. Dep't of Labor and Indus.*, 1 Wn. App. 77, 459 P.2d 651 (1969), to support its position that the prior decision of the Department of Labor and Industries should not be mentioned to the jury pool. Since the opinion of the Board on review of the Proposed Decision and Order by the

Industrial Appeals Judge, IAJ, became the decision of the Board of Industrial Insurance Appeals pursuant to *RCW* 51.52.106, mentioning the prior Decision of the IAJ to the jury which is at odds with the Board's decision is error. However, stating that to the jury as an introductory oral instruction that the Board had affirmed a decision of the Department of Labor and Industries, has nothing to do with the *Stratton* case, and is consistent with the last paragraph of Instruction No. 3 given to the jury.

On page 14, Clark County argues that Mr. McManus asserts that the jury should have been permitted to hear that the Department had found that his condition was an occupational disease. The jury was only entitled to know that the Board had affirmed a prior decision of the Department which was consistent with Instruction No. 3, not that they had specifically denied that Mr. McManus' condition constituted an occupational disease. The jury could have inferred that the Department had decided for Mr. McManus by the fact that the Board affirmed the decision of the Department, but that is not the same thing as stating the Department's finding. As stated in Instruction No. 3, the Board is a separate state agency to hear appeals from the Department's determinations, and that is the only jurisdiction within which the Board has to act. *RCW* 51.52.010. See Appendix "A", CP No. 14, Instruction NO. 3, attached.

Assignment of Error No. 2

The trial court erred in reversing an evidentiary ruling of the Board of Industrial Insurance Appeals in allowing the expert opinion of a doctor, who was not called to testify, through another doctor's testimony.

Issues pertaining to the Second Assignment of Error

A. Was the opinion of the doctor who did not testify hearsay?

B. Are there any recognized exceptions to the hearsay rule that would allow the non testifying doctor's opinion to be admissible?

Commencing at page 17, Clark County argues that the statement of Dr. Paul Won, the expert witness called on behalf of Mr. McManus, was an admission by a party opponent. The statement that Dr. Wrobel testified in a discovery deposition was that it is unknowable as to whether or not the protrusion at L2-3 was related to his employment. Through Dr. Won, the admission by his doctor can hardly be said to be (i) Mr. McManus' own statement, (ii) a statement adopted by Mr. McManus, (iii) a statement authorized by Mr. McManus, (iv) a statement by Mr. McManus' agent, or

(v) a statement by a coconspirator of Mr. McManus. *ER* 801(d)(2). The statement by Dr. Wrobel, not called to testify at hearing, is blatant hearsay.

As Clark County states, Dr. Won provided testimony that he believed the L2-3 disc protrusion was symptomatic because that is what his own neurosurgeon, Dr. Wrobel, had said. The question on cross examination of Dr. Won, at page 38, line 15, asked by Clark County's counsel and objected to by Mr. McManus' counsel as hearsay, had nothing to do with whether the L2-3 disc protrusion was symptomatic, but went solely to the issue of etiology, or causation, as related to Mr. McManus' employment. In the question, Clark County states the opinion of Dr. Wrobel which was not in evidence. The statement was offered to prove the truth of the matter asserted, and was not introduced to impeach Dr. Won as to something he had earlier stated. The question went to the ultimate issue in the case as to the cause of the L2-3 disc herniation. By asking the question, Clark County's counsel introduced the opinion of Dr. Wrobel who did not testify at hearing.

Continuing at page 19 of the respondent's brief, Clark County argues that pursuant to *ER* 703, the facts or data on which an expert bases his opinion needs not be admissible in evidence. There are no facts or data being introduced into evidence from Dr. Wrobel, but only Dr.

Wrobel's opinion. Clark County then argues under *ER* 803(18) the learned treatise exception to the hearsay rule, but there was no statement contained in a published treatise, periodical or pamphlet being relied upon as authority, only the opinion of Dr. Wrobel from a discovery deposition. Under *ER* 803(4), statements made for the purpose of diagnosis or treatment describing medical history, or past or present symptoms, reasonably pertinent to diagnosis of treatment are an exception to the hearsay. Here Dr. Wrobel's opinion on causation was not made for the purpose of diagnosis or treatment, and was not reasonably pertinent to diagnosis or treatment. There is no question that there was substantial likelihood that the error by the trial court in reversing the evidentiary ruling by the Board affected the jury's verdict, and this court should not be put in position of weighing or balancing the testimony of Mr. McManus' medical witness with Clark County's medical witnesses, as counsel would have you do.

