

No. 70754-0-I

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

KATHY STEVENS,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is a substantial evidence case arising from a workers' compensation appeal. This industrial insurance case involves a claim that exposure to dust caused asthma. The Department of Labor & Industries rejected the occupational disease claim on the basis that the claimant's asthma was not caused by an industrial exposure, but rather, was caused by her smoking three quarters of a pack of cigarettes a day since 1991.

In December 2008, Kathy Stevens became exposed to dust from sanding materials. Ms. Stevens had prior breathing difficulties, including bronchitis, upper respiratory, reactive airway disease, and nasal or sinus allergic reaction. The Department rejected Ms. Stevens's claim because a Board certified pulmonologist determined that her asthma was due to her smoking. The Board of Industrial Insurance Appeals affirmed.

The Board determined that Stevens had not proven that she had an occupational disease. The Board did not find Stevens to be credible about her exposure, her symptoms, and her frequency of smoking. It did not find the testimony of Stevens's doctors to be persuasive, as it was based on Stevens's incredible statements. The Board considered the testimony of the Department's medical witness who attributed the progression of the asthma to smoking. He said that dust could cause asthma, but that it did not in Stevens's case.

At superior court, the jury found for the Department. Stevens filed a motion for a new trial. She provided a declaration from a juror that a jury instruction about the need for medical testimony to be based on medical probability was confusing in view of the instruction on proximate cause. The juror said she did not understand that there could be more than one cause of her asthma.

This jury instruction is based on well-established case law that medical opinions have to be stated in terms of probability, not possibility. The Department successfully argued that a juror's declaration about a jury instruction could not be used as a basis for a new trial. The superior court denied Ms. Stevens's motion for a new trial. Ms. Stevens filed this appeal. The objection to the jury instruction raised by Stevens's counsel and the basis for this objection is not part of the record on review and, therefore, is not preserved for review by this Court.

II. STATEMENT OF THE CASE

A. When Ms. Stevens Started Working at JAMCO in 2006, She Had Been Smoking For 15 Years

Kathy Stevens started smoking in 1991. CP 234; *see also* CP 470-71. She had generally been a smoker before she started working full time at JAMCO, an aerospace company, in September 2006. CP 224, 234-35, 243, 276; *see also* CP 249, 470. She reported that she smoked three-

quarters of a pack of cigarettes a day when she started working as an assembler at JAMCO. CP 224, 235, 243, *see also* CP 410. Ms. Stevens worked for JAMCO until June 14, 2011 when she was fired for unplanned absences. CP 32, 225, 241-242.

While employed at JAMCO, Ms. Stevens continued to smoke. *See* CP 244, 380-81. By her report, she smoked three-quarters of a pack a day from September 2006 to November 2007 during the time she assembled harnesses in Building 2 at the JAMCO facility. CP 235, 244. She reported smoking three-quarters of a pack a day from March 2008 to December 2008 when she worked in Building 1 doing inventory control.¹ CP 244.

During 2009 and 2010, she smoked between 10 and 20 cigarettes a day. CP 425. Her family physician, Dr. Susana Escobar, reported that Ms. Stevens smoked about three-quarters of a pack a day in January 2009. CP 425. At an independent medical exam on November 29, 2010, Ms. Stevens reported that she was “down to one pack per week.” CP 445, 471. The examiner, Dr. Robert Cox, noted that Ms. Stevens’s medical record documented times when she had smoked “at least one pack per day.” CP 471, 503-504. By the end of February 2011, she and her son reported that she was smoking no more than 2-4 cigarettes per day. CP 276-77.

¹ Ms. Stevens was off work from November 2007 to March 2008 due to a surgery. CP 224.

B. Smoking Can Cause the Inflammation of the Airways

Asthma is a chronic condition characterized by inflammation of the airways. CP 442, 475. A variety of things can cause airway inflammation. CP 442. When the airways are inflamed, they become overly sensitive, which can lead to coughing, muscle spasms around the airway, increased mucus, and shortness of breath. CP 442.

Smoking can lead to inflammation of the airways, and can cause asthma. CP 442-43. Smoking can also destroy air sacs in the lungs, damage the immune system that protects the lungs, and damage the elastic properties of the lungs, making it more difficult to get air out of the lungs. CP 443. Smoking can cause or worsen bronchitis by inflaming the airways. CP 458. Smoking can lead to permanent changes that cannot be reversed even if the individual stops smoking. CP 443.

Cigarette smoke contains over 7,000 different chemicals, including formaldehyde and chromium. CP 417, 443, 476-78. Formaldehyde is present in cigarettes at levels hundreds of times higher than the permissible exposure level allowed by the Occupational Safety and Health Administration. CP 476; *see also* CP 318. Chromium is a toxic metal present in cigarettes that can cause respiratory problems. CP 477. Hundreds of other substances in cigarettes are potential irritants or can cause cancer. CP 478.

Because of her smoking, Ms. Stevens had medical conditions before her claimed industrial exposure to dust that started in December 2008. *See* CP 234. She had bronchitis requiring the use of an inhaler, sinusitis, rhinitis, and airway reactive disease and other difficulties with her lungs, which required the use of an inhaler. CP 395-396, 403. Her own doctor admits that she had such problems. *See* CP 394, 396, 403.

C. Ms. Stevens was Exposed to Sanding Dust at Work

From December 2008 to June 2010, Ms. Stevens worked in Building 3 at the JAMCO facility. CP 225, 227. She retrieved parts from a storage area on an open mezzanine deck above the manufacturing floor. CP 227, 261. On the manufacturing floor below the mezzanine deck, workers sanded aircraft panels on a downdraft table. CP 228, 239, 259. The panels were made of fiberglass, phenol, and formaldehyde. CP 229, 446. A downdraft table contains small holes that draw air through them in order to prevent particles and chemicals from rising up to where people are working. CP 469; *see also* CP 320.

