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NO. 66973-7-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

PILCHUCK CONTRACTORS, INC. and STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents,

v.

MICHAEL T. AUSTIN,

Appellant.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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STATE OF WASHINGTON
DIVISION I

ORIGINAL

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I. INTRODUCTION

This is an appeal under the Industrial Insurance Act, Title 51 RCW. The worker, Michael Austin, appeals a superior court judgment incorporating a 12-person jury verdict in favor of the employer, Pilchuck Contractors, Inc. and the court's order denying his motion for a new trial. The jury reversed the decision of the Board of Industrial Insurance Appeals (Board), which had affirmed the order of the Department of Labor and Industries (Department) allowing Mr. Austin's claim for industrial injury. Thus, the issue in the jury trial was whether Mr. Austin suffered an industrial injury within the meaning of the law, and the jury answered "no."

Mr. Austin asserts on appeal that the Department's attorney committed misconduct warranting a new trial when she refused to sit where Mr. Austin's attorney wanted her to sit, proposed a verdict form that was different from the verdict form Mr. Austin proposed, and declined to give a closing argument asking the jury to affirm the Board's decision. Mr. Austin did not object to any of these things at trial or request a limiting instruction. He has also cited no authority supporting that any of these actions constituted misconduct or persuasively argued that any misconduct prejudiced the outcome of the trial. The trial court did not abuse its discretion in denying the motion for a new trial.

Mr. Austin also assigns error on appeal to the verdict form, which summarized the language of the Board's conclusion of law when it asked the jury whether the Board's conclusion was correct, as the Washington pattern instruction recommends. Although Mr. Austin argues that separate questions should have been proposed regarding each of the bodily conditions he alleges were injured, he did not propose such a verdict form, and he did not object to the court's verdict form on this basis. The court did not abuse its discretion in refusing to give his proposed instruction.

II. COUNTERSTATEMENT OF THE ISSUES

1. Mr. Austin failed to object at trial to any conduct of the assistant attorney general representing the Department and instead raised this issue for the first time in his motion for a new trial. The assistant attorney general consistently represented her client's stated neutral position throughout the trial. Did the superior court properly exercise its discretion in denying Mr. Austin's motion for a new trial for attorney misconduct?
2. Mr. Austin's proposed verdict form was similar to the Court's verdict form except that it did not accurately summarize the Board's conclusion of law on appeal as recommended by the Washington pattern instructions. Mr. Austin did not object to the Court's verdict form on the basis he alleges for the first time on appeal. Did the superior court properly exercise its discretion in declining to give Mr. Austin's proposed verdict?
3. RCW 51.52.130(1) authorizes attorney fees to a worker who succeeds on appeal in reversing the Board's order resulting in additional relief to the worker or who succeeds in having the Board's order sustained. Is Mr. Austin's request for attorney fees for this appeal premature when the Board's order has not been sustained and the result he seeks is a reversal of the jury verdict and a new trial on the merits?

III. COUNTERSTATEMENT OF THE CASE

Mr. Austin applied for workers' compensation benefits with the Department for injuries to his left knee and low back that he allegedly suffered while working as a flagger for Pilchuck on November 29, 2007. BR Austin 5-7, 9.¹ The Department allowed his claim for industrial injury and provided benefits. BR 46-47. Pilchuck timely appealed the Department's allowance order to the Board. BR 32.

Hearings were held before an Industrial Appeals Judge. Due to some newly acquired information of which the Department was not previously aware, the Department elected to take a neutral position in the litigation at the Board and not actively defend its order. CP 85-86 ¶ 5; *see also* BR 55 ("The Department will be present at all hearings, but intends to call no witnesses."). The Department communicated this intent to the parties. CP 86.

After considering the evidence, the industrial appeals judge issued a proposed decision and order affirming the Department's order allowing the claim for industrial injury. BR 16. Pilchuck filed a timely petition for

¹ The record before the Board is paginated separately from the Clerk's Papers. Citations to the Board record will be by the abbreviation "BR" and either the large page number in the lower right corner or the witness' last name and transcript page number.

review (BR 3), which the Board denied (BR 2). Pilchuck timely appealed to the King County Superior Court. CP 1.

A trial was held to a jury of 12. Before jury selection and outside of the jury venire's presence, the assistant attorney general representing the Department explained to the court that the Department's position in the trial would be neutral, as it had been at the Board. RP 11/8/10 at 13-14. During voir dire, Mr. Austin and the Department shared peremptory challenges because they were both named defendants. RP 11/8/10 at 6; CP 86 ¶ 8.² Thus, they sat at the same table during jury selection. CP 86 ¶ 8. For the remainder of the trial, the assistant attorney general sat near the corner of the "L" shape that the two tables made, situated in between Mr. Austin's attorney and Pilchuck's attorney. CP 86 ¶ 7, 87 ¶ 9. She selected that seat because it was the only one available on the first day of trial when she arrived in the courtroom. CP 86 ¶ 7.

