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NO. 44508-5-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

PATRICK J. MCMANUS

Appellant,

v.

CLARK COUNTY,

Respondent.

BRIEF OF RESPONDENT CLARK COUNTY

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I. INTRODUCTION

The Clark County Superior Court, following trial by jury, appropriately concluded that the Board of Industrial Insurance Appeals was incorrect in finding that the appellant's, Patrick McManus, conditions diagnosed as aggravation of degenerative disc changes and a new central disc protrusion at L2-3 level arose naturally and proximately out of the distinctive conditions of his employment as a street sweeper with the respondent, Clark County. The assignments of error alleged by the appellant find no support whatsoever in the law. As well, even if the outcome pertaining to the assignments of error would have been decided in appellant's favor, it still would have remained far from any substantial likelihood that such relief would have affected the jury's ultimate verdict based on the evidence in the record.

II. STATEMENT OF THE CASE

Appellant began working for the respondent in June of 1989 and ultimately accepted a position as a sweeper operator in 1999. CABR Patrick McManus at 73-75.[1] In the sweeper operator position, the appellant testified that he worked five eight hour days a week along with

[1] "CABR" stands for the Certified Appeal Board Record. Board documents cited as "CABR [Board-stamped page number]. Witness testimony cited as "CABR [witness name] [page number of transcript]. "CP" stands for Clerk's Papers. "RP" stands for Report of Proceedings.

having worked four ten hour days at different times as well. *Id.* at 76-77. The appellant explained that the first two machines he operated had adjustable air ride seats that were more ergonomic than the final machine he had operated. *Id.* at 80, 78. He stated the ride of sweeper was bumpy when striking holes or dips along the curb line. *Id.* at 81. As for the final machine he operated, which he obtained in either 2008 or 2009, he testified it rode about the same as the others but had a negative air ride seat that felt like a block of concrete when he hit a bump. *Id.* at 87.

The appellant testified he began experiencing back pain in the first part of 2010 that radiated across his low back and into his left leg. *Id.* at 91-92. On cross-examination, the appellant admitted his weight had hovered around the 330 pound mark for the past 30 years and that he had used tobacco products up through 2011. *Id.* at 106, 108. He too conceded having been on prescription medications for his back since 2001 and that prior to his third and final sweeper he was having symptoms in his low back, both buttock and into his left leg. *Id.* at 108-09. The appellant also acknowledged an injury at age 19 to his low back that resulted in subsequent flare-ups of pain into his low back and legs. *Id.* at 111.

In turning to the medical evidence, the sole medical expert to testify on behalf of the appellant was Dr. Paul Won. Dr. Won is board

certified in preventative and family medicine and had began seeing the appellant in January of 2005 following an unrelated low back injury. CABR Paul Won, M.D. at 5, 10. Dr. Won testified that he continued to work his regular job as a sweeper operator and had a gradual increase in low back pain. *Id.* at 11. He next treated the appellant on April 11, 2011 where it was reported to the doctor that he had a poor seat cushion. *Id.* at 18-19. Dr. Won obtained an MRI dated June 25, 2010 that showed a new central disc protrusion at L2-3 resulting in what was described as moderate to severe stenosis along with spondolotic changes at other levels without change when compared to the prior study. *Id.* at 23. Dr. Won diagnosed him with displacement of a lumbar intervertebral disc at L2-3. *Id.* at 23. Dr. Won testified that he believed trucks with the associated jarring and bouncing made a "major material contribution to his lumbar condition." *Id.* at 30-31. Dr. Won reasoned that appellant was "pretty sedentary" and had just been "doing street sweeping work." *Id.* at 31. The doctor stated further that the appellant was obese and under great force when striking potholes. *Id.* at 32.

On cross-examination, Dr. Won testified that his opinions were based in large part on the history he had received. *Id.* at 36. With that, he noted being unaware of the extent of appellant's tobacco use and was surprised to learn the appellant sustained an injury to his back as a

teenager with resulting sciatica. *Id.* at 42, 35. Dr. Won further testified that he does not have greater expertise than an orthopedic or neurosurgeon in determining the etiology of a disc protrusion and degenerative disc disease. *Id.* at 38. He previously noted that he believed the L2-3 disc protrusion was symptomatic because that is what his neurosurgeon, Dr. Wrobel, had felt. *Id.* at 37-38. In light of that reliance and deference provided to Dr. Wrobel, Dr. Won was confronted with Dr. Wrobel's statements regarding causation of the L2-3 protrusion. *Id.* at 38-40. Specifically, Dr. Won agreed that he was aware that Dr. Wrobel felt it was unknowable whether or not the protrusion at L2-3 was related to the appellant's employment. *Id.* at 38-39. Despite Dr. Won's belief that the neurosurgeon had greater expertise, he maintained he could formulate his opinions based on history. *Id.* at 39-40.

