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NO. 49246-6-II

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

NEIL R. BECK, *APPELLANT,*

v.

GLACIER NORTHWEST, INC., *RESPONDENT.*

PETITION FOR REVIEW TO THE SUPREME COURT OF WASHINGTON

BUSICK HAMRICK PALMER PLLC
STEVEN L. BUSICK
Attorney for Appellant/Petitioner

By Steven L. Busick, WSBA #1643
Busick Hamrick Palmer PLLC
PO Box 1385
Vancouver, WA 98666
360-696-0228

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INTRODUCTION

The appellant, Neil R. Beck, petitions the Supreme Court of the State of Washington for review of the Unpublished Opinion of the Court of Appeals, Division II, filed on May 23, 2017.

ISSUE FOR REVIEW

1. Did the Court of Appeals error in holding that any error in giving the attending physician instruction via *Clark County v McManus*, 185 Wn. 2d 466, 372 P.2d 764 (2016) was harmless, though there was no attending physian who testified in the case?

A. Did the Court of Appeals error in refusing to apply an exception to the attending physician instruction in a worker compensation appeal where the purported attending physician terminated the Doctor patient relationship within a month after commencing treatment?

B. Was there prejudice in giving the attending physician instruction when the same doctor two months later determined that the worker could return to his job of injury as a concrete mixer truck driver, which resulted in his treatment and time loss benefits ending, and his claim helping closed?

C. Should the Court of Appeals have considered other evidence supporting denial of benefits when Glacier Northwest relied in closing argument on distinguishing the discharged

attending physician verses Mr. Beck's only medical witness who had conducted three independent medical examinations of him?

CONSIDERATIONS FOR ACCEPTANCE OF REVIEW

Mr. Neil Beck maintains that the Unpublished Opinion of the Court of Appeals, Division II, is in conflict with the decisions of the Supreme Court and the Court of Appeals as to when to give the attending physician instruction in worker compensation appeals, and what constitutes prejudice in giving and not giving the instruction.

STATEMENT OF THE CASE

Neil Beck was a 42 year old concrete mixer truck driver for Glacier Northwest, Inc., working out of a batch plant in Woodland, Washington. On May 17, 2005, he was injured sitting on a stool, when a coworker grabbed him in a bear hug from behind, picked him up with the stool, twisting him down to the floor, bringing him back up again, and sitting him back down still on the stool. Mr. Beck filed a claim for industrial injury with the self insured employer, Glacier Northwest. The claim was allowed by the Department of Labor and Industries. Mr. Beck received conservative treatment and his claim was closed by the Department on September 2, 2008, with a permanent partial disability award of a category 2 for dorsal region or thoracic impairment. Clerk's papers No. 6, Certified Appeal Board Record, Jurisdictional History page 152.

On June 23, 2009, Mr. Beck filed an application to reopen his claim for a worsening of his thoracic condition. The reopening application was denied by the Department, Mr. Beck appealed to the Board of Industrial Insurance Appeals, and following a full evidentiary hearing before the Board, the Department order was reversed and further treatment was allowed. Glacier Northwest then appealed the Board's determination to Superior Court for Cowlitz County, and the Court without a jury affirmed the Board on February 11, 2011, and the claim was reopened for further treatment. CP No. 6, CABR, page 152-153.

Mr. Beck had moved to Alaska in the interim and received conservative treatment with a neurologist and a pain management doctor, having received an epidural injection in his thoracic spine with two weeks of relief. Mr. Beck describes his pain as a stabbing, back to front, between his shoulder blades as if he has been shot with an arrow. In August 2012, Mr. Beck moved back to Washington to Sequim, where he was referred to Dr. Guy Earle by the nurse case manager hired by the private claim administrator Eberle Vivian for Glacier Northwest. CP No. 6, CABR, N. Beck, 5-29-14; page 29, line 14; page 30, line 16, 18, 24 and 26; page 33, line 16 and 21; page 38, lines 5, 8, 13 and 15.

