

69269-1

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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)

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON

ORIGINAL

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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

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

ASSIGNMENT OF ERROR

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.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

This is a workplace injury case. Sandra Olsen filed an occupational disease claim involving injury over time to her hands, wrists, and arms. The condition arose in 2007. The Department allowed her claim as follows: Right Carpal Tunnel Syndrome, Right Hand Tenosynovitis, Left Wrist Tendonitis. RP V1 p. 148 14-19. Ms. Olsen treated extensively for these conditions and experienced some relief, but also the worsening of certain symptoms over a period of two and a half years. Id at p 149. 22-24. Her doctor diagnosed her with Non-Specific Neurogenic Thoracic Outlet Syndrome [NTOS]. Id at p. 150 1-5. Ms. Olsen sought to add this diagnosis to her L&I claim, and was initially denied. She appealed to the Board of Industrial Insurance Appeals [The Board] through counsel, Attorney Corey Endres of the Law Offices of Steven D. Weier. The Board ruled against the addition of her claim, and Ms. Olsen appealed to a jury trial before Superior Court Judge Hon. Hollis Hill. [The Court]

THE OBJECTIONABLE RULING

The specific evidentiary ruling to which Ms. Olsen objects occurred on day two of trial, after both parties had made opening statements. Essentially, on day two the Court overruled a ruling from day one. Appellant believes the first ruling was correct. The Court was kind enough to provide a substantial record as to the basis for its decision each time.

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. Dr. Franklin's testimony was particularly odious to Ms. Olsen, as it revolved nearly entirely around Department guidelines for categorizing injured people – these are essentially insurance utilization review tools, not in any way diagnostic tools. They were also written three years after Ms. Olsen's date of injury. Id at p. 11 6-18.

In oral argument in support of his objection, Mr. Endres stated:

[Dr. Franklin is] a witness who describes insurance company guidelines – Department of Labor and Industries’ guidelines that were not effective until October 2010 when the issue in this case is whether or not this lady, Sandra Olsen, developed a condition in October, 2007. So almost the entirety of his conversation is focusing on these guidelines which came out three years later. And the guidelines aren’t the legal standard. They’re just . . . guidelines for their utilization review firm for the Department - - Department of Labor and Industries. Id. at p. 11 6-18.

In response to the court’s question as to these guidelines’ applicability to Ms. Olsen, Mr. Endres responded “[T]he issue in this case is whether Sandra Olsen has neurogenic thoracic outlet syndrome. And these are guidelines - - treatment and diagnostic guidelines for neurogenic thoracic outlet syndrome which came about three years after the date of injury in this case - - date of manifestation in this case . . . I believe they’re not relevant at all.” Id at p. 11-12 22-8.

In rebuttal to Ms. Olsen's motion, the Department's attorney, Sarah Reyneveld, argued weight of the evidence rather than exclusion, and that the new guidelines are "very similar to the guidelines that existed fifteen years prior to their adoption." Id at p. 13 13-16. The Court stated "[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. Id at p. 14 1-5. Again, the Department responded that "As [Ms. Reyneveld] stated before, these guidelines are almost identical to the guidelines that the Department . . . used at the time they were making the decision." Id at p. 14 6-9. The court then made its ruling:

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.

The parties then proceeded through *voire dire*, and began to read the first testimony, that of Ms. Olsen's. The following day, on its own motion, the Court began by reiterating its ruling from the day before: “[the Court] is not going to grant [Ms. Olsen's] request that [Dr. Franklin's testimony] be excluded in its entirety. . . He is an expert in the field and can talk about the methods of diagnosis of this condition or disease . . . [B]ut . . . not the . . . guidelines, which went into effect after this incident occurred. RP V2 p 5 4-12.

Ms. Reyneveld then “renew[ed] the Department's objection in regards to [the Court's] ruling on the guidelines.” Id at .p 5 23-25. The Department's basis for their renewed objection was that, during the Board hearing, Ms. Olsen's counsel had asked two of her experts, Dr. Johansen

and Dr. Thomas, about the guidelines. Id at p. 6 1-4. The Department argued that Ms. Olsen’s counsel thereby had “opened the door to a discussion of the guidelines” at the Superior Court trial. Id at p. 6 2-3. The Department argued that “it is not a remedy at this point to simply remove Dr. Thomas’ discussions of the guidelines because [Ms. Olsen’s counsel had] opened the door.” Id at p 7 3-5. During the Board hearing, Ms. Olsen had objected to Dr. Franklin, and that objection was denied, so Dr. Franklin was allowed to testify regarding the guidelines. Ms. Olsen’s counsel acknowledged that, having been advised of the Board’s ruling allowing Dr. Franklin’s to testify, and knowing the nature of Dr. Franklin’s testimony, he solicited rebuttal testimony from Dr. Thomas in advance of Dr. Franklin’s testimony. Id at p. 7 12-18. Mr. Endres further offered to “strike out those questions that I asked as well [as Dr. Franklin’s testimony about the guidelines.]” Id at p. 7 19.