Dr. Won also acknowledged the role of heredity, tobacco use, obesity and age in the development of the appellant's degenerative disc disease and protrusion at L2-3 and further that he had treated individuals with multi-level degenerative disc disease who do not perform physically demanding work. *Id.* at 40. Dr. Won then went on to agree that he could not say one way or another if the appellant would have went on to develop his low back condition if he was not driving a sweeper. *Id.* at 41. He testified that this fact was unknowable, precisely what Dr. Wrobel had

stated, in that there may be a relationship between the appellant's work activities and the development of his low back condition and there may not. *Id.* at 41. In the end, Dr. Won testified that his initial opinion had been proven wrong. *Id.* at 42.

Another medical expert to testify at the request of the respondent was Dr. Dietrich, a board certified orthopedic surgeon who operates on the spine. CABR Thomas Dietrich, M.D. at 7-8. Dr. Dietrich performed an independent medical examination on July 14, 2011. *Id.* at 9. As part of this examination, he reviewed medical records dating back to March of 1974 and through the 2000s. *Id.* at 11. He too was made aware of the appellant's employment exposures by the records and from the appellant directly. *Id.* at 12. Dr. Dietrich was told by the appellant that he had occasional back pain before 2005 that was temporary and that his pain became more persistent and severe over the last few years. *Id.* at 16.

When looking at the diagnostic imaging studies, consisting of an MRI from 2006 and 2010, Dr. Dietrich stated there was little change between the two aside from more narrowing at certain levels and a central protrusion at L2-3 that was not on the prior study. *Id.* at 17, 19. Dr. Dietrich explained that age and heredity were the two most important factors when looking at the development of degeneration, which was

supported by medical literature. *Id.* at 19-20. He too noted other factors like posture, smoking and repetitive jarring of the back but reiterated these factors would be minimal when compared to age and heredity. *Id.* at 20-21, 26.

Dr. Dietrich diagnosed the appellant with diffuse severe degenerative changes of the lumbar spine with a congenitally shallow spinal canal. *Id.* at 24. He also diagnosed an L2-3 disc protrusion but did not believe it was symptomatic or clinically significant given there was no nerve root compression. *Id.* at 25-26. The doctor concluded that if you were to take away the appellant's employment activities with the respondent he would still have his degenerative disc disease as a result of other unrelated factors. *Id.* at 28. Therefore, his condition had not arisen naturally and proximately from the distinctive conditions of his employment with the respondent. *Id.* at 29, 54.

The respondent further called Dr. James Harris, a physician board certified in orthopedic surgery and sports medicine, to testify. CABR James Harris, M.D. at 6-7. Dr. Harris testified that he completed a medical records review of this case on June 27, 2012. *Id.* at 11. He, like Dr. Dietrich, reviewed records spanning a period of time of more than 35 years. *Id.* at 14. Dr. Dietrich noted the records consistently demonstrated

the appellant was over 300 pounds. *Id.* at 14. He further reviewed diagnostic imaging studies and stated the findings were consistent with a morbid obese individual of appellant's age. *Id.* at 18. In fact, by age 50 half the population would have similar degenerative changes and the doctor noted the appellant was 58 years of age at the time of his review. *Id.* at 18-19. Dr. Harris described this process of developing degenerative changes as a universal phenomenon. *Id.* at 20. He testified further the literature showed a connection between obesity and degenerative change in the lumbar spine as well as a person's genetic makeup predisposing them to developing these types of findings. *Id.* at 19. As for the disc protrusion noted on the most recent MRI from 2010, Dr. Harris concluded this too was very common in the population indicating such protrusion can be the result of specific trauma but that the vast majority are the result of the aging process. *Id.* at 23.