Ms. Stevens and a co-worker testified that sanding dust drifted into the mezzanine area where she worked in Building 3. CP 228-29, 260. While working in Building 3, she experienced shortness of breath, nausea, and light headedness. CP 231. She reported that she did not have these symptoms before working in Building 3. CP 236.

In June 2009, Dr. Escobar diagnosed Ms. Stevens with asthma with acute exacerbation. CP 402-04. She believed that the exposure to dust in Building 3 “created the asthma problem.” CP 414. In her opinion, the exposure “took her from having intermittent reactive airway disease to persistent daily asthma.” CP 415. She did not believe that Ms. Stevens’s cigarettes smoking in and of itself accounted for the development of asthma. CP 411. Dr. Escobar assisted Ms. Stevens in filing a workers’ compensation claim. CP 405.

Dr. Escobar referred Ms. Stevens to Dr. Ranheim, a doctor of environmental medicine and allergies. CP 231-32, 407. Dr. Ranheim acknowledged that he determined that Ms. Stevens’s condition was caused or aggravated by her work because Ms. Stevens said she did not have symptoms before she started working in Building 3, and the symptoms became worse the longer she was there. CP 164. Dr. Ranheim noted that cases involving health problems related to their environment “always have a subjective element to them and you are trying to figure out if the patient is a credible witness to their own health.” CP 359. Dr. Ranheim also noted that Ms. Stevens’s symptoms did not improve when she was away from work. CP 360.

D. Department's Industrial Hygienist Chris Jacomme Testified That There Was No Exposure to Particulates Above Permissible Exposure Levels at Building 3 at JAMCO

Chris Jacomme, an industrial hygienist for the Department's Division of Occupational Safety and Health, testified about air quality inspections he conducted on March 25, June 8, and June 15, 2010 at the JAMCO work space and specifically at Building 3. CP 314-15, 322-23. The first inspection was due to the employer being on a regularly scheduled inspection list and the second inspection was due to an internal referral within the Department triggered by Ms. Stevens's occupational disease claim. CP 321. Mr. Jacomme measured total particulate, respirable particulate and formaldehyde particulate. CP 316. Total particulate is all the dust in the air, a respirable particulate is particles of a small enough size that they would pass through the larynx and go deep into the lung. CP 316. He stated that he did not find any levels above permissible exposure limit of any of the contaminants. CP 316-17, 320. Mr. Jacomme testified that even if the downdraft tables were in operation on the day of his air quality inspection, it would be atypical that it would increase the exposure to the particulates because the filters are designed to remove the particulates. CP 320.

E. Dr. Robert Cox, a Board-Certified Doctor of Pulmonary Medicine, Concluded that Ms. Stevens's Work Did Not Cause Her Asthma

On November 29, 2010, Ms. Stevens saw Dr. Robert Cox for an independent medical exam. CP 445. Dr. Cox is Board-certified in pulmonary medicine and internal medicine. CP 438.

Dr. Cox reviewed Ms. Stevens's medical records, including the records of Dr. Escobar and Dr. Randheim, and conducted a physical exam *See* CP 452-54, 471. His office performed a complete series of pulmonary function studies on Ms. Stevens. CP 472. He also reviewed air quality studies dated March 25, 2010, June 8, 2010, and June 15, 2010. CP 467-68; *see also* CP 314. All showed respirable dust and formaldehyde below permissible exposure levels, with some levels so low as to be undetectable. CP 316-317, 468.

Dr. Cox diagnosed Ms. Stevens with asthma. CP 474. He concluded that her asthma was not work-related:

Q: And did you come up with any determination about the causes of this condition in Miss Stevens?

A: In Miss Stevens I - - using the air quality reviews, the smoking history, and 25 years of pulmonary experience, I felt that this was not a work-related asthma, that this was related to the claimant's smoking or other factors, genetic factors, whatever.

Q: Well, Doctor - -

A: Allergy factors.

CP 476.

Dr. Cox noted that Ms. Stevens had “had problems” that required the use of an inhaler in January 2008, which was before she started working in Building 3. *See* CP 481. He believed that her smoking was the cause of her worsening symptoms:

There are a lot of reasons the claimant may have felt worse working there. It appears from what I read in the records that the air quality was not a problem in that workplace. We all get older every day. Her smoking history increases by a day every day. And it’s my opinion that it was time for her to start having problems. With her smoking history.

....

Her internal smoking clock had been running for many years. I just feel that it was kind of the natural history of things that that’s when she started to get worse. Unless there is documentation of other – of air quality issues in that plant that I was not given.

CP 481. Ms. Stevens’s counsel cross-examined Dr. Cox about the basis of his opinions. CP 485-511.

Dr. Cox was asked about whether the downdraft tables were in use on the day of the air quality studies by Chris Jacomme, industrial hygienist for the Department. CP 496. Dr. Cox said it would not change his opinion because he took into account the aspects of the exposure and he did not think the exposure was the causative agent of Ms. Stevens’s

asthma. CP 514. Dr. Cox testified that the temporal connection between Ms. Stevens's asthma and her work in Building 3 was a coincidence. CP 517-518.

He also noticed that she went to the ER on February 13, 2011, when she was not working and symptoms were unabated. CP 482. One of the tenets of occupational asthma is it usually gets better when you leave the workplace. CP 482.

F. The Board and Superior Court Concluded that Ms. Stevens's Work Did Not Cause Her Asthma

The Department rejected Ms. Stevens's workers' compensation claim for occupational asthma. *See* CP 154-66. Ms. Stevens appealed to the Board. *See* CP 154-66.

