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COA No. 71816-9-I

FILED
AUG 18 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

JOHN W. PALM,
a workers' compensation claimant,
Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent.

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY
#12-2-03403-2

PETITION FOR REVIEW

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 AUG 12 AM 10: 11

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ORIGINAL

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INTRODUCTION

After impaneling a jury, may a trial court reopen voir dire and allow a party to remove a juror with an unused peremptory strike? Plaintiff John W. Palm seeks workers compensation benefits for occupational disease from 38 years' work as a commercial electrician. An industrial appeals judge allowed his claim for benefits, but the Board of Industrial Appeals reversed. Mr. Palm filed for trial de novo in Whatcom County Superior Court.

During voir dire in Superior Court, Mr. Palm and the Department of Labor and Industries each received three peremptories to choose a 12-person jury. The parties winnowed the jury pool to 12, and the Department waived its last peremptory. When it discovered that Juror 20 was seated as the 12th juror, the Department tried to exercise its waived strike. The court declined, and counsel for the Department stated it was "no problem". (VRP 126). The bailiff swore in the jury.

After the court impaneled the jury, the Department again tried to challenge Juror 20, arguing that it misunderstood the process for selecting the jury. This time the trial court agreed and allowed the Department to exercise its last peremptory. In a written order

denying Mr. Palm's motion for reconsideration and new trial, the court explained its reasoning.

> Defendant's counsel notified the Court of the misunderstanding immediately; no arguments had been made, no testimony had been taken, and the jury pool was still present. The Court determined that there was no actual or potential prejudice to either party, and that the right to exercise peremptory challenges was more important than the formality of the timing of the oath.
>
> The Court noted that it would have likely ruled differently had this been a criminal matter as with the administration of the oath, jeopardy would attach.

(Order Denying Reconsideration at 2; CP 403).

Mr. Palm respectfully requests this Court to grant review of the trial court's rulings and the jury verdict against him. The circumstances for – and limitations on – a trial court dismissing jurors after impaneling is an issue of substantial public interest that should be determined by the Supreme Court.

I. IDENTITY OF PETITIONER

John W. Palm, Plaintiff and Appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. Court of Appeals Decision

Mr. Palm seeks review of the Court of Appeals, Division I's unpublished decision, filed July 13, 2015. A copy of the decision is attached in the Appendix at pages A-1 to A-14.

III. Issues Presented for Review

Mr. Palm's petition presents four issues:

A. Under RCW 4.44.290, "if after the formation of the jury, and before verdict, a juror becomes unable to perform his or her duty, the court may discharge the juror." The trial court determined that Juror 20 was qualified to serve as a juror, but allowed the Department to strike her from the impaneled jury. Does RCW 4.44.290 restrict a trial court's authority to reopen voir dire and allow peremptory strikes after forming a jury?

B. The Court of Appeals affirmed the trial court's reopening voir dire, citing State v. Williamson, 100 Wn. App. 248, 996 P.2d 1097 (2000). In 2003, the Legislature amended the statute governing peremptory strikes, RCW 4.44.210, undermining the Williamson opinion. Did the trial court err by reopening voir dire and allowing the Department to exercise a waived peremptory strike?

C. Where "the trial court's practice of jury selection constitutes a material departure from the statute, prejudice is

presumed." State v. Tingdale, 117 Wn.2d 595, 602, 817 P.2d 850, (1991). Here, the trial court exceeded its authority under RCW 4.44.290 and RCW 4.44.210, materially departing from the statutes governing jury selection. Did the Court of Appeals err by not presuming prejudice from the trial court's errors?

D. An occupational disease is one that "arises naturally and proximately out of employment..." RCW 51.08.140. To disprove an occupational disease, the Department presented testimony from two doctors who did not know the nature of Mr. Palm's work or how long he performed it. Does erroneous and misleading expert testimony invalidate the jury's verdict, requiring a retrial?

IV. STATEMENT OF THE CASE

A. Working As An Industrial Electrician Destroyed John Palm's Back, Knees, And Shoulders

After working 38 years as an industrial electrician, John Palm applied for workers' compensation benefits. (Appeal Board Record (AR) 24; CP 3). He could not move without significant pain. "I had pain in my left shoulder, pain in my right shoulder, pain in my lower back, and pain in my left knee." (IAJ Hearing Transcript at 19; CP 3).

The degenerative damage eventually prevented Mr. Palm from working.

> ...When you're young, everything is fine. You keep going. But as you get older, I kept trying to get – to keep up, and it was getting harder and harder, hard to reach overhead, work overhead for any length of time. Bending over and picking stuff up, you did it, but it hurt a lot. The knee would buckle. And this started in my probably my mid-forties you start feeling these things.