Dr. Earle saw Mr. Beck on three occasions, September 6, 2012, September 20, 2012, and October 4, 2016. On September 6, 2012, Dr. Earle reviewed a thoracic Magnetic Resonance Imaging study (MRI) performed in March 2011, that showed two herniated thoracic disks at T5-6 and T6-7. Dr. Earle diagnosed a thoracic sprain injury with annular tears at T5-6 and T6-7,

likely producing chronic discogenic pain. On September 20, 2012, Dr. Earle received a job analysis for a concrete mixer truck driver and disapproved the job, requiring lifting and carrying up to 50 pounds. CP No. 6, CABR, Dr. Earle, page 12, line 1; page 13, line 1; page 16, line 25; page 17 line 2; page 20, line 9; page 22, line 18; page 50, lines 14, 18 and 21.

On October 4, 2012, Mr. Beck presented Dr. Earle with a brochure from a surgery center in Houston, Texas, where they could do laser surgery on leaking disks. Mr. Beck asked Dr. Earle to help him obtain another MRI for consideration of laser surgery. Dr. Earle was not happy about the prospect of laser surgery, Mr. Beck was insistent, and Dr. Earle terminated the doctor patient relationship. Then, five months later on December 3, 2012, Dr. Earle signed off on the same job analysis that he had disapproved earlier that Mr. Beck could return to work as a concrete mixer truck driver without restrictions. Mr. Beck's time loss benefits were terminated on December 4, 2012, and his claim was closed without further treatment. CP No. 6, CABR, Dr. Earle, page 46, line 22; page 51, lines 18 and 21; page 53, line 9, 11, 19, 22; page 54 lines 4 and 7; and N. Beck, page 47, line 14.

Dr. Thomas Gritzka, an occupational orthopedist, had conducted independent medical examinations of Mr. Beck on October 10, 2006, December 15, 2009, and February 12, 2014. On the first examination, Dr. Gritzka had diagnosed chronic thoracic sprain with probable intraspinous ligament rupture. On the second examination, Dr. Gritzka reviewed an MRI of the thoracic spine dated June 23, 2009, which showed a disk herniation at T6-7, impinging on the front of the thoracic cord on the left causing mild

flattening of the spinal cord. On the third examination, an MRI of the thoracic spine on April 29, 2013, showed an additional disc herniation at T4-5, and a new finding of bony spurring at T5-6. CR No. 6, CABR, Dr. Gritzka, page 19, lines 4 and 22; page 26, line 5; and page 27, lines 9 and 12; page 36, line 7.

Dr. Gritzka testified that doctors do not know what is wrong with Mr. Beck's mid back, and do not have objective data into his residual functions. Mr. Beck has not reached maximum medical improvement. Mr. Beck needs flexion extension x-rays of his thoracic spine, and a performance based physical capacities evaluation of his lower back to determine what he is capable of doing. Mr. Beck was not able to return to work from June 15, 2009, and on April 13, 2011, while his reopening application was pending before the Board of Industrial Insurance Appeals and on appeal to Superior Court for Cowlitz County and he was not receiving treatment, and December 4, 2012, through May 10, 2013, when the Department of Labor and Industries last acted upon his claim. CP No. 6, CABR Dr. Gritzka, page 46, lines 11 and 25; page 47, lines 11 and 18; page 48, line 17; and page 50, line 2; page 52, line 2.

The self insured employer also called to testify before the Board of Industrial Insurance Appeals two other doctors who conducted one time independent medical examinations of Mr. Beck. Dr. Douglas Bald conducted his examination on October 29, 2009, and Dr. James Harris conducted his examination on November 15, 2012. Glacier Northwest also introduced surveillance video through a private investigator, showing Mr. Beck engaged in limited construction activities on his newly purchased nineteenth century fixer-upper home in Sequim, Washington, on which the major construction

activities were contracted out, and showed Mr. Beck operating the Kubota tractor his wife purchased for him in Alaska, holding their young son Matthew on his lap while he spread gravel for a driveway, and building a 8 x 12 foot front porch so they could use their front door. CP No. 6, CABR, S. Beck, 10-15-14, page 51, line 16, and N. Beck, 10-15-14, page 60, line 20.

