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No.61965-9

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

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STATE OF WASHINGTON
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VALLEY GENERAL HOSPITAL MONROE/WASHINGTON
HOSPITALS WORKERS' COMPENSATION TRUST,

Appellant,

v.

STEPHANIE MILLER,

Respondent.

APPELLANT'S REPLY BRIEF

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A. REPLY

As a preliminary matter, Miller asserts that “[t]his appeal has grossly delayed the injured worker’s benefits resulting in tremendous financial hardship.” Respondent’s Brief, 3. Miller also states that “Dr. Mann also testified the Claimant was not employable at any occupation during the relevant period from 2/8/05 through 8/22/05 and indefinitely thereon into the future because of the carpal tunnel syndrome that had been untreated.” Respondent’s Brief, 10, citing CP 272-274.

The Court will note that the jury explicitly determined, despite Dr. Mann’s testimony, that Miller was not temporarily totally disabled. VRP 4/11/08, 8-9. Hence, there has been no delay in payment of wage replacement benefits because none were found owing.

As to the jury’s verdict that Miller’s right-sided carpal tunnel syndrome was proximately caused by the injury of November 7, 2003, or was an occupational disease (a finding without supporting medical evidence), because Miller has opened the door to information that is beyond the record in this appeal with her claims of “gross delay” and “tremendous financial hardship,” the Employer feels compelled to apprise the Court that the Employer paid for Miller to have carpal tunnel surgery outside of the claim as her appeal was pending even though it had no legal

obligation to do so. The Employer affies to this Court that she, in fact, had the carpal tunnel surgery on November 30, 2005, and the Employer provided four to six months of post-operative care. The Employer will provide a copy of the operative report and agreement for post-operative care upon request.

Miller also references her prior injury, her move, gardening, and assisting in her husband's business as irrelevant to the issue of causation. The determination of causation is based in large part on the timing of Miller's complaints. When the Court contrasts the contemporaneous records with her subsequent testimony before the Board, for example the claim of a tearing sensation in the forearm, the credibility issues are evident. Miller's credibility is further called into question by her failure to report the prior injury and her other activities to her treatment providers, who rendered opinions without this knowledge, even initially denying her move while under oath. Hence, these issues of credibility are germane to the causation question.

1. THE TRIAL COURT'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Employer reiterates that the only expert medical testimony in the record remotely supporting an occupational disease theory was the testimony of Dr. Mann. CP 274-277. However, that testimony was based

on an incomplete, inflated, and inaccurate hypothetical to which the Employer objected and for which the trial court erroneously denied the Employer's curative instruction. CP 274-277, 279. For example, the generalities presented by hypothetical do not account for Miller's concession that she was not constantly inputting information into the computer. Rather, she only input information when the unit secretary was not there. CP 131. The generalities also do not reflect that she worked with two to three other CNAs per shift, was responsible for twelve patients, and many of the activities such as bathing, changing linens, changing diapers, feeding, tying, buckling, and writing, are really nothing more than activities of daily living of the sort performed by a stay-at-home parent. The Employer's objections to the hypothetical are that it is too general in terms of frequency to be of any value and is based on Miller's self-serving testimony. Dr. Mann had no knowledge of Miller's job duties, by reference, for example, to a documented job analysis. Ex. 2. His only point of reference was Counsel's hypothetical, which was based in turn on Miller's testimony. Dr. Mann also had no knowledge of her prior wrist injury, her computer activities assisting her husband in his business, or her move, until they were presented by Counsel. CP 270, 279.

It is well-established that an expert medical opinion concerning causal relationship between an industrial injury or disease and a

subsequent disability must be based upon full knowledge of all material facts. *Sayler v. Dep't of L. & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966). An expert opinion based on an incomplete hypothetical, an incomplete history, and incomplete facts is without probative value. If the doctor has not been advised of a vital element bearing upon causal relationship, his conclusion or opinion does not have sufficient probative value to support an award. *Berndt v. Dep't of Labor & Indus.*, 44 Wn.2d 138, 265 P.2d 1037 (1954); *Cyr v. Dep't Labor & Indus.*, 47 Wn.2d 92, 286 P.2d 1038 (1955); *Parr v. Dep't of Labor & Indus.*, 46 Wn.2d 144, 278 P.2d 666 (1955). As such, the opinion testimony lacked foundation and does not support an occupational disease claim. It was prejudicial and reversible error for the trial court to present the claim as an occupational disease to the jury. Failing that, it was prejudicial and reversible error to refuse to instruct the jury on the law as to hypothetical questions.

Miller also places undue reliance on *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 474, 745 P.2d 1295 (1987). Respondent's Brief, 10-11. In *Dennis*, the Court noted "our decision has at its heart the requirement that the worker's disabled condition must be work related." *Id.* The decision does not obviate Miller's obligation to establish proximate cause between the condition and the distinctive conditions of her employment.

