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Washington State Supreme Court

JUL 30 2015  
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**THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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PATRICK J. MCMANUS

*Appellant,*

v.

CLARK COUNTY,

*Respondent.*

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**ANSWER TO PETITION FOR REVIEW**

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## I. ISSUES PRESENTED FOR REVIEW

1. **Whether the trial erred in refusing to submit to the jury the special consideration attending physician instruction. No.**
2. **Whether the trial court erred in allowing into the record during the cross-examination of Dr. Won the statement from an expert who did not testify. No.**
3. **Whether the trial court erred in refusing to alter a finding of fact of the Board listed within Instruction No. 4, paragraph 4. No.**
4. **If the trial court erred, whether the errors would be considered harmful or prejudicial to the appellant. No.**

## II. STATEMENT OF THE CASE

*Substantive Evidence-* The sole medical expert to testify on behalf of the appellant was Dr. Paul Won. See generally CABR Won. The doctor testified the appellant had a cervical condition that tended to press on the nerve. *Id.* at 21-22. Dr. Won also diagnosed him with displacement of a lumbar intervertebral disc at L2-3. *Id.* at 23. Dr. Won testified that the appellant's employment with the associated jarring and bouncing made a "major material contribution to his lumbar condition." *Id.* at 30-31.

On cross-examination, the history relied upon by Dr. Won proved to be incomplete as he was surprised to learn the appellant sustained an injury to his back as a teenager with resulting sciatica. *Id.* at 42, 35-36. Dr. Won testified that the L2-3 disc protrusion was symptomatic because that is what his neurosurgeon, Dr. Wrobel, had felt. *Id.* at 37-38. Dr. Won was confronted with Dr. Wrobel's statements regarding causation of the L2-3 protrusion. *Id.* at 38-40. 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. Dr. Won also independently agreed 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 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. He too said his initial opinion had been proven wrong. *Id.* at 42.

The only other medical experts to testify were Drs. Dietrich and Harris. The doctors testified that the claimant's back condition had not arisen naturally and proximately from the distinctive conditions of his employment with the respondent. CABR Dietrich at 29, 54; CABR Harris at 33-34, 41-42.

***Procedural Facts-*** Following an appeal from a Department order that allowed the claim, the Board issued a Proposed Decision and Order dated February 21, 2013 that affirmed allowance. *Id.* at 57-72. A subsequently filed Petition for Review by the respondent made reference to the fact that the administrative law judge had appeared to have 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 taking no exceptions to the Board's decision. *Id.* at 19-33. The Board adopted the Proposed Decision and Order on April 4, 2013. *Id.* at 1.

The respondent subsequently appealed the Board's determination to the Clark County Superior Court. 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 questioning of Dr. Won dealt with him affirming he was aware of the discovery deposition responses provided by his own neurosurgeon Dr. Wrobel. CABR Won at 38-39. Following argument, the trial allowed the line of questioning as Dr. Won had relied 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. 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 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. Finally, appellant's counsel instructed the jury in his closing argument that the unaltered finding of fact was merely a scrivener's error. RP at 79-80.

The respondent also objected to the appellant's request for an instruction explaining that special consideration was to be paid to the testimony of an attending physician. RP – Second Supplemental Excerpt 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, which included the introductory and expert testimony instruction. CP at 81; WPI 155.01; WPI 1.02; WPI 2.10.

Following an appeal from a unanimous jury verdict that found the Board was incorrect the appellate court reversed and remanded this matter for a new trial by way of a published opinion filed on June 8, 2015. CP at 98; *Clark County v. McManus*, No. 72437-1-I, slip op. (Wash. June 8, 2015). Appellant filed a Petition for Review from the appellate court's decision, which was served on the respondent on July 6, 2015.

### III. ARGUMENT

#### **1. The trial court did not err in refusing to submit to the jury the special consideration attending physician instruction.**

The trial court has broad discretion when determining whether to give a particular jury instruction. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). As a result, the refusal to provide an instruction is only reviewed for an abuse of discretion. *Id.* at 186. First it will be shown that WPI 155.13.01 should never be given. If it is found to be an appropriate instruction, discretion must remain with the trial court.

#### **(A) The inherent lack of value contained within the substance of the special consideration attending physician instruction as**

**compared to the harm that results from providing the instruction justifies discarding the instruction in its entirety.**

One detriment resulting from allowing this instruction to influence the deliberations of a jury is that it amounts to an improper comment on the evidence. In *Hamilton vs. Department of Labor and Industries*, the Court dismissed this argument on the basis that the instruction did not expose a judge's personal attitudes toward the merits of a case or a particular witness's testimony. *Hamilton v. Dept. of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988).

While strictly speaking this instruction may not rise to the level of an improper comment on the evidence as interpreted by the case law, that does not mean that the resulting harm from a the trier of fact inappropriately placing the attending physician on a pedestal as compared to other testifying experts has been eliminated. Attorneys representing workers and employers know the tactical advantage of securing this instruction to argue their case. This treatment does have a detrimental impact upon the trier of fact fairly adjudicating the issues on appeal based upon the facts and substance of a witness's testimony as opposed to their status.

The court in *Hamilton* states, “The industrial insurance act is a unique piece of legislation; it is “remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries.” *Hamilton*, 111 Wn.2d at 572. Liberal construction in favor of beneficiaries does not extend to determinations pertaining to factual matters that fall outside the language of Title 51, as is the case here. See RCW 51.12.010; *McIndoe v. Dep’t of Labor & Indus.*, 144 Wn.2d 252, 256, 26 P.3d 903 (2001). Moreover, such a practice promotes inequality in a system that prides itself on ensuring equal treatment under the law. WPI 1.07.

A second harm that stems from this particular instruction is that it is confusing and misleading to the trier of fact. This was argued by the Department within *Hamilton* and again dismissed previously by this Court. *Hamilton*, 111 Wn.2d at 573; see also WPI 2.10. The significant change since the 1988 *Hamilton* decision has been the issuance of two Court of Appeals cases wherein the justices themselves confirm that this special consideration instruction is patently confusing.