The assistant attorney general gave a brief opening statement, apparently telling the jury that there were more facts presented at the Board hearings than were available when the Department made its

² Just as Mr. Austin was required to timely object at trial to the Department's allegedly improper choice of seats at trial (*see* Section V.A.1., below), he was also required to make a contemporaneous record of the parties' seating arrangement in order to preserve this issue for appeal. *See* RAP 9.2(b). Because he did not do so, this brief refers to the post-hearing declarations, which reflect this factual information. By citing those declarations, the Department does not concede that such a record is sufficient for appellate review.

decision. *See* RP 11/10/10 at 8 (referring to her opening statement).³ She did not tell the jury that she would be asking them to either affirm or reverse the order on appeal. *See* RP 11/10/10 at 8-9; CP 73 ¶ 5. She did not make a closing argument. *See* RP 11/10/10 at 20-52 (closing arguments).

The three parties agreed on all of the jury instructions except for the verdict form and submitted the agreed set, which was ultimately given by the court. CP 33-52, 74, 86 ¶ 6; *see also* RP 11/10/10 at 6. Pilchuck and the Department agreed on a verdict form, to which Mr. Austin excepted on the basis that the diagnoses included in the question were too specific. RP 11/10/10 at 6-7. Mr. Austin submitted a different, more general, proposed verdict form, which the court rejected in favor of the one proposed by the other two parties. CP 4, 31, 32; RP 11/10/10 at 7.

The jury returned its verdict in less than an hour. CP 87 ¶ 11. In answering the sole question on the special verdict form whether the Board was correct in finding that Mr. Austin had sustained an industrial injury to his left knee and low back, the jury answered “No.” RP 11/10/10 at 54-55; CP 32. After the trial, the assistant attorney general spoke with some of the jurors about their experience. CP 87 ¶ 11.

³ The second day of trial, November 9, 2010, when opening statements were made, was not transcribed and made part of the record on appeal.

The trial court entered its judgment in favor of Pilchuck on February 2, 2011. CP 53. On February 11, Mr. Austin filed a motion for a new trial on two grounds—Department’s counsel’s conduct at trial was outrageous and prejudicial, and the verdict form was “narrowly construed and unduly limiting.” CP 61, 62. The Department and Pilchuck responded (CP 68, 76), and the trial court denied the motion without oral argument (CP 56, 141-42). Mr. Austin appealed to this Court.

IV. STANDARD OF REVIEW

Washington law recognizes a strong presumption in favor of jury verdicts. *Brashear v. Puget Sound Power & Light Co., Inc.*, 100 Wn.2d 204, 209, 667 P.2d 78 (1983) (also recognizing the “high standard for taking a case from the jury”). This strong presumption is based on the constitutional right to a trial by jury. *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967) (citing Const. art. I, § 21); *Bunch v. King County Dep’t of Youth Servs.*, 155 Wn.2d 165, 176, 116 P.3d 381 (2005). “[T]he jury is the final arbiter of the effect of the evidence, for it determines the credibility of the witnesses, the weight of their testimony, and the consequence of all other evidence.” *Cox*, 70 Wn.2d at 176-77.

Consistent with this presumption, there must be a compelling reason to take a case from the jury. *See id.* at 177 (requiring evidence that

the jury was incited by passion or prejudice before taking the case from the jury); *accord Reiboldt v. Bedient*, 17 Wn. App. 339, 343, 562 P.2d 991 (1977). The non-moving party is entitled to all reasonable inferences in favor of the verdict. *Brashear*, 100 Wn.2d at 209.

In workers' compensation cases, the Court of Appeals reviews jury instructions as it does in other civil cases. RCW 51.52.140; *Hudson v. United Parcel Service, Inc.*, ___ Wn. App. ___, 258 P.3d 87, ¶ 14 (2011). Trial courts have considerable discretion in wording jury instructions. *State v. Castle*, 86 Wn. App. 48, 62, 935 P.2d 656 (1997). Whether to give a particular instruction is within the trial court's discretion. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). Alleged errors of law in jury verdict forms, like in other jury instructions, are reviewed de novo. *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 71, 244 P.3d 32 (2010), *review granted*, 172 Wn.2d 1001, 258 P.3d 685 (2011).

In workers' compensation cases, the Court of Appeals reviews a trial court's denial of a motion for new trial for an abuse of discretion. *Safeway, Inc. v. Martin*, 76 Wn. App. 329, 332, 885 P.2d 842 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.

Kelley v. Centennial Contractors Enters., Inc., 169 Wn.2d 381, 386, 236 P.3d 197 (2010).