Following an evidentiary hearing before an industrial appeals judge, the Board issued its decision in favor of Glacier Northwest on the issues of the need for further treatment and time loss benefits. Mr. Beck appealed the decision to Superior Court for Cowlitz County, and the case proceeded to a six person jury trial on May 3, 4 and 5. At the conclusion of reading the witness testimony before the Board, the court instructed the jury on the law and gave instruction No. 5, the attending physician instruction proposed by Glacier Northwest, which reads 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 though in your deliberations.

Mr. Beck had taken exception to the giving of instruction No. 5 on the basis that Dr. Earle was the only doctor that could be considered the attending physician for Mr. Beck during the period of time in question here, commencing December 4, 2012, and he had discharged Mr. Beck as his patient as of October 4, 2012. Giving the instructions would give Glacier Northwest the authority to argue that Dr. Earle was the attending physician. Report of Proceedings, page 1.

Early on in the closing argument, Glacier Northwest did argue that Dr. Earle was Mr. Beck's attending physician, Dr. Gritzka was not, and Dr. Earle was the more creditable witness and should be believed over Dr. Gritzka. On the issues of whether Mr. Beck has reached maximum medical improvement, or is in need of further treatment, specifically whether he needs a performance based physical capacity evaluation as recommended by Dr. Gritzka. Glacier Northwest argued:

> But we've already asked the attending physician – Dr. Earle – and he's like no it's- it's- it's- it's not recommended. And - and above that he's the attending physician.
>
> So now the law about the attending physician – the reason they're entitled to special consideration under the law is because the law views attending physicians as people who have seen you on more than one occasion and are treating you.
>
> And so the law presumes that they know you pretty well. They know you pretty well – that's your – that's your – that's your doctor. Your doctor probably knows you better than the IME examiner. That's what the law says. Or it doesn't say it- it's just what is being implied.
>
> But what it does say is that you have to give the attending physician special consideration and that's a concept in the law that is difficult for anyone to really wrap their mind around because it says well you don't give more weight or credibility – but you have to listen to their opinions. So here Dr. Earle – who testified on behalf of the employer – is the attending physician. RP, page 34, line 18, through page 35, line 12.

Again during his closing argument, counsel for Glacier Northwest argues that Dr. Gritzka is not the attending physician and special consideration cannot be given to his testimony, as opposed to Dr. Earle:

> So who is Dr. Gritzka? Well he's that doctor that has a fancy Harvard undergrad and a medical degree. But he saw the claimant at the request of the lawyer all three times – all three times.
>
> Now there may or may not be bias there – that's up to you guys to decide. But he didn't treat him. He didn't have a doctor patient relationship. It's the lawyer asking the doctor to see Mr. Beck – wonder what that was for. RP, page 47, line 19, through page 48, line 1.

If that were not enough, counsel again emphasized that Dr. Earle is the attending physician and under the law he gets special consideration.

> Again counsel emphasizes that Dr. Earle is the only attending physician to testify and he is entitled to special consideration:
>
> So let's switch over now. Let's talk about the evidence for my client, Glacier. So we have Dr. Guy Earle – the attending physician – entitled to special consideration – that's my argument – he's the attending physician and under law he gets special consideration. I know of no distinction that would to entitle him to that. RP, page 50, line 22, through page 51, line 2.

The jury returned their verdict in favor of Glacier Northwest, Judgement was entered on the verdict, and Mr. Beck appealed to the Court of Appeals, Division II. After the parties had filed their respective briefs, the Brief of the Appellant, the Brief of the Respondent, and the Appellant's Reply Brief, Division II issued a determination that the appeal would proceed to decision without oral argument, indicated by Appendix A. Mr. Beck filed his objection to decide the case without oral argument, Appendix B, and the Chief Judge denied the request as indicated by Appendix C.