Likewise, Miller's rendition of Dr. McCutchan's testimony and ultimate conclusions is incomplete, inaccurate, and is a misrepresentation of the record, including her statements that he "finally concluded putting it all together, that his opinion in his letter of 9/1/05 was correct. ... [I]n the end, he was of the opinion, more probably than not, that her injury of 11/7/03, caused the right-sided CTS to become symptomatic[.]" Respondent's Brief, 11-13. The Employer can only request that the Court review the testimony, as summarized by the Employer, to discern Dr. McCutchan's conclusion that he could not support proximate cause. His alleged concession as to the September 1, 2005 letter was based on a hypothetical scenario presented by Counsel rather than the facts as established by the contemporaneous records. In fact, Dr. McCutchan concluded his testimony by stating specifically, "It's - - what I've been presented with has made it difficult for me to say this caused her carpal tunnel syndrome." CP 354, ll. 5-7.

2. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY WERE ERRONEOUS.

In addressing the Employer's arguments regarding the jury instructions, the Claimant argues the Employer's arguments are waived because the Employer did not make a Motion to Dismiss, Motion for Directed Verdict, a Motion for Judgment as a Matter of Law or any other

post-trial motions. Respondent's Brief, 18-21, 30. However, the Employer's arguments, to the extent prior Counsel was able to get the arguments and rulings on the record before the trial court, are in the record for review and are preserved. For example, in *Westway Const., Inc. v. Benton Co.*, 136 Wn. App 859, 865, 151 P.3d 1005 (2006), the Court held it was not necessary for a formal motion for summary judgment to be filed to preserve error. In rejecting Benton County's waiver argument, the Court noted as follows:

At the threshold, Benton County claims Westway waived any substantive arguments opposing the entry of summary judgment dismissal because it failed to raise those arguments at the trial court. A summary judgment argument not pleaded or argued to the trial court cannot be raised for the first time on appeal. *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035, *review denied*, 129 Wn.2d 1023, 919 P.2d 600 (1996). Westway did not advance the arguments now made on appeal in any written pleading prior to the summary judgment hearing. **The record of the summary judgment arguments, however, establishes that it did make its arguments orally to the trial court. Since the court considered them below, we will consider them on appeal.**

Westway, 136 Wn. App. at 864-865, *emphasis added*. Likewise, the Employer's arguments, theories, and positions in this appeal, as the record of the Verbatim Reports of Proceedings reflect, were clearly considered by the trial court even absent formal motions by prior counsel. Accordingly, the Employer's arguments are preserved.

In addition, the Court in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), held that an error is not waived where it is clear from other trial court rulings that additional assertions of the rejected arguments would be futile, noting as follows:

Where, as here, the issue was clearly before the trial court, and its prior rulings demonstrated that a motion to modify the order would not have been granted, a party cannot be reasonably held to have waived the right to assert the error on appeal merely by declining to engage in the useless act of repeating their arguments in a motion to amend the trial court's order. *East Gig Harbor Improvement Ass'n v. Pierce County*, 106 Wn.2d 707, 709-10 n. 1, 724 P.2d 1009 (1986) (“As long as the trial court had sufficient notice of the issue to know what legal precedent was pertinent this court will not refuse to consider the issue.”)(citing *Osborn v. Public Hosp. Dist. 1*, 80 Wn.2d 201, 492 P.2d 1025 (1972)). See also *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 753-54, 875 P.2d 1228 (1994) (where a trial court has ruled before trial that the jury would only consider certain matters, the plaintiff “was not required to propose an instruction that he knew would not be given”).

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 498-499, 933 P.2d 1036, 1043 (1997). “It is the applicable law which is controlling, and not what the trial court announced the law to be in his instructions.” *Kim v. Dean*, 133 Wn. App. 338, 135 P.3d 978 (2006), quoting *Coca Cola Bottling Co. of Black Hills v. Hubbard*, 203 F.2d 859 (8th Cir. 1953).

In the alternative, if the Court determines the Employer was required to submit the motions referenced by Miller to preserve its assigned errors, the Employer requests that the Court exercise its inherent

authority to consider the Employer's arguments. "An appellate court has inherent authority to consider issues which were not raised on appeal, or even at trial, if necessary for a proper decision." *Kramarevcky v. Dep't of Social and Health Svcs.*, 122 Wn.2d 738, 751, 863 P.2d 535 (1993), *citing*, *Falk v. Keene Corp.*, 113 Wn.2d 645, 659, 782 P.2d 974 (1989); *Wood v. Postelthwaite*, 82 Wn.2d 387, 510 P.2d 1109 (1973); *Siegler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1972), *cert. denied* 411 U.S. 983, 93 S.Ct. 2275, 36 L.Ed.2d 959 (1973); RAP 12.1(b). In particular, RAP 2.5(a) provides that the appellate court may refuse to review any claim not raised before the trial court. Nonetheless, the appellate court may address, if raised for the first time on appeal, among other matters, a party's failure to establish facts upon which relief can be granted. RAP 2.5(a)(2). In addition, it is well-established that the appellate courts have considered, *sua sponte*, some matters not brought before the trial court or addressed in the parties' appellate briefs. *Crawford v. Wojnas*, 51 Wn. App. 781, 786-787, 754 P.2d 1302 (1988), *citing*, *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982); *Siegler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983, 93 S.Ct. 2275, 36 L.Ed.2d 959 (1973); *State v. Matuszewski*, 30 Wn. App. 714, 637 P.2d 994 (1981). In *Crawford*, the Court decided the issue of informed consent even though not raised by the parties because "[w]ere we to ignore this issue and

decide this appeal only on the issues presented by the parties, by inference we would be expanding the doctrine of informed consent to nonpatient third parties.” *Crawford*, 51 Wn. App. at 786. The Court stated that it was required to consider the issue to properly decide the case, noting as follows:

Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. **A case brought before this court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it.**

The court has the authority to consider this issue and to decide the case on that basis.

