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COURT OF APPEALS,
DIVISION I

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STATE OF WASHINGTON *RF*

IN THE STATE OF WASHINGTON

CLARK COUNTY,
RESPONDENT/PLAINTIFF

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STATE OF WASHINGTON
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v.

PATRICK J. McMANUS,
PETITIONER/DEFENDANT.

PETITION FOR REVIEW TO THE SUPREME COURT

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Issue Presented for Review

No. 1. Where the well-established rule of law in Washington for cases arising out Title 51 RCW requires finders of fact to give special consideration to opinions of attending physicians and where an attending physician has testified, is the trial court required to advise the jury of this rule of law?

The Supreme Court should grant review on this issue because Division I's decision in this matter, and reliance on *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 968 P.2d 14 (1998), directly conflicts with this Court's decision in *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.3d 569, 761 P.2d 618 (1988). RAP 13.4(b)(1). As pointed out by Judge Dwyer's pointed dissent the Court of Appeals erred, *inter alia*, by relying on its own precedence in derogation of the Supreme Court's precedence.

Statement of the Case

Patrick McManus started working for Clark County, Washington, on June 12, 1989, as an entry-level maintenance worker, and progressed to specialist operating backhoes and flatbed-type trucks. After three years, he transferred to the bridge crew doing bridge maintenance, from painting to replacing bridge decks to replacing beams. After seven years on the bridge crew in 1998, Mr. McManus accepted a position as a street sweeper operator. He operated three street sweepers for over a decade, which

exposed him to various levels of whole-body vibration. (Certified Appeal Board Record, P. McManus, Direct, page 73, line 22; page 74, lines 8, 11, 15, 18 and 20; page 75, line 21; page 76, line 4; page 80, line 3; page 81, lines 14 and 21; page 82, line 1; page 83, lines 11 and 14; and page 84, line 25).

His third sweeper did not have an ergonomic cab, requiring Mr. McManus to assume awkward postures to operate it. Furthermore, the seat of this third sweeper did not protect him from bumps, vibration, and jarring. (CABR, P. McManus - Direct, page 80, line 3; page 81, line 14; page 86, line 24; page 87, lines 12 and 23; and page 90, line 17).

In the first part of 2010, Mr. McManus started to develop a problem related to the operation of the Elgin Regenerative Air sweeper. Mr. McManus has had injuries and treatment to his low back over the years. Then in 2010, the pain in his low back worsened to the point where it was radiating across the lower back, down his left leg; as a result, effecting his sleep and activities of daily living. Mr. McManus would have electric shocks going down his left leg and across the top of his foot. Weakness in his lower left leg caused him to stumble and he almost fell twice. Between January and April 2011, his low back became progressively worse to the point where he could not operate a street sweeper without being overwhelmed with pain. He last worked in

April 2011. (CABR, P. McManus - Direct, page 91, lines 22 and 25; page 92, lines 7, 9, 16 and 25; page 93, lines 12 and 19; and page 94, lines 16 and 19).

Dr. Paul Won, who is Board Certified in family medicine and occupational medicine, first treated Patrick McManus on January 13, 2005, for a low back injury at work when he was moving a rubber speed bump. Mr. McManus twisted and felt a pull in his back but he continued working and as a result, had an increase in low back pain. On examination, Dr. Won found muscle spasm and limited range of motion. Dr. Won prescribed Ibuprofen and a muscle relaxer, and also placed Mr. McManus on modified work, which he performed for one day. Mr. McManus then went back to his regular job as a street sweeper and his low back condition improved. (CABR, Dr. Won - Direct, page 5, line 15; page 7, lines, 20, 23 and 25; page 9, line 19; page 10, line 12; page 11, lines 6, 8 and 10; page 13, lines 2, 4 and 23; page 14, line 10; page 15, line 5; and Cross, page 36, line 13).

Dr. Won next saw Mr. McManus on April 11, 2011. Mr. McManus had gotten a new street sweeper two years before with a very poor seat cushion. His back was being jarred when the road was

bumpy, or he hit a pothole, and his back pain was getting progressively worse. His pain was going down his left thigh, and he was taking Tramadol and Dilaudid for pain. He had an epidural injection without much improvement, and he had last worked on April 6, 2011. (CABR, Dr. Won - Direct, page 18, line 12; page 19, lines 1 and 16; page 20, lines 7, 17, and 25; and page 21, lines 3, 5 and 8).

When Dr. Won next examined Mr. McManus, he had difficulty standing from a seated position, and walked slowly and stiffly. Mr. McManus had limited range of motion of the low back, and could not bend backwards. Dr. Won reviewed a Magnetic Resonance Imaging taken on June 25, 2010, which was compared to an MRI taken on February 4, 2006, and showed a new central disc protrusion at L2-3, resulting in moderate to severe stenosis, or narrowing, with crowding of the nerve root. Dr. Won diagnosed displacement of the lumbar intervertebral disc at L2-3. Dr. Won continued to treat Mr. McManus through December 15, 2011. (CABR, Dr. Won - Direct, page 22, lines 13, 15 and 24; page 23, lines 3, 5, 11 and 20; and page 30, line 1).

As the attending physician, Dr. Won testified that driving the street sweeper, with the jarring and bouncing, had been a major contributor to Mr. McManus' lumbar condition. Mr. McManus worked full time, and a major portion of his activity was driving a street sweeper. He had no

major outside activities, and is a pretty sedentary guy just doing street sweeping work. Mr. McManus is a big man and drives a street sweeper on bumpy roads. Physical force equals mass times acceleration, ($P=M \times A$) and there was a great force focused on his low back. The L2-3 disc protrusion is symptomatic and the distinctive conditions of his employment driving a street sweeper were a cause of the disc herniation at L2-3. (CABR, Dr. Won – Direct, page 31, lines 10, 15 and 22; page 32, lines 6, 11, 16 and 18; Cross, page 38, line 2; and Re-Direct, page 43, line 5).

Dr. Thomas Dietrich, a Board Certified neurosurgeon, conducted a one-time medical evaluation of Mr. McManus on July 14, 2011, at the request of the Self-Insured Employer, Clark County, pursuant to RCW 51.32.110(1). Dr. Dietrich testified that Mr. McManus' low back condition did not arise naturally and proximately from the distinctive conditions of his employment; Dr. Dietrich also testified that contributing to the development of his degenerative disc disease is a situation where you have repetitive bouncing up and down over a period of years, and that likely played a role in the rate of degenerative change in Mr. McManus' low back condition. (CABR, Dr. Dietrich - Direct, page 8, line 9; page 9, line 24; page 26, line 11).