After considering the testimony, the industrial appeals judge concluded in a proposed decision and order that Ms. Stevens's asthma was not an occupational disease. CP 166. The judge's decision noted that the opinions of Dr. Escobar and Dr. Ranheim relied heavily on Ms. Stevens's accounts of her medical history, smoking, and symptoms, which the judge did not find persuasive. CP 165.

Ms. Stevens petitioned for review of the judge's decision to the three-member Board. CP 134-48. The Board denied Ms. Stevens's

petition for review and adopted the proposed decision and order as its final decision and order. CP 114-15.

G. The Superior Court Instructed the Jurors on Proximate Cause and the Requirement that the Proximate Cause of Ms. Stevens's Condition Had To Be Based On Testimony in the Form of Medical Probability

Ms. Stevens appealed to superior court. CP 527. On the third day of trial, a jury instruction conference was held but not recorded. *See* CP 102. The trial minutes state only that that the parties gave "exceptions and objections" to the Court's instructions. CP 102. The trial minutes do not state which specific instructions the parties objected to or the basis for the parties' objections. *See* CP 102.

The superior court gave the following proximate cause instruction, which is slightly modified from the pattern instruction, as Instruction 12:

A cause of a condition is a proximate cause if it is related to the condition in two ways: (1) the cause produced the condition in a direct sequence, unbroken by any new independent cause, and (2) the condition would not have happened in the absence of the cause.

There may be one or more proximate causes of a condition. For a worker to recover benefits under the Industrial Insurance Act, the work conditions must be a proximate cause of the alleged condition for which benefits is sought. The law does not require that the work conditions be the sole proximate cause of such condition.

CP 40; Washington Pattern Jury Instruction: Civil (6th ed. 2012)
155.06.03 (WPI).

The superior court gave the Department's proposed instruction that the proximate cause of that worker's condition must be established by medical testimony as Instruction 15:

Ms. Stevens's condition and the proximate cause of that condition must be established by medical testimony.

Medical testimony of this causal relationship must be in terms of medical probability, not medical possibility.

Testimony as to possibility means testimony confined to words of speculation and conjecture. Medical testimony that an incident could cause, can cause, or probably could cause such a condition is not sufficient.

CP 42. The Department filed a brief in support of this instruction. CP 48-54.

During deliberations, the jurors submitted three inquiries to the court, including two inquiries about causation. CP 24-26. The first inquiry about causation read: "Does the workplace conditions [sic] need to be the 51% or majority cause of her asthma?" CP 25. The court instructed the jury to refer to the court's instructions. CP 25. The jury's second inquiry about causation read: "What is the layman's definition of 'proximate cause' [?] Struggling with understanding definition in instruction 12[.] can we look up the definition of proximate cause?" CP

24. The court again referred the jury to the court's instructions, and it informed the jury that it could not look up the definition of proximate cause. CP 24.

The jury returned a verdict, concluding that the Board was correct in deciding that Ms. Stevens's asthma was not an occupational disease. CP 23. The verdict was returned on January 31, 2013, the trial court entered judgment on July 17, 2013. CP 23, 104, CP 20-22.

H. The Superior Court Denied Ms. Stevens's Motion for a New Trial

Ms. Stevens moved for a new trial under CR 59(a)(1), (7), (8), and (9). CP 541-50. She attached declarations from her counsel and from the presiding juror to her motion. CP 528-30. 536-39.

Ms. Stevens asserted in her motion that she was entitled to a new trial under CR 59(a)(1), (8), and (9) because of "the introduction of Instruction No. 15 to the Jury over the Plaintiff's objection." CP 547. Additionally, she asserted that she was entitled to a new trial under CR 59(a)(7) because the testimony of Dr. Cox "required him to ignore any work exposure to dust [sic]." CP 549.

Counsel's declaration stated that he "formally objected to the use of Defendant's Proposed Instruction 13² on the basis that, in light of other

² Department's Proposed Jury Instruction No. 13 became the Court's Instruction No. 15.

Jury Instructions pertaining to proximate cause and medical testimony this additional Instruction would be unnecessarily confusing to the Jury.” CP 528-29. He stated that his objection indicated that the other jury instructions allowed the Department “ample opportunity to argue [its] case without confusing the jury.” CP 529.

Ms. Stevens’s counsel’s declaration stated that, after the verdict, the jury asked to meet with him and specifically requested that the assistant attorney general not participate in the discussions. CP 529. It is unclear whether the entire 6 person jury asked to meet with Ms. Stevens’s counsel or just some of the jurors. According to the declaration, the jury advised him that it had been confused by Instruction 15 “and by other Instructions when considered as a whole as to the meaning of proximate cause.” CP 529. And the jury advised him that “all jurors thought Ms. Stevens’s work exposure was a cause of her asthma but they were confused as to whether it had to be the main cause.” CP 529.

The presiding juror’s declaration stated that the jury “had a great deal of difficulty” understanding how Instruction 12 was to be considered in light of Instruction 15, 16, and 17. CP 537. She stated that the jury could not determine from a review of the instructions whether Ms. Stevens’s work exposure “had to be the main cause, the predominant cause, or just a cause of her asthma.” CP 537. She stated that had the

court advised the jury that Ms. Stevens work exposure only had to be one cause of her asthma, the verdict would not have been rendered in favor of the Department. CP 538.

The Department filed a response to the motion, objecting in relevant part to Ms. Stevens's "attempt to include and refer to hearsay comments made by the jurors after rendering the verdict." CP 12. The superior court denied the motion for a new trial. CP 8-9.

Ms. Stevens appeals. CP 2-8.