V. ARGUMENT

A. The Trial Court Properly Exercised Its Discretion In Denying Mr. Austin's Motion for a New Trial Under CR 59

1. Mr. Austin has not preserved this issue for appeal because he did not timely object to the Department's allegedly improper conduct

To preserve an alleged trial error for appellate review, the opposing party must timely and specifically object at trial. *E.g.*, *State v. Gray*, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006); *see also* ER 103(a)(1). An objection is timely if it is made at the earliest possible opportunity after the basis for the objection becomes apparent. *Gray*, 134 Wn. App. at 557. The purpose of requiring a timely objection is to give the trial court an opportunity to cure any error. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

The issue of attorney misconduct cannot be raised for the first time in a motion for a new trial unless the misconduct is so flagrant that no instruction could have cured the prejudicial effect. *Sommer v. Dep't of Social & Health Servs.*, 104 Wn. App. 160, 171, 15 P.3d 664 (2001).

Here, counsel for Mr. Austin did not timely object to any of the Department's conduct during the trial. Rather, he raised his objections for

the first time in his motion for a new trial. CP 58-64. Not only could the trial court have issued a curative instruction (assuming there was any error to cure), but the court could have intervened and prevented the alleged error before it affected the jury. This is because the judge could have asked Department's counsel to switch seats before the jury ever entered the courtroom and saw her.⁴ Thus, Mr. Austin waived the issue, and this Court should not consider it on appeal. *See Gray*, 134 Wn. App. at 558.

Mr. Austin asserts in his brief that he objected at trial to “the confusing actions of Department’s counsel.” App. Br. at 3 (citing RP 11/10/10 at 8). Out of the jury’s presence before closing arguments, Mr. Austin did object to the possibility that the Department would make a closing argument and state that it was not asking the jury to either affirm or reverse. RP 11/10/10 at 8. Department’s counsel, however, did not make a closing argument, so that scenario never occurred. *See* RP 11/10/10 at 20-52 (closing arguments). Mr. Austin did not object to any of the actual conduct he assigns error to in this appeal.

As will be discussed below, the Department’s conduct was not improper. The only conduct Mr. Austin cites as problematic is the

⁴ Of course, the Department filing of proposed jury instructions (which accurately stated the law applicable to the case) was outside of the jury’s presence. This action could not have prejudiced the jury by suggesting which party the Department was aligned with. And Mr. Austin cites no authority that the Department should not be allowed to submit jury instructions that it believes accurately state the law of the case.

location of Department's counsel's chair and the fact that she proposed a verdict form that Mr. Austin disagreed with.⁵ App. Br. at 10. But even if counsel erred, it is undisputable that her choice of chairs at trial and her submission of a verdict form outside of the jury's presence were not so flagrant that no instruction could have cured them. Compare *Sommer*, 104 Wn. App. at 171 (finding that suggestions during closing argument that opposing counsel was uncooperative and motivated by profit were not flagrant under the rule); with *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011) (finding that the prosecutor's blatantly racist comments and theory of the case were so "repugnant to the concept of an impartial trial" that reversal was required despite defense counsel's failure to object).

Because Mr. Austin waited until his motion for a new trial to object, for the first time, to conduct that was not flagrant but could have been cured by an instruction, he waived this issue and it should not be considered on appeal.

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⁵ Mr. Austin also assigns error to Department counsel's lack of conduct, *i.e.*, her failure to ask the jury to affirm the Department order on appeal. App. Br. at 2, 10. It is not clear at what point a party can object to a lack of conduct by another party, but in any event, Mr. Austin did not object at trial to the Department's stated neutral position. *See, e.g.*, RP 11/8/10 at 13-14 (Department's explanation of its neutral role, with no objection).

2. There was no attorney misconduct warranting a new trial

The trial court in this case properly denied the claimant's motion for a new trial under CR 59(a)(2).⁶ That rule states that a new trial is warranted for:

any one of the following causes materially affecting the substantial rights of such parties:

.....

(2) Misconduct of prevailing party or jury[.]

CR 59(a).

Here, a new trial was not warranted for three reasons: (a) the Department was not the prevailing party at trial; (b) Department's counsel did not commit misconduct; and (c) any error did not materially affect the outcome of the trial.

a. The Department was not the prevailing party at trial as CR 59 requires

CR 59 allows for a new trial when misconduct "of [a] prevailing party" materially affects the substantial rights of the parties. Mr. Austin alleges that conduct of the Department, not the employer, violated this rule. App. Br. at 1-2, 9-11. However, an examination of both the

⁶ Although the claimant has not cited CR 59 in his brief, he appears to invoke subsection (a)(2) of that rule when he assigns error to the Department's "confusing and prejudicial conduct" (App Br. at 1) and argues that the Department's conduct constituted "attorney misconduct" (App. Br. at 9).