With respect to diagnoses, Dr. Harris diagnosed the appellant with a three and a half decade history of chronic low back pain progressing in severity with age, which was a degenerative condition, along with a central disc protrusion at L2-3 developing between 2006 and 2010. *Id.* at 24-25. After conducting further research, Dr. Harris stated it was clear there was no connection between driving heavy vehicles that vibrate and the increased risk of a disc herniation. *Id.* at 25, 31-32. Instead, the

herniation had developed as a result of the ongoing aging process and as a consequence of his morbid obesity, which had contributed to his ongoing chronic back pain complaints. *Id.* at 25-26. Following a discussion regarding supporting literature, Dr. Harris concluded the appellant did not develop any condition of the spine nor was any condition aggravated as a natural and proximate result of the distinctive conditions of his employment. *Id.* at 33-34, 41-42. Rather, the appellant's conditions were related to his genetic makeup, age and chronic morbid obesity. *Id.* at 34.

Following receipt of an application for benefits, the Department allowed the claim for an occupational disease by order dated August 30, 2011. CABR at 89. This determination was protested and the Department affirmed the August 30, 2011 order on December 13, 2011. *Id.* This December 13, 2011 Department order was then appealed to the Board by the respondent and an order granting the appeal was issued by the Board on March 5, 2012. *Id.*

Following presentation of the above noted substantive evidence before the Board, the Board issued a Proposed Decision and Order dated February 21, 2013. *Id.* at 57-72. Within this decision the Board concluded the appellant's "condition diagnosed as aggravation of degenerative disc changes, arose naturally and proximately out of the

distinctive conditions of his employment" with respondent thereby constituting an occupational disease. *Id.* at 71.

A Petition for Review of this decision was timely filed by respondent on March 22, 2013. *Id.* at 36-52. Within this Petition for Review, the respondent made a point of showing that the administrative law judge had incorrectly stated in finding of fact number 5 that the appellant had aggravated his cervical degenerative disc changes. *Id.* at 48, 70. Appellant's attorney filed a Response to Employer's Petition for Review dated April 5, 2013. *Id.* at 19-33. Within this response, the appellant attorney affirmatively stated, "Claimant disagrees with the Proposed Decision and Order in one respect, that this is a close case." *Id.* at 33. The Board issued an Order Denying Petition for Review on April 4, 2013 thereby adopting the February 21, 2013 Proposed Decision and Order. *Id.* at 1.

The respondent subsequently appealed the Board's determination to the Clark County Superior Court wherein a two day jury trial took place on November 18 and 19, 2013. During the course of this trial, the appellant sought to have a statement of the case read to the jury that included language that Board had affirmed a prior order from the Department. RP – First Supplemental Excerpt at 5. The respondent

objected to the jury being made aware of what the Department had decided as the inquiry of the jury was limited solely to whether the Board was correct or incorrect. *Id.* at 5-6. The trial court agreed with the respondent that the jury would not be permitted to hear the Department's determination had been affirmed by the Board. *Id.* at 15-16.

While discussing objections to the evidentiary record, the respondent requested that the trial court revisit an evidentiary ruling by the Board regarding testimony provided by Dr. Won. *Id.* at 22. The testimony at issue involved the Board sustaining an objection on hearsay grounds on page 38, line 19, along with page 39, line 3, within Dr. Won's testimony. CABR at 57; CABR Paul Won, M.D. at 38-39. The questioning of Dr. Won dealt with him affirming he was aware of the discovery deposition responses provided by his own neurosurgeon Dr. Wrobel. CABR Paul Won, M.D. at 38-39. Following argument, the trial allowed the line of questioning as Dr. Won had demonstrated he had depended upon Dr. Wrobel's opinions in forming his own. RP at 30.

When addressing jury instructions, the appellant objected to the verbatim inclusion of finding of fact number 5, which became fact number 4 in the trial court's instructions to the jury. RP – Second Supplemental Excerpt at 4; See also CP at 81. Specifically, the finding of fact at issue

that was adopted by the Board read as follows, "Mr. McManus sustained an aggravation of his pre-existing cervical degenerative disc changes arising naturally and proximately out of the distinctive conditions of his employment with Clark County." CABR at 70. The trial court refused to alter the Board's finding of fact due to some alleged scrivener's error. RP – Second Supplemental Excerpt at 14. After making that ruling, the trial court also allowed appellant's special verdict form over objection from the respondent, which presented the sole question to be submitted to the jury as the following, "Was the Board of Industrial Insurance Appeals correct in deciding that Patrick McManus' low back condition, diagnosed as aggravation of degenerative disc changes and a new central disc protrusion at L2-3 level arose naturally and proximately from the distinctive conditions of his employment with Clark County operating the street sweeper." *Id.* at 45. The trial judge, again over objection from the respondent, made no reference to any cervical finding of fact in this all important question that ultimately was submitted to the jury. *Id.* at 45-51.