Assignment of Error No. 3

The trail court erred in refusing to correct a scriveners error in Finding of Fact No. 5 of the Board of Industrial Insurance Appeals restated in Instruction No. 4, paragraph 4, that Mr. McManus sustained an

aggravation of his pre existing cervical degenerative disc changes, when in fact it was lumbar, or low back, degenerative disc changes that were aggravated, and had nothing to do with the cervix or neck.

Issues pertaining to the third Assignment of Error

A. Did the trial court have jurisdiction as an appellate court, reviewing a prior decision of the Board of Industrial Insurance Appeals, to correct a scriveners error in the Board's findings?

B. Should the trial court have corrected the scriveners error of the Board referencing cervical rather than lumbar degenerative disc disease, which was aggravated by Mr. McManus' employment with Clark County?

Commencing at page 19, Clark County argues that Mr. McManus waived any argument or right to seek amendment of a finding of fact by the trial court by not raising the error while the case was still before the Board. Clark County petitioned for review from the Proposed Decision and Order and pointed out the error. Mr. McManus acknowledged that an error had been made by not arguing otherwise in his response to Employer's Petition for Review. (CABR, page 19-33). Because the Board erred in Finding of Fact No. 5 that Mr. McManus sustained an

aggravation of his pre-existing cervical degenerative disc changes, does not mean that Mr. McManus is bound by that error. (CABR, page 70). The trial court restated that error in Finding No. 4 of Instruction No. 4, attached as appendix "B."

Clark County argues that the Special Verdict Form submitted to the jury only referencing Mr. McManus' low back condition somehow cures the trial court error. The question submitted is stated:

> Was the Board of Industrial Insurance Appeals correct in deciding that Patrick McManus' low back condition, diagnosed as aggravation of degenerative disc changes and a new central disc protrusion at the L2-3 level, arose naturally and proximately from the distinctive conditions of his employment with Clark County operating a street sweeper? (CP, page 15)

The jury was being instructed, "was the Board of Industrial Insurance Appeals correct…" and it could reasonably be inferred by the jury that the Board was not correct by Instruction No. 4 that Mr. McManus sustained an aggravation of his pre-existing cervical degenerative disc changes, not his pre-existing lumbar degenerative disc changes. (CP, page 15) Finding No. 4 was the concluding and key finding by the Board on which the Board acted in deciding the appeal by Clark County in favor of Mr. McManus.

Assignment of Error No. 4

The trail court erred in refusing to give Mr. McManus proposed Instruction No. 10 that special consideration should be given to testimony of an attending physician, namely Dr. Paul Won, who was the only attending physician to testify.

Issues pertaining to the fourth Assignment of Error

A. Should Mr. McManus' proposed Instruction No. 10 on attending physicians have been given to the jury?

B. Is the failure to give the instruction on attending physician prejudicial error?

Construing the Worker Compensation Act liberally in favor of the worker, Mr. McManus, as the court is required to do, defendant's proposed Instruction No. 10 should have been given by the trial court. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 572, 761 P.2d 618 (1988). In *Hamilton*, the instruction had been given and the appellate court reversed the trial court for giving the instruction. The Supreme Court then reversed the Court of Appeals, holding that the instruction should have been given. In *Hamilton*, the standard expert testimony instruction was given as was the case here, Instruction No. 7, WPI 2.10,

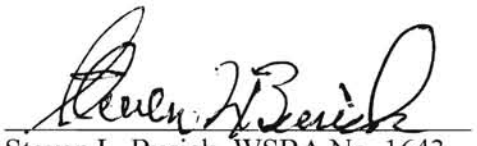
(CP, page 14), but the Supreme Court still said that the testimony of attending physician instruction, appendix C to appellant's brief, should have been given. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d at page 573.

Mr. McManus' proposed Instruction No. 10 was critical here, because Clark County relied on the testimony of Dr. Dietrich and Dr. Harris, as well the hearsay opinion of Dr. Wrobel, on the issue of causation, and the supporting opinion of Dr. Won, the attending physician, was being challenged by Clark County. Unlike in *Harker-Lott*, here there was no disparity in the opinions of attending physicians. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 183 and 187, 986 P.2d 14 (1998).

Conclusion

The appellate court should order a new trial for Mr. McManus and award reasonable attorney fees for sustaining the decision of the Board of Industrial Insurance appeals in the appellate court.

Dated June 18, 2014



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COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

CLARK COUNTY, Respondent, v. PATRICK MCMANUS, Appellant.	))))))))	Court of Appeals Case No. 45695-8-II Clark County Case No. 13-2-01560-2 PROOF OF SERVICE

The undersigned states that on Wednesday, the 18th day of June, 2014, I deposited in the United States Mail, with proper postage prepaid, Appellant's Motion to Amend Title Page to Brief of Appellant and to Extend Time to File a Reply Brief, and Reply Brief of Appellant, dated June 18, 2014, addressed as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

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