III. ISSUES

1. Did Ms. Stevens preserve her exception to Instruction 15 where the trial minutes state only that she gave "exceptions and objections" to the court's instructions without stating what objections she objected to or the basis for her objections?
2. Assuming that Ms. Stevens preserved her exception to Instruction 15, does that instruction accurately state the law that medical opinions must be expressed in terms of probability, not possibility?
3. Did the trial court err in denying Stevens's motion for a new trial based on a juror's declaration, where the juror's declaration was drafted by Ms. Stevens's attorney to include hearsay statements of others and thought process of the juror which inhered in the verdict and is, therefore, not subject to review?
4. Does substantial evidence support the jury's verdict that Ms. Stevens's asthma was not caused by industrial exposure where a pulmonologist testified that Ms. Stevens's asthma was caused by her cigarette smoking for 20 years and her symptoms simply coincidentally presented while Ms. Stevens was employed by JAMCO?

IV. SUMMARY OF THE ARGUMENT

Ms. Stevens argues that the trial court erred when it gave Instruction No. 15. App. Br. at 3. She suggests that the instruction was erroneous because it uses the phrase “the proximate cause” where she only had the burden to prove that her work conditions were “a proximate cause” of her asthma. App. Br. 9. She has failed to preserve this issue for appeal because there is no record at trial of her objection to this instruction or her basis for the objection. In any case, even if this Court reaches the issue, this argument has no merit because it was a proper statement of the law. When read in concert with other jury instructions, it properly allowed each side to argue its theory of the case.

The superior court properly denied Ms. Stevens’s motion for a new trial because the juror thought process is irrelevant and is inhered in the verdict. The superior court did not abuse its discretion in denying Ms. Stevens’s motion for a new trial.

Substantial evidence supports the findings of the trial court that Ms. Stevens’s asthma was not caused by the distinct conditions of her employment, but rather by her lifelong smoking habit.

V. STANDARD OF REVIEW

In a workers’ compensation case, the superior court reviews the decision of the Board of Industrial Insurance Appeals de novo on the

certified appeal board record. RCW 51.52.115; *Raum v. City of Bellevue*, 171 Wn. App. 124, 139, 286 P.3d 695 (2013), *review denied*, 176 Wn.2d 1024 (2013). On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision, although fact-finder may substitute its own findings and decision for the Board's if it finds, from a preponderance of the evidence, that the Board's findings and decisions are incorrect. *See Raum*, 171 Wn. App. at 139.

The ordinary standard of civil review applies to this court's review of the trial court's decision in a workers' compensation appeal. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *see Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The Court of Appeals reviews the findings of the superior court, not the Board. *See Rogers*, 151 Wn. App. at 179-81.

This court limits its review to "examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions flow from the findings." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). "Substantial evidence exists if the record

contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

When undertaking substantial evidence review, the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the fact finder. *Fox v. Dep’t of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem’l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Rather, the appellate court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006); *Gagnon*, 110 Wn. App. at 485. “Where there is substantial evidence, we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently.” *Korst*, 136 Wn. App at 206.

Here, Ms. Stevens raises an issue of her objection to Instruction 15. CR 51(f) requires a party objecting to a jury instruction to “state distinctly the matter to which he objects and the grounds for the objection.” “The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.” *Crossen v. Skagit County*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983).

Jury instructions are sufficient if they (1) allow each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Raum*, 171 Wn. App. at 142. Whether the court's instructions have met these standards is a question of law that is reviewed de novo. *Raum*, 171 Wn. App. at 142. The court then reviews the judge's wording, choice, or the number of instructions for abuse of discretion. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 491, 205 P.3d 145 (2009).

VI. ARGUMENT

A. Ms. Stevens Did Not Preserve Her Objection to Jury Instruction 15 for Review by This Court

Ms. Stevens argues that the trial court erred as a matter of law by allowing Instruction No. 15. App. Br. 3. Because she has not preserved her objection to this instruction, this court cannot consider it. *Crossen*, 100 Wn.2d at 359.

CR 51(f) requires a party objecting to a jury instruction to "state distinctly the matter to which he objects and the grounds for the objection." The purpose of CR 51(f) is to "sufficiently apprise the trial court of any alleged error in order to afford it the opportunity to correct the matter if necessary." *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994) (quoting *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 163, 795 P.2d 1143 (1990)). This

allows the court “to correct any mistakes before they are made and thus avoid the inefficiencies of a new trial.” *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 615, 1 P.3d 579 (2000).

This Court’s inquiry on review “is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.” *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993) (internal quotations omitted). If an exception is inadequate to apprise the judge of certain points of law, this Court will not consider those points on appeal. *See Walker*, 121 Wn.2d at 217; *accord Reed v. Pennwalt Corp.*, 93 Wn.2d 5, 7, 604 P.2d 164 (1979) (where the record on appeal fails to show what exceptions a party made to an instruction, the court cannot address any alleged instructional error).

Ms. Stevens asserts that she objected to Instruction 15 “on the grounds that it was potentially confusing to the jury.” App. Br. 8. And she cites the trial minutes to support her statement that “[t]he objection was noted on the record.” App. Br. 8.³

But the portion of the trial minutes that Ms. Stevens cites does not indicate what instructions Ms. Stevens objected to or the basis for her objections. *See* CP 102. The minute entry simply states: “The Court takes exceptions and objections to instructions. Plaintiff gives exceptions and

³ Ms. Stevens cites CP #13, page 7, a designation in the trial court’s Index to Plaintiff’s Clerk’s Papers; this is found at CP 102 in the record.

objections to the Court's instructions. Defendant gives exceptions and objections to the Court's instructions." CP 102. Thus, it is not apparent from this record whether Ms. Stevens objected to Instruction 15 and, if she did, what the basis for her objection was.

RAP 9.2(b) mandates that if a party seeks review of an instruction, "the party should include in the record . . . the party's objections to the instructions given and the court's ruling on the objection." The appealing party has the burden of providing a sufficient record to review the issues raised on appeal. *See Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988); *see also In re Dependency of H.W.*, 70 Wn. App. 552, 558 n.5, 854 P.2d 1100 (1993). Ms. Stevens did not meet this burden and there is insufficient record to review.