(IAJ Hearing Transcript at 21; CP 3).

The unique, demanding requirements of working as an industrial electrician took its toll.

> The work I performed as an industrial electrician involved "rigid conduit", which is another way of saying "steel pipe". I would be handling steel pipe all day – carrying, cutting, fitting. The lifting required with steel pipe was a maximum of 100 pounds up to 20 times per day, with lesser amounts constantly throughout the work day.

(Palm Declaration ¶ 7; Exhibit 1 to IAJ Hearing Transcript; CP 3). Mr. Palm worked with electrical panel boxes that weighed from 70 pounds to a few tons. (Palm Declaration ¶ 7; CP 3). To build electrical panels, he moved steel pieces weighing up to 100 pounds, and had assistance for panels over 100 pounds. (Palm Declaration ¶ 7; CP 3).

A lifetime of this heavy, physical labor left Mr. Palm unable to work. On June 1, 2009, Mr. Palm applied for workers' compensation

benefits, describing injuries and occupation disease to his shoulders, left knee, and low back. (AR 24; CP 3). On September 28, 2009, the Department rejected his claim. (AR 24; CP 3). Mr. Palm appealed, and on July 14, 2010, Industrial Appeals Judge Mitchell Harada reversed the Department's decision, concluding "the repetitive crawling, kneeling, lifting, carrying, working with arms at or above shoulder height, and climbing ladders constitute distinctive conditions of employment with Powertek Electric." (IAJ Decision; AR 59; CP 3).

The Department filed a Petition for Review with the Board of Industrial Appeals, and on October 27, 2010, the Board reversed Judge Harada and affirmed the Department's denial. (Board Decision and Order; AR 21; CP 3). Mr. Palm appealed for a trial de novo in Whatcom County Superior Court.

B. The Trial Court Reopened Voir Dire And Allowed The Department To Use A Waived Peremptory Strike

Mr. Palm's case went to trial on June 11, 2013. (VRP 3). After making a series of pretrial rulings on witness transcripts, the court began voir dire. (VRP 31). Early in the proceedings, Juror 20 raised her hand when asked if she knew John Palm. (VRP 33). The court questioned whether she could be a fair, impartial juror.

> THE COURT: Um, well, again, I don't want to put you in a difficult position by asking you to serve on a jury if you think it would be difficult to be fair. But that was your statement that you would find it difficult to be fair and impartial.
>
> JUROR NO. 20: (Nods).
>
> THE COURT: I'm sorry, you need to answer out load so she knows what to write down.
>
> JUROR NO. 20: Sorry. Yes. Yes.
>
> THE COURT: Sometimes being on a jury is difficult. Do you think it would be too much to ask, do you think you just couldn't do it?
>
> JUROR NO. 20: I could.
>
> THE COURT: Would it cause a degree of discomfort or do you think you would have any reluctance to make the decision that you believe to be right because of the acquaintance?
>
> JUROR NO. 20: No.

(VRP 34-35). Neither counsel moved to strike Juror 20 for cause.

Later in voir dire, counsel for the Department returned to Juror 20, asking if her acquaintance with Mr. Palm would interfere with her judgment.

> MR. GARLING: Would that affect your ability to take the totality of the evidence and sift it and come to a decision?
>
> JUROR NO. 20: I don't think so.

> MR. GARLING: Why do you say that? Because you are a friend and we love our friends and we want to do good things for our friends but we also want to be fair.
>
> JUROR NO. 20: Because I think I am a very fair person and I can see both sides.
>
> MR. GARLING: All right. And if you don't mind, what in your experience has allowed you to make that assessment? What kind of situations have you been in where you have been forced to be fair when there have been possibly people that you know you had to decide between the two, like your children, maybe?
>
> JUROR NO. 20: I have been on jury panels four times.

(VRP 97-98) Again, counsel did not move to strike Juror 20 for cause.

The Department's trouble began when the parties exercised their peremptory strikes. After both used their first two, counsel for plaintiff used his third to strike Juror 13. (VRP 125). This made Juror 20 next in line for the 12th seat. The Court asked the Department for its last strike.

> THE COURT: ...And the Department's third and final. As to the first 12.
>
> MR. GARLING: Thank you, okay.
>
> THE COURT: *Waves the third.* Okay. Now, I'll have the bailiff indicate where the 12th juror is.
>
> THE BAILIFF: The 12th juror is No. 20.

> THE COURT: Okay. So we have the presumptive alternate, then, would be No. 21. Each party has a right to one challenge as to an alternate.