In turning to the Court of Appeals decisions, the court in *McClelland v. ITT Rayonier, Inc.* was the first to point out the confusing and misleading nature of this particular instruction.

“We are unsure what the Supreme Court means by “special consideration.” *Hamilton* explained that this does not require a jury to “give more weight or credibility to the attending physician’s testimony, but to give it careful thought.” 111 Wash.2d at 572, 761 P.2d 618. We assume that the jury gives careful thought to every witness’s testimony. If the attending physician’s testimony does not carry any more weight or credibility with the jury, how then does the jury give it special consideration?” *McClelland v. ITT Rayonier, Inc.*, 65 Wn.App. 386, 394, 828 P.2d 1138 (1992); see also *Boeing Co. v. Harker-Lott*, 93 Wn.App 181, 188, 968 P.2d 14 (1998).

When an appellate court by merely looking at the plain language of the special consideration instruction comments that it is unaware how a jury can give an attending physician’s testimony special consideration, it must be conceded that such instruction is in fact confusing and misleading. A judge sitting on the Court of Appeals assuredly would be more qualified than the typical juror in the application of a Washington Pattern Jury Instruction to the facts of a particular case. Consequently, if a highly qualified and trained legal mind cannot ascertain how give special consideration to the testimony of an attending physician, then a lay person sitting on a jury should not be expected to either. For this reason alone, this instruction should be discarded given the resulting harm, which is contrary to the general legal rule applied to any and all jury instructions. See *Rekhter v. State*, 180 Wn.2d 102, 323 P.3d 1036, 1044 (2014).

The prior appellate decisions in *Boeing* as well as *McClelland* highlight a broader point, which is that this special consideration

instruction is of no value to a trier of fact given the instruction does not require them to give greater weight or credibility to the testimony of a treating physician, merely careful thought during deliberations. *Boeing Co.*, 93 Wn. App. at 188 (citing *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 394, 828 P.2d 1138 (1992)). Providing careful thought to a witness's testimony is expected of any trier of fact. Accordingly, reciting this general expectation to a jury does not provide them any additional value in deciding the merits of a case especially when the jury is instructed on WPI 1.02 and 2.10. The special consideration attending physician instruction, at the very least, is redundant and unnecessary when considering the instructions as a whole. *Id.* These resulting harms coupled with the complete and utter lack of value transmitted by this particular instruction to a trier of fact are enough for this court to reconsider the decision it made in *Hamilton*.

**(B) If the special consideration attending physician instruction remains, discretion on whether to allow the instruction to be submitted to a jury should rest with the trial judge.**

First, the legal precedent addressing this issue, which followed *Hamilton*, correctly concluded that providing WPI 155.13.01 is not mandatory and should remain within the discretion of the trial court.

Secondly, keeping discretion with the trial judge, who is in the best possible position to assess the individual facts and circumstances presented in an appeal from a Board decision ensures the most just outcome by a trier of fact.

The case that speaks directly to the action taken by the trial judge here is that of *Boeing Co. v. Harker-Lott*. In assessing the trial court's actions in refusing WPI 155.13.01, the appellate court noted that, "No case has specifically held that such an instruction must be given when the evidence supports it." *Boeing Co.*, 93 Wn. App. at 186. The court then reiterated the general rule as it pertains to jury instructions, which is that "instructions are sufficient if they permit a party to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury on the applicable law." *Id.* at 186. The appellate court went on to reason that this test was satisfied such that the trial court's action was not manifestly unreasonable. *Id.* at 187-188.

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. In applying the general rule governing the sufficiency of jury instructions, as well as WPI 1.02, and in

looking to the instruction addressing expert testimony contained within WPI 2.10, the appellant had no restrictions placed upon his ability to argue that special consideration should be afforded to Dr. Won's testimony as compared to Drs. Dietrich and Harris. As well, the instructions as a whole were not misleading and properly informed the jury on the applicable law, which had to do with causation of claimant's back condition.

The appellant has argued that the *Hamilton* decision has established binding precedent that requires providing the special consideration attending physician instruction in each and every case when an attending physician testifies. Appellant's Petition for Review at 10-13; see also *Clark County*, No. 72437-1-I, dissent at 2-3. This interpretation, taken to its logical extreme, would improperly remove the discretion entrusted to trial courts to assess the validity of requested instructions contrary to the law as previously mentioned. This as well would result in an unfair adjudication of Board appeals within Superior Court for both employers and injured workers alike.

By way of illustration, the City of Bellevue recently argued to the appellate court that the trial court had erred when it refused to submit to the jury WPI 155.13.01. *Larson v. City of Bellevue*, No. 71101-6-I, slip op. at 28 (Wash. July 13, 2015). In an exercise of discretion, the trial

court expressed concerns over the substance of the testimony provided by the attending physician in comparison to other more elaborate testimony from medical experts. *Id.* at 29. The trial court elected not to provide the instruction due to concerns that it would be misleading. *Id.* at 28-29. The appellate court found this action was proper and not an abuse of discretion citing to the *Boeing* decision. *Id.* at 29. It is not a stretch to conclude the worker's likelihood of prevailing in that case would have been detrimentally impacted if that instruction had been mandated. The wherewithal to avoid placing on a pedestal lackluster testimony from an attending physician by the trial judge in this instance allowed for a more equitable adjudication of the issue presented, which happened to be decided in the worker's favor. A strict interpretation of *Hamilton* would bring to an end this reasoned and justified exercise of discretion by a trial judge to the detriment of all parties.