Department's order on appeal and the Department's position at trial reveals that the Department was not a prevailing party at trial.

The Department order on appeal to the Board was an order allowing Mr. Austin's claim for industrial injury. BR 33. Although the Board affirmed the Department order, the jury disagreed, and the trial court reversed the Board's order affirming the Department's order. CP 32, 53-55. As a technical matter, the Department did not prevail when its order was reversed on appeal.

Moreover, the Department's litigation position at trial was not opposed to Mr. Austin. From the beginning of this litigation before the Board, the Department had declared its intention to remain neutral and not actively defend its order allowing Mr. Austin's claim, based on facts that came to light after the Department issued the order on appeal. CP 85-86. Department's counsel reiterated this intention to remain neutral to the superior court judge outside of the jury's presence before the jury was empaneled. RP 11/8/10 at 13-14. The Department did not ask the jury to either affirm or reverse the Board's decision affirming the Department order on appeal. *See* RP 11/10/10 at 8-9, 20-52 (closing arguments); CP 73 ¶ 5. Thus, the Department cannot be said to have prevailed when the jury found the Board's order to be incorrect.

The superior court judgment entered in this case confirms that the Department was not the prevailing party, listing Pilchuck as the judgment creditor and both Mr. Austin and the Department as judgment debtors. CP 53. Mr. Austin's attorney signed the judgment. CP 55.

Because the Department was not a prevailing party at trial, the verdict in favor of Pilchuck should not be overturned based on allegedly improper conduct by the Department, a neutral third party.

b. The assistant attorney general did not act improperly

Without citing any authority, Mr. Austin argues that Department's counsel committed misconduct by stating the Department's neutrality yet not acting neutral when she refused to sit at counsel table with Mr. Austin's attorney, refusing to agree to Mr. Austin's proposed verdict form,⁷ and refusing to ask the jury to affirm the Department order on appeal. App. Br. at 9-10.

Although the Department decided to take a neutral position at trial, it had no obligation to do so. As a party to this appeal, the Department has the same rights as any other party. *See 6 Washington Pattern Jury Instructions: Civil* 1.07, at 26 (2005) (WPI) ("The law treats all parties

⁷ Contrary to Mr. Austin's statement that the Department submitted "instructions" that were "in contradiction to" those proposed by Mr. Austin (App. Br. at 10), all of the jury instructions except for the verdict form were agreed by all three parties. CP 74, 86 ¶ 6.

equally whether they are . . . government entities . . . or individuals.”); RCW 1.16.080 (“The term ‘person’ may be construed to include . . . this state . . . as well as an individual.”). And as the Department’s attorney, the assistant attorney general was required to represent its client’s interests within the bounds of the law and ethics. *See* RPC 1.2(a); CR 11.

The Industrial Insurance Act specifically allows the Department to participate as a party in any appeal from one of its orders, and, in fact, *requires* the Department to appear in appeals to superior court in state fund cases. RCW 51.52.100 (allowing the Department to participate at the Board); RCW 51.52.110 (requiring the Department to appear in state fund superior court appeals); *see also Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 588-89, 880 P.2d 539 (1994) (Department properly allowed to participate at superior court trial despite lacking a financial interest in the outcome of the case).

The attorney general is charged by statute with representing the state and its departments in all legal proceedings. RCW 43.10.040. Our Supreme Court has applied this statute to assistant attorneys general representing the Department of Labor and Industries in appeals to the Board of Industrial Appeals and the superior courts. *See Aloha Lumber Corp. v. Dep’t of Labor & Indus.*, 77 Wn.2d 763, 774, 466 P.2d 151 (1970). The Court in that case held that the attorney general can appear

and actively defend the Department's order on appeal even when the Department neither appealed nor prevailed at the Board. *Id.* at 775-76. The Court also explained that the attorney general is not *required* to defend the Department's order on appeal, the attorney general can remain *passive* in the superior court appeal, and that the attorney general should represent his client's interests on appeal:

We do not mean to suggest that the Attorney General must zealously defend the position originally taken by the supervisor on an appeal of this kind. It may be that the Department will, in a given case, wish to acquiesce in the decision of the Board, and the Attorney General will play only a passive role before the superior court.

The Attorney General must, of course, be guided by the interests of his client in determining the extent of his participation in the appeal. *We merely rule that the Department remains his client*, even though it is neither the appellant nor the prevailing party before the Board.

Id. at 776 (emphasis added).

Here, the first of the above-quoted paragraphs describes precisely what the Department did in this case—it chose to take a passive role in the superior court appeal and not zealously defend its order on appeal. Consistent with RCW 51.52.110, RCW 43.10.040, and *Aloha Lumber*, the Department, through its attorney, could have taken a different position but elected not to.