(VRP 126).

Here, counsel for the Department recognized his mistake, but the trial court would not let him exercise the waived peremptory.

> MR. GARLING: I don't understand. Could you say that again, please?
>
> THE COURT: Yes. We have the 12, the 12th would be No. 20, and, then, there is -- we'll have one alternate and you each have one challenge as to the alternate.
>
> MR. MAXWELL: I'll challenge Juror No. 21.
>
> THE COURT: What?
>
> MR. MAXWELL: I'll challenge Juror No. 21.
>
> THE COURT: Okay. If 21 would step out so the presumptive alternate would then be No. 22 and the Department still has a challenge.
>
> MR. GARLING: Oh, No. 20, we challenge No. 20. Because you called No. 20, correct?
>
> THE COURT: No.
>
> THE BAILIFF: You stay right there.
>
> THE COURT: Twenty would be one of the first 12.
>
> MR. GARLING: I'm sorry.
>
> THE COURT: So the presumptive alternate would now be No. 22.

MR. GARLING: No problem.

(VRP 126-27).

When the Department did not strike the alternate, the court had the clerk swear in the jury. (VRP 127-28) ("Okay. The jury is impaneled"). The Department then requested a side-bar and asked to reopen voir dire. The court agreed and confirmed for a third time that Juror 20 could be fair and impartial. (VRP 128-29). ("Would that cause you to or influence you to change your decision or opinion – No"). Neither party moved to strike Juror 20 for cause. The Department requested a second side bar. (VRP 129).

After an off-the-record discussion with counsel, the trial court reopened voir dire and allowed the Department to strike Juror 20 with its remaining peremptory.

> What I'm going to do is, because we haven't had any evidence or testimony, we have just had the jury seated by the bailiff, allow the jury selection to continue but to give each party one additional challenge, if they wish to exercise an additional challenge. So we have juror – the jurors seated in order, and I guess we should begin to see if the Department wishes an additional challenge?
>
> MR. GARLING: Yes, I would, Your Honor, and we would respectfully excuse Juror No. 20.
>
> THE COURT: Okay. No. 20 step down and then we would then have everybody remain in the same order, so Juror No. 22 who was the alternate would be now

> No. 12, and plaintiff is allowed an additional challenge...

(VRP 129-30). Counsel for Mr. Palm objected, but the trial court swore in the new jury and proceeded to trial. (VRP 129-30). The jury later returned a verdict for the Department. (Verdict; CP 455).

Mr. Palm appealed to the Court of Appeals, Division I, challenging the jury's verdict and the trial court's reopening of voir dire. In an unpublished opinion, the Court upheld the trial court's discretion.

> The court also noted on the record that it "t[ook] responsibility" for the Department's counsel's misunderstanding of the jury selection process because the court had not explained the procedure.
>
> This ruling plainly demonstrates that the court did not abuse its discretion by reopening the jury selection process. Palm does not dispute that there was a misunderstanding that required a remedy. The parties had not made any argument or presented any evidence when the court reopened jury selection. And the remainder of the venire was still present from which to draw the replacement juror.

Palm v. Dept. of Labor and Indus., No. 71816-9-I, slip op. at 4 (July 13, 2015).

Because the trial court does not have broad discretion to change a jury's composition after impaneling, Mr. Palm now seeks review by the Supreme Court.

ARGUMENT

V. STANDARD OF REVIEW

In a typical case, this Court reviews a trial court's selection of jurors for an abuse of discretion. State v. Tingdale, 117 Wn.2d 595, 599, 817 P.2d 850 (1991) ("standard of review for excusing jury venire members is abuse of discretion"). However, a trial court abuses its discretion when it materially departs from the statutes governing jury selection. Tingdale, 117 Wn.2d at 600.

Furthermore, this Court should review the proper construction of RCW 4.44.210 and RCW 4.44.290, de novo. Buecking v. Buecking, 179 Wn.2d 438, 443, 316 P.3d 999 (2013) cert. denied, 135 S. Ct. 181, 190 L. Ed. 2d 129 (2014) ("questions of statutory construction are reviewed de novo").

Finally, a trial court abuses its discretion if it makes a decision for untenable reasons. A decision is "based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

VI. THE COURT SHOULD ACCEPT REVIEW TO DETERMINE THE LIMITS OF THE TRIAL COURT'S AUTHORITY

A. After Swearing In A Jury, The Trial Court May Only Dismiss Jurors For Cause

Washington recognizes two challenges to potential jurors: for cause and peremptory. RCW 4.44.120; State v. Saintcalle, 178 Wn. 2d 34, 76, 309 P.3d 326 cert. denied, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013) (Gonzalez, J., concurring). A trial court may excuse jurors for cause at any point in a trial. But no opinion from this Court has described when a trial court may no longer excuse a juror for no cause – based on a party's unused peremptory strike.