**2. The trial court did not err in allowing into the record during the cross-examination of Dr. Won the statement from an expert who did not testify.**

Trial courts have "broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion." *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997). In

this case, the appellate court misconstrued Dr. Won's testimony. This misunderstanding of the testimony is apparent in appellate court's written opinion given there was no mention whatsoever made to the clear and irrefutable reliance Dr. Won placed on the ultimate opinions previously offered by Dr. Wrobel. See *Clark County*, 72437-1-I, slip op. at 7-10.

**(A) The statement offered from Dr. Wrobel was admissible under ER 703 as the basis for Dr. Won's expert opinion and pursuant to ER 705 was subject to disclosure on cross-examination.**

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 in order to arrive at a his own diagnosis. CABR Won at 37-38.

Q. Do you believe that L2-3 disc protrusion is symptomatic?

A. Yes.

Q. How – how are you making that conclusion as compared to his other multi-level –

A. The neurosurgeon felt that, our neurosurgeon.

Q. Your neurosurgeon Dr. Wrobel?

A. Right.

The first necessary step in rendering an opinion as to causation is to identify what physical condition is in fact causing a worker to have difficulties. “The causal connection between a claimant’s physical condition and his or her employment must be established by competent medical testimony which shows that the disease is probably, as opposed to possibly, caused by the employment.” *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987). An opinion addressing causation as a matter of logic is inextricably intertwined with a corresponding medical diagnosis that identifies a disabling physical condition. This reality, which was overlooked by the appellate court, is further reflected in the sole question that was submitted to the jury. See RP – Second Supplemental Excerpt at 45. Evident from Dr. Won’s own testimony was that he was relying upon the opinions and conclusions reached by Dr. Wrobel addressing pathology, which was not separate from the issue of causation.

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

The trial court had no authority to alter the final and binding decision made by the Board. 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. As well, the attorney for the appellant took it upon himself to correct the jury in closing argument as to the presence of the alleged scrivener's error thereby curing any defect in the instruction.

**(A) The trial court did not have authority to alter the Board's ultimate finding of fact.**

The appellant contended that he was aggrieved by the finding of fact entered by the Board but had waived any objection to the Board record by not filing a petition for review. RCW 51.52.104 mandates the necessary procedure to take when a party is aggrieved by a Board determination. The Court of Appeals in the *Homemakers Upjohn v. Russell* further 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." *Homemakers Upjohn v.*

*Russell*, 33 Wn. App. 777, 780, 658 P.2d 27 (1983). The court in *Homemakers* 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 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. This filing was despite the Board's use of the word "cervical" as opposed to "lumbar" contained within the ultimate finding of fact at issue.

The appellate court incorrectly dismissed this argument finding that the appellant was not an aggrieved party as he had prevailed in the proceedings before the Board. *Clark County*, No. 72437-1-I, slip op. at 14. Despite this statement, the appellate court then went on to find that the appellant was "precluded" from establishing the necessary causal link between his back condition and industrial exposure. *Id. at 16.* If the Board's findings of fact preclude a party from establishing the necessary causal link to justify the resulting conclusions of law, by the very definition you are an aggrieved party. On this basis, the reasoning employed by the court in *Homemakers* was on point.

Furthermore, 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. 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. That very fact takes this particular action out of the realm of alleged error and confirms it as deliberate action taken by the Board. For the appellate court to conclude otherwise would usurp the Board’s authority to first address orders issued by the Department. See 51.52.050.

The appellate court, to justify finding the trial court erred in failing to amend the particular finding of fact, cited to the *Stratton* decision. *Clark County*, No. 72437-1-I, slip op. at 15-16 (citing *Stratton v. Dept. of Labor & Indus.*, 7 Wn. App. 652, 501 P.2d 1072 (1972)). However, the *Stratton* decision is clearly distinguishable from the case at hand. First off, there was medical evidence presented by Dr. Won of a cervical condition at the base of the appellant’s skull that “tends to press on the nerve.” CABR Won at 5. This is contrary to the *Stratton* case, which found the language at issue was “not based upon any medical or other

evidence in the record.” *Stratton*, 7 Wn. App. at 654. More importantly, the finding of the Board that was stricken in *Stratton* was clearly not a material finding as it was in this particular appeal. *Id.* at 654-56; see also *Gaines v. Dept. of Labor & Indus.*, 1 Wn. App. 547, 551-553, 463 P.2d 269 (1969) (which too is not supportive as the court ruled it had authority to prevent “argumentative” findings of fact from being instructed to the jury but not “findings of ultimate fact.”). Accordingly, the trial courts within the above appellate decisions were not restricted by the mandates imposed by RCW 51.52.115.

**(B) If it was improper not to revise the Board’s finding of fact, this mistake was cured by further action taken by the trial court and argument of appellant’s counsel.**

As cited previously, the appellant’s requested verdict form properly submitted the sole question that was to be decided by the jury, which referenced a back condition and not any cervical condition thereby rendering this issue moot. RP – Second Supplemental Excerpt at 45; CP at 98. The trial court submitted the appellant’s requested verdict form with the full knowledge that it would cure any issue or problem previously raised involving paragraph 4 within Instruction No. 4, which it did given it directed the jury to address the sole material ultimate fact under appeal.

RP – Second Supplemental Excerpt at 47-51. Moreover, counsel for the appellant within closing argument also directed the jury that this finding involving the neck was a “minor error” and that there was “no question” they were to address the low back condition. RP at 79-80; RP – Second Supplemental Excerpt at 25. This correction was not addressed or exploited by respondent’s counsel, which coupled with the appellant’s verdict form, made this a non-issue.

**4. If the trial court erred as alleged, no error could be considered harmful or prejudicial to the appellant.**

It further cannot be stressed enough that any alleged error committed by the trial court was not harmful, which on a substantive basis was not addressed by the appellate court within their published opinion. Dr. Won, the sole expert to testify on behalf of the appellant who testified based upon an inaccurate and incomplete understanding of the appellant’s medical history acknowledged that his initial opinions had been proven wrong and that the ultimate question addressing causation posed to the jury was “unknowable.” Consequently, even if the trial court had not purportedly erred, the outcome of trial would not have been materially affected. Not only would the outcome have not changed had the alleged errors not occurred within a reasonable probability, it could not have

changed irrespective of the action taken by the trial court within these assignments of error under the facts presented. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn2d 432, 446, 191 P.3d 879 (2008) (quoting *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993)).