Despite the Department's right to have actively participated in the trial, the assistant attorney general did, in fact, remain neutral throughout the trial consistent with her client's position. She stated the Department's position to the trial judge on the first day of trial. She gave a neutral opening statement and did not make a closing argument. She did not ask the jury to either affirm or reverse the Board's order. She sat in between the employer's and claimant's attorneys at the adjoined counsel tables. She asked only clarifying questions of one of the witnesses presented at the Board, which is the same record that was presented to the jury (BR Austin 52-53), and she presented no witnesses for the Department. All of these actions are consistent with the Department's decision to be a neutral party in this litigation.

Mr. Austin argues that Department counsel's "refusal to ask the jury to affirm the Department Order being appealed reinforced the message to jury [sic] that the Department was not a 'neutral' party." App. Br. at 10. It is hard to imagine anything more neutral than simply not making a closing argument and not asking the jury to either affirm or reverse. Thus, this conduct (or lack thereof) did not deviate from the Department's stated position.

For all of these reasons, the assistant attorney general's choice of seats at trial, proposal of a legally correct verdict form, and failure to make

a closing argument do not constitute attorney misconduct under any legally cognizable or ethical theory.

Because he cites no authority, it is simply not clear what rule or procedure Mr. Austin is asserting the Department violated. The trial court judge has great latitude in dictating the procedures of his or her courtroom. *E.g., State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979); *State v. Schneider*, 158 Wash. 504, 515-16, 291 P. 1093 (1930). And the Department is aware of no statute or civil rule that governs details such as where the parties sit in the courtroom. In the absence of such a rule, this type of procedure is within the discretion of the trial court. *See Schneider*, 158 Wash. at 516. There is nothing in this record to suggest the trial court abused its discretion, especially when Mr. Austin waited until after the jury's verdict to first bring the issue to the court's attention.

c. Mr. Austin has not shown that the Department's actions affected the outcome of the trial

Finally, Mr. Austin has not shown that the Department's actions "materially affect[ed] the substantial rights of [the] parties." *See* CR 59(a). Although he argues that at least one juror was confused by the Department's position at trial (App. Br. at 10), that assertion is not supported by the record, nor does it tend to show that the verdict was affected.

In response to Mr. Austin's motion for a new trial at the superior court, the Department filed a declaration that, among other things, summarized counsel's interactions with the jury after the trial. CP 87 ¶ 11. She stated that one juror was "not sure" of the Department's position, and no one believed the Department was aligned with the employer:

The jury returned their verdict in less than an hour. In speaking with the unanimous jury in the hallway after the trial, I asked if the jury could discern whether I was aligned with Austin or the Employer. Most indicated that they had not given my client's position any thought. One juror indicated that she was *not sure*, since I collaborated with [Mr. Austin's counsel] for the jury selection, but sat at the table with [the employer's counsel]. Not a single juror stated that they believed I was on the side of the Employer.

CP 87 ¶ 11 (emphasis added). Reading this paragraph as a whole illustrates the incorrectness of Mr. Austin's assertion that "[a]t least one juror stated her confusion on the matter" App. Br. at 10. The juror's uncertainty as to which position the Department took at trial is entirely consistent with the Department's stated neutrality. And to equate "not sure" with "confused" contradicts the plain meaning of the declaration.

Moreover, only ten votes were required for a verdict. CP 52. Mr. Austin has not shown how one juror's uncertainty about the Department's position affected the verdict when the Department's position was neutral, there is no reason to believe the juror's uncertainty affected her vote, and the other jurors had not given the Department's position any thought. Mr.

Austin presented no evidence in his motion for a new trial showing any effect on the outcome of the trial. CP 58-67, 135-140. The trial court did not abuse its discretion in denying the motion.

B. The Trial Court Did Not Commit Prejudicial Error In Submitting A Verdict Form That Mirrored The Language Of The Board's Ultimate Conclusion

1. Mr. Austin did not preserve this issue for appeal because he did not propose a jury instruction that addresses the issue he raises in this appeal

A party has a duty to propose alternative jury instructions if that party is dissatisfied with those proposed by the other party. *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 614-15, 1 P.3d 579 (2000). In order to preserve the issue for review, the party must object if the court refuses to accept the party's proposed instruction. *Id.*; CR 51(f).

For the first time on appeal, Mr. Austin argues that the verdict form in this case did not allow the jury to consider his two injuries independently but instead required them to decide the case in an all-or-nothing fashion. App. Br. at 7. Mr. Austin, however, did not object to the Court's verdict on this basis. The basis for his objection to the Court's verdict form was that the two medical diagnoses were too specific and that the jury would not need to find those specific diagnoses but could find

“just general low back and left knee injuries.” RP 11/10/10 at 7. And the verdict form he proposed was incorrect because it only asked one vague question that did not summarize the Board’s conclusion of law. *See* CP 31; Section V.B.2, below. Mr. Austin, therefore, has waived this issue, and the Court should decline to reach it for the first time on appeal.