Three statutes, incorporated expressly into CR 47(e), define when a party may and may not exercise a peremptory. First, under RCW 4.44.210, parties may exercise peremptory strikes until they run out, waive further challenges or voir dire ends.

> The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. During this alternating process, if one of the parties declines to exercise a peremptory challenge, then that party may no longer peremptorily challenge any of the jurors in the group for which challenges are then being considered and may only peremptorily challenge any jurors later added to that group. A refusal to challenge by either party in the said order of alternation shall not prevent the adverse party from using the full number of challenges.

RCW 4.44.210.

Second, voir dire ends when the court swears in the jury.

> When the jury has been selected, an oath or affirmation shall be administered to the jurors, in substance that they and each of them, will well, and truly try, the matter in issue between the plaintiff and defendant, and a true verdict give, according to the law and evidence as given them on the trial.

RCW 4.44.260.

Third, once the jury is sworn in, it is impaneled or formed and has an independent status at law. Under RCW 4.44.290, the trial court may dismiss a juror after this point only if "unable to perform his or her duty."

> If after the formation of the jury, and before verdict, a juror becomes unable to perform his or her duty, the court may discharge the juror. In that case, unless the parties agree to proceed with the other jurors: (1) An alternate juror may replace the discharged juror and the jury instructed to start their deliberations anew; (2) a new juror may be sworn and the trial begin anew; or (3) the jury may be discharged and a new jury then or afterwards formed.

RCW 4.44.290. Civil rule 47(b) describes how a trial court may substitute an alternate juror for the one discharged.

None of these statutes permit a trial court to reopen voir dire after swearing in a jury and allow the parties to exercise additional peremptories. By allowing that here, the trial court reintroduced the

arbitrary dismissal of jurors that members of this Court have criticized.

> The actual use of peremptory challenges within our jury selection process presents a divergence between theory and practice. In theory, peremptory challenges are supposed to further the goal of an impartial jury. *See Press–Enterprise Co. v. Superior Court,* 464 U.S. 501, 510 n. 9, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("The process is to ensure a fair impartial jury, not a favorable one.") In practice, however, litigants simply use peremptory challenges to remove the prospective jurors they perceive to be least favorable to their position, regardless of whether such prospective jurors possess biases so severe as to render their participation unfair.

Saintcalle, 178 Wn.2d at 79-80 (Gonzalez, J., concurring) (citation omitted).

One reported case, State v. Williamson, 100 Wn. App. 248, 996 P.2d 1097 (2000), suggests otherwise. In Williamson, a juror disclosed to the trial judge after the State's first witness, that she knew the alleged victim. Rather than dismiss the juror for cause, the court reopened voir dire and allowed the State to challenge the juror with its remaining peremptory. On appeal, the Court of Appeals found no error or prejudice.

> No Washington case addresses the specific challenge here—a peremptory challenge after the jury has been impaneled, sworn, and the plaintiff presents its first witness. But neither the court rule nor the statute prohibits a peremptory challenge to an impaneled and

> sworn juror based on unforeseen circumstances. CrR 6.4(e); RCW 4.44.210. And the majority of courts grant the trial judge wide discretion in these circumstances.

Williamson, 100 Wn. App. at 254.

No published Washington opinion has followed Williamson, and nationwide, state and federal courts increasingly disapprove using peremptories after a jury is impaneled. See, e.g., U.S. v. Harbin, 250 F.3d 532, 539 (7th Cir. 2001) ("peremptory challenges by their very nature are a jury selection tool, and have historically and uniformly been limited to the pre-trial jury selection process"); People v. Cottle, 39 Cal. 4th 246, 258, 138 P.3d 230, 237 (2006) ("once a jury has been sworn, the court lacks authority to reopen jury selection proceedings").

Furthermore, the Court in Williamson relied on an earlier version of RCW 4.44.210, adopted in 1881. When the Legislature amended the statute in 2003, it clarified that parties waive their peremptories when they fail to challenge a juror currently among those to be seated.

Compelling reasons exist for this Court to restrict a trial court's ability to reopen voir dire – and extend the use of peremptories after a jury has been sworn.

B. The Court Appropriately Presumes Prejudice From This Material Error

Because jury deliberations are secret, proving prejudice from striking one juror and adding another is close to impossible.