While continuing to work through instructions to be presented to the jury, the respondent objected to the appellant's request for an instruction explaining that special consideration was to be paid to the testimony of an attending physician. *Id.* at 38; CP at 44; WPI 155.13.01. The trial court declined to give that instruction. RP – Second

Supplemental Excerpt at 43. The trial court did give other instructions to the jury addressing witness testimony, which included an introductory instruction along with the expert testimony instruction. CP at 81; WPI 155.01; WPI 1.02; WPI 2.10.

Following jury deliberations, the jury came back with a unanimous decision that the Board was incorrect in concluding that appellant's low back condition, diagnosed as aggravation of degenerative disc changes and a new central disc protrusion at L2-3 level arose naturally and proximately from the distinctive conditions of his employment with Clark County operating the street sweeper. CP at 98. An order was subsequently entered on November 19, 2013 that reversed the Board's decision and denied the industrial claim. CP at 99.

III. ARGUMENT

1. The trial court did not err by refusing to explain to the jury, which was convened solely to decide the correctness or incorrectness of a Board determination, how it was the Department of Labor and Industries decided the issue on appeal.

The function of a jury, stemming from appeals filed from decisions made by the Board, is to determine whether the Board and Board alone

was correct in rendering that decision. In an appeal to superior court, "the court shall not receive evidence or testimony other, or in addition to, that offered before the board." RCW 51.52.115. This statute governing court appeals of Board decisions further mandates, "Where the court submits a case to the jury, the court shall by instructions advise the jury of the exact findings of the board on each material issue before the court." RCW 51.52.115.

The case law has further explained the meaning of what constitutes a "material issue." Specifically, the Court of Appeals for Division 1 was asked to determine whether a rejected prior determination made by an administrative law judge within a proposed decision and order constituted a material finding of the Board. See generally *Stratton v. Department of Labor & Industries*, 1 Wash.App. 77, 459 P.2d 651 (1969). Plainly, the appellate court said this prior determination was not material to any question to be decided by the trier of fact, which was whether the Board's ultimate determination was correct. *Id.* at 80. The court in *Stratton* further acknowledged the improper tactical advantage that can be gained by a party when advising the trier of fact as to prior determinations made by individuals or entities that are not ultimate Board findings. *Id.* at 80. The court clearly stated, "The practice only serves to confuse the jury and divert its attention from the duty to determine whether, on Material issues

presented to them, the evidence preponderates in favor of or against the Board's findings and decision." *Id.* at 81.

Here, the appellant's assertion that the jury should have been permitted to hear that the Department had found appellant's condition constituted an occupational disease is without merit and directly contrary to the law. RP – First Supplemental Excerpt at 5. First and foremost, a Department determination, similar to prior decision rendered by an industrial appeals judge before a final determination had been entered by the Board, does not constitute a "finding of the board on each material issue." RCW 51.52.115; *Stratton*, 1 Wash.App. at 80. This conclusion is unavoidable based upon the plain meaning and interpretation of RCW 51.52.115 as applied by the Court of Appeals in *Stratton.*

The appellant argues that failing to instruct the jury on prior Department action on the ultimate issue they are asked to decide, "leaves the jury hollow as an explanation of the appeal process to reach Superior Court." Brief of Appellant at 16. The respondent fails to see how the jury is left "hollow" when the sole focus of the jury, as mandated by law, is to determine the correctness of the Board's findings on each material issue. RCW 51.52.115. The only resulting prejudice, had the appellant gotten his way, would have been to confer an improper tactical advantage to the

appellant that would serve to only confuse and distract the jury from completing their duty. *Stratton*, 1 Wash.App. at 81. If the jury were aware that the Department had previously found the appellant's low back condition constituted an occupational disease, they could place improper deference on that determination as opposed to strictly evaluating the substantive evidence presented to the Board to arrive at their own conclusion addressing the issue at hand. CP at 81; WPI 1.02. This danger of improper deference being applied to prior Department actions by a jury would not only run afoul of their sworn duty but too would be contrary to law. As well, such a danger is much more tangible than leaving a jury with an invented sense of hollowness as suggested by appellant that apparently would result from not instructing them accordingly on prior Department actions.