Counsel's post-trial declaration stating that he objected to Instruction 15 because it was "confusing to the Jury" does not cure this deficiency in the record. *See* CP 528-29. First, Ms. Stevens cites no authority for the proposition that statements by counsel in a post-trial declaration are sufficient to preserve an alleged instructional error. This Court should reject her unsupported argument. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *see also DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (a court may generally assume that where no authority is cited,

counsel has found none after a diligent search). Second, her counsel's declaration was submitted six months after trial and did not give the trial court an opportunity at trial to correct any alleged problem with the instruction. *Queen City Farms, Inc.*, 126 Wn.2d at 63; *see* CP 528-30.

Finally, third, the declaration states a ground that the jury instruction was "confusing" to the jury. But now she argues that it was the use of the phrase "the proximate cause" as opposed to "a proximate cause" that was problematic. App. Br. 9. Although there was nothing wrong the usage of "the proximate cause" when reading the instructions properly in context as discussed below, assuming *arguendo* it was problematic, this was precisely the sort of thing that should be raised to a superior court so that the superior court could make a correction if needed. Here there is no record or argument that the superior court was given this opportunity, as CR 51(f) contemplates. *See Queen City Farms, Inc.*, 126 Wn.2d at 63. Nor is it clear from this record that the trial court had an opportunity to correct any alleged confusion that Instruction 15 might have caused. Accordingly, this Court cannot address any alleged instructional error with regard to Instruction 15. *See Reed*, 93 Wn. 2d at 7.

Ms. Stevens asserts that "the issue of the propriety" of Instruction 15 "was clearly and squarely before the Judge" because the Department filed a brief in support of the instruction. App. Br. 8; *see* CP 48-54. She

cites no authority for the assertion that where one party files a brief in support of an instruction, the opposing party has preserved for appeal an argument that the instruction is erroneous. This Court should reject this unsupported and illogical argument. See *Cowiche Canyon Conservancy*, 118 Wn.2d at 809; *DeHeer*, 60 Wn.2d at 126. The Department's legal briefing did not preserve for review Ms. Stevens's objection and the basis for the objection.

Ms. Stevens has the burden to show that she preserved her issues for review. See *Story*, 52 Wn. App. at 345; *H.W.*, 70 Wn. App. at 558 n.5. There is no record before this Court to assess whether Ms. Stevens took exception to Instruction No. 15 in a manner that was sufficient to apprise the trial judge of the nature and substance of the objection. Accordingly, this Court should decline to review this issue.

B. Even If Ms. Stevens has Preserved Her Objection to Instruction 15, It Accurately States the Law Because Medical Opinions Must Be Expressed In Terms of Probability, Not Possibility

Assuming arguendo that Ms. Stevens has preserved her exception to Instruction 15, she argues that the trial court erred in giving that instruction because it misstates the law. App. Br. 9. Specifically, she notes that Instruction 15 uses the phrase "the proximate cause" when she only had the burden to establish that her work conditions were "a

proximate cause” of her asthma. App. Br. 9. Thus, she argues that it “conflicted with other instructions as to the appropriate burden of proof.” App. Br. 10. Her argument lacks merit.

First, Ms. Stevens misreads Instruction 15. That instruction did not state, as she suggests, that she had to prove that her work exposure was the sole proximate cause of her asthma in order to prevail. See App. Br. 16; CP 42. The court did not instruct the jury that the distinct conditions of Ms. Stevens’s employment must be “the” proximate cause of her condition, asthma, as she argues in her brief. See App. Br. 9, 16. The instruction says that “Ms. Stevens’s condition and the proximate cause of that condition must be established by medical testimony.” CP 42. Thus, any proximate cause must be established by medical testimony. This does not limit it to one proximate cause. CP 42. If there was any question about this, as discussed below, Instruction No. 12 specifies that there may be more than one proximate cause of a condition. CP 40. Such instructions are read together. See *State v. Alvis*, 70 Wn.2d 969, 975, 425 P.2d 924 (1967); *Bryant v. Dep’t of Labor & Indus.*, 23 Wn. App. 509, 512, 596 P.2d 291 (1979); see also *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 321, 189 P.3d 178 (2008). Whatever the proximate cause, it must be proven by medical testimony.

The instruction plainly stated that medical testimony in terms of medical probability, not medical possibility, was required to establish causation. *See* CP 42. Thus, any causation, whether or not it was related to the distinct conditions of her employment, had to be established in terms of probability, not just mere possibility. *See* CP 42.

Instruction 15 accurately states the law. Courts have routinely approved of similar instructions. *See Young v. Group Health Cooperative of Puget Sound*, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975) (approving of instruction that the evidence must be more than that the alleged act of the defendants “might have”, “may have”, “could have”, or “possibly did” cause the physical condition); *Vanderhoff v. Fitzgerald*, 72 Wn.2d 103, 108, 431 P.2d 969 (1967) (appellants entitled to have the jury told that mere possibility is not sufficient to find a causal connection); *Safeway, Inc. v. Martin*, 76 Wn. App. 329, 334, 885 P.2d 842 (1994) (instructing jury that medical testimony that an incident “could” cause, “can” cause, “may have” caused or “probably could” cause such a permanent disability is not sufficient because these terms indicate a possibility rather than a probability is appropriate even if all testimony is in terms of probability); *Bryant*, 23 Wn. App. at 513-14 (instructing jury that medical testimony in terms of possibility, speculation or conjecture is not sufficient and the evidence must be more than could cause, can cause, or probably cause).