The Court of Appeals, Division II, then on May 23, 2017, filed its Unpublished Opinion conceding that error may have been committed by the trial court in giving the attending physician instruction, but that any error was harmless, Appendix D. Mr. Beck cannot imagine any more grievous error that could have been committed during the course of the trial that prevented him from having a fair trial. Glacier Northwest's counsel did not only refer to the distinction between Dr. Earle and Dr. Gritzka, but he vehemently argued throughout his closing that special consideration be given to Dr. Earle as opposed to Dr. Gritzka, who had examined Mr. Beck on three separate occasions over the course of the claim.

ARGUMENT

In reviewing the decision in *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186-189, 968 P.2d 14 (1998), where four attending physicians split on their testimony whether the worker was injured and the attending physician instruction was not given, the Court in *Clark County v. McManus*, 185 Wn.2d 466, 475-76, 372 P.3d 764, 764 475 (2016), held that the attending physician instruction is required, except in those cases where there are articulable reasons for not accepting the attending physician testimony. Mr. Beck maintains that there were articulated reasons for not giving the instructions as in *Harker-Lott*, and it was error to give the instruction to the jury. The *McManus* court emphasized that by not giving the instruction, it would convert the rule of law into no more than the opinion of the workers' attorney. By the same token, by giving the instruction in this case where it should not

have been given, it converts the opinion of the employer's attorney into the authority of law.

The Unpublished Opinion of Division II at page 7, distinguished the attending physician instruction from other instructions by emphasizing that this instruction does not require the jury to give more weight to Dr. Earle's testimony, and if there is an abundance of other evidence against Mr. Beck, he cannot show that the error is prejudicial. What the Court of Appeals is stating is that the attending physician instructions has less authority than the other instructions given by the trial court, and if they weigh the other evidence in the case on which the verdict could be sustained, any error is harmless.

Clark County v McManus, 186 Wn.2d at page 476, reiterates its holding that special consideration should be given to the opinion of an attending physician, unless specific reasons why the attending physician instruction are articulated. Mr. Beck is able to articulate specific reasons for why the attending physician's instruction should not be given. Mr. Beck was referred to Dr. Earle by the nurse case manager hired by the self insured employers claim administrator. Dr. Earle only saw Mr. Beck three times during a month's period of time, had disapproved the job analysis for concrete mixer trucker driver, had discharged Mr. Beck when a controversy arose over treatment, and then approved the same job analysis two months later, resulting in his time loss benefits being terminated and the claim closed. The trial court did commit prejudicial error by giving the attending physician instruction.

The Unpublished Opinion of the Court of Appeals, Division II, is in conflict with the Supreme Court's decision in *McManus* and the Court of

Appeals, Division I, in *Harker-Lott*. The attending physician's instruction does have the authority of law, and the appellate court should not weigh the other evidence to rationalize giving the instruction. Mr. Beck was an injured worker unable to return to work because of his injury, going up against a large national corporation with unlimited resources to defend the claim. Mr. Beck had one medical expert who supported his need for treatment and time loss benefits and he should not be put on an unequal footing by giving Dr. Earle the benefit of the attending physician instruction.

Division II's reliance on *Blaney v. Int'l Ass'n of Machinists*, 151 Wn.2d 203, 87 P.3d 757 (2004) is misplaced. Citing *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947), *Blaney* at page 211, holds that an erroneous instruction is harmless if it is not prejudicial to the substantial right of the parties and in no way affected the outcome of the case. Though the Supreme Court found the jury instruction erroneous because if denied the jury discretion to determine the duration of Ms. Blaney's future employment. The instruction was in error because the duration of future employment in an employment discrimination case may not necessarily extend to retirement. *Blaney v Int'l Ass'n of Machinists*, 151 Wn.2d at page 211. When considering an erroneous instruction, the court presumes prejudice subject to a comprehensive examination of the record. It then becomes the duty of appellate court to review the entire record and determine whether the error was harmless or prejudicial. Because the record revealed that Ms. Blaney presented evidence that she intended to work until retirement, the error was harmless. *Blaney v. Int'l Ass'n of Machinists*, 151 Wn.2d at page 211.