As a final point, the appellant was well aware of the material finding of the Board that was at issue in this case and it had nothing to do whatsoever with any prior Department determination. The appellant's special verdict form, which was adopted by the trial court, contained the sole finding and material issue that was presented to the jury. RP – Second Supplemental Excerpt at 45; CP at 98. The verdict form read, "Was the Board of Industrial Insurance Appeals correct in deciding that Patrick McManus' low back condition, diagnosed as aggravation of

degenerative disc changes and a new central disc protrusion at L2-3 level arose naturally and proximately from the distinctive conditions of his employment with Clark County operating a street sweeper." *Id.* This finding and material issue as offered by appellant and properly adopted by the trial court was the only determination the jury was allowed to consider. To open the door to allow information as to a prior determination made by the Department on this ultimate issue would not have been appropriate. The trial court was correct in precluding the jury from hearing how it was the Department had previously come down on the issue at hand. RP – First Supplemental Excerpt at 5.

2. The trial court during the cross-examination of Dr. Won did not err in allowing reference to the testimony of another medical expert.

The trial court properly allowed into the record questioning that referenced prior testimony of a Dr. Wrobel, appellant's treating neurosurgeon, during the cross-examination of. Dr. Won. RP at 30. First, reference to prior statements made by Dr. Wrobel did not constitute hearsay by definition under the rules of evidence. Second, even if reference to Dr. Wrobel's statements were deemed hearsay they were permissible as there was a valid and applicable exception to the hearsay

rule present. Finally, even if permitting the line of questioning as was done by the trial court had been an error, there was no substantial likelihood precluding the references made to Dr. Wrobel would have affected the jury's verdict.

The rules of evidence clearly delineate that "hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801; See also 802 (noting hearsay is not admissible unless exempted by the rules of evidence). ER 801 further clarifies that a statement will not be considered hearsay if the statement is being offered against a party and that party has "manifested an adoption or belief" in the statement's truth. 801(d)(2)(ii).

In this matter, Dr. Won provided that testimony that he believed the L2-3 disc protrusion was symptomatic because that is what his own neurosurgeon Dr. Wrobel had said. CABR Paul Won, M.D. at 37-38. Dr. Won further indicated he did not have any greater expertise than a neurosurgeon in determining the etiology of a disc protrusion and degenerative disc disease. *Id.* at 38. Evident from Dr. Won's own testimony was that he was relying upon the opinions and conclusions reached by Dr. Wrobel addressing pathology that was at issue in the

appeal before the Board. Confronting Dr. Won regarding the actual statements made by Dr. Wrobel was not being offered to prove the truth of the matter asserted in those statements but rather to impeach and fully develop the information Dr. Won relied upon in reaching his ultimate conclusions. As a result, this would not constitute hearsay by definition under ER 801(c).

In addition, the statements raised by Dr. Wrobel during the cross-examination of Dr. Won were ultimately adopted by Dr. Won and by rule did not constitute hearsay. Specifically, Dr. Won testified that he was aware that Dr. Wrobel had felt it was unknowable whether or not the protrusion at L2-3 was related to the appellant's employment. CABR Paul Won, M.D. at 38-39. Dr. Won, a party-opponent to the respondent, subsequently manifested an adoption of Dr. Wrobel's conclusion when he testified it was unknowable whether there was a relationship between the appellant's work activities and the development of his low back condition. *Id.* at 41. This belief of Dr. Won along with the testimony he was aware of the same opinion offered by Dr. Wrobel would not constitute hearsay under ER 801(d)(2)(ii).

Even if it were found that reference to Dr. Wrobel's prior testimony was hearsay, there were numerous applicable exceptions to the

hearsay rule that would permit such questioning in this instance. For example, experts are allowed to testify regarding facts or data that the expert uses to formulate their own opinions. ER 703. The rules of evidence go on to state that while an expert may provide opinions without disclosure of the underlying facts or data that the expert may be required to disclose those facts and data on cross-examination. ER 705. This is what occurred in this instance as Dr. Won had testified to relying upon his own neurosurgeon Dr. Wrobel. CABR Paul Won, M.D. at 37-38. The trial court acted within its discretion by allowing exploration and identification of that reliance through further cross-examination of the witness in accordance with ER 703 and 705.