Dr. James Harris is a Board Certified orthopedic surgeon and an active duty medical officer in the Navy. On one of those evenings, June 27, 2012, Dr. Harris conducted a records review at the request of the employer's attorney. Dr. Harris never examined Mr. McManus. At the time of his review, Dr. Harris stated in his report that it was possible that the L2-3 disc protrusion were caused by his employment activities. On the contrary, when he testified he stated that he does not believe the L2-3 disc protrusion is symptomatic in any event. (CABR, Dr. Harris - Direct, page 4, line 21; page 5, line 3; page 7, line 12; page 10, line 2; page 11, lines 12 and 14; page 12, line 3; page 13, line 1; page 21, line 21; page 22, lines 2 and 7; page 26, line 4; Cross, page 37, line 1; and Re-Direct, page 44, line 22).

On December 13, 2011, the Department of Labor and Industries affirmed the order dated August 30, 2011, allowing the claim as an occupational disease with a manifestation date of June 25, 2010. On February 7, 2012, Clark County appealed the Department order allowing the claim to the Board of Industrial Insurance Appeals, and its appeal proceeded to an evidentiary hearing before an Industrial Appeals Judge. On February 21, 2013, an Industrial Appeals Judge issued a 15 page Proposed Decision and Order upholding the decision of the Department of Labor and Industries. On March 22, 2013, Clark County petitioned to the

three member Board for review of the Proposed Decision. On April 5, 2013, the Board denied Clark County's petition and adopted the Proposed Decision. (CABR, pages 1, 36-51, 57-71 and 73-76).

Clark County then appealed to Superior Court for Clark County, and the case proceeded to a two-day jury trial on November 18 and 19, 2013. After having the testimony read to them by the attorneys from the Certified Appeal Board Record, being provided the exhibits admitted before the Board, and receiving the Court's instructions, the jury reversed the Board and the Department in deciding that Mr. McManus did not have an occupational disease. On November 19, 2013, the trial court entered the Order and Judgment on the jury verdict. (Clerk's Papers Sub. 18).

The trial court's refusal to give Defendant's Proposed Jury Instruction No. 10, *inter alia*, was appealed to the Washington Court of Appeals. While the Court of Appeals' May 18, 2015, decision agreed with some of the issues raised by Mr. McManus and remanded the matter for a new trial, Division I affirmed the trial court's decision not to give Defendant's Proposed Jury Instruction No. 10.

Finally, on June 8, 2015, the Court of Appeals withdrew its prior opinion and *sua sponte* issued a new opinion. The new opinion of June 8, 2015, finally addressed Mr. McManus' request for attorney fees.

The Court made an award of attorney fees and costs for time spent on appeal contingent upon Mr. McManus prevailing upon remand.

Argument

The Supreme Court should grant review because the Court of Appeals failed to follow its precedent in *Hamilton*, 111 Wn.3d 569. Instead, the Court of Appeals relied upon its own precedent *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, which is directly inconsistent with *Hamilton*. The Court should grant review to affirm the primacy of its holding in *Hamilton*: where substantial evidence supports it, the Attending Physician – Special Consideration jury instruction is required.

Additionally, the Court should grant review because the trial court failed to recognize the attendant facts and circumstances of the role attending physicians play in our workers compensation system. The Court should grant review because the trial court failed to do what was right under the circumstances because this jury instruction levels the playing field between resource-poor injured workers and self-insured employers. Review should be granted because the trial court's decision was manifestly unreasonable because it meant the jury used a different set of rules in reviewing the Board's decision than those used by the Board itself. For these reasons, Mr. McManus petitions the Court to review the decision of the Court of Appeals.

1. Standard of Review

It is well established that it is within the trial court's discretion whether to give a particular jury instruction. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Abuse of discretion means a disregard of "attendant facts and circumstances." *Samantha A. v. Dep't of Social and Health Serv.*, 171 Wn.2d 623, 645 (2011). This Court has also summarized this standard as:

An exercise of judicial discretion is a composite of, among other things, conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. A decision involving discretion will not be disturbed on review except on a clear showing of its abuse, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State Ex Rel. Carroll v. Junker, 79 Wn.2d 12, 26 (1971). Alternatively, the trial court abuses its discretion when it makes a decision contrary to the law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Mr. McManus was entitled to have the trial court give his Proposed Jury Instruction No. 10 so long as there was substantial evidence to support it. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). When assessing the presence of substantial evidence to support the instruction, a court views the evidence in the light most favorable to the party who requested it. *Mina v. Boise Cascade Corp.*, 37 Wn. App. 445,

448, 681 P.2d 880 (1984), *aff'd*, 104 Wn.2d 696, 710 P.2d 184 (1985).

2. **The law requires instructing the jury on the Attending Physician-Special Consideration doctrine where it is supported by substantial evidence; failure to do was an abuse of discretion.**

The Court of Appeal's opinion did not question whether there is substantial evidence Dr. Won was an attending physician. The dispute is whether the trial court abused its discretion in refusing to give Defendant's Proposed Jury Instruction No. 10. The Court of Appeals erred when it concluded the trial court did not abuse its discretion.

The law is well settled: the trier of fact is required to give special consideration to the testimony of the attending physician. *Hamilton*, 111 Wn.2d at 571. This does not mean giving that testimony more weight or credibility, and so forth, because those determinations are the province of the jury. *Hamilton*, 111 Wn.2d at 572. No decision of the Supreme Court since *Hamilton* has disturbed this rule. Nevertheless, this appeal is not whether the Defendant's Proposed Jury Instruction No. 10 is a correct recitation of the law, but whether the trial court failed "to do what was right under the circumstances." *Junker*, 79 Wn.2d at 26. It did not.

The Court of Appeals wrongly relied upon its prior decision *Boeing*, 93 Wn. App. at 186; Majority Opinion p. 13. The *Boeing* decision wrongly concluded the Attending Physician – Special Consideration was not required

even where there was substantial evidence that an attending physician testified in the case. *Boeing*, 93 Wn. App. at 186. The Court of Appeals held that Mr. McManus was still able to argue special consideration, even without his Proposed Jury Instruction No. 10. Majority Opinion p. 13.