The Court decided to reconsider the issue, and once again provided significant insight as to its basis:

[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. And given

the fact that [Plaintiff's counsel] did raise the issue in your case . . . I really don't think that I have a choice but to permit the - - the State from - - from providing a response. So, um, I – I am gonna reverse my ruling on that and let it all in. 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. . . And given the fact that the order of events at the hearing was that you opened the door, I can only - - I think I am - - it necessitates my permitting the - - - all of that testimony in. Id at p. 8 10-24; p. 10 15-18.

ARGUMENT

The Superior Court Appeal Hearing is heard de novo, but with an important limitation. RCW 51.52.115 states :”

[u]pon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of

the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court . . .”

In other words, except under the rarest of circumstances, no new evidence may be added to the record the jury considers, and the Board’s evidentiary rulings are evaluated de novo by the Superior Court. The rules allow the Superior Court judge to consider less of the record than the board did, since the Court has the ability to consider evidentiary rulings de novo, but not more. The jury may also end up considering less than 100% of the record, based on the Superior Court’s de novo evidentiary rulings. Thus, the Department’s statement before the court and jury that “[t]he Board, after hearing the exact same evidence that [you the jury] will hear at trial, determined that Ms. Olsen did not have this NOTS . . .” is an incorrect statement of fact and law. *Id at p. 163 21-24* (my italics). It appears, however, that both the Department and the Court misunderstood the nature of the court’s authority to deal with evidentiary issues.

What we have here is the Court making a correct decision, for the correct reasons, then reconsidering its ruling for the wrong reasons, resulting in a wrong decision. This second decision led to substantial amounts of information being presented to the jury that was prejudicial and confusing to them. Indeed, it was confusing to the Court, and the court was confused at the time it made its second ruling. Ultimately the jury found against Ms. Olsen.

A trial court's decision to admit evidence is reviewed for abuse of discretion. Doe v. Gonzaga Univ., 99 Wash.App. 338, 362, 992 P.2d 545 (2000). This is an evidentiary appeal, thus the standard at play is “abuse of discretion.” The burden on Ms. Olsen is to establish that not only did the Court abuse its discretion when it overruled itself, but that this decision caused her harm. Northington v. Sivo 102 Wash.App. 545, 8 P.3d 1067 Wash.App. Div. 1,2000.

In order to find an abuse of discretion, we must look at the nature of the evidence presented, determine its relevancy, and determine its prejudice. In the case at hand, the specific testimony to which Ms. Olsen objected was Dr. Franklin’s testimony regarding Department Medical Treatment Guidelines in Washington Worker’s Compensation (the

guidelines). Some similar testimony was presented by Dr. Neuzil and Dr. Price, to which Ms. Olsen also objects.

The first page of these guidelines exposes the intent of its drafters: “[the committee] shall advise the Department on matters related to the safe, effective, and cost effective treatment for injured workers.” RCW 51.36 et seq. Furthermore, “[t]hese guidelines are used for physician education, in the utilization review program and in the claim management process.” Ex. 1 Guideline Front Page. The guidelines relate to, essentially, business practices between the Department and its providers. They serve to put providers on notice as to what the Department will willingly pay for, and what it’ll fight. If providers want to get paid, they have to follow the guidelines.

“So the first job [we in the committee] really undertook,” Dr. Franklin testified over objection, “was to . . . look at all of the older guidelines that we had and to do new guidelines . . . completely new ones on all the upper extremity entrapment neuropathies . . . ultimately also on to Thoracic Outlet Syndrome. VR V3 p. 110-111 22-25; 1-5. The guideline regarding TOS, “Work-Related Neurogenic Thoracic Outlet Syndrome: Diagnosis and Treatment” has an effectiveness date of October 1st, 2010.