In turning to the exceptions to the hearsay rule contained within ER 803, there is further room to have concluded the trial court's determination to allow the statements of Dr. Wrobel in the cross-examination of Dr. Won was appropriate. ER 803(18), the learned treatises exception, which deals with written material being brought to the expert's attention does not constitute hearsay so long as the material is established as reliable authority by the witness, through other testimony or by judicial notice. ER 803(18). Here, as noted in detail above, Dr. Won fully endorsed the conclusion reached by Dr. Wrobel that it was unknowable whether there was a connection between the appellant's

employment and the development of his low back condition. CABR Paul Won, M.D. at 38-41. Dr. Won, by his own admission, had thereby rendered this statement of Dr. Wrobel reliable satisfying this exception to the hearsay rule.

Another applicable exception to the hearsay rule is that contained within ER 803(4), which holds that statements made for the purpose of determining the cause of a medical condition as being reasonably pertinent to diagnosis or treatment have a certain indicia of reliability such that they too are not considered objectionable hearsay irrespective of the availability of the declarant. ER 803(4). At their core, the statements referenced to by Dr. Wrobel, a consulting and treating neurosurgeon, would fall with this exception. As previously stated, Dr. Wrobel was addressing the "cause or external source" to explain the appellant's low back condition. CABR Paul Won, M.D. at 38-39; ER 803(4).

Putting aside the above analysis and assuming the trial court improperly allowed into the record objectionable hearsay from Dr. Wrobel, "reversal is required only if there is a substantial likelihood the error affected the jury's verdict." *Henderson v. Tyrrell*, 80 Wash.App. 592, 620, 910 P.2d 522 (1996) (citing *Carnation Co. v. Hill*, 115 Wash.2d 184, 186, 796 P.2d 416 (1990)). In evaluating the testimony provided in

the record, there is insufficient evidence put forth by Dr. Won to support any fact finder concurring with the Board's ultimate determination in this matter. See generally CABR Paul Won, M.D. at 1-44. It cannot be ignored that the testimony of Dr. Won on cross-examination was that his initial opinions had been proven wrong. *Id.* at 42. This coupled with the credible opinions offered by Drs. Dietrich and Harris that were founded upon a complete and accurate understanding of the pertinent facts, contrary to Dr. Won, and further that were based on well grounded medical literature prove there was no substantial likelihood that precluding the alleged objectionable inquiry would have affected the jury's unanimous verdict.

3. The trial court did not err in refusing to alter a finding of fact of the Board contained within Instruction No. 4, paragraph 4.

The trial court properly submitted the findings of material fact as found by the Board without amending paragraph 4 within Instruction No. 4. The trial court had no authority to alter the final and binding decision made by the Board. Additionally, the appellant had waived any argument or right to seek amendment of a finding of fact from the trial court as no issue had ever previously been made of this alleged error while the matter was still before the Board. Finally, any failure to amend paragraph 4

within Instruction No. 4 was cured by the trial court in submitting to the jury the appellant's proposed verdict form, which properly framed the sole issue to be decided by the trier of fact.

The finding of fact at issue stated, "Mr. McManus sustained an aggravation of his pre-existing cervical degenerative disc changes arising naturally and proximately out of the distinctive conditions of his employment with Clark County." CABR at 70; CP at 81; Instruction No. 4. As discussed previously, RCW 51.52.115 states that in appeals from a Board determination involving a jury, "the court shall by instruction advise the jury of the exact findings of the Board." RCW 51.52.115. This does not leave room for the trial court to amend such findings as counsel for appellant has requested given the operative language of the statute, which commands the identical findings of the Board be transmitted to the jury. There is an absence of authority for the trial court to take action to amend such findings by statute. As a result, taking no action and doing precisely what the statute said, which the trial court did in this instance, was proper. This is especially true when the Board was put on notice of this alleged error within the respondent's Petition for Review and chose to still adopt the language at issue as its final and binding determination. CABR at 48, 70, 1.

What's more, the appellant, who contends that he was aggrieved by the finding of fact entered by the Board, waived any objection to the Board record by not filing a petition for review as required by law. RCW 51.52.104 sets forth the necessary procedure to take when a party is aggrieved by a Board determination. RCW 51.52.104 specifically states that, "Such petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein." RCW 51.52.104. The Court of Appeals in the *Upjohn v. Russell* decision applied this statutory waiver provision contained within RCW 51.52.104. See generally *Upjohn v. Russell*, 33 Wash.App 777, 780, 658 P.2d 27 (1983). In particular, the court stated "that any party who was aggrieved by a hearing examiner's proposed decision and order and who thereafter might wish to contest such order would in fact file a petition." *Id.* at 780. The court in *Upjohn* went on to state that any aggrieved party who failed to file a petition thereby taking specific exception to determinations made by the Board would be deemed to have waived their objections to the record. *Id.*