2. The verdict form correctly summarized the Board’s conclusion of law, was supported by substantial evidence, and allowed Mr. Austin to argue his theory of the case

Verdict forms, like jury instructions, are sufficient when they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Anfinson*, 159 Wn. App. at 71. An instruction containing an erroneous statement of the applicable law is reversible error only when it prejudices a party. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). Prejudice occurs if the erroneous instruction affects or presumptively affects the outcome of the trial. *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 740, 981 P.2d 878 (1999).

Nonconstitutional error is harmless if, within reasonable probability, it did not affect the verdict. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). A “clear misstatement of the law” is presumed prejudicial. *Thompson*, 153 Wn.2d at 453 (citing *Keller v. City*

of *Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002)) (emphasis added).

The Washington pattern instructions explain that verdict forms in workers' compensation trials should mirror the language of the Board's conclusion of law on appeal:

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was the Board of Industrial Insurance Appeals correct in deciding that _____ ?

ANSWER: (Write "yes" or "no")

(INSTRUCTION: If you answered "yes" to Question 1, do not answer any further questions. If you answered "no" to Question 1, answer Question 2.)

QUESTION 2: (Prepare appropriate questions relating to elements of the specific case, such as aggravation, increase in disability, etc.)

.....

Note on Use

Use this special verdict in worker compensation actions. The blank line in Question 1 *should be completed by summarizing the ultimate conclusions of the Board of Industrial Appeals*. The remaining interrogatories to the jury should consist of questions relating to the elements of the case, such as aggravation, increase in disability, etc.

6A *Washington Pattern Jury Instructions: Civil* 155.14, at 149 (2005) (emphasis added).

Washington pattern instructions are not binding on the courts, but they are often treated as persuasive. *See, e.g., State v. Mills*, 116 Wn. App. 106, 116 n.24, 64 P.3d 1253 (2003), *reversed on other grounds*, 154

Wn.2d 1, 109 P.3d 415 (2005). Written by the Washington Supreme Court Committee on Jury Instructions, the pattern instructions are intended to be clear and accurate restatements of existing law that are understandable by common lay persons. 6 *Washington Pattern Jury Instructions: Civil* 0.10, at 1 (Supp. 2011).

In this case, the verdict form did not contain a misstatement of the law. It stated:

Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Austin's conditions diagnosed as lumbar sprain/strain and left knee contusion were proximately caused by a November 29, 2007 industrial injury?

CP 32. As the WPI recommends, the verdict question mirrored the Board's conclusion of law on appeal, which stated:

Claimant's conditions diagnosed as lumbar sprain/strain and left knee contusion were proximately caused by the industrial injury within the meaning of RCW 51.08.100 and, accordingly, should be allowed conditions under the claim.

CP 101 (Conclusion of Law 2); BR 28 (Conclusion of Law 2).

Moreover, the surrounding instructions correctly informed the jury that in order to have a valid industrial insurance claim, Mr. Austin must have suffered an "industrial injury" resulting in a physical condition, but not necessarily affecting both his low back and left knee. For example, Instruction No. 11 defines "industrial injury," including the requirement

that the alleged injury proximately causes a physical condition. CP 46. And Instruction No. 9 defines “proximate cause,” explaining that the injury must be a proximate cause of “the alleged condition.” CP 44. Taken as a whole, these instructions properly informed the jury that in order to be allowed, the alleged injury must have caused some physical condition, but it is not necessary that the injury caused two physical conditions.

The court’s verdict form also allowed Mr. Austin to argue his theory of the case, which was that he suffered injuries to both his low back and his left knee on November 29, 2007. *See* Section V.B.3, below. In fact, the court’s verdict form precisely mirrored his theory of the case, and he asked the jury to answer “yes” to the question posed. RP 11/10/10 at 48.

Citing no legal authority, Mr. Austin argues that it is “quite common” for parties to edit or change the language of the Board’s decision when crafting the question for the verdict form. App. Br. at 8. But whether or not it is common to deviate from the WPI, Mr. Austin has cited no authority, and the Department is aware of none, supporting that the parties *should* deviate from the language in the Board’s conclusion on appeal when submitting the ultimate question to the jury. To the contrary,

the WPI clearly states that the Board's conclusion should be summarized in the verdict form. That was done here.