It is the testimony regarding these guidelines, and the development thereof, that is the real crux of this case. The problems are multitude. First, these guidelines don't even address the disease Ms. Olsen has. She has Nonspecific Thoracic Outlet Syndrome of vascular nature, not Thoracic Outlet Syndrome of a neurological nature. One is neurological; one vascular – the information presented was about the neurological form, not the vascular form from which Ms. Olsen suffers. Secondly, the guidelines were released three years after the injury. Finally, they aren't even diagnostic codes in the first place, thus the only bearing they can have on the jury's factual determination, to wit did Dr. Johansen make a correct diagnosis of Ms. Olsen's NTOS, is one for which the guidelines are not admissible.

These guidelines are not relevant, indeed the Court said as much on both days. The guidelines got in only because of the Department's argument on day two that, because Ms. Olsen had opened the door in soliciting rebuttal testimony against Dr. Franklin in during the Board hearing, the Court was obligated to allow Dr. Franklin's testimony at the Superior Court for the same reason. In other words, the Court believed

that Ms. Olsen's witness, through their testimony, made these previously irrelevant guidelines relevant.

At this point it's clear that the trial court judge became confused, because he states the reasoning for his new decision: "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."

This is surprising indeed. On the prior day, the Court acknowledged its ability to review the Board's evidentiary rulings de novo and made a de novo ruling, but now the Court is saying it doesn't have this power if, in the exercise thereof, it would result in too much data being removed from the underlying record. There is no basis for this opinion anywhere that this attorney can find. In fact this argument – the protection of the underlying record – wasn't even voiced by the Department. The Department argued from the perspective of misunderstanding. They assumed, incorrectly, that whatever got in front of the Board would necessarily get in front of the jury, and because Ms. Olsen's "opening the door" witnesses would necessarily get in, the Departments witnesses should get into to rebut Ms. Olsen's witnesses. Under that false

assumption, they were perfectly correct. The judge seemed to agree, though with lots of “hmmms” and pauses indicating that he wasn’t completely sure in his judgment. Indeed, the court was so flustered by this issue that it didn’t catch Mr. Endre’s proposal to excise all mention of the guidelines from his witnesses as well as the Department’s, which would have been an excellent compromise for all involved.

In short, by the plain language of the Court, the second ruling was made on an improper basis – that of preserving the underlying record. The first ruling was made on a proper basis, relevancy.

Were the guidelines relevant? Clearly not, and the court said so very repeatedly. That guidelines that look like diagnostic guidelines, but actually aren’t, would confuse the jury is pretty clear to all involved. That guidelines not in effect when Ms. Olsen’s condition arose have no relevance to the underlying diagnostics is clear as well. Irrelevant testimony should be suppressed.

Were the guidelines prejudicial? Forgetting for a moment that these weren’t even in effect at the time Ms. Olsen’s disease arose, there is prejudicial language buried in the guidelines regarding the specific type of TOS Ms. Olsen claims. In the medical community, this is called “Non-

Specific Thoracic Outlet Syndrome.” In the Department’s guidelines, this is called “Disputed Thoracic Outlet Syndrome.” The difference between labeling a condition “Non-Specific” and “Disputed” need not be belabored. One label carries an inherent ad hominum attack against the victim and will necessarily evoke skepticism in anyone who hears the term “disputed.”

Did the Court have a proper basis for allowing the guidelines in? Clearly not, again based on the Court’s own words. The Court’s basis was to preserve the underlying record, not because it had changed its mind as to the relevancy of the guidelines. The Court believed it had to let the underlying record be undisturbed, and refused to exercise its evidentiary discretion on specifically that basis, which is incorrect under the law.

Did the guidelines cause Ms. Olsen harm? Well, she lost her case, which is in fact evidence that the guidelines caused her harm. In order for her to lose her case, the jury had to reach the conclusion that Dr. Johansen misdiagnosed Ms. Olsen. As such, diagnostic procedures are directly in question, and the entrance into evidence of guidelines that pretend to be diagnostic in nature, but aren’t, can foreseeably produce the result Ms. Olsen suffered. Secondly, the harm was caused by the repeated use of the

term ‘disputed’ rather than “non-specific” is quite difficult to gauge, but also quite difficult to negate. To this attorney’s knowledge, the jury was not polled after trial, so further information as to what was going on in their minds is not available.

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:

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CERTIFICATE OF SERVICE

I certify that on the 11th Day of July, 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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