#### IV. CONCLUSION

For the reasons stated above, respondent requests this Court affirm the June 8, 2015 appellate court decision with respect to the sole finding that concluded the trial court did not abuse its discretion when refusing to give the proposed instruction, WPI 155.13.01. The respondent further requests that review be granted to overturn the erroneous appellate court's determinations that resulted in a reverse and remand for a new trial. The appellate court was incorrect in determining the trial court had erred in properly refusing to amend the Board's affirmed material finding of fact. The trial court too acted properly to permit a statement by Dr. Wrobel into the record based upon Dr. Won's demonstrated reliance on Dr. Wrobel to arrive at his own opinions and conclusions. Finally, if the trial court erred, it was harmless.

Respectfully submitted this July 27, 2015.

  
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Attorney for Respondent

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**THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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PATRICK J. MCMANUS

*Appellant,*

v.

CLARK COUNTY,

*Respondent.*

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**APPENDIX**

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No. 72437-1-1/2

after leaving work, McManus filed a claim for workers' compensation under Title 51 RCW, the Industrial Insurance Act (Act).

In reviewing the claim, the Board of Industrial Insurance Appeals (Board) considered deposition testimony from several witnesses. McManus testified that he began experiencing pain that radiated across his low back and down his left leg in early 2010. He attributed this pain to the cramped confines and bumpy rides of the street sweepers he operated for the County. In particular, he claimed that while the first two street sweepers he operated had adjustable air ride seats and relatively ergonomic cab designs, the third and final machine he operated, to which he was assigned in either 2008 or 2009, had an uncomfortable cab layout and a negative air ride seat that, according to McManus, felt like a block of concrete whenever he hit a bump.

McManus also testified regarding a preexisting back condition and other possible causes for his pain. He testified that his weight had hovered around the 330 pound mark for the past 30 years and that he had used tobacco products regularly until 2011. He acknowledged sustaining a low back injury at age 19, which resulted in flare-ups of pain in his low back and legs. McManus also conceded having been on prescription medication for pain in his lower back, buttocks, and left leg since 2001, approximately 9 years before the onset of the symptoms he alleged were work related.

The sole medical expert to testify on behalf of McManus was Dr. Paul Won, who is board certified in preventive and family medicine. In his deposition, Dr. Won testified that he began treating McManus in January 2005 following a

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low back injury unrelated to the condition alleged in his workers' compensation claim. After this initial treatment, McManus had continued to work his regular job as a street sweeper operator. According to Dr. Won, McManus had a gradual increase in low back pain during this time. On June 25, 2010, Dr. Won obtained a magnetic resonance imaging (MRI) scan of McManus' back. The scan showed various spinal changes as compared to a prior study, including a central disc protrusion at the L2-3 vertebra. Based on this scan, Dr. Won diagnosed McManus with displacement of a lumbar intervertebral disc at L2-3. Dr. Won next treated McManus on April 11, 2011, at which time McManus complained about low back pain due to a poor quality seat cushion in his street sweeper.

On direct examination, Dr. Won acknowledged a November 14, 2011 letter to McManus' claims representative, in which Dr. Won had opined that the cause of McManus' lower back condition was his work as a street sweeper operator. Dr. Won testified that his opinion had not changed since writing the November 14 letter. He opined that "driving trucks with jarring and bouncing has made a major material contribution to [McManus'] lumbar condition." CABR (Won) at 30-31.<sup>1</sup> According to Dr. Won, this opinion was based on his understanding of McManus' medical history and the physical forces McManus' spine endured during his street sweeping work.

On cross examination, Dr. Won testified over McManus' hearsay objection that he was aware a consulting neurosurgeon, Dr. Wrobel, had opined that it was

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<sup>1</sup> "CABR" refers to the certified appeal board record. Deposition transcripts within the CABR are cited by parenthetical reference to the deponent's last name.

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unknowable whether or not the disc protrusion at L2-3 was related to McManus' employment. Dr. Won also stated he was aware of Dr. Wrobel's opinion that "no one could relate the protrusion at 23 [sic] and the stenosis to the work activities with Clark County." CABR (Won) at 39. While Dr. Won conceded that a neurosurgeon would likely have greater expertise than he in determining the etiology of degenerative disc disease such as McManus', he ultimately did not agree with Dr. Wrobel's opinion and testified that his own initial opinion that McManus' low back condition arose from the conditions of his work as a street sweeper operator was still valid based on his knowledge of McManus' medical history.

The County offered the deposition testimony of two experts, Dr. Thomas Dietrich and Dr. James Harris. Dr. Wrobel did not testify. Dr. Dietrich, a board certified neurosurgeon, stated that he had rendered an opinion based on a July 14, 2011 examination of McManus. Dr. Dietrich concluded that McManus' low back condition did not arise naturally and proximately from the distinctive conditions of his employment; however, he acknowledged that the repetitive bouncing up and down McManus endured over a period of years as a street sweeper operator likely played a role in the rate of degenerative change in his condition.

Dr. Harris, a board certified orthopedic surgeon, testified that he conducted a review of McManus' records at the request of the County. Dr. Harris compared a December 14, 2005 CT (computed tomography) scan of McManus' lumbar spine with the June 25, 2010 MRI ordered by Dr. Won and concluded that

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the 2010 imaging showed a new central disc protrusion at the L2-3 level. Dr. Harris' initial report indicated that McManus' employment could be a possible cause of the abnormalities visible in the imaging scans. However, Dr. Harris testified that his initial conclusion was speculative, rendered with insufficient information on his part. He testified that after additional research, his ultimate conclusion was that McManus' low back condition was not the result of an industrial injury. Dr. Harris attributed the injury to the normal aging process. He noted that by age 50, about half the population would experience similar degenerative changes. He also recognized the role of obesity and heredity in such degenerative changes. While acknowledging that the conditions of McManus' work may have contributed to symptoms of this underlying condition, Dr. Harris maintained that McManus' work did not cause the condition.