Though there was other evidence here to support the verdict in favor of Glacier Northwest, there is no question that Dr. Earle was being set off against Dr. Gritzka, and the attending physician instruction is the reason that Dr. Earle's opinion should prevail. Like in *Blaney*, if there was other evidence to support the jury instruction, such as evidence that Dr. Gritzka could be considered an attending physician, which there was not, the instruction could be considered harmless. The *Blaney* court in reviewing the record found evidence of Ms. Blaney's intent to work until retirement, and the error was harmless. Here, Division II could find no evidence to support giving the attending physician instruction, and the error was prejudicial. The other evidence in the case such as Dr. Bald's and Dr. Harris' testimony, both IME doctors, and the video surveillance support not giving the attending physician an instruction, as opposed to giving the instruction.

Where an instruction is clearly erroneous and the prejudice is presumed, the appellate court cannot weigh the other evidence to find a basis for the jury's verdict, or in essence decide the issue of fact that is being presented to the jury. The appellate court cannot invade the province of the jury to find other evidence to support the verdict beyond the attending physician issue. Had Division II allowed oral argument, the reasoning of the court with counsel could have been explored. *Blaney v. Int'l Ass'n of Machinists*, 151 Wn.2d at page 211.

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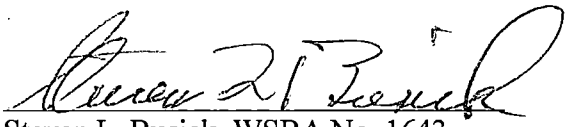
CONCLUSION

The error committed by the trial court in giving the attending physician instruction was not harmless, and the case should be remanded back to Superior Court for Cowlitz County for a new trial.

Dated: June 15, 2017.



Steven L. Busick, WSBA No. 1643
Busick Hamrick Palmer PLLC
Attorney for Petitioner

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS:** 9-12, 1-4

February 15, 2017

Steven L. Busick
Busick Hamrick PLLC
PO Box 1385
Vancouver, WA 98666-1385
fhamrick@busicklaw.com

Ryan Steven Miller
Thomas Hall & Associates
PO Box 33990
Seattle, WA 98133-0990
rmiller@thall.com

CASE #: 49246-6-II
Neil Beck, Appellant v Glacier Northwest, Inc., Respondent

Counsel:

After a careful review of the issues raised in the above referenced appeal, the court has decided to review this case without oral argument. RAP 11.4(j). Any request to change this decision must be filed not later than ten (10) days after the date of this letter. Unless a panel of judges concludes that oral argument would benefit the court, this matter will be set for consideration on April 21, 2017 and a written opinion will be issued thereafter. If a panel of judges agrees that argument would be beneficial, a letter setting the date and time of oral argument will be sent. In most instances, the date set for oral argument will be the date specified above.

Note: In those cases in which this court must consider an affidavit of financial need in ruling on an attorney fees request, the affidavit of financial need must be filed no later than 10 days before April 21, 2017. *See* RAP 18.1(c).

Very truly yours,

Derek M. Byrne,
Court Clerk

DMB:sw

APPENDIX A

WASHINGTON COURT OF APPEALS

DIVISION TWO

NEIL BECK,	)	
	)	
Appellant,	)	CASE NO. 49246-6-II
	)	
v.	)	
	)	
GLACIER NORTHWEST, INC.,	)	REQUEST TO CHANGE
	)	DECISION TO REVIEW CASE
Respondent.	)	WITHOUT ORAL ARUGMENT

The appellant, Neil Beck, requests to change the decision to review the case without oral argument. There is no secret that Division Two of the Court of Appeals has difficulty scheduling oral argument with the multitude of civil appeals involving the state agencies which it has to consider, and the last two appeals before Division Two in which Mr. Beck's attorney represented the appellant were transferred to Division One. This attorney is 4 for 4 in winning appeals before previous editions of Division Two since the year 2000, including two significant published opinions which established case law in the area of worker compensation. This attorney is now 2 for 2 with published opinions in Division One, but 0 for 3 in recent cases before Division Two, and obviously would prefer arguing this case before Division One, which usually schedules oral argument.