> The error presented here is precisely the type of error that "defies harmless error analysis." No one argues that the alternate who replaced Juror M was somehow biased, and it is impossible to determine what impact, if any, the substitution had on the jury's ultimate decision. This would be true of many errors relating to peremptory challenges, because the existence of challenges for cause presumably removes anyone with obvious bias or potential for bias, and we cannot assess how the makeup of the jury may have impacted the decisionmaking process. If the inability to adequately assess harmlessness were the only consideration, then we could immediately conclude that automatic reversal is appropriate for all errors involving peremptory challenges.

U.S. v. Harbin, 250 F.3d 532, 545 (7th Cir. 2001).

This Court distinguishes reversible from harmless error in jury selection by examining whether there was a material departure from the statutory procedure.

> [A] litigant is entitled to have his case submitted to a jury selected in the manner required by law; and further, that, if the selection is not made substantially in the manner required by law, an error may be claimed without showing prejudice, which will be presumed. But it will only be presumed when there has been a *material* departure from the statute.

State v. Tingdale, 117 Wn.2d 595, 602, 817 P.2d 850 (1991). Here, the trial court departed materially from the relevant statutes by allowing the Department to strike a juror on an impaneled jury. Once the Court swore in the jury, it could remove jurors only for cause.

CONCLUSION

Petitioner John Palm requests this Court to accept review of his case, reverse the Court of Appeals and remand for a new trial. He also requests an award of reasonable attorneys' fees under RCW 51.52.130. Because the trial court violated RCW 4.44.210 and RCW 4.44.290 by reopening voir dire and allowing the Department to exercise a peremptory strike on a sworn juror, the lower court materially departed from the statutory rules for jury selection. This was prejudicial per se and entitles Mr. Palm to a new trial.

DATED this 11 day of August, 2015.

BURI FUNSTON MUMFORD, PLLC

By ______________________
Philip J. Buri, WSBA #17637
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Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of this **Petition for Review** to:

Paul Weideman
Assistant Attorney General
WSBA No. 42254; Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

DATED this 11th day of August, 2015.

Beck Abdelbaki

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 AUG 12 AM 10: 12

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN W. PALM,	)	No. 71816-9-I
Appellant,	)	DIVISION ONE
v.	)	
STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES,	)	UNPUBLISHED
	)	FILED: July 13, 2015
Respondent.	)	

2015 JUL 13 AM 10: 31
COURT OF APPEALS DIV I
STATE OF WASHINGTON

Cox, J. — John Palm appeals the denial of his worker's compensation claim. The trial court did not abuse its discretion in reopening jury selection to permit the Department of Labor and Industries to exercise a peremptory challenge. The court properly instructed the jury and did not abuse its discretion in rejecting an instruction proposed by Palm. And the court properly exercised its discretion in denying the post-verdict motion for judgment as a matter of law. We affirm.

Palm sought worker's compensation benefits for medical conditions in his shoulders, back, and left knee. Both the Department and the Board of Industrial Insurance Appeals (BIIA) denied his claim, concluding that he did not suffer an "occupational disease."

On appeal to the superior court, a trial de novo ensued. During voir dire, one prospective juror stated that Palm was a "close acquaintance." The court questioned the juror, and she stated that she believed that she could be fair. Neither party exercised a peremptory challenge to this juror prior to the impaneling and swearing of the jury.

But just after the jury was sworn in, the Department notified the court that it had intended to exercise a peremptory challenge to the juror who had indicated she was Palm's close acquaintance. The Department had not done so prior to impanelling the jury because it misunderstood the local jury selection process for the county. Over Palm's objection, the court reopened the jury selection process to allow the Department to exercise a peremptory challenge to the juror. The court also granted Palm an additional peremptory challenge.

At the close of evidence, Palm asked the court to instruct the jury that "[a] worker is taken as he is, with all his pre-existing frailties and bodily infirmities."[1] The trial court declined to provide this instruction, stating that Palm could make his argument with the other jury instructions in the case.

After deliberations, the jury found that the BIIA decision to deny Palm's claim was correct. Following the verdict, Palm moved for judgment as a matter of law, arguing that the Department had failed to provide sufficient evidence that his injuries were not an occupational disease. The court denied this motion.

Palm appeals.

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[1] Clerk's Papers at 333.

JURY SELECTION

Palm argues that he is entitled to a new trial because the court reopened jury selection to permit the Department to exercise a peremptory challenge after impaneling and swearing in the initial jury. We disagree.