In this case, the appellant merely filed a Response to Employer's Petition for Review dated April 5, 2013, which took no exceptions to the Board decision and in fact wholeheartedly endorsed the adopted Proposed

Decision and Order. CABR at 19-33. Again, this was despite the Board's use of the word "cervical" as opposed to "lumbar" contained within the finding of fact at issue. Therefore, it was not appropriate for the appellant to have alleged for the first time in superior court just prior to closing argument that he was aggrieved by the Board's determination having previously "waived all objections or irregularities" to the Board record. RP – Second Supplemental Excerpt at 14.

Even assuming that the trial court had the authority to amend the finding of fact as suggested by the appellant and that appellant did not waive any objection to irregularities within the Board record, altering paragraph 4 within Instruction No. 4 to reflect "lumbar" instead of "cervical" would not have likely changed the outcome of the trial. This fact is supported by the trial court's action in submitting to the jury the appellant's special verdict form over the respondent's objection, which made this issue involving amendment of the word "cervical" with "lumbar" moot.

As cited previously, the appellant's requested verdict form properly submitted the sole question that was to be decided by the jury, which read as follows: "Was the Board of Industrial Insurance Appeals correct in deciding the Patrick McManus' low back condition, diagnosed

as aggravation of degenerative disc changes and a new central disc protrusion at L2-3 level arose naturally and proximately from the distinctive conditions of his employment with Clark County operating the street sweeper." RP – Second Supplemental Excerpt at 45; CP at 98. The trial court submitted this question proposed by appellant verbatim to the jury with the full knowledge that it would cure any issue or problem previously raised involving paragraph 4 within Instruction No. 4, which it did. In the end, the jury was asked to answer yes or no to only one question on appeal involving the appellant's low back, not cervical, condition. Consistent with the overwhelming evidence presented on this issue, the jury found the Board was incorrect, which would not have been different had the trial court acquiesced to appellant's request and modified the Board's finding of fact.

4. The trial court did not err in refusing to give appellant's proposed Instruction No. 10, which had requested that special consideration be given to the testimony of an attending physician.

The trial court, appropriately exercising its discretion, did not err in declining to submit to the jury WPI 155.13.01, appellant's proposed Instruction No. 10. First, the legal precedent has established that providing WPI 155.13.01 is not mandatory and is within the discretion of

the trial court. Second, refusal to instruct the jury to bestow "special consideration" upon an attending physician was not manifestly unreasonable. Third, there is no value whatsoever to WPI 155.13.01 in light of the other instruction pertaining to the jury's evaluation of witness testimony. Finally, similar to all assignments of error alleged by the appellant, submitting WPI 155.13.01 to the jury would have made no difference at all in the outcome of the trial.

The case that speaks directly to the action taken by the trial judge here is that of *Boeing v. Harker-Lott*. In *Harker-Lott*, the worker sustained an industrial injury in July of 1988 and ultimately had two disks in her neck removed and fused surgically in October of 1990. *Boeing Co. v. Harker-Lott*, 93 Wash.App. 181, 183-184, 968 P.2d 14 (1998). The worker never returned to her job following this industrial injury. *Id.* at 183. An order in June of 1995, affirmed in September that same year, was entered by the Department awarding time-loss compensation benefits as paid through November 15, 1993. *Id.* at 184. This Department order was appealed by the worker to the Board who in turn reversed the Department's determination and found she was unable to engage in any reasonably continuous gainful employment. *Id.* at 184-85. Boeing ultimately appealed the Board's decision to King County Superior Court. *Id.* at 185.

While at superior court, the worker requested the court instruct the jury to give special consideration to the testimony put forth by the attending physician and the court refused. *Id.* A jury found in favor of Boeing concluding that the worker was capable of gainful employment. *Id.* The worker then filed an appeal to the Court of Appeals, Division 1, arguing that she was prejudiced by the trial court's refusal to provide WPI 155.13.01. *Id.*

The appellate court immediately noted that choosing to give a jury instruction is within the trial court's discretion and will be reviewed only for an abuse of discretion. *Id.* at 186. The court further stated an error on jury instructions would only require reversal if there was resulting prejudice thereby affecting the outcome of the trial. *Id.* In assessing the trial court's actions, the Court of Appeals noted that, "No case has specifically held that such an instruction must be given when the evidence supports it." *Id.* (following a discussion of *Hamilton v. Dept. of Labor & Indus.*, 111 Wash.2d at 571, 761 P.2d 618 (1988)). The appellate court further noted that refusing to give the proposed instruction was not necessary for the jury to understand the worker's theory of the case and that the trial court did not abuse its discretion when refusing to give it. *Id.* at 187-88. Even assuming that not giving the instruction had been an

error, giving the proposed instruction would not have changed the outcome of the case in light of the evidence presented. *Id.* at 188.