The *Boeing* decision and the present opinion simply ignore the unambiguous holding in *Hamilton*. The *Hamilton* Court properly distinguishes between the Judge advising the jury what is the law and the attorney's arguments and statements about the law. *Hamilton*, 111 Wn. 2d at 572. This distinction is emphasized by the introductory instruction given by the Court, which advises the jury not to confuse the attorney's argument as definitive statements of the law. (Court's Jury Instruction No. 1; CP 11).

The *Hamilton* Court states:

[The attending physician instruction] reflects binding precedent in this state and correctly states the law. Since this is a rule of law, it is appropriate that the jury be informed of this by the instructions of the court. To refuse to do so would convert the rule of law into no more than the opinion of the claimant's attorney.

Hamilton, 111 Wn.2d at 572 (emphasis added). What the *Hamilton* Court proscribed is exactly what the Court of Appeals' opinion allowed: refusing to advise the jury on this rule of law. Merely allowing counsel to argue this is not the same as the Court's pronouncement that special consideration of attending physician's opinions is the law. The Court should grant review of

the Court of Appeals' mistaken analysis of Supreme Court precedent.

The Supreme Court's *Hamilton* decision is in marked contrast with the analysis of the Court of Appeals in its *Boeing* decision, "But the *Hamilton* court did not hold that an instruction to that effect was mandatory." *Boeing*, 93 Wn. App. at 186. The *Boeing* Court is simply wrong; the Supreme Court in *Hamilton* did say it was mandatory because if it were not then it is only argument by the attorneys. If it is not mandatory, according to the Supreme Court, then the jury is permitted to disregard statements by attorneys about the law. The instruction is mandatory, assuming substantial evidence supports it, because the jury must know what is the law from the judge. The jury must know what is the law so it can place the attorney's arguments and the evidence in the proper context.

In the present case, the Court of Appeals erred because it relied on its own precedent, which derogated the Supreme Court's precedent. Judge Dwyer's dissent is correct on this elementary point of law: where there is a conflict between the Court of Appeals precedent and the Supreme Court precedent, the Supreme Court's decision must be followed. *Clark County v. McManus*, No. 72437-1-I, slip op. dissent at 2-3 (Wash. June 8, 2015, Dwyer, J., dissenting). This Court said the same thing as Judge Dwyer in its *Hamilton* decision. *Hamilton*, 111 Wn.2d at 571.

If Defendant's Proposed Jury Instruction No. 10 was required, then

the trial court abused its discretion. As noted above, failure to follow the law is a *per se* abuse of discretion. *Fisons Corp*, 122 Wn. 2d at 339. The trial court must be directed to give this instruction upon retrial.

3. The trial court abused its discretion by ignoring the attendant facts and circumstances regarding the special role attending physicians hold under the Industrial Insurance Act.

Even if the Court believes this instruction is not required, it can still conclude the trial court abused its discretion because it ignored the attendant facts and circumstances. *Samantha A.*, 171 Wn.2d 645. The medical testimony presented to the jury was from Dr. Won, attending physician; Dr. Dietrich, one-time examiner; and Dr. Harris, record reviewer. The attendant facts and circumstances of this case is that it is a workers compensation case, which is its own “unique piece of legislation,” from which courts are required to liberally construe its provisions in favor of workers and beneficiaries. *Hamilton*, 111 Wn. 2d at 572-73.

Within this system, attending physicians are given special status and role. *See* RCW 51.36.060 (duties of attending physicians); RCW 51.52.050 and RCW 51.52.060 (all departmental orders must be served on attending physicians); WAC 296-20-01002 (defines role of attending physician *vis-à-vis* consulting and treating physicians). This role places the attending physician in a special role when helping the injured worker, the Department

of Labor and Industries, the Board of industrial Insurance Appeals, and our courts understand the various medical conditions and their impact on the injured worker.

Furthermore, as the physician who has seen the injured worker the most it also places Dr. Won in a special position within our system of industrial insurance. The trial court abused its discretion because it failed to address these facts and circumstances, which required advising the jury of the longstanding special consideration doctrine. There were no counter-veiling facts or circumstances the trial court could have relied upon to determine it was legally inappropriate to give this instruction. Therefore, the Court of Appeals erred when it concluded the trial court did not abuse its discretion.

4. The trial court failed to do what was right because giving the Attending Physician – Special Consideration instruction levels the playing field between injured workers and self-insured employers.

The trial court abused its discretion by failing to do what was right under the circumstances. *Junker*, 79 Wn.2d at 26. As identified by the dissenting opinion, one of the policy purposes of this longstanding rule is to level the economic playing field between injured workers and Self-Insured Employers. *Clark County v. McManus*, No. 72437-1-I, slip op. dissent at 5-6

(Wash. June 8, 2015, Dwyer, J., dissenting). Unless the claim winds its way through the appeal process into superior court, the injured worker must pay for his or her own expert witnesses to testify. As was recognized by our Legislature, the Act was intended to minimize the economic loss to injured workers. RCW 51.12.010. An injured worker, unable to work or work at his former earning capacity, cannot afford to hire multiple doctors and experts.

A Self-Insured Employer can, and often does, hire multiple experts to testify. This appeal is a prime example of this practice. After having Dr. Dietrich's one-time examination report, the Self-Insured Employer paid to have a second expert prepare a report based solely on a review of records. The injured worker only had his long-standing attending physician, Dr. Won, to rely upon. Defendant's Proposed Jury Instruction No. 10 implicitly tells the jury it is the law in workers' compensation cases not to play the numbers game: which side has more experts.

Instead, it explicitly tells the jury it is the law of Washington they must specially consider and give careful thought to the opinions of the attending physician. In workers compensation cases, what is right under the circumstances is to follow the Legislature's command to level this economic playing field. What is right is to tell the jury what is the law; what is wrong is on one hand, to tell the jury the lawyer's statements are not the law and on the other hand, let the lawyer advise the jury about the law. The trial court

abused its discretion by not telling the jury about the law of special consideration in workers compensation appeals. Therefore, the Court of Appeals erred because it failed to recognize the trial court did not do what was right under the circumstances. The Supreme Court should grant review to fix this error.

5. The trial court abused its discretion because failure to give the Attending Physician – Special Consideration instruction means the jury’s review of the Board’s decision was on a different legal basis than the one used by the Board.

As argued above, it is the long-standing rule in Washington that attending physician’s opinions must be given special consideration. *Hamilton, supra*. This rule applies to all levels of our system where the facts are determined: Department of Labor & Industries, Board of Industrial Insurance Appeals, and our superior courts. Here, the trial court manifestly abused its discretion for untenable reasons by allowing the jury to decide Mr. McManus’ case on a different legal basis than the one used by the Board.