At the close of evidence, an industrial appeals judge determined that McManus' injury was work related, awarded him compensation under the Act, and issued a proposed decision and order, which included the following findings of fact:

1. On April 10, 2012, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History, as amended, in the Board record solely for jurisdictional purposes.
2. Patrick J. McManus worked as a street sweeper operator for Clark County from 1998 or 1999 to April of 2011. As a street sweeper operator, Mr. McManus worked 40 hours per week, and sometimes worked overtime. While operating the street sweeper, Mr. McManus repetitively hit holes and dips along the curb line, which can be the roughest part of the road. Bumpy conditions jarred his back, causing pain. In 2008 or 2009, Clark County purchased a new street sweeper. Mr. McManus experienced more bumping and jarring while operating the new street sweeper. In April of 2011, Mr.

McManus ceased working as a street sweeper operator due to pain in his low back.

3. As early as 1976, prior to his employment with Clark County, Mr. McManus was seen and treated for intermittent, chronic low back pain and degenerative disc changes. An MRI dated February 24, 2006 showed moderately severe degenerative changes in the entire lumbar spine. An MRI dated June 25, 2010, showed moderately severe degenerative changes in the entire lumbar spine, and also a new central disc protrusion at the L2-3 level.
4. Repetitive jarring and bumping constitute distinctive conditions of employment.
5. 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 70-71.

The County petitioned for review by the Board. On McManus' motion, the Board excluded Dr. Won's testimony regarding his knowledge of Dr. Wrobel's opinions. The Board affirmed the industrial appeals judge's decision and adopted its proposed decision and order.

The County petitioned for review in the Clark County Superior Court. At trial, the jury was instructed that the sole question before it was whether "the Board of Industrial Insurance Appeals [was] 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." Clerk's Papers (CP) at 98. The jury concluded that the Board was incorrect in concluding that McManus' back condition arose from

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his employment operating the street sweeper. The trial court entered an order reversing the Board's decision. McManus appeals.

## DISCUSSION

### Evidentiary Rulings

Before trial, the County requested that the trial court reverse the Board's ruling excluding that part of Dr. Won's testimony relating to Dr. Wrobel's opinion. The County argued that this testimony was admissible under ER 703 because, although hearsay, Dr. Won relied on Dr. Wrobel's opinion in forming his own conclusions as to the cause of McManus' condition. The trial court agreed with the County, reversed the ruling of the Board, and overruled McManus' objection. McManus argues that the trial court's ruling was error. We agree.

A superior court on review of a Board's decision has discretion to review the Board's evidentiary rulings. We review for abuse of discretion. Gorre v. City of Tacoma, 180 Wn. App. 729, 769-70, 324 P.3d 716 (2014), review granted, 181 Wn.2d 1033 (2015). A trial court abuses its discretion if its decision is manifestly unreasonable or its discretion is exercised on untenable grounds or for untenable reasons. Boeing Co. v. Harker-Lott, 93 Wn. App. 181, 186, 968 P.2d 14 (1998).

Generally, the out of court statements of a nontestifying declarant are inadmissible to prove the truth of the matter asserted. ER 802. The County contends that Dr. Wrobel's statements are admissible for impeachment purposes under ER 613 or as a statement of a party-opponent under ER 801(d)(2). Both arguments lack merit. Dr. Wrobel's opinion was not a prior statement by Dr. Won and, thus, could not be used for impeachment of Dr. Won under ER 613. And

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because Dr. Wrobel was not a party to the case, one authorized by a party to make a statement, or an agent or employee of a party, the ER 801(d)(2) exemption for admissions of party-opponents does not apply.

The County also contends that Dr. Wrobel's statements were admissible, even if hearsay, under the statement for medical diagnosis or treatment (ER 803(a)(4)) or learned treatise (ER 803(a)(18)) hearsay exceptions. Neither exception applies.

ER 803(a)(4) provides a hearsay exception for

[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Here, the trial court admitted the following line of questioning over McManus' hearsay objection:

Q. Are you aware that Dr. Wrobel himself testified in a discovery deposition in this case that it is unknowable as to whether or not the protrusion at L2-3 was, in fact, related to his employment?

....

Q. Are you aware of that, Doctor?

A. Yes.

Q. You are aware of that?

A. Yes.

....

Q. And his answer was that no one could relate the protrusion at 23 [sic] and the stenosis to the work activities with Clark County; correct?

A. Yes, that is correct.

CABR (Won) at 38-39. Because it is evident from counsel's first question that Dr. Wrobel's statements were made in a discovery deposition and not in the course of medical diagnosis or treatment, ER 803(a)(4) does not apply.

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ER 803(a)(18) is likewise inapplicable. The rule establishes a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." Because Dr. Wrobel's statements plainly were not contained in a published work, they were not admissible pursuant to this exception.

Next, the County argues that, even if hearsay, Dr. Wrobel's statements were admissible under ER 703 as the basis for Dr. Won's expert opinion and, pursuant to ER 705, were subject to disclosure on cross examination. But the argument fails because the County misconstrues Dr. Won's testimony.

It is well established that under ER 703, an expert opinion based on the opinion of a nontestifying expert is admissible, so long as the testifying expert reasonably relied on the opinion. On cross-examination, the testifying expert may be compelled to reveal the underlying sources of his or her opinion, including otherwise inadmissible hearsay evidence. ER 705; see also Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 275, 215 P.3d 990 (2009) ("[ER 703] permits experts to base their opinions on facts or data that might not otherwise be admissible into evidence...[and] the trial court may allow the admission of hearsay evidence and otherwise inadmissible facts for the limited purpose of showing the basis of the expert's opinion."); Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541, 545 (5th Cir. 1978) (construing Fed. R. Evid. 703

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and 705); 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 703.6 (5th ed. 2007). But neither rule applies in this case.