Parties have the right to trial by an impartial jury. But parties "ha[ve] no right to be tried by a particular juror or by a particular jury."[2]

If the jury selection process substantially complied with the relevant statutes, a party must show prejudice to obtain a new trial.[3]

This court reviews for abuse of discretion a trial court's decision to reopen jury selection after the jury has been impaneled and sworn.[4]

Here, the court did not abuse its discretion by allowing the Department to use a peremptory challenge after the initial jury had been sworn and impaneled.

The court detailed, in writing, the circumstances underlying its decision:

> An apparent misunderstanding of local jury selection procedures resulted in this civil jury having been sworn at a time when [the Department's] counsel believed that the court was still accepting peremptory challenges. In order to afford both parties a fair trial, the Court deemed it appropriate to allow [the Department] to exercise its challenge and the court further granted an additional peremptory challenge to each party.
>
> [The Department's] counsel notified the Court of the misunderstanding immediately: no argument had been made, no testimony had been taken, and the jury pool was still present. The Court determined that there was no actual or potential prejudice to either party, and that the right to exercise peremptory challenges

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[2] State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995).

[3] State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

[4] State v. Williamson, 100 Wn. App. 248, 253, 996 P.2d 1097 (2000).

was more important than the formality of the timing of the oath.[5]

The court also noted on the record that it "t[ook] responsibility" for the Department's counsel's misunderstanding of the jury selection process because the court had not explained the procedure.

This ruling plainly demonstrates that the court did not abuse its discretion by reopening the jury selection process. Palm does not dispute that there was a misunderstanding that required a remedy. The parties had not made any argument or presented any evidence when the court reopened jury selection. And the remainder of the venire was still present from which to draw the replacement juror.

Significantly, as the court stated in its written decision, Palm cannot show prejudice. During voir dire, Palm had the opportunity to question the juror who joined the panel after the Department used its peremptory challenge. Palm also received an additional peremptory challenge when the court reopened jury selection.

State v. Williamson also supports our conclusion.[6] In that case, after the first witness had begun to testify, a juror informed the court that she knew a different witness in the case.[7] The court denied a challenge for cause, but allowed the State to use a peremptory challenge.[8] Division Three of this court

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[5] Clerk's Papers at 403.

[6] 100 Wn. App. 248, 996 P.2d 1097 (2000).

[7] Id. at 252.

[8] Id.

held that it was not an abuse of discretion for the court to reopen voir dire in those circumstances.[9]

Comparing the present case to Williamson makes it even clearer that the court did not abuse its discretion. Unlike in Williamson, "[N]o argument had been made [and] no testimony had been taken."[10] Additionally, the court here granted Palm an additional peremptory challenge when it reopened voir dire.

Thus, the court did not abuse its discretion by reopening voir dire.

Palm argues that the procedure in this case created a non-random jury. This makes no sense.

The mere fact that the Department used a peremptory challenge when jury selection was reopened, rather than before, does not affect the randomness of the jury drawn from this venire. The replacement juror came from the same venire as the original juror. And nothing else suggests a lack of randomness in the ultimate selection process.

Palm also argues that this court should presume prejudice. He is mistaken.

He cites Brady v. Fibreboard Corp. for this proposition.[11] That case states that courts presume prejudice if "statutory jury selection procedures are ***materially*** violated."[12] Here, Palm fails to identify anything that expressly or

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[9] Id. at 253-55.

[10] Clerk's Papers at 403.

[11] 71 Wn. App. 280, 857 P.2d 1094 (1993).

[12] Id. at 284 (emphasis added).

impliedly prohibits reopening jury selection after administering the oath under the circumstances of this case. Thus, there is no material violation of the statutory jury selection process. Rather, the court substantially complied with this process. For these reasons, this argument is unpersuasive.

JURY INSTRUCTION

Palm argues that the court abused its discretion by failing to give a jury instruction he requested. Because the jury instructions given were sufficient, the court properly exercised its discretion by rejecting the proposed instruction.

This court reviews legal errors in jury instructions de novo.[13] But we "review a trial court's choice of jury instructions for abuse of discretion."[14] "The number of instructions necessary to present a theory of a case is within the trial court's discretion."[15] Whether to give a particular instruction is also within the trial court's discretion.[16]

"Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law."[17]

Here, Palm asked for the court to instruct the jury that:

> A worker is taken as he is, with all his pre-existing frailties and bodily infirmities. The provisions of the workmen's

[13] Fergen v. Sestero, 182 Wn.2d 794, 803, 346 P.3d 708 (2015).

[14] State v. Douglas, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005).

[15] Tennant v. Roys, 44 Wn. App. 305, 308, 722 P.2d 848 (1986).

[16] Fergen, 182 Wn.2d at 802.

[17] Id. at 803.