In *Vanderhoff*, for example, the issue was whether a car accident caused or accelerated the injured person's development of cancer. See 72 Wn.2d at 107-08. The Court remanded the case for trial and observed that the defendants "were entitled to have the jury told that mere possibility is not sufficient to warrant a finding of causal connection." *Vanderhoff*, 72 Wn.2d at 108. The Court explained that "[t]he stock instruction defining proximate cause did not cover the matter adequately." *Vanderhoff*, 72 Wn.2d at 108. The Court stated that "it would be well on retrial to give an instruction pointing out that evidence of causal relationship must go beyond speculation and conjecture and must show that causal connection is probable rather than possible." *Vanderhoff*, 72 Wn.2d at 108.

The court in *Young* rejected a similar argument that the proximate cause instruction adequately addressed the issue. It approved of the instruction that informs the jury that the causal relationship must be established by evidence that arises above speculation, conjecture, or mere possibility. *Young*, 85 Wn.2d at 340.

The *Safeway* and *Bryant* cases are workers' compensation cases that approved of the instruction. In *Safeway*, the appellant argued that the trial court erred in instructing the jury on the sufficiency of the medical evidence because none of the experts testified in terms other than those of probability and the jury instruction inserted an additional issue into the

trial. *Safeway*, 76 Wn. App. at 334. The court held that proximate cause was a central issue in the case and, therefore, the trial court did not err in instructing the jury on the sufficiency of the medical evidence and providing the jury with a verdict form that asked the jury to decide whether the Board was correct in finding that “Martin suffered a worsening of her carpal tunnel syndrome that arose naturally and proximately out of her employment at Safeway.” *Id.* at 334.

Just as Ms. Stevens is arguing in her brief, in *Bryant*, the appellant argued that an instruction was misleading and that the trial court erred in instructing the jury that an industrial injury must be “the” proximate cause of the result complained of rather than “a” proximate cause. *Bryant*, 23 Wn. App. at 511. Similarly to this case here, a separate instruction stated that “[t]here may be one or more proximate causes”, thus negating any implication that there may be only one proximate cause. *Id.* The court also approved of an instruction that the causal relationship between unusual emotional exertion and the injury must be proved in terms of probability. *Id.* at 512-3. Here, the court properly instructed the jury on proximate cause and that the proximate cause, any proximate cause, of the condition must be established in terms of probability, not possibility. This is a correct statement of the law.

C. The Jury Instructions are Not Confusing When Read Together as a Whole as to Whether there Can Be More Than One Proximate Cause to an Occupational Exposure When Jury Instruction 12 Instructs the Jury that there Can Be More Than One Proximate Cause.

The only instruction that Ms. Stevens assigns error to is Instruction 15. App. Br. 3. In her brief, she makes a passing statement that Instruction 15, “when read in conjunction with *the other jury instructions as a whole*” did not properly inform the jury of the applicable law. App. Br. 10 (emphasis added). But apart from Instruction 12, the proximate cause instruction, she makes no specific argument about how any of the other jury instructions, when read in conjunction with Instruction 15, misstates the law. *See* App. Br. 8-10. Thus, this Court should disregard her passing assertion that “other jury instructions”—which she does not identify—failed to inform the jury of the applicable law when read in conjunction with Instruction 15. *See Peters v. Vinatieri*, 102 Wn. App. 641, 655, 9 P.3d 909(2000) (this Court need not consider “assertions that are given only passing treatment and are unsupported by reasoned argument.”); *see also* RAP 10.3(a)(6), (g); *Cowiche Canyon Conservancy*, 118 Wn.2d at 809.

In any case, when all jury instructions are read together, it is apparent that they correctly inform the jury that the work conditions must be a proximate cause of the condition, as stated in Instruction 12, not “the”

sole proximate cause of the condition, as Ms. Stevens argues the jury was instructed. Instruction 15 correctly states that when testimony is offered on any proximate cause, such testimony must be in terms of probability not mere possibility. The court does not read jury instructions in isolation, rather the jury instructions must be read together. *Alvis*, 70 Wn.2d at 975. Here, the issue was whether Ms. Stevens's condition was proximately caused by the distinct conditions of her employment. Therefore, it was appropriate for the trial court to instruct the jury on the sufficiency of medical testimony to establish a proximate cause. The instructions in this case permitted each party to argue his or her theory of the case, were not misleading, and when read as a whole, properly informed the trier of fact of the applicable law. *See Raum*, 171 Wn. App. at 142; *Bryant*, 23 Wn. App. at 511.

D. The Trial Court Did Not Abuse Its Discretion In Denying Stevens's Motion For a New Trial Based on a Juror's Declaration, Drafted By the Claimant's Attorney

Stevens argues that she is entitled to a new trial because Instruction 15 "fatally confused the jury." App. Br. 15. She contends that the proximate cause instruction (Instruction 12) and the medical probability instruction (Instruction 15) are inconsistent and that this inconsistency is "insurmountable." App. Br. 16. This argument fails.

CR 59 allows for a new trial in specifically enumerated circumstances. Ms. Stevens argues that at trial substantial justice has not been done. CR 59(a)(9). App. Br. 16-17.

An appellate court will not reverse a trial court's denial of a motion for a new trial absent a showing of abuse of discretion. *Tarabochia v. Johnson Line, Inc.*, 73 Wn.2d 751, 757, 440 P.2d 187 (1968). The decision to give or deny a requested instruction is a matter within the discretion of the trial court. *Seattle Western Indus., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 9, 750 P.2d 245 (1988).

As explained above, Ms. Stevens did not preserve her exception to Instruction 15. Therefore, this Court should decline her request to grant a new trial based on the trial court's decision to give this instruction.