In this case, the trial court was well within its authority to decline to give to the jury the appellant's proposed instruction requesting special consideration be provided to the testimony of the attending physician. RP – Second Supplemental Excerpt at 43. As noted within *Harker-Lott*, there is no mandatory requirement that this instruction is to be provided to the jury upon request. *Harker-Lott*, 93 Wash.App. at 186. What's more, there was no resulting prejudice to appellant for not submitting the instruction to the jury. Taking into account the general instruction provided, WPI 1.02, along with the instruction addressing expert testimony contained within WPI 2.10, the appellant was free to argue greater weight should have been afforded to Dr. Won as opposed to Drs. Dietrich and Harris. The appellant was not restricted in any way from arguing that Dr. Won, as a treating doctor, had a greater opportunity to observe appellant in the treatment setting. See WPI 1.02. Also, the appellant could have put forward the argument that Dr. Won's opinion should have been considered more credible given the alleged superior knowledge of an individual's medical condition and history that is obtained over the course of establishing a doctor-patient relationship. See WPI 2.10. The instructions submitted, absent WPI 155.13.01, contrary to appellant's contention, provided ample

room to argue to the jury that special consideration, or for that matter and more importantly, greater weight, should have been applied to the testimony of the treating physician Dr. Won.

Even if, as appellant has claimed, refusing to give the instruction was an error, it is not likely the outcome of the case would have been altered had the instruction been submitted to the jury. In looking at the complete language of the proposed instruction, the court in *Harker-Lott*, referencing a footnote from a decision previously handed down by the Division II Court of Appeals, inferred that the instruction is of no value to a trier of fact given it does not require them to give greater weight or credibility to the testimony of a treating physician, merely careful thought during deliberations. *Harker-Lott*, 93 Wash.App. at 188 (citing *McClelland v. ITT Rayonier, Inc.*, 65 Wash.App. 386, 394, 828 P.2d 1138 (1992)). Giving careful thought to the testimony of Dr. Won, who at one point during cross-examination testified that he had been proven wrong and further that it was unknowable whether there was a relationship between his work activities and the development of his low back condition would have only emboldened the respondent's case. CABR Paul Won, M.D. at 41-42. Taking into account the lack of value inherent within the language of this proposed instruction, the resulting confusion to the trier of fact and the ample instructions already provided addressing witness

testimony, the respondent would encourage this court to go a step further than the comment it made in the *McClelland* decision and affirmatively state WPI 155.13.01 should not be submitted to a jury.

IV. CONCLUSION

For the reasons stated above, respondent requests this Court affirm the November 19, 2013 Order and Judgment of the Clark County Superior Court. The trial court acted properly and in accordance with the law. The appellant's assignments of error are not supported by the law and even if an error had been committed by the trial court there was no showing that such error would have had any substantial likelihood of affecting the jury's verdict rendered in favor of the respondent. In fact, the overwhelming substantive evidence supporting the jury's verdict proves that any error that has been alleged, if corrected, would have had no bearing on the ultimate outcome reached in this appeal. Consequently, the respondent respectfully requests that this appeal and the attorney fees and costs being sought by appellant be denied.

Respectfully submitted this April 21, 2014.

Brett B. Schoepper, WSBA #42177
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that I caused to be served the foregoing **BRIEF OF RESPONDENT** on the following individuals on April 21, 2014, by mailing to said individuals true copies thereof, certified by me as such, contained in sealed envelopes, with postage prepaid, addressed to said individuals at their last known addresses to wit:

Steven L. Busick
Busick Hamrick, PLLC
1915 Washington Street
Vancouver, WA 98666

And deposited in the post office at Portland, Oregon on said date.

I further certify that I filed the original of the foregoing with:

Clerk of the Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

By overnight federal express mail on: April 21, 2014.

LAW OFFICE OF GRESS AND CLARK, LLC

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