Dr. Won offered an expert opinion on the cause of McManus' low back condition, which he testified was based solely on his understanding of McManus' medical history and the physical realities of McManus' work as a street sweeper operator. On cross-examination, the County elicited testimony regarding Dr. Wrobel's conflicting opinion as to causation. But, there is no evidence that Dr. Won relied on Dr. Wrobel's statements in forming his own opinion as to causation as contemplated by ER 703 and 705. Thus, Dr. Won's hearsay statements were not subject to admission under either rule.

Because Dr. Wrobel's statements are hearsay not within any exception, the trial court's decision to admit the statements was an abuse of discretion.

#### Jury Instructions

McManus also contends that the jury instructions in this case were insufficient for several reasons. The standard of review for jury instructions is whether the instructions are correct as a matter of law. State v. Edwards, 92 Wn. App. 156, 164, 961 P.2d 969 (1998). Instructions are sufficient if they permit a party to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. Boeing, 93 Wn. App. at 186. We review the trial court's decision not to give a particular jury instruction for abuse of discretion. Id.

McManus first contends the trial court erred in refusing to give an introductory instruction to the jury, advising it that the Board's decision affirmed the industrial appeals judge's earlier, favorable decision. We disagree.

In superior court review of a Board decision, the function of a jury is to determine whether the Board is correct in rendering that decision. Stratton v. Dep't of Labor & Indus., 1 Wn. App. 77, 80, 459 P.2d 651 (1969). Prior to deliberations, the trial court is charged with instructing the jury of the exact findings of the board on each material issue before the court. RCW 51.52.115. In this case, the trial court's instruction 4 reproduced verbatim each of the Board's findings of fact on the nature and cause of McManus' injury.<sup>2</sup>

McManus contends that the prior history of the case, i.e., that the Board reached its decision in affirmance of the industrial appeals judge's decision, was also a "material issue" within the meaning of RCW 51.52.115. We rejected a similar argument in Stratton. In that case, we considered whether an administrative law judge's preliminary determination in a proposed decision and order, which was subsequently rejected by the Board, constituted a finding of the Board on a material issue. 1 Wn. App. at 77. We concluded that it did not. We expressly held that the preliminary determination by the administrative law judge was immaterial to the only question to be decided by the trier of fact: whether the Board's ultimate determination was correct. Id. at 80. We also recognized the improper tactical advantage to be gained by a party advising the trier of fact of

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<sup>2</sup> The only other finding of fact entered by the Board acknowledges the Board's jurisdictional basis, not a material issue before the trial court.

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prior favorable determinations made by individuals or entities other than the Board in rendering its ultimate findings. We noted that “[t]he 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 (emphasis omitted).

Notwithstanding our holding in Stratton, McManus appears to argue, without citation to authority, that jurors must have an understanding of the exact procedural history that brought the case before them. See Br. of Appellant at 15-16. But neither the industrial appeals judge’s decision nor the fact that the Board affirmed that decision was material to the only issue to be determined by the jury in this case. Accordingly, the trial court had no statutory obligation to instruct the jury on the procedural history of the case and its refusal to give McManus’ proposed introductory instruction was not error.

Next, McManus assigns error to the trial court’s refusal to give his proposed jury instruction 10, which reproduced 6A WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 155.13.01 (6TH ED. 2012) in relevant part as follows:

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.

The trial court concluded that the instruction was unnecessary. Although we may have concluded otherwise, we cannot say on this record that the trial court’s

refusal to give the proposed instruction was an abuse of discretion.<sup>3</sup> The trial court's general instructions informed the jury that it could consider

the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP at 82. Based on this instruction, McManus was able to argue that Dr. Won, as his treating physician, was better qualified to render an opinion on the etiology of his injury than the Department's witnesses. And the jury was informed that it could accept this theory. Thus, under the circumstances, the trial court's general instruction was sufficient. See Boeing, 93 Wn. App. at 186.

Finally, McManus assigns error to the trial court's jury instruction 4, which included a verbatim recitation of the Board's findings of fact. In particular, the instruction included the Board's findings of fact 5, which provides:

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 (emphasis added). McManus argues that the Board's reference to disease of the cervical spine, i.e., the neck and upper back, was a scrivener's error, given that his claimed injury affected only his lumbar spine, i.e., the lower back. He further contends that the trial court's refusal to revise the

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<sup>3</sup> Generally, trial courts would be well advised to give careful consideration to whether the proposed instruction should be given in a particular case. See Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 761 P.2d 618 (1988).

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Board's finding so that it reflected only injury to his lumbar spine was error. We agree.

Citing RCW 51.52.104 and Homemakers Upjohn v. Russell, 33 Wn. App. 777, 780-81, 658 P.2d 27 (1983), the Department contends that McManus has waived this error because he did not appeal the Board's finding. In Homemakers, we interpreted RCW 51.52.104 to mean that a party aggrieved by a hearing examiner's proposed decision and order and who failed to file a petition for review waived its objections to the record. Id. at 780. But we also noted "that a nonaggrieved party waived absolutely nothing by not filing a petition." Id. at 782. Because McManus prevailed in the proceedings before the Board, we conclude that he was not an aggrieved party and therefore was not precluded from raising the error before the superior court. Moreover, it is undisputed that the finding at issue was in error. The County conceded as much in its petition for review of the Board's decision. See CABR at 48 n.1 ("the administrative law judge incorrectly stated in finding of fact number 5 that Mr. McManus had aggravated his CERVICAL degenerative disc changes"). We are satisfied that the error was properly preserved for our review.

We next consider whether the trial court erred in refusing to revise the Board's finding. We conclude that it did.