Even assuming that she preserved her exception to Instruction 15, the trial court did not abuse its discretion in denying her motion for a new trial. Her claim that the jury was confused relies entirely on inadmissible hearsay in her counsel's and the presiding juror's declaration and on the presiding juror's statement in her declaration that she had difficulty understanding the instructions on causation. *See* App. Br. 15-17; *see also* CP 537-38.

This court should disregard hearsay in counsel's and the presiding juror's declarations. ER 801-02; *Gardner v. Malone*, 60 Wn.2d 836, 843,

376 P.2d 651, 655 (1962), *amended*, 379 P.2d 918 (1963) (court disregarded “allegations that are obviously hearsay” when it considered party’s motion for a new trial); *see also State v. Whitney*, 96 Wn.2d 578, 581 n.1, 637 P.2d 956 (1981) (“[A]n attorney’s affidavit, reporting statements made to him by jurors, is hearsay and cannot be used to accomplish that which cannot be done by affidavits of the jurors themselves.”). An affidavit of counsel that is hearsay in character cannot impeach a jury verdict “for impeachment by such means would inevitably place nearly every verdict in jeopardy and promote great uncertainty in the judicial process.” *Cox v. Charles Wright Academy, Inc.* 70 Wn.2d 173, 177, 422 P.2d 515 (1967).

After disregarding the inadmissible hearsay, all that remains is the presiding juror’s statements that she, as a member of the jury, was confused about proximate cause. *See* CP 536-38. Under well-established law, that cannot be a basis for a new trial.

The law is clear that, “[A] juror’s post verdict statement regarding the way in which the jury reached its verdict cannot be used to support a motion for a new trial.” *Breckenridge v. Valley Gen. Hos.*, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003). As our Supreme Court has explained, courts have “long accepted the premise that jurors may not impeach their own verdict”:

[C]ourts may consider only such facts asserted in the affidavits of jurors which relate to the claimed misconduct of the jury and do not inhere in the verdict itself. The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

A different rule, one permitting jurors to impugn the verdicts which they have returned by asserting matters derogatory to the mental processes, motivations and purposes of other jurors or purporting to explain how and why a juror voted as he did in arriving at his verdict, would inevitably open nearly all verdicts to attack by the losing party and thwart the courts in achieving a long held and cherished ambition, the rendering of final and definitive judgments.

Cox, 70 Wn.2d at 179-80 (citations omitted).

A verdict may not be affected by the circumstances that some jurors misunderstood the judge's instructions. *Ayers v. Johnson & Johnson Baby Prod. Co.*, 117 Wn.2d 747, 769, 818 P.2d 1337, 1348 (1991); *Gardner*, 60 Wn.2d at 841. "The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict." *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 272, 796 P.2d 737 (1990) (quoting *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988)).

Here, the fact the presiding juror did not understand the proximate cause instructions inheres in the verdict and cannot be the basis for a new trial. The trial court did not abuse its discretion in denying the motion for a new trial. The jury instructions allowed both parties to argue their cases without an error of law or irregularity of the proceedings.

E. This Court Cannot Liberally Construe the Facts in Favor of Ms. Stevens

Under RCW 51.12.010, the Industrial Insurance Act “should be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” Citing this rule, Ms. Stevens asserts that “the *repeatedly* stated fundamental purpose of the industrial Insurance Act is to give sure and certain relief to injured workers and to resolve all doubts in favor of the worker.” App. Br. at 17. Ms. Stevens misapprehends this rule.

The rule of liberal construction “does not apply to questions of fact but to matters concerning the construction of the statute.” *Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Hastings v. Dep’t of Labor & Indus.*, 24 Wn.2d 1, 13, 163 P.2d 142 (1945).

Here, there is no issue of statutory construction and no ambiguity with regard to the applicable law. Rather, Ms. Stevens appears to argue

that the facts should be liberally construed in his favor. *See* App. Br. 17. This is a misapplication of the rule of liberal construction, and the Court should not apply the rule in this way.

F. Substantial Evidence Supports the Jury's Finding that Ms. Stevens's Asthma Was Not an Occupational Disease

Ms. Stevens asserts that substantial evidence did not support the jury's verdict. App. Br. 10. She challenges Dr. Cox's testimony, stating that pertinent parts of his testimony "were based on mistakes, misunderstandings, and a lack of knowledge." App. Br. 15. Therefore, she argues that Dr. Cox's testimony does not constitute substantial evidence. App. Br. 15. These arguments are unavailing. Substantial evidence supports finding that Ms. Stevens's condition is not caused by distinct conditions of her employment rather than activities of daily living, including her smoking habit. Dr. Cox testified that he was aware that the downdraft table was not in use on the day of the air quality studies by industrial hygienist Chris Jacomme. CP 495. However, whether or not there was dust did not change Dr. Cox's ultimate opinion that Ms. Stevens's condition was caused by smoking rather than by work exposure, because it really did not make sense that inert paper dust was a cause of her asthma. CP 515.

An occupational disease is defined as “such disease or infection as arises naturally and proximately out of employment.” RCW 51.08.140. To establish an “occupational disease,” the causal connection between a claimant’s condition and his or her employment must be established by competent medical testimony that shows that the condition is probably, not merely possibly, caused by the employment. RCW 51.08.140; *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987); *Raum*, 171 Wn. App. at 124.

Here, substantial evidence supports the jury’s verdict that Ms. Stevens’s asthma was not an occupational disease. Dr. Cox, a Board-certified doctor in pulmonary medicine, reviewed Ms. Stevens’s medical records, performed a physical examination, included pulmonary function tests, and reviewed the Department’s air quality studies. CP 438, 452, 471. He testified on a more probable than not basis that Ms. Stevens’s asthma was not work-related. CP 474, 484. He stated that her asthma was caused by her smoking and other factors, including genetics and allergies. CP 476.