Mr. Austin seems to argue that the verdict form was conjunctive where it should have been disjunctive. App. Br. at 5, 7, 8. Notably, the WPI recommends follow-up questions as appropriate given the facts of a particular case. WPI 155.14. In this case, for example, follow-up questions could have been proposed separately asking whether Mr. Austin injured either his low back or his left knee as a result of an industrial injury. The jury could have been asked to answer these follow-up questions only if its answer to the main question whether the Board was correct was "no." See WPI 155.14 (suggesting follow-up questions as appropriate if the jury answers "no" to the main question). Mr. Austin, however, did not propose such a verdict form to the trial court and has, therefore, waived this argument. See *Goehle*, 100 Wn. App. at 614-15.

The verdict form Mr. Austin did propose was insufficient. His proposed instruction asked one vague question—whether the Board was correct in finding that Mr. Austin had sustained an industrial injury.⁸ CP 31; App. Br. at 8. The problem with the proposed verdict is that it does not summarize the Board's conclusion of law, which is the decision on appeal that the jury was being asked to review. Also, Mr. Austin's

⁸ Mr. Austin's proposed verdict asked, "Whether the Board was correct when it found that Mr. Austin sustained an industrial injury on November 29, 2007?" CP 31.

proposed verdict would not give the jury the opportunity to clarify whether, if the Board was correct, Mr. Austin suffered an industrial injury to his knee, low back, or both. If the jury found that Mr. Austin suffered an industrial injury to only one of those body parts but not both, his proposed verdict form would not inform the Department which bodily condition should be allowed on the claim on remand. Only proposing two separate follow-up questions would have cured the alleged error Mr. Austin now complains of in a legally correct way, and he did not propose such a verdict form.

Moreover, there is no evidence in this record that Mr. Austin injured his knee or low back, but not both. Likewise, there is no evidence that Mr. Austin suffered an industrial injury resulting in a medical condition other than a lumbar strain or left knee contusion. Both of the medical experts who testified on behalf of Mr. Austin opined that he sustained an industrial injury to both his low back and his left knee on November 29, 2007. BR Alsager 32; BR Haynes 13, 25-26. These opinions were consistent with Mr. Austin's own testimony that he injured both his low back and left knee on that date. BR Austin 6, 9. Conversely, both medical experts who testified on behalf of the employer testified that Mr. Austin had pre-existing low back and left knee conditions but no industrial injury of November 29, 2007. BR Kopp 7/13/09 at 29-30; BR

Hamilton 34. Thus, no evidence in the record supports either Mr. Austin's proposed verdict or the disjunctive verdict Mr. Austin suggests for the first time in his brief to this Court.

Because Mr. Austin did not propose a correct verdict form and the court's verdict form correctly informed the jury of the Board's conclusion of law on appeal, this Court should reject his argument that the court's verdict was in error.

3. Any error was not prejudicial because both the employer and Mr. Austin argued an "all or nothing" theory, consistent with the evidence

Even if the verdict form was incomplete in not including follow-up questions, any error did not prejudice the outcome of the case. The employer's theory of the case was that the alleged industrial accident never occurred and that Mr. Austin's low back and knee conditions were both pre-existing and unrelated to his employment with Pilchuck. The jury apparently believed this theory, deciding that Mr. Austin injured neither his knee nor his low back at work on November 29, 2007. Mr. Austin's theory of the case mirrored the employer's; he argued that he injured both his knee and his low back in the November 29 incident.

In its closing argument, the employer stated its position that the November 29 lifting incident never occurred, and that if it did, it did not cause or aggravate any condition. RP 11/10/10 at 23-24, 51-52. The

employer reiterated throughout its closing argument that an industrial injury did not occur. RP 11/10/10 at 24, 26-27, 40-41. The employer focused on Mr. Austin's credibility, the fact that he had been convicted in the past of fraudulently obtaining public benefits, and the fact that he had neglected to tell his doctors about prior injuries to his low back and knee. RP 11/10/10 at 24, 28-29, 30-32, 34, 37, 39, 40-41, 50-51. In addition, the employer argued that the doctors' opinions that Mr. Austin suffered an industrial injury depended heavily on Mr. Austin giving a truthful account of the incident and his pre-existing conditions, which he did not do. RP 11/10/10 at 29-30, 36-37, 39.

Conversely, Mr. Austin argued in closing argument that the November 29 incident occurred, causing both a low back and a left knee condition. RP 11/10/10 at 46. Counsel for Mr. Austin defended his credibility, arguing that he was a poor historian but not dishonest, and that he was a good worker with strong character. RP 11/10/10 at 41-42, 43-44. Mr. Austin admitted that the central issue was whether an injury occurred at all. RP 11/10/10 at 41. His counsel did not argue that the injury caused one medical condition and not the other, but she did argue that the jury should answer "yes" to the question on the verdict form, asking whether the Board was correct in finding that an industrial injury caused both conditions. RP 11/10/10 at 48.