The written decisions of the Board referring to the special consideration doctrine are too numerous to cite. An electronic search of the Board’s decisions note 332 cases with the phrase, “special consideration.” It is a fundamental element of the Board’s jurisprudence. This should not be

surprising given the detailed history and strong language used by this Court in its *Hamilton* decision.

The purpose of the superior court trial is to determine whether the Board's factual and legal determinations are correct. RCW 51.52.110. While this review is *de novo*, the burden is on the appealing party challenging those determinations. RCW 51.52.110. Explicitly included in the Board's factual and legal determinations in this appeal, was application of the attending physician rule. (CABR page 69, line 27; Proposed Decision and Order page 13, line 27).

It is manifestly unreasonable to have the jury review the Board's decision using a different legal doctrine. Stated differently, there is no colorable reason not to instruct the jury to use the same legal doctrines used by the Board. The jury's judgment cannot be substituted for the Board's judgment if they were using different sets of rules. Therefore, the trial court abused its discretion when it failed to give Defendant's Proposed Jury Instruction No. 10.

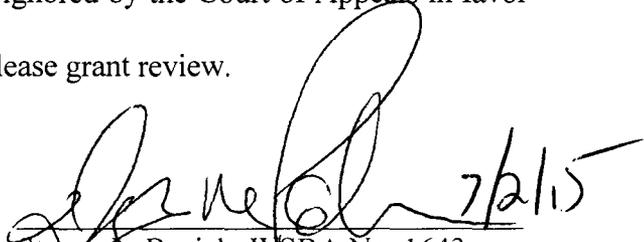
As stated above, simply saying Mr. McManus can argue special consideration is not a colorable reason to deny the instruction. An attorney's argument is not a substitute for the Court's pronouncement. It is simply and manifestly unreasonable for a trial court not to give the proposed jury instruction where the injured worker calls his attending physician and the

self-insured employer calls its hired physicians. The Court of Appeals erred when it concluded the trial court did not abuse its discretion in denying Defendant's Proposed Jury Instruction No. 10.

Conclusion

The Supreme Court should grant review because the decision by the Court of Appeals conflict with its prior precedent in *Hamilton*. The *Hamilton* Court unambiguously required use of the Attending Physician jury instruction. The trial court failed to follow this law, which is a *per se* abuse of discretion. It abused its discretion by failing to recognize the attendant facts and circumstances of the special role attending physicians play under Title 51 RCW. The trial court failed to do what was right under the circumstances, which is to level the playing field between injured workers and self-insured employer, by failing to tell the jury about the Attending Physician – Special Consideration doctrine. Finally, the trial court's failure to instruct the jury with the same law used by the Board was manifestly unreasonable because there is no colorable reason why the jury should not be told of the same legal doctrines used by the Board.

For these reasons, Mr. McManus is requesting the Supreme Court grant his Petition for Review. The Court should affirm its longstanding precedent in *Hamilton*, which was ignored by the Court of Appeals in favor of its own conflicting precedent. Please grant review.



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Petitioner/Defendant

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CLARK COUNTY,)
)
 Respondent,) No. 72437-1-I
)
 v.) ORDER WITHDRAWING
) OPINION
 PATRICK J. McMANUS,)
)
 Appellant.)

The court is withdrawing the opinion filed on May 18, 2015 in the above matter and replace it with a revised opinion.

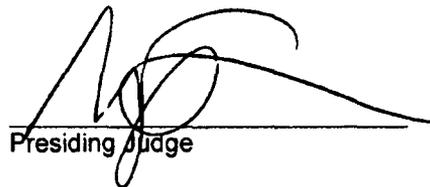
It is hereby

ORDERED that the opinion filed on May 11, 2015 is withdrawn and replaced with a revised opinion to be filed on June 8, 2015.

SO ORDERED

Dated this 8th day of June, 2015.

FOR THE COURT:


Presiding Judge

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STATE OF WASHINGTON
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after leaving work, McManus filed a claim for workers' compensation under Title 51 RCW, the Industrial Insurance Act (Act).

In reviewing the claim, the Board of Industrial Insurance Appeals (Board) considered deposition testimony from several witnesses. McManus testified that he began experiencing pain that radiated across his low back and down his left leg in early 2010. He attributed this pain to the cramped confines and bumpy rides of the street sweepers he operated for the County. In particular, he claimed that while the first two street sweepers he operated had adjustable air ride seats and relatively ergonomic cab designs, the third and final machine he operated, to which he was assigned in either 2008 or 2009, had an uncomfortable cab layout and a negative air ride seat that, according to McManus, felt like a block of concrete whenever he hit a bump.

McManus also testified regarding a preexisting back condition and other possible causes for his pain. He testified that his weight had hovered around the 330 pound mark for the past 30 years and that he had used tobacco products regularly until 2011. He acknowledged sustaining a low back injury at age 19, which resulted in flare-ups of pain in his low back and legs. McManus also conceded having been on prescription medication for pain in his lower back, buttocks, and left leg since 2001, approximately 9 years before the onset of the symptoms he alleged were work related.

The sole medical expert to testify on behalf of McManus was Dr. Paul Won, who is board certified in preventive and family medicine. In his deposition, Dr. Won testified that he began treating McManus in January 2005 following a

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low back injury unrelated to the condition alleged in his workers' compensation claim. After this initial treatment, McManus had continued to work his regular job as a street sweeper operator. According to Dr. Won, McManus had a gradual increase in low back pain during this time. On June 25, 2010, Dr. Won obtained a magnetic resonance imaging (MRI) scan of McManus' back. The scan showed various spinal changes as compared to a prior study, including a central disc protrusion at the L2-3 vertebra. Based on this scan, Dr. Won diagnosed McManus with displacement of a lumbar intervertebral disc at L2-3. Dr. Won next treated McManus on April 11, 2011, at which time McManus complained about low back pain due to a poor quality seat cushion in his street sweeper.

On direct examination, Dr. Won acknowledged a November 14, 2011 letter to McManus' claims representative, in which Dr. Won had opined that the cause of McManus' lower back condition was his work as a street sweeper operator. Dr. Won testified that his opinion had not changed since writing the November 14 letter. He opined that "driving trucks with jarring and bouncing has made a major material contribution to [McManus'] lumbar condition." CABR (Won) at 30-31.¹ According to Dr. Won, this opinion was based on his understanding of McManus' medical history and the physical forces McManus' spine endured during his street sweeping work.