This case now before Division Two follows *Clark County v. McManus*, 188 Wn. App. 228 (2015), decided by Division One, and the Supreme Court accepted review on the

issue of the attending physician jury instruction. The Supreme Court decided that the attending physician instruction should be given, except in those cases where there are articulable reasons for not accepting the attending physician's instruction. *Clark County v. McManus*, 185 Wn. 2d, 466 (2016). Mr. Beck maintains in this appeal that there were articulable reasons why the attending physician instruction should not be given, and the trial court erred in giving the attending physician instruction.

The appellate court would benefit from oral argument on what constitutes articulable reasons not to give the attending physician instructions, under what circumstance the instruction should be given and when it should not, and when does the trial court abuse its discretion in giving the instruction. To every rule of law there is exception, and Mr. Beck maintains the exception applies here.

The one previous case that Mr. Beck's attorney had decided by Division Two without oral argument, *Cooper v. Labor and Indus.*, 188 Wn. App. 641 (2015), was decided wrongly, because the appellate court would not consider whether a weakened condition, as well as quiescent prior condition, instruction should have been given, when the facts supported a weakened condition.

Dated this 21st day of February, 2017.

/s/ STEVEN L. BUSICK

Steven L. Busick, WSBA #1643
Attorney for Neil Beck, Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Filed
Washington State
Court of Appeals
Division Two

February 28, 2017

NEIL BECK,

Appellant,

v.

GLACIER NORTHWEST, INC.,

Respondent.

No. 49246-6-II

ORDER DENYING MOTION FOR ORAL ARGUMENT

APPELLANT filed a motion requesting oral argument in the above-entitled matter set for April 21, 2017. A panel of judges has considered appellant's request to modify the decision to review this case without oral argument, RAP 11.4, and has decided that the facts and legal arguments are adequately presented in the briefs and the record and that additional oral argument would not aid the decisional process or benefit the court. Therefore, the request for oral argument is denied and the matter will remain on the non-oral argument docket as set forth in our previous letter. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Worswick, Lee.

FOR THE COURT:

Bjorgen, C.J.
CHIEF JUDGE

APPENDIX C

Filed
Washington State
Court of Appeals
Division Two

May 23, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NEIL R. BECK, Appellant, v. GLACIER NORTHWEST INC., Respondent.	No. 49246-6-II UNPUBLISHED OPINION

WORSWICK, J. — Neil Beck appeals from a jury verdict affirming the closure of his industrial insurance claim. He argues that the trial court erred in instructing the jury that special consideration should be given to the testimony of an attending physician. Because any potential error was harmless, we affirm.

FACTS

In 2005, Beck worked as a concrete mixer truck driver for Glacier Northwest, Inc. In May 2005, Beck's coworker grabbed him in a bear hug and twisted him while Beck was seated. The injury caused a thoracic strain in Beck's back. Beck filed a workers' compensation claim with Glacier Northwest, a self-insured employer. The claim closed in April 2007 with an award for permanent partial disability.

In June 2009, Beck filed an application to reopen his claim. He contended that his condition had worsened to the point of total disability and required further treatment. The Board of Industrial Insurance Appeals ultimately reopened Beck's claim for further authorized treatment. In March 2013, Beck's claim was again closed after a determination that Beck had

reached maximum medical improvement, no further treatment was necessary, and he was not totally disabled.

Beck appealed to the Board. The Board considered evidence and testimony of Beck and his wife, Dr. Gritzka, Dr. Bald, Dr. Harris, and Dr. Earle, in addition to viewing a surveillance video showing Beck engaged in home reconstruction projects.