It is undisputed in this case that Mr. Austin had both low back and left knee conditions in his body. RP 11/10/10 at 30 (Pilchuck's closing argument); BR Kopp 7/13/09 at 29 (Pilchuck's witness); BR Hamilton 22-23, 28-29 (Pilchuck's witness). The only contested issue is whether those conditions were either caused or aggravated by an industrial injury on November 29, 2007, or, conversely, whether Mr. Austin was mistaken about the fact that any incident occurred on that day. For this reason, the verdict form's single question, asking whether the Board was correct in finding that an industrial injury caused both conditions, did not affect the outcome of the trial.

It is true that Mr. Austin could have a claim for industrial injury if he injured either his left knee or low back, but not both, as a result of a lifting incident at work. However, such a hypothetical situation does not change the outcome of this case because Mr. Austin did not propose a verdict form that separated the two conditions or object to the court's verdict form on this basis, the evidence does not support that Mr. Austin injured one body part but not the other, and both parties argued an all-or-nothing theory of the case, making any effect on the outcome of the case negligible.

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C. Mr. Austin Is Not Entitled To Attorney Fees

Mr. Austin seeks attorney fees under RCW 51.52.130. Relevant here, this statute allows for a worker to be reimbursed for attorney fees if, on appeal, either the Board's order is reversed resulting in additional relief to the worker or the employer appeals and the Board's order is sustained. RCW 51.52.130(1).

Here, neither of these factual scenarios is present. The employer appealed to the superior court and successfully obtained a reversal of the Board's order in favor of Mr. Austin. If Mr. Austin prevails in his appeal to this Court, it will not result in the Board's order being sustained. Rather, it will result in the employer having another attempt, through a jury trial, to have the Board's order reversed. Only if the Board's order is ultimately sustained would Mr. Austin be entitled to attorney fees for work done on appeal to effectuate that result. His request for attorney fees at this stage in the litigation is premature. *See Martinez v. Dep't of Labor & Indus.*, 31 Wn. App. 221, 225, 640 P.2d 732 (1982) (finding the worker's request for attorney fees premature when there had not yet been a decision on the merits of the worker's appeal).

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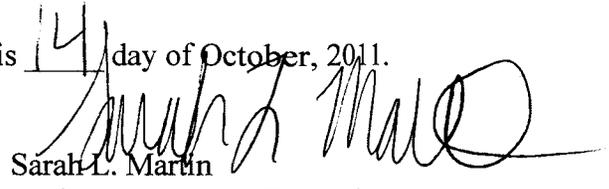
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VI. CONCLUSION

For the foregoing reasons, the Department requests that the Court affirm the King County Superior Court's judgment entered February 2, 2011 and order denying Austin's motion for new trial entered February 23, 2011, thereby sustaining the jury's verdict, which reversed the Board's March 12, 2010 order denying petition for review.

RESPECTFULLY SUBMITTED this 14 day of October, 2011.



Sarah L. Martin
Assistant Attorney General
WSBA No. 37068

No.66973-7-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

PILCHUCK CONTRACTORS, INC.,

Respondent,

v.

MICHAEL T. AUSTIN and STATE OF
WASHINGTON DEPARTMENT OF
LABOR AND INDUSTRIES,

Appellants.

CERTIFICATE OF
SERVICE

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Brief of Respondent and this Certificate of Service to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

**Original + 1 Copy via First Class United States Mail,
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Richard D. Johnson, Court Administrator/Clerk
Court of Appeals, Division I
One Union Square
600 University St
Seattle, WA 98101-1176

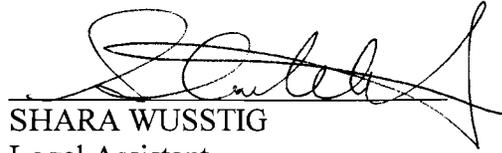
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DATED this ^{TW} 14 day of October, 2011.


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October 14, 2011

Richard D. Johnson, Court Administrator/Clerk
Washington State Court of Appeals, Division I
One Union Square
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Seattle, WA 98101-1176

RE: ***Pilchuck Contractors, Inc. v. Austin, Michael T. & DLI***
Court of Appeals No. 66973-7-I
King County Superior Court No. 10-2-03377-1

Dear Mr. Johnson:

Please file the enclosed original and copy of the Brief of Respondent and the Certificate of Service in the above matter. Also, enclosed is a copy to be conformed and a self-addressed stamped envelope for return to this office. Thank you for your assistance.

Sincerely,

SHARA WUSSTIG
Legal Assistant to
SARAH L. MARTIN
Assistant Attorney General

SLM:sbw

Enclosures: *as stated*

cc: Kylee MacIntyre Redman, Attorney for Appellant (w/encl.)
Terry Peterson, Attorney for Respondent (w/encl.)

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