On cross examination, Dr. Won testified over McManus' hearsay objection that he was aware a consulting neurosurgeon, Dr. Wrobel, had opined that it was

¹ "CABR" refers to the certified appeal board record. Deposition transcripts within the CABR are cited by parenthetical reference to the deponent's last name.

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unknowable whether or not the disc protrusion at L2-3 was related to McManus' employment. Dr. Won also stated he was aware of Dr. Wrobel's opinion that "no one could relate the protrusion at 23 [sic] and the stenosis to the work activities with Clark County." CABR (Won) at 39. While Dr. Won conceded that a neurosurgeon would likely have greater expertise than he in determining the etiology of degenerative disc disease such as McManus', he ultimately did not agree with Dr. Wrobel's opinion and testified that his own initial opinion that McManus' low back condition arose from the conditions of his work as a street sweeper operator was still valid based on his knowledge of McManus' medical history.

The County offered the deposition testimony of two experts, Dr. Thomas Dietrich and Dr. James Harris. Dr. Wrobel did not testify. Dr. Dietrich, a board certified neurosurgeon, stated that he had rendered an opinion based on a July 14, 2011 examination of McManus. Dr. Dietrich concluded that McManus' low back condition did not arise naturally and proximately from the distinctive conditions of his employment; however, he acknowledged that the repetitive bouncing up and down McManus endured over a period of years as a street sweeper operator likely played a role in the rate of degenerative change in his condition.

Dr. Harris, a board certified orthopedic surgeon, testified that he conducted a review of McManus' records at the request of the County. Dr. Harris compared a December 14, 2005 CT (computed tomography) scan of McManus' lumbar spine with the June 25, 2010 MRI ordered by Dr. Won and concluded that

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the 2010 imaging showed a new central disc protrusion at the L2-3 level. Dr. Harris' initial report indicated that McManus' employment could be a possible cause of the abnormalities visible in the imaging scans. However, Dr. Harris testified that his initial conclusion was speculative, rendered with insufficient information on his part. He testified that after additional research, his ultimate conclusion was that McManus' low back condition was not the result of an industrial injury. Dr. Harris attributed the injury to the normal aging process. He noted that by age 50, about half the population would experience similar degenerative changes. He also recognized the role of obesity and heredity in such degenerative changes. While acknowledging that the conditions of McManus' work may have contributed to symptoms of this underlying condition, Dr. Harris maintained that McManus' work did not cause the condition.

At the close of evidence, an industrial appeals judge determined that McManus' injury was work related, awarded him compensation under the Act, and issued a proposed decision and order, which included the following findings of fact:

1. On April 10, 2012, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History, as amended, in the Board record solely for jurisdictional purposes.
2. Patrick J. McManus worked as a street sweeper operator for Clark County from 1998 or 1999 to April of 2011. As a street sweeper operator, Mr. McManus worked 40 hours per week, and sometimes worked overtime. While operating the street sweeper, Mr. McManus repetitively hit holes and dips along the curb line, which can be the roughest part of the road. Bumpy conditions jarred his back, causing pain. In 2008 or 2009, Clark County purchased a new street sweeper. Mr. McManus experienced more bumping and jarring while operating the new street sweeper. In April of 2011, Mr.

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McManus ceased working as a street sweeper operator due to pain in his low back.

3. As early as 1976, prior to his employment with Clark County, Mr. McManus was seen and treated for intermittent, chronic low back pain and degenerative disc changes. An MRI dated February 24, 2006 showed moderately severe degenerative changes in the entire lumbar spine. An MRI dated June 25, 2010, showed moderately severe degenerative changes in the entire lumbar spine, and also a new central disc protrusion at the L2-3 level.
4. Repetitive jarring and bumping constitute distinctive conditions of employment.
5. Mr. McManus sustained an aggravation of his pre-existing cervical degenerative disc changes arising naturally and proximately out of the distinctive conditions of his employment with Clark County.

CABR at 70-71.

The County petitioned for review by the Board. On McManus' motion, the Board excluded Dr. Won's testimony regarding his knowledge of Dr. Wrobel's opinions. The Board affirmed the industrial appeals judge's decision and adopted its proposed decision and order.

The County petitioned for review in the Clark County Superior Court. At trial, the jury was instructed that the sole question before it was whether "the Board of Industrial Insurance Appeals [was] correct in deciding that Patrick McManus' low back condition, diagnosed as aggravation of degenerative disc changes and a new central disc protrusion at L2-3 level[,] arose naturally and proximately from the distinctive conditions of his employment with Clark County operating a street sweeper." Clerk's Papers (CP) at 98. The jury concluded that the Board was incorrect in concluding that McManus' back condition arose from

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his employment operating the street sweeper. The trial court entered an order reversing the Board's decision. McManus appeals.

DISCUSSION

Evidentiary Rulings

Before trial, the County requested that the trial court reverse the Board's ruling excluding that part of Dr. Won's testimony relating to Dr. Wrobel's opinion. The County argued that this testimony was admissible under ER 703 because, although hearsay, Dr. Won relied on Dr. Wrobel's opinion in forming his own conclusions as to the cause of McManus' condition. The trial court agreed with the County, reversed the ruling of the Board, and overruled McManus' objection. McManus argues that the trial court's ruling was error. We agree.

A superior court on review of a Board's decision has discretion to review the Board's evidentiary rulings. We review for abuse of discretion. Gorre v. City of Tacoma, 180 Wn. App. 729, 769-70, 324 P.3d 716 (2014), review granted, 181 Wn.2d 1033 (2015). A trial court abuses its discretion if its decision is manifestly unreasonable or its discretion is exercised on untenable grounds or for untenable reasons. Boeing Co. v. Harker-Lott, 93 Wn. App. 181, 186, 968 P.2d 14 (1998).

Generally, the out of court statements of a nontestifying declarant are inadmissible to prove the truth of the matter asserted. ER 802. The County contends that Dr. Wrobel's statements are admissible for impeachment purposes under ER 613 or as a statement of a party-opponent under ER 801(d)(2). Both arguments lack merit. Dr. Wrobel's opinion was not a prior statement by Dr. Won and, thus, could not be used for impeachment of Dr. Won under ER 613. And

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because Dr. Wrobel was not a party to the case, one authorized by a party to make a statement, or an agent or employee of a party, the ER 801(d)(2) exemption for admissions of party-opponents does not apply.

The County also contends that Dr. Wrobel's statements were admissible, even if hearsay, under the statement for medical diagnosis or treatment (ER 803(a)(4)) or learned treatise (ER 803(a)(18)) hearsay exceptions. Neither exception applies.

