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COURT OF APPEALS
DIVISION ONE

NOV 04 2013

69269-1

No. 692691

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

SANDRA OLSEN (Appellant)

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON (Respondent)

REPLY OF APPELLANT

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TABLES - RAP 10.3(a)

<u>TABLE OF CONTENTS</u>	<u>Page No.</u>
Reiteration of Assignment of Error	1
Restatement of Facts	2
Argument	4
Request to the Court	5
<u>OTHER SOURCES</u>	
ER 401	6
ER 403	6

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

SANDRA OLSEN,)	
Plaintiff/Appellant)	No. 692691
)	
)	APPELLANT'S
)	REPLY
)	
DEPARTMENT OF LABOR AND)	
INDUSTRIES)	
OF THE STATE OF WASHINGTON)	
Defendant/Respondent)	

ASSIGNMENT OF ERROR - REITERATION

Appellant Sandra Olsen avers that the Superior Court Judge erred in allowing certain testimony by Respondent Department of Labor and Industries of the State of Washington [The Department]'s medical expert Dr. Franklin to be heard by the jury. The specific testimony allowed to be heard involved Department Guidelines which were inherently confusing to the jury and prejudicial to Appellant. The issue pertaining thereto is whether it was an abuse of discretion to allow Dr. Franklin's testimony to be heard over objections on the basis of ER 401 and ER 403.

RESTATEMENT OF FACTS

On day one, prior to voire dire, Ms. Olsen moved that the Dr. Gary Franklin's testimony be stricken on the basis of relevance ER 401 and confusion to the jury ER 403. Ms. Olsen had made the same motion at the Board hearing, but failed to directly implicate ER 403. At the appeal, Ms. Olsen directly implicated ER 403, and the Department failed to object to Ms. Olsen's motion. Indeed, it is clear from the judge's own words that his decision was made on the basis of both 401 and 403:

“[The Court] can . . . understand . . . the relevance of testimony as to guidelines which were in either in the medical community or used by the Department of Labor and Industries at the time they made the decision regarding Ms. Olsen. [The Court doesn't] understand the relevance of his testimony as to guidelines that . . . came into existence after the fact . . . If [Dr. Franklin] is knowledgeable of the standard used by the Department at the time that this diagnosis was arrived at by the Department . . . [h]e may testify as to the standards that

existed at the time if he's qualified to do that . . . But [the Court is] not going to allow him to testify about standards that came into existence at a later time, or about how these standards were developed. [The Court just doesn't] see that that's relevant to this particular case. [Dr. Franklin] can testify as to the prior guidelines, but he can't testify to guidelines that were in the process of being created, or were actually started to be used after the fact. Id at p 14-15 15-24, 16-19.

On the day the initial ruling was made, the Department never raised any issues as to Ms. Olsen's right to raise ER 403 at appeal. The judge agreed to hear ER 403 based argument. Both parties argued ER 403 arguments – Ms. Olsen stating that the standards were confusing and irrelevant, having been written three years after the fact, and the Department arguing that they were relevant because they were so similar to the then current guidelines that there was no chance for confusion to the jury.

The following day, the Department had another chance to convince the judge to allow the guidelines in. This time, they argued that Ms. Olsen had opened the door to Dr. Franklin's testimony. However, the judge didn't make his ruling on that basis. In fact, the judge quite clearly explicated what was on his mind when he made the ruling:

[W]e now have a jury who is supposed to be deciding whether the Board - - what the Board considered amounted to . . . something that they can sustain or reject . . . Otherwise, what we're doing is dissecting what the Board considered and then asking the jury to - - match up their decision with something that's different from what [the Board] heard." Id at p. 8 10-24; p. 10 15-18.

ARGUMENT

In short, the judge overruled his prior decision because he feared 'dissecting' the record. The Department has provided this court with no evidence that keeping the record whole is a proper concern for a judge under these circumstances. In fact, the undisputed fact that the judge considers evidentiary motions *de novo* directly contradicts any notion that keeping the record the

same is important. Rather, it seems logical that the judge is allowed to review those motions *de novo* in order to correct mistakes and clean up evidentiary issues from the first hearing. In the case at hand, the judge allowed Dr. Franklin's testimony in not because it was relevant, not because its probity outweighed its prejudice, but simply because he didn't want the jury to 'match up their decision with something that's different from what the board heard.' That reasoning, the fundamental reasoning behind the judge's decision, is unsupported by law or logic. The judge's reasoning on the first day was the correct decision but, more importantly, it was made on a proper basis (confusion to the jury by presenting dubiously relevant after-the-fact guidelines).

REQUEST TO THE COURT

For the reasons submitted above, Ms. Sandra Olsen respectfully petitions the court to order a new trial in which all testimony regarding the 2010 "guidelines" is stricken from the record before the jury hears it.

RESPECTFULLY PRESENTED:

11, 4, 13



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CERTIFICATE OF SERVICE

I certify that on the 4th day of November, 2013, I caused a true and correct copy of this Document to be served on the following in the manner indicated below:

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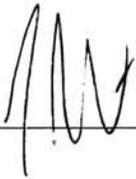
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