Dr. Gritzka is an orthopedic surgeon who saw Beck three times at the request of Beck's counsel.[1] When asked if Beck had reached maximum medical improvement, Dr. Gritzka testified that "if we had a more specific exact diagnosis, then our treatment could be directed towards something other than covering up the pain." Clerk's Papers (CP) at 131. He recommended X-rays of Beck's thoracic spine, a physical capacities evaluation, and a psychiatric evaluation. While Dr. Gritzka testified that Beck was not capable of returning to his past work as a concrete driver from June 2009 through April 2011 and December 2012 through May 2013, he could not say whether Beck was unable to perform any continuous gainful employment during those periods of time.

Drs. Bald, Harris, and Earle all testified that Beck's conditions were fixed and stable and in need of no further treatment. Dr. Bald is an orthopedic surgeon who performed an independent medical examination of Beck at Glacier Northwest's request in October 2009. At that time, Dr. Bald recommended that Beck perform additional self-directed exercise to remain fit, but recommended no further formal treatment. Dr. Bald opined that in 2009 through 2013

[1] Dr. Gritzka saw Beck in October 2006, December 2009, and February 2014.

Beck had no physical capacity restrictions and noted that during all relevant periods on appeal, Beck was fully capable of sustained gainful employment.

Dr. Harris is an orthopedic surgeon who examined Beck at Glacier Northwest's request in November 2012 and did not identify any anatomic injury to Beck's cervical, thoracic, or lumbar spine. Dr. Harris diagnosed Beck with degenerative disc disease and found Beck's condition fixed and stable because Beck had several years of nonoperative treatment, was not a surgical candidate, and there was no additional treatment that could be considered curative.

Dr. Earle was Beck's attending physician for a short period and saw Beck on three occasions in 2012. Dr. Earle's treatment plan was to strengthen Beck's back, taper him off narcotics, and get him back to work. Dr. Earle ordered a bone scan of Beck's back which showed normal results. At Beck's third appointment with Dr. Earle, Beck brought up a new laser surgery being performed in Texas which he had learned about on the Internet. Dr. Earle explained that the surgery was neither mainstream nor approved by the Department of Labor and Industries, and he discouraged Beck from pursuing it. Beck became hostile with Dr. Earle for not agreeing to the surgery, and as a result, Dr. Earle discharged Beck from his care. Dr. Earle ultimately concluded that there was no reasonable and necessary treatment that would help Beck. After viewing surveillance footage showing Beck doing extensive home renovation work without any signs of pain, Dr. Earle concluded that Beck was capable of at least medium-level work.

Glacier Northwest introduced video evidence from a private investigator who had filmed Beck on three different dates between June 2012 and September 2012.[2] The Board stated that the videos showed Beck engaged in home reconstruction projects such as building a deck. In the videos, Beck appeared capable of normal function and physical activity, including repetitive motion and repetitive lifting of heavy objects. He also appeared capable of normal activities consistent with employment, such as lifting boards overhead, operating industrial equipment, and using hand tools. The Board found that the videos showed Beck moving easily and smoothly without any apparent significant pain or any obvious deficits of motion or strength.

The Board concluded that (1) Beck did not require further proper and necessary treatment for any condition proximately caused by his industrial injury, (2) Beck was not temporarily totally disabled because of his industrial injury, and (3) no condition proximately related to Beck's industrial injury permanently worsened or became aggravated during the relevant time period.

Beck then appealed to superior court. Over Beck's objection, the trial court gave the following instruction to the jury:

> 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.

CP at 819. The jury affirmed the Board's order and decision.

[2] These videos are not included in the record on appeal. This summary of their contents is based on the Board's order.

ANALYSIS

Beck argues that the trial court erred by instructing the jury that special consideration be given to an attending physician's testimony, because Beck is able to give articulable reasons for not accepting the physician's testimony. He further argues that giving the instruction was not harmless because Glacier Northwest referred to it in its closing argument as part of its strategy to distinguish Dr. Earle's testimony from Dr. Gritzka's. We assume without deciding that the instruction was erroneously given, but hold that any instructional error was harmless.