ER 803(a)(4) provides a hearsay exception for

[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Here, the trial court admitted the following line of questioning over McManus' hearsay objection:

Q. Are you aware that Dr. Wrobel himself testified in a discovery deposition in this case that it is unknowable as to whether or not the protrusion at L2-3 was, in fact, related to his employment?

....

Q. Are you aware of that, Doctor?

A. Yes.

Q. You are aware of that?

A. Yes.

....

Q. And his answer was that no one could relate the protrusion at 23 [sic] and the stenosis to the work activities with Clark County; correct?

A. Yes, that is correct.

CABR (Won) at 38-39. Because it is evident from counsel's first question that Dr. Wrobel's statements were made in a discovery deposition and not in the course of medical diagnosis or treatment, ER 803(a)(4) does not apply.

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ER 803(a)(18) is likewise inapplicable. The rule establishes a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." Because Dr. Wrobel's statements plainly were not contained in a published work, they were not admissible pursuant to this exception.

Next, the County argues that, even if hearsay, Dr. Wrobel's statements were admissible under ER 703 as the basis for Dr. Won's expert opinion and, pursuant to ER 705, were subject to disclosure on cross examination. But the argument fails because the County misconstrues Dr. Won's testimony.

It is well established that under ER 703, an expert opinion based on the opinion of a nontestifying expert is admissible, so long as the testifying expert reasonably relied on the opinion. On cross-examination, the testifying expert may be compelled to reveal the underlying sources of his or her opinion, including otherwise inadmissible hearsay evidence. ER 705; see also Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 275, 215 P.3d 990 (2009) ("[ER 703] permits experts to base their opinions on facts or data that might not otherwise be admissible into evidence...[and] the trial court may allow the admission of hearsay evidence and otherwise inadmissible facts for the limited purpose of showing the basis of the expert's opinion."); Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541, 545 (5th Cir. 1978) (construing Fed. R. Evid. 703

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and 705); 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 703.6 (5th ed. 2007). But neither rule applies in this case.

Dr. Won offered an expert opinion on the cause of McManus' low back condition, which he testified was based solely on his understanding of McManus' medical history and the physical realities of McManus' work as a street sweeper operator. On cross-examination, the County elicited testimony regarding Dr. Wrobel's conflicting opinion as to causation. But, there is no evidence that Dr. Won relied on Dr. Wrobel's statements in forming his own opinion as to causation as contemplated by ER 703 and 705. Thus, Dr. Won's hearsay statements were not subject to admission under either rule.

Because Dr. Wrobel's statements are hearsay not within any exception, the trial court's decision to admit the statements was an abuse of discretion.

Jury Instructions

McManus also contends that the jury instructions in this case were insufficient for several reasons. The standard of review for jury instructions is whether the instructions are correct as a matter of law. State v. Edwards, 92 Wn. App. 156, 164, 961 P.2d 969 (1998). Instructions are sufficient if they permit a party to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. Boeing, 93 Wn. App. at 186. We review the trial court's decision not to give a particular jury instruction for abuse of discretion. Id.

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McManus first contends the trial court erred in refusing to give an introductory instruction to the jury, advising it that the Board's decision affirmed the industrial appeals judge's earlier, favorable decision. We disagree.

In superior court review of a Board decision, the function of a jury is to determine whether the Board is correct in rendering that decision. Stratton v. Dep't of Labor & Indus., 1 Wn. App. 77, 80, 459 P.2d 651 (1969). Prior to deliberations, the trial court is charged with instructing the jury of the exact findings of the board on each material issue before the court. RCW 51.52.115. In this case, the trial court's instruction 4 reproduced verbatim each of the Board's findings of fact on the nature and cause of McManus' injury.²

McManus contends that the prior history of the case, i.e., that the Board reached its decision in affirmance of the industrial appeals judge's decision, was also a "material issue" within the meaning of RCW 51.52.115. We rejected a similar argument in Stratton. In that case, we considered whether an administrative law judge's preliminary determination in a proposed decision and order, which was subsequently rejected by the Board, constituted a finding of the Board on a material issue. 1 Wn. App. at 77. We concluded that it did not. We expressly held that the preliminary determination by the administrative law judge was immaterial to the only question to be decided by the trier of fact: whether the Board's ultimate determination was correct. Id. at 80. We also recognized the improper tactical advantage to be gained by a party advising the trier of fact of

² The only other finding of fact entered by the Board acknowledges the Board's jurisdictional basis, not a material issue before the trial court.

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prior favorable determinations made by individuals or entities other than the Board in rendering its ultimate findings. We noted that “[t]he practice only serves to confuse the jury and divert its attention from the duty to determine whether, on material issues presented to them, the evidence preponderates in favor of or against the Board's findings and decision.” Id. at 81 (emphasis omitted).

Notwithstanding our holding in Stratton, McManus appears to argue, without citation to authority, that jurors must have an understanding of the exact procedural history that brought the case before them. See Br. of Appellant at 15-16. But neither the industrial appeals judge’s decision nor the fact that the Board affirmed that decision was material to the only issue to be determined by the jury in this case. Accordingly, the trial court had no statutory obligation to instruct the jury on the procedural history of the case and its refusal to give McManus’ proposed introductory instruction was not error.

Next, McManus assigns error to the trial court’s refusal to give his proposed jury instruction 10, which reproduced 6A WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 155.13.01 (6TH ED. 2012) in relevant part as follows:

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.

The trial court concluded that the instruction was unnecessary. Although we may have concluded otherwise, we cannot say on this record that the trial court’s

refusal to give the proposed instruction was an abuse of discretion.³ The trial court's general instructions informed the jury that it could consider

the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP at 82. Based on this instruction, McManus was able to argue that Dr. Won, as his treating physician, was better qualified to render an opinion on the etiology of his injury than the Department's witnesses. And the jury was informed that it could accept this theory. Thus, under the circumstances, the trial court's general instruction was sufficient. See Boeing, 93 Wn. App. at 186.

Finally, McManus assigns error to the trial court's jury instruction 4, which included a verbatim recitation of the Board's findings of fact. In particular, the instruction included the Board's findings of fact 5, which provides:

Mr. McManus sustained an aggravation of his pre-existing **cervical** degenerative disc changes arising naturally and proximately out of the distinctive conditions of his employment with Clark County.