> compensation act are not limited in their benefits to such persons only as approximate physical perfection, for few, if any, workers are completely free from latent infirmities originating either in disease or in some congenital abnormality.[18]

The trial court noted that this instruction correctly stated the law. But the court declined to give this instruction because another instruction—the proximate cause instruction—allowed Palm to make the same argument. That other instruction stated:

> The term "proximate cause" means a cause which in a direct sequence produces the condition complained of and without which such condition would not have happened.
>
> There may be one or more proximate causes of a condition. For a worker to recover benefits under the Industrial Insurance Act, the work conditions must be a proximate cause of the alleged condition for which entitlement to benefits is sought. ***The law does not require that the work conditions be the sole proximate cause of such condition.***[19]

This court has noted that this "multiple proximate cause" language "'is but another way of stating the fundamental principle that, for disability assessment purposes, a workman is to be taken as he is, with all his preexisting frailties and bodily infirmities.'"[20]

The proximate cause instruction allowed Palm to argue his theory of the case. And he did so. In closing argument, Palm argued that the jury had to accept Palm with his infirmities:

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[18] Clerk's Papers at 333.

[19] Clerk's Papers at 448 (emphasis added).

[20] City of Bremerton v. Shreeve, 55 Wn. App. 334, 340, 777 P.2d 568 (1989) (quoting Wendt v. Dep't of Labor and Indus., 18 Wn. App. 674, 682-83, 571 P.2d 229 (1977)).

> The, um, next thing I want to talk about, there is, you know, this is all being blamed on Mr. Palm being old and heavy. You will recall that the instructions indicate that the work conditions must be "a" cause of his medical problems. They don't have to be the sole cause or the only cause or the major contributing cause. They have to be a cause and that's because we take our workers as they come. Some workers are heavy. Some workers are strong. Some workers are weak. Some workers are like he-man. They all get covered no matter what their situation is.[21]

Thus, Palm was able to argue his theory of the case with the court's instructions to the jury. Accordingly, the court did not abuse its discretion by declining to give Palm's proposed instruction.

Palm argues that the proximate cause instruction did not allow him to argue his theory of the case. He argues that the court's instructions, which instructed the jury to disregard arguments not supported by the law, allowed the jury to ignore his argument as the "mere opinion of counsel."

This record shows otherwise. As we discussed earlier in this opinion, the proximate cause instruction supported Palm's argument, and he was able to use it to frame his argument. This proximate cause instruction was not the "mere opinion of counsel" that the jury could ignore.

JUDGMENT AS A MATTER OF LAW

Palm argues that he was entitled to judgment as a matter of law. Specifically, he argues that substantial evidence does not support the jury's verdict. We disagree.

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[21] Report of Proceedings (June 13, 2013) at 219-20.

In an appeal from a BIIA decision, the superior court reviews the decision de novo.[22] The party challenging the BIIA decision has the burden of establishing that the BIIA's findings are incorrect.[23]

We review a superior court's decision on a BIIA appeal under the usual civil standards.[24] When reviewing the denial of a motion for judgment as a matter of law, this court applies the same standard as the superior court.[25] "The standard on a motion for judgment as a matter of law mirrors that of summary judgment."[26] Granting judgment is appropriate if, "viewing the evidence in the light most favorable to the nonmoving party, substantial evidence exists to support the verdict for the nonmoving party."[27]

A worker with an "occupational disease" is entitled to worker's compensation benefits.[28] An "occupational disease" is one that "arises naturally

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[22] Yuchasz v. Dep't of Labor and Indus., 183 Wn. App. 879, 886, 335 P.3d 998 (2014).

[23] Cochran Elec. Co. v. Mahoney, 129 Wn. App. 687, 692, 121 P.3d 747 (2005).

[24] Malang v. Dep't of Labor and Indus., 139 Wn. App. 677, 683, 162 P.3d 450 (2007).

[25] Grove v. PeaceHealth St. Joseph Hosp., 182 Wn.2d 136, 143, 341 P.3d 261 (2014).

[26] Washburn v. City of Fed. Way, 178 Wn.2d 732, 752-53, 310 P.3d 1275 (2013).

[27] Grove, 182 Wn.2d. at 143.

[28] RCW 51.32.180.

and proximately out of employment . . . ."[29]

Here, the court properly denied Palm's post-verdict motion for judgment as a matter of law. That is because substantial evidence supported the jury's verdict.

In this case, the question before the jury was whether the BIIA had correctly determined that Palm did not have an occupational disease.