Asthma is a chronic condition characterized by inflammation of the airways, and smoking can cause airway inflammation. CP 442, 475. Ms. Stevens has smoked since 1991. CP 234, 470-71. Her medical record indicated she had smoked “at least one pack per day” at times, and she

reported smoking three quarters of a pack of cigarettes a day when she started full time at JAMCO in 2006. CP 234. She smoked between 10 and 20 cigarettes a day in 2009 and 2010. CP 425.

Dr. Cox explained that it was Ms. Stevens's smoking habit that caused her symptoms, noting that "[h]er internal cigarette smoking clock had been running for many years." *See* CP 481. Dr. Cox stated that "formaldehyde is in cigarettes in extremely high levels . . . in hundreds of times higher often than the OSHA PEL, permissible exposure level." CP 476. He explained that it is inconsistent for someone to smoke, and yet to be sensitive to work in an environmentally clean workplace. CP 483.

Furthermore, Dr. Cox reviewed the air quality studies conducted on March 25, June 8, and June 15, 2010, by the Department's industrial hygienist. CP 467-68; *see* CP 314-31. Dr. Cox noted that respiratory dust particles at the worksite were either not measurable or were below the permissible exposure level. CP 467. Specifically, the formaldehyde levels were approximately 100 times below the permissible exposure level, except in Building 1 where it was about a fifth of the permissible exposure level. CP 467-68. Although Ms. Stevens now contests these studies, the industrial hygienist Jacomme testified that even if the downdraft tables were in operation on the day of his air quality inspection, it would be atypical that it would increase the exposure to the particulates

because the filters are designed to remove the particulates. CP 320. Ms. Stevens's contention that the dust particulates level was significantly higher when the downdraft tables were in operation are challenged by the findings in the air quality studies by the Department's industrial hygienist, who was there to inspect the work space based on Ms. Stevens's industrial insurance claim. CP 321.

Dr. Cox testified that Ms. Stevens's report of her reaction to dust while filing was inconsistent for that type of exposure to cause asthma symptoms. CP 482. The other inconsistency in Ms. Stevens's medical chart is that there was a period of time when Ms. Stevens was not working and her symptoms did not abate. CP 482. One of the tenets of occupational asthma is that it usually gets better when the claimant leaves the workplace. CP 482. Dr. Cox testified that it is very inconsistent that someone who is that sensitive to odors can smoke. CP 483. He stated: "[h]ow can they smoke and be that sensitive that they can't even work in what appears to be an environmentally-clean workplace is inconsistent." CP 483. On cross-examination, Dr. Cox testified that it is not possible for a smoker to become adjusted to the chemicals in the cigarettes, "each time they light up they get those chemicals." CP 507.

Ms. Stevens misapplies the standard of review and argues in her brief that Dr. Cox's testimony is not substantial evidence. *See App. Br.*

15. The court's function here is not to substitute judgment for that of the trier of fact. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980).

Ms. Stevens argues that Dr. Cox "admitted to testifying to something he did not understand." App. Br. 15; *see also* App. Br. 14. This is inaccurate because Dr. Cox admitted merely to scope of his review, for example, that he did not visit Building 3 and did not have a floor plan of the work space, and his opinion did not change based on information discussed in cross-examination. CP 493, 514. Dr. Cox was asked by Ms. Stevens's counsel whether he knew that the downdraft tables were not in use on the day of the air quality study, March 25, 2010, and Dr. Cox acknowledged that he has heard that from the claimant. CP 495-96. The jury could consider the evidence that downdraft tables were not running on the day of the sampling and Dr. Cox's testimony about his knowledge of the facility. It could also consider the hygienist testimony that it would be atypical for there to be an increase in particulates when the downdraft tables operated because of the use of filters. *See* CP 320. Jury instructions nos. 16 and 17 instructed the jury to consider the basis of the expert's opinions. CP 43-44. On review, it is not this court's role to reweigh that factual determination.

Ms. Stevens grossly overstates the concessions by Dr. Cox on cross-examination, and all of her overstatements point to a misapplication of the substantial evidence standard of review. *See* App. Br. 11-15 (alleging that Dr. Cox “agreed that pertinent parts of his testimony were based on mistakes, misunderstandings and a lack of knowledge of the evidence.”). In her overstatement of the record, Ms. Stevens attempts to take the evidence in the light most favorable to herself, but this is not the standard. *See Korst*, 136 Wn. App. at 206 (evidence taken in the light most favorable to the prevailing party). But Dr. Cox testified that his opinion did not change despite the correction on cross-examination about the downdraft table, the scope of the hygienist investigation, and the levels of phenol, formaldehyde, and fiberglass. CP 514. Certainly, the jury could rely on his testimony that his opinion did not change, and thus his expert belief that the corrections on cross-examination were not material. The jury was also entitled to discount Ms. Stevens’s doctors’ opinions because they were based on Ms. Stevens’s report of her medical history, symptoms, and smoking history, and the jury could find Ms. Stevens’s views not credible and instead believe the testimony of Dr. Cox. This weighing is properly done by the jury. *See In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234, 1237 (1996); *Davis*, 94 Wn.2d at 124.

The correct standard of review on appeal is whether the superior court's decision is supported by substantial evidence, not the preponderance of the evidence. *See Ruse*, 138 Wn.2d at 5. In short, Ms. Stevens is attempting to re-litigate this case in the Court of Appeals. But this Court does not reweigh the evidence as well-established standards for substantial evidence review provide.

As already explained above, the standard of review is not preponderance of the evidence but rather the substantial evidence standard and substantial evidence supports that Ms. Stevens's condition was caused by her lifelong smoking habit rather than her work conditions.

VII. CONCLUSION

For the foregoing reasons, the Department requests that this Court affirm the superior court judgment.

RESPECTFULLY SUBMITTED this 23 day of December, 2013.

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