CABR at 70; CP at 81 (emphasis added). McManus argues that the Board's reference to disease of the cervical spine, i.e., the neck and upper back, was a scrivener's error, given that his claimed injury affected only his lumbar spine, i.e., the lower back. He further contends that the trial court's refusal to revise the

³ Generally, trial courts would be well advised to give careful consideration to whether the proposed instruction should be given in a particular case. See Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 761 P.2d 618 (1988).

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Board's finding so that it reflected only injury to his lumbar spine was error. We agree.

Citing RCW 51.52.104 and Homemakers Upjohn v. Russell, 33 Wn. App. 777, 780-81, 658 P.2d 27 (1983), the Department contends that McManus has waived this error because he did not appeal the Board's finding. In Homemakers, we interpreted RCW 51.52.104 to mean that a party aggrieved by a hearing examiner's proposed decision and order and who failed to file a petition for review waived its objections to the record. Id. at 780. But we also noted "that a nonaggrieved party waived absolutely nothing by not filing a petition." Id. at 782. Because McManus prevailed in the proceedings before the Board, we conclude that he was not an aggrieved party and therefore was not precluded from raising the error before the superior court. Moreover, it is undisputed that the finding at issue was in error. The County conceded as much in its petition for review of the Board's decision. See CABR at 48 n.1 ("the administrative law judge incorrectly stated in finding of fact number 5 that Mr. McManus had aggravated his CERVICAL degenerative disc changes"). We are satisfied that the error was properly preserved for our review.

We next consider whether the trial court erred in refusing to revise the Board's finding. We conclude that it did.

RCW 51.52.115 requires that on review of a Board's decision by the superior court, if a case is submitted to a jury "the court shall by instruction advise the jury of the exact findings of the board on each material issue. . . ." The findings and decision of the Board are presumed to be correct, and the burden of

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proof is on the party challenging them. RCW 51.52.115; Gorre, 180 Wn. App. at 754. A trial court may substitute its own findings for those of the Board only if it finds from a fair preponderance of credible evidence that the Board's findings and decision are incorrect. Gorre, 180 Wn. App. at 754-55. Stratton v. Department of Labor & Industries, 7 Wn. App. 652, 501 P.2d 1072 (1972) (Stratton II) is instructive on whether the trial court erred in failing to do so in this case.

In Stratton II, we affirmed a trial court's revision of a board finding that contained obvious error that was prejudicial to the challenging party. Id. at 654-56. In that case, we considered the following jury instruction, which reproduced a board finding on Stratton's condition:

3. On or about April 29, 1964, the claimant suffered from a psychiatric disorder which was causally related to his industrial injury and was diagnosed as anxiety neurosis with conversion symptoms. Associated with this psychiatric disorder is a demonstrated lack of motivation in the claimant to seek out and maintain gainful employment, coupled with a strong tendency and desire to realize a monetary gain from his injury.

Id. at 654. Stratton contended that the emphasized sentence was not a medical finding based on evidence, but rather an argumentative assertion that he was unmotivated and eager to realize a monetary gain from his injury. We agreed and concluded that the emphasized sentence was "not based upon any medical or other evidence in the record" and merely expressed the "opinion of the board that Stratton won't look for work and has a strong desire to make money from his injury." Id. Because the Board's error was obvious and resulted in prejudice to Stratton, we reversed the judgment and remanded for a new trial. Id. at 656.

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Similarly in this case, the Board's finding that McManus "sustained an aggravation of his pre-existing cervical degenerative disc" is unsupported by any evidence in the record. Both McManus and the County offered medical testimony related to the degenerative condition in McManus' lumbar spinal region. The only mention of his cervical spinal region came from Dr. Won, who testified briefly that McManus suffered from "arno chiari⁴)... a malformation of the base of the skull that tends to press on the nerve." CABR (Won) at 22. Based on this record, we conclude that the Board's finding of fact 5 contained an obvious scrivener's error.

Moreover, the trial court's refusal to revise the finding was not harmless.

The jury was instructed to answer only one question:

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?

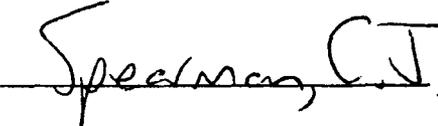
CP at 60. Thus, the issue before the jury was whether the Board's determination that a causal link existed between McManus' claimed industrial injury and the conditions of his work for the County. Because the Board's finding of fact 5 as represented to the jury referenced the wrong injury, it effectively precluded McManus from establishing this link. Thus, the trial court's refusal to correct the Board's scrivener's error materially affected the outcome of trial.

⁴ This appears to be a reference to an Arnold-Chiari malformation, which, according to the National Institute of Neurological Disorders and Stroke, is a congenital structural defect in which the cerebellum and parts of the brain stem sit in an indented space at the lower rear of the skull, where it attaches to the spinal column. See Chiari Malformation Fact Sheet, Nat'l Inst. of Neurological Disorders & Stroke. http://www.ninds.nih.gov/disorders/chiari/detail_chiari.htm (last updated April 29, 2015).

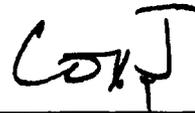
Attorney Fees

McManus requests an award of reasonable attorney fees on appeal pursuant to RCW 51.52.130.⁵ The statute provides for an award of attorney fees to a worker who prevails on appeal from an order granting relief to the worker. Because this matter is remanded for retrial, the prevailing party is not yet determined. Accordingly, an award of attorney fees at this time would be premature and we decline to make such an award. We note that the trial court may award appellate attorney fees, as appropriate, after retrial. Washington Fed. v. Gentry, 179 Wn. App. 470, 496, 319 P.3d 823, 836 review granted sub nom. Washington Fed. v. Gentry, 180 Wn.2d 1021, 328 P.3d 902 (2014) and aff'd sub nom. Washington Fed. v. Harvey, 182 Wn.2d 335, 340 P.3d 846 (2015).

Reversed and remanded for a new trial.



WE CONCUR:



⁵ The statute provides:

(1) If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

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DWYER, J. (concurring and dissenting). I concur with the majority's resolution of the issues presented herein—save one. I believe that the trial court erred by refusing to instruct the jury that special consideration should be given to the opinion of a treating physician. This decision both contravened our Supreme Court's precedent and created a disparity between the law applied by the Board of Industrial Insurance Appeals (BIIA) and the law applied by the superior court fact finder. Additionally, such decisions may ultimately lead to additional financial burdens on the funds from which claimants are compensated. Accordingly, from that limited section of the majority opinion, I dissent.