Dr. David Karges, one of the Department's expert witnesses, testified that Palm's medical conditions "were primarily the result of increase in age, living, and exogenous obesity, and deconditioning, too."[30] He further testified that "the main factor, by far the only proven factor [Palm] ha[d] that really effected [sic] [his] knees, was his longstanding overweight problem."[31]

Similarly, Dr. Gary Bergman testified that age was "[t]he primary cause" of Palm's shoulder injuries.[32] He also testified that the condition of Palm's shoulders was "very typical" of someone Palm's age.[33]

This testimony from two doctors was substantial evidence supporting the jury's verdict that Palm's work did not cause his medical conditions. Thus, there was no occupational disease that required payment of worker's compensation benefits.

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[29] RCW 51.08.140.

[30] Clerk's Papers at 278.

[31] Id. at 283.

[32] Id. at 250.

[33] Id. at 253.

Further, although neither party raised this argument, Palm's motion for a judgment as a matter of law was untimely. Under CR 50(a)(2), "[a] motion for judgment as a matter of law may be made at any time before submission of the case to the jury." If the motion is not granted, the moving party "may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment."[34]

Here, Palm first filed a motion for judgment as a matter of law on June 21, eight days after the jury returned its verdict. Palm has not pointed to anything in the record indicating that this motion was a renewal of a motion made before the case was submitted to the jury. And our review of this record confirms that his motion was not a renewal. Thus, the motion was untimely.

Palm argues that "no fair-minded person could have decided that [he] did not suffer occupational diseases."[35] This argument is merely a disagreement with the jury's verdict.

Palm uses two portions of the record to support this argument. First, Palm points to his cross-examination of the doctors who testified for the Department. His cross-examination revealed that Dr. Karges was unaware of the specifics of Palm's job duties. And Dr. Bergman testified that he could not recall Palm telling him about the specifics of his work.

Second, Palm points to Dr. Karges's use of an incorrect definition of "occupational disease." Dr. Karges testified that "from the medical standpoint,

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[34] CR 50(b).

[35] Brief of Appellant at 26.

when I think about occupational disease, that implies a type of work that usually has one or two motions that are extremely repetitive."[36] While, under the law, an "occupational disease" is one that "arises naturally and proximately out of employment."[37]

Neither of these alleged shortcomings in the testimony of these witnesses is sufficient to show there was not substantial evidence to support the jury's verdict. In closing, Palm argued to the jury that it should not rely on the Department's expert witnesses for the reasons we previously identified. But it is clear that the jury rejected these arguments. We do not, on appeal, reweigh evidence before the finder of fact where there is substantial evidence to support the verdict. There is such evidence here. The trial court properly denied this post-verdict motion.

Palm argues that his case resembles Chalmers v. Department of Labor and Industries.[38] But that case is distinguishable.

In Chalmers, an expert witness "based his opinion largely, if not entirely, upon his information that the compound used by decedent when he suffered his near fatal exposure on March 28, 1960, was a compound known as Epoxylite."[39] But the decedent's employer did not use Epoxylite at the time of the accident.[40]

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[36] Clerk's Papers at 282.

[37] RCW 51.08.140.

[38] 72 Wn.2d 595, 434 P.2d 720 (1967).

[39] Id. at 599.

[40] Id. at 600.

The supreme court held that because the expert's opinion was "founded on erroneous factual data" it was insufficient to establish the cause of the decedent's death.[41] Thus, the defendant was entitled to judgment as a matter of law.

Chalmers does not resemble the present case. In Chalmers, the expert noted that the alleged exposure to Epoxylite was "[e]xtremely important" to his opinion.[42] Here, Palm has not shown that a key assumption underlying the experts' opinions was false. Dr. Karges testified that he believed Palm had worked as an electrician for approximately 15 or 16 years, when he had actually work as an electrician for over 30 years. But nothing in Dr. Karges's testimony established that the duration of Palm's work was important to his opinion.

Similarly, while Dr. Karges was unaware of some details of Palm's work duties, on redirect examination he testified that his opinion had not changed. Dr. Bergman also testified that his opinion had not changed after Palm had cross-examined him on the details of Palm's work duties. Thus, because the experts' opinions did not depend on erroneous factual data, Chalmers is distinguishable.

ATTORNEY FEES

Palm seeks an award of attorney fees on appeal. Because he is not entitled to an award, we deny this request.

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[41] Id. at 601.

[42] Id. at 600.

Under RCW 51.52.130, a worker who obtains reversal of a BIIA decision on appeal is entitled to an award of attorney fees. Because we do not reverse the BIIA decision, Palm is not entitled to attorney fees.

We affirm the judgment affirming the BIIA decision that Palm does not suffer from an occupational disease.

Cox, J.

WE CONCUR:

Becker, J.