RCW 51.52.115 requires that on review of a Board's decision by the superior court, if a case is submitted to a jury "the court shall by instruction advise the jury of the exact findings of the board on each material issue. . . ." The findings and decision of the Board are presumed to be correct, and the burden of

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proof is on the party challenging them. RCW 51.52.115; Gorre, 180 Wn. App. at 754. A trial court may substitute its own findings for those of the Board only if it finds from a fair preponderance of credible evidence that the Board's findings and decision are incorrect. Gorre, 180 Wn. App. at 754-55. Stratton v. Department of Labor & Industries, 7 Wn. App. 652, 501 P.2d 1072 (1972) (Stratton II) is instructive on whether the trial court erred in failing to do so in this case.

In Stratton II, we affirmed a trial court's revision of a board finding that contained obvious error that was prejudicial to the challenging party. Id. at 654-56. In that case, we considered the following jury instruction, which reproduced a board finding on Stratton's condition:

3. On or about April 29, 1964, the claimant suffered from a psychiatric disorder which was causally related to his industrial injury and was diagnosed as anxiety neurosis with conversion symptoms. Associated with this psychiatric disorder is a demonstrated lack of motivation in the claimant to seek out and maintain gainful employment, coupled with a strong tendency and desire to realize a monetary gain from his injury.

Id. at 654. Stratton contended that the emphasized sentence was not a medical finding based on evidence, but rather an argumentative assertion that he was unmotivated and eager to realize a monetary gain from his injury. We agreed and concluded that the emphasized sentence was "not based upon any medical or other evidence in the record" and merely expressed the "opinion of the board that Stratton won't look for work and has a strong desire to make money from his injury." Id. Because the Board's error was obvious and resulted in prejudice to Stratton, we reversed the judgment and remanded for a new trial. Id. at 656.

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Similarly in this case, the Board's finding that McManus "sustained an aggravation of his pre-existing cervical degenerative disc" is unsupported by any evidence in the record. Both McManus and the County offered medical testimony related to the degenerative condition in McManus' lumbar spinal region. The only mention of his cervical spinal region came from Dr. Won, who testified briefly that McManus suffered from "arnold chiari<sup>4</sup>... a malformation of the base of the skull that tends to press on the nerve." CABR (Won) at 22. Based on this record, we conclude that the Board's finding of fact 5 contained an obvious scrivener's error.

Moreover, the trial court's refusal to revise the finding was not harmless.

The jury was instructed to answer only one question:

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 the L2-3 level, arose naturally and proximately from the distinctive conditions of his employment with Clark County operating a street sweeper?

CP at 60. Thus, the issue before the jury was whether the Board's determination that a causal link existed between McManus' claimed industrial injury and the conditions of his work for the County. Because the Board's finding of fact 5 as represented to the jury referenced the wrong injury, it effectively precluded McManus from establishing this link. Thus, the trial court's refusal to correct the Board's scrivener's error materially affected the outcome of trial.

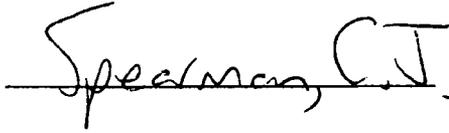
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<sup>4</sup> This appears to be a reference to an Arnold-Chiari malformation, which, according to the National Institute of Neurological Disorders and Stroke, is a congenital structural defect in which the cerebellum and parts of the brain stem sit in an indented space at the lower rear of the skull, where it attaches to the spinal column. See Chiari Malformation Fact Sheet, Nat'l Inst. of Neurological Disorders & Stroke. [http://www.ninds.nih.gov/disorders/chiari/detail\\_chiari.htm](http://www.ninds.nih.gov/disorders/chiari/detail_chiari.htm) (last updated April 29, 2015).

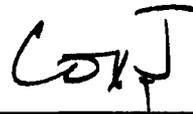
Attorney Fees

McManus requests an award of reasonable attorney fees on appeal pursuant to RCW 51.52.130.<sup>5</sup> The statute provides for an award of attorney fees to a worker who prevails on appeal from an order granting relief to the worker. Because this matter is remanded for retrial, the prevailing party is not yet determined. Accordingly, an award of attorney fees at this time would be premature and we decline to make such an award. We note that the trial court may award appellate attorney fees, as appropriate, after retrial. Washington Fed. v. Gentry, 179 Wn. App. 470, 496, 319 P.3d 823, 836 review granted sub nom. Washington Fed. v. Gentry, 180 Wn.2d 1021, 328 P.3d 902 (2014) and aff'd sub nom. Washington Fed. v. Harvey, 182 Wn.2d 335, 340 P.3d 846 (2015).

Reversed and remanded for a new trial.

  
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WE CONCUR:

  
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<sup>5</sup> The statute provides:

(1) If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

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DWYER, J. (concurring and dissenting). I concur with the majority's resolution of the issues presented herein—save one. I believe that the trial court erred by refusing to instruct the jury that special consideration should be given to the opinion of a treating physician. This decision both contravened our Supreme Court's precedent and created a disparity between the law applied by the Board of Industrial Insurance Appeals (BIIA) and the law applied by the superior court fact finder. Additionally, such decisions may ultimately lead to additional financial burdens on the funds from which claimants are compensated. Accordingly, from that limited section of the majority opinion, I dissent.

I

Because our Supreme Court has made clear that, in a workers' compensation case, the state of the law is that the opinion of a treating physician is entitled to special consideration by the trier of fact, the trial court erred by refusing to so instruct the jury.

"Instructions are sufficient if they permit a party to argue his or her theory of the case, are not misleading, *and*, when read as a whole, properly inform the jury on the applicable law." Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662, 935 P.2d 555 (1997) (emphasis added). I agree with the majority that the instructions given permitted McManus to argue his theory "that Dr. Won, as his treating physician, was better qualified to render an opinion on the etiology of his

injury than the Department's witnesses." Slip Op. at 13. However, the jury was not informed of the "long-standing rule of law in workers' compensation cases that special consideration should be given to the opinion of a claimant's attending physician." Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988).