I

Because our Supreme Court has made clear that, in a workers' compensation case, the state of the law is that the opinion of a treating physician is entitled to special consideration by the trier of fact, the trial court erred by refusing to so instruct the jury.

"Instructions are sufficient if they permit a party to argue his or her theory of the case, are not misleading, *and*, when read as a whole, properly inform the jury on the applicable law." Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662, 935 P.2d 555 (1997) (emphasis added). I agree with the majority that the instructions given permitted McManus to argue his theory "that Dr. Won, as his treating physician, was better qualified to render an opinion on the etiology of his

injury than the Department's witnesses." Slip Op. at 13. However, the jury was not informed of the "long-standing rule of law in workers' compensation cases that special consideration should be given to the opinion of a claimant's attending physician." Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988).

Hamilton concerned an instruction, similar to the one herein proposed, that provided: "In cases under the Industrial Insurance Act of the State of Washington, special consideration should be given to the opinion of the plaintiff's attending physician." 111 Wn.2d at 570. Reviewing prior case law, our Supreme Court concluded that the instruction "reflect[ed] binding precedent in this state and correctly stated the law." Hamilton, 111 Wn.2d at 572; accord Chalmers v. Dep't of Labor & Indus., 72 Wn.2d 595, 599, 434 P.2d 720 (1967) ("It is settled in this state that, in this type of cases, special consideration should be given to the opinion of the attending physician."); Groff v. Dep't of Labor & Indus., 65 Wn.2d 35, 45, 395 P.2d 633 (1964) ("[W]e have, in several cases, emphasized the fact that special consideration should be given to the opinion of the attending physician.").

Because the instruction stated a clear "rule of law," the Hamilton court held, "it [was] appropriate that the jury be informed of this by the instructions of the court." 111 Wn.2d at 572. "To refuse to do so," the court explained, "would *convert the rule of law into no more than the opinion of the claimant's attorney.*" Hamilton, 111 Wn.2d at 572 (emphasis added). The difference between the law, as explained by the court, and the argument of counsel is key.

As juries are instructed, instructions from the court carry a far greater legal and practical significance than do the arguments of counsel. Juries may choose whether to accept or reject an argument of counsel.¹ By contrast, juries may not choose whether to follow the law—they are required to do so.²

The majority's conclusion that the proposed instruction was not necessary relies, in part, on Boeing Co. v. Harker-Lott, 93 Wn. App. 181, 968 P.2d 14 (1998). In Boeing, this court held that an instruction comparable to the one at issue in Hamilton was not required because, it opined, "the Hamilton court did not hold that an instruction to that effect was mandatory." 93 Wn. App. at 186 (emphasis added). But this is a matter of semantics. Regardless of whether the Hamilton court's prohibition against converting the applicable rule of law "into no more than the opinion of the claimant's attorney," is denominated a *holding* or something else, it binds all lower courts:

[F]ew opinions address the ground that later opinions deem sufficient to reach a different result. If a court of appeals could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument.

Nat'l Rifle Ass'n of Am. v. City of Chicago, 567 F.3d 856, 857-58 (7th Cir. 2009), *rev'd on other grounds sub nom. McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

¹ Thus, the jury herein was instructed: "[I]t 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*." Jury Instruction 1 (emphasis added).

² Again, as the jury herein was instructed: "It . . . is your duty to accept the law as [the court] explain[s] it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that [the court] give[s] you." Jury Instruction 1.

Moreover, the Boeing court reasoned that the proposed instruction was unnecessary because the claimant's counsel could argue the claimant's theory of the case—that the opinions of the attending physician were entitled to special consideration—under the instructions given. See 93 Wn. App. at 186-87. But this reasoning directly contravened the Hamilton court's assertion that such a view "would convert the rule of law into no more than the opinion of the claimant's attorney." 111 Wn.2d at 572. Because these two contrasting views cannot be reconciled, the view of our Supreme Court must prevail.

"Once [our Supreme Court] has decided an issue of state law, that interpretation is binding until [it] overrule[s] it." Hamilton, 111 Wn.2d at 571. Both the majority and the trial court stray from proper adherence to applicable Supreme Court precedent by determining that the instructions given in this case were sufficient because the claimant's attorney was permitted to argue a rule of law to the jury, in the absence of an instruction on that law by the trial judge.

II

In addition, the trial court's decision not to instruct the jury regarding the rule that special consideration should be given to the opinion of a treating physician created a disparity between the law applied by the BIIA and that applied by the jury.

The Industrial Insurance Act (Title 51 RCW) appeals process is structured such that, between the decision of the BIIA and the superior court decision, the only thing intended to change is the identity of the fact finder. The jury's charge in a workers' compensation case is "to determine whether [the presumption that the findings and decision of the BIIA are correct] is rebuttable by the evidence."

Jury Instruction 5. This determination must be made only on the record before the BIIA. Thus, as the jury herein was instructed, "The law requires that this case be tried solely on the evidence and testimony that was offered before the [BIIA]."

Jury Instruction 2.

Barring an intervening departure from precedent, the law applied to the record must also remain the same. However, unlike the members of the BIIA, the lay jurors must be instructed by the trial judge on the applicable law, with which the jurors are, in all likelihood, entirely unfamiliar. Thus, if the superior court's instructions do not, as herein requested, include the "long-standing" rule of law that special consideration should be given to the opinion of a treating physician, there is no assurance that the law applied by the two decision-makers (the BIIA and the jury) was the same. This is contrary to the careful design of the legislature.

III

Finally, if trial court decisions of this type become widespread, claimants will be incentivized to seek additional (and, at this time, unnecessary) medical opinions, which may lead to increased financial strain on the funds from which claimants are compensated.

The rule that special consideration should be given to the opinion of a treating physician works, in part, to correct a potential imbalance between the expert witnesses whose testimony is offered by claimants, often primary care physicians and other general practitioners, and the expert witnesses offered by self-insured employers, often specialists with noted and impressive certifications. Without the rule here at issue, claimants may be incentivized to seek additional

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medical advice or treatment as a litigation strategy, thus burdening the funds. By obtaining a second opinion—from a physician with a “fancier” curriculum vitae—a claimant may hope to strike a balance between the number and credentials of the expert witnesses offered by each side. This is a potential “real world” impact of decisions such as that we make today. We can avoid such unintended consequences by the simple expedient of requiring that the law—as declared by our Supreme Court—be adhered to.

A handwritten signature in black ink, appearing to read "D. J. ...", written over a horizontal line.