I. SPECIAL CONSIDERATION INSTRUCTION

In *Clark County v. McManus*, 185 Wn.2d 466, 476, 372 P.3d 764 (2016), our Supreme Court held that the instruction that special consideration should be given to the opinion testimony of an attending physician in workers' compensation cases is mandatory. Washington courts consider the instruction reasonable because an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case. *See Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 129, 913 P.2d 402 (1996); *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 654, 833 P.2d 390 (1992).

Appellate courts recognize that an attending physician who has cared for and treated a patient over a period of time is better qualified to give an opinion as to the patient's condition than a doctor who has seen and examined the patient once. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 6, 977 P.2d 570 (1999). Even where a special consideration testimony is given, the weight and credibility given to an attending physician's testimony remains up to the jury. *See McManus*, 185 Wn.2d at 472 (noting that the special consideration instruction does not require the jury to give more weight or credibility to the attending physician's testimony, but only to

give it careful thought). The primary reason behind the special consideration instruction is that an attending physician is not a paid expert, but rather an unbiased expert who is "'better qualified to give an opinion as to the patient's disability.'" *Ruse*, 138 Wn.2d at 6 (quoting *Spalding v. Dep't of Labor & Indus.*, 29 Wn.2d 115, 129, 186 P.2d 76 (1947)).

II. ANY ERROR WAS HARMLESS

Beck contends that giving the special consideration instruction was not harmless because Glacier Northwest referred to it in its closing argument as part of its strategy to distinguish Dr. Earle's testimony from Dr. Gritzka's. We disagree.

To succeed on a claim that a jury instruction was erroneously given, Beck must show that the error was not harmless. *Blaney v. Int'l Ass'n of Machinists*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004). "An erroneous instruction is harmless if it is 'not prejudicial to the substantial rights of the part[ies] . . .. and in no way affected the final outcome of the case.'" *Blaney*, 151 Wn.2d at 211 (alterations in original) (quoting *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)).

Here, Beck contends that he was prejudiced by the special consideration instruction because Glacier Northwest referenced it in its closing argument as part of its strategy to distinguish Dr. Earle's testimony from Dr. Gritzka's testimony. However, the special consideration instruction clearly states, "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." CP at 819.

Additionally, Glacier Northwest's case did not hinge on Dr. Earle's testimony. Rather it focused on the lack of evidence supporting Beck's position and the abundance of evidence against it. The evidence included surveillance footage showing Beck doing extensive home

renovation work without any signs of pain, MRI (magnetic resonance imaging) results showing no disc protrusion, and the testimony of two additional doctors who testified in support of Glacier Northwest's position.

Given that the special consideration instruction did not require the jury to adopt or give more weight to Dr. Earle's testimony, and the abundance of other evidence cutting against Beck's position at trial, Beck cannot show that any error in issuing the special consideration instruction was prejudicial. Consequently, we hold that any error was harmless. We affirm.

ATTORNEY FEES

Beck argues that, should he prevail on this appeal and on retrial in superior court, he is entitled to attorney fees pursuant to RCW 51.32.130. However, because Beck does not prevail, we do not consider his request for fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Bridgewater, C.J.

Lee, J.

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

NEIL BECK,	)	COA No. 49246-6-II
	)	
Appellant,	)	
	)	PROOF OF SERVICE
v.	)	
	)	
GLACIER NORTHWEST, INC.,	)	
	)	
Respondent.	)	
	)	

The undersigned states that on June 15, 2017, I served via US mail, as indicated below, Petition for Review to the Supreme Court of Washington, addressed as follows:

Ryan S. Miller, Attorney at Law
Thomas G. Hall & Associates
PO Box 33990
706 North 182nd Street
Seattle, WA 98133

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: June 15, 2017.

Steven L. Busick, WSBA #1643
Attorney for Neil Beck, Appellant