Hamilton concerned an instruction, similar to the one herein proposed, that provided: "In cases under the Industrial Insurance Act of the State of Washington, special consideration should be given to the opinion of the plaintiff's attending physician." 111 Wn.2d at 570. Reviewing prior case law, our Supreme Court concluded that the instruction "reflect[ed] binding precedent in this state and correctly stated the law." Hamilton, 111 Wn.2d at 572; accord Chalmers v. Dep't of Labor & Indus., 72 Wn.2d 595, 599, 434 P.2d 720 (1967) ("It is settled in this state that, in this type of cases, special consideration should be given to the opinion of the attending physician."); Groff v. Dep't of Labor & Indus., 65 Wn.2d 35, 45, 395 P.2d 633 (1964) ("[W]e have, in several cases, emphasized the fact that special consideration should be given to the opinion of the attending physician.").

Because the instruction stated a clear "rule of law," the Hamilton court held, "it [was] appropriate that the jury be informed of this by the instructions of the court." 111 Wn.2d at 572. "To refuse to do so," the court explained, "would *convert the rule of law into no more than the opinion of the claimant's attorney.*" Hamilton, 111 Wn.2d at 572 (emphasis added). The difference between the law, as explained by the court, and the argument of counsel is key.

As juries are instructed, instructions from the court carry a far greater legal and practical significance than do the arguments of counsel. Juries may choose whether to accept or reject an argument of counsel.<sup>1</sup> By contrast, juries may not choose whether to follow the law—they are required to do so.<sup>2</sup>

The majority's conclusion that the proposed instruction was not necessary relies, in part, on Boeing Co. v. Harker-Lott, 93 Wn. App. 181, 968 P.2d 14 (1998). In Boeing, this court held that an instruction comparable to the one at issue in Hamilton was not required because, it opined, "the Hamilton court did not hold that an instruction to that effect was mandatory." 93 Wn. App. at 186 (emphasis added). But this is a matter of semantics. Regardless of whether the Hamilton court's prohibition against converting the applicable rule of law "into no more than the opinion of the claimant's attorney," is denominated a *holding* or something else, it binds all lower courts:

[F]ew opinions address the ground that later opinions deem sufficient to reach a different result. If a court of appeals could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument.

Nat'l Rifle Ass'n of Am. v. City of Chicago, 567 F.3d 856, 857-58 (7th Cir. 2009), *rev'd on other grounds sub nom. McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

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<sup>1</sup> Thus, the jury herein was instructed: "[I]t is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you." Jury Instruction 1 (emphasis added).

<sup>2</sup> Again, as the jury herein was instructed: "It . . . is your duty to accept the law as [the court] explain[s] it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that [the court] give[s] you." Jury Instruction 1.

Moreover, the Boeing court reasoned that the proposed instruction was unnecessary because the claimant's counsel could argue the claimant's theory of the case—that the opinions of the attending physician were entitled to special consideration—under the instructions given. See 93 Wn. App. at 186-87. But this reasoning directly contravened the Hamilton court's assertion that such a view "would convert the rule of law into no more than the opinion of the claimant's attorney." 111 Wn.2d at 572. Because these two contrasting views cannot be reconciled, the view of our Supreme Court must prevail.

"Once [our Supreme Court] has decided an issue of state law, that interpretation is binding until [it] overrule[s] it." Hamilton, 111 Wn.2d at 571. Both the majority and the trial court stray from proper adherence to applicable Supreme Court precedent by determining that the instructions given in this case were sufficient because the claimant's attorney was permitted to argue a rule of law to the jury, in the absence of an instruction on that law by the trial judge.

II

In addition, the trial court's decision not to instruct the jury regarding the rule that special consideration should be given to the opinion of a treating physician created a disparity between the law applied by the BIIA and that applied by the jury.

The Industrial Insurance Act (Title 51 RCW) appeals process is structured such that, between the decision of the BIIA and the superior court decision, the only thing intended to change is the identity of the fact finder. The jury's charge in a workers' compensation case is "to determine whether [the presumption that the findings and decision of the BIIA are correct] is rebuttable by the evidence."

Jury Instruction 5. This determination must be made only on the record before the BIIA. Thus, as the jury herein was instructed, "The law requires that this case be tried solely on the evidence and testimony that was offered before the [BIIA]." Jury Instruction 2.

Barring an intervening departure from precedent, the law applied to the record must also remain the same. However, unlike the members of the BIIA, the lay jurors must be instructed by the trial judge on the applicable law, with which the jurors are, in all likelihood, entirely unfamiliar. Thus, if the superior court's instructions do not, as herein requested, include the "long-standing" rule of law that special consideration should be given to the opinion of a treating physician, there is no assurance that the law applied by the two decision-makers (the BIIA and the jury) was the same. This is contrary to the careful design of the legislature.

III

Finally, if trial court decisions of this type become widespread, claimants will be incentivized to seek additional (and, at this time, unnecessary) medical opinions, which may lead to increased financial strain on the funds from which claimants are compensated.

The rule that special consideration should be given to the opinion of a treating physician works, in part, to correct a potential imbalance between the expert witnesses whose testimony is offered by claimants, often primary care physicians and other general practitioners, and the expert witnesses offered by self-insured employers, often specialists with noted and impressive certifications. Without the rule here at issue, claimants may be incentivized to seek additional

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medical advice or treatment as a litigation strategy, thus burdening the funds. By obtaining a second opinion—from a physician with a “fancier” curriculum vitae—a claimant may hope to strike a balance between the number and credentials of the expert witnesses offered by each side. This is a potential “real world” impact of decisions such as that we make today. We can avoid such unintended consequences by the simple expedient of requiring that the law—as declared by our Supreme Court—be adhered to.

A handwritten signature in black ink, appearing to read "D. J. ...", written over a horizontal line.