Crawford v. Wojnas, 51 Wn. App. 781, 786-787, 754 P.2d 1302 (1988), *emphasis added*, quoting *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 623, 465 P.2d 657 (1970).

Hence, even if the Court determines the Employer waived any of the assigned errors by not filing formal motions at any particular juncture of the proceedings, the Employer submits that the case must be decided based on the applicable law. The applicable law does not support the manner in which the case was presented to the jury, no reasonable jury could reach the determination made in this case based on the record, and the verdict is not supported by substantial evidence. Miller is merely casting meritless aspersions at the Employer for pursuing its statutory right

of appeal by claiming that the Employer is attempting to relitigate the facts. In actuality, the Employer is so strong in its conviction that the verdict is unsupported, Miller is not entitled to the relief awarded, and the trial was fundamentally flawed that it feels compelled to challenge the trial court's unsupported decision. Respondent's Brief, 3, 13.

As to the Employer's assignment of error to the trial court's submission of the total and permanent disability issue to the jury, Miller asserts it is "quite inappropriate to claim judicial error on an issue the Appellant won." Respondent's Brief, 19, 30. On the contrary, there was no basis in the record for the issue to be presented to the jury, and it was prejudicial and reversible error for the trial court to do so. The error lies in the jury's consideration of the issue, the confusion it caused the jury, and its effect on the remaining portions of the verdict to the extent it induced the jury to provide Miller with some benefit by granting allowance of the condition. It is well established that both verdict forms and jury instructions are to include only those theories of liability supported by substantial evidence in the record. *Young v. Group Health Co-op. of Puget Sound*, 85 Wn.2d 332, 339, 534 P.2d 1349 (1975).

Notwithstanding Counsel's arguments to the contrary, the Employer's arguments as to each instruction are set forth in its opening

brief. However, the Employer has opted to reply to a few of Miller's more baseless arguments.

As to Instructions 17 and 18, Miller falsely states the Employer waived its objection to the hypothetical question and is therefore not entitled to an instruction. Respondent's Brief, 22-23. The Employer objected to the opinion based on the hypothetical question, and the objection is not waived. CP 276. Miller's self-serving statements as to her job duties do not form the basis of a valid hypothetical.

The Employer disagrees with Miller's assertion that a hypothetical instruction is not necessary because "a juror does not require further instruction on the obvious fact that the correctness of the opinion depends on the correctness of the assumptions." Respondent's Brief, 23. An instruction is necessary on this esoteric point, which is certainly confusing to a jury, when Counsel argues the opinion derived from the hypothetical as testimony based on fact. The Employer submits the jury is not going to recall the nature of the question when deliberating. The trial court's failure to give this instruction materially affected the outcome of this case, and is prejudicial, reversible error.

Based as the opinions were on Miller's testimony in contrast with the contemporaneous records, failure to give Instruction 18 as to source of the witnesses information was also reversible prejudicial error.¹

The language requested by the Employer in Instruction 12 was not unnecessary verbiage given Miller's alternate theories of liability. Respondent's Brief, 24. The prejudicial error associated with the failure to give this instruction is evident when the instruction is viewed in conjunction with the special verdict form. Respondent's Brief, 31. Miller was required to establish the elements of either an industrial injury or an occupational disease (assuming the Court determines the latter theory was properly presented to the jury). Failure to give the requested instruction in conjunction with the combined verdict form invited the jury to mix and match the elements, and find for Miller where it otherwise may not have had it been required to analyze each element of both theories independently.

The Employer's proposed occupational disease instruction, Instruction 13, again without waiving the Employer's argument that the issue should not have reached the jury, is an accurate statement of the law,

¹ The Employer's assignment of error as to Instruction 5, CP 483, is withdrawn. In the undersigned's haste to timely complete and file Appellant's brief following transfer of the file, the Employer failed to note the requested language was contained in the Court's opening instruction.

and was especially crucial given the nature of the job duties Miller alleges were the distinctive conditions of her employment giving rise to her condition. The Employer pauses to reject Miller's unfounded claim that the Employer has not alleged prejudice as to any instruction because there is none. Respondent's Brief, 25.

Miller also attempts to perpetuate the confusion she caused before the trial court with her arguments regarding *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939). Her argument that the trial court properly refused the Employer's natural progression instruction does not follow. Per Dr. Fleming, Miller would have developed the condition regardless of the industrial injury or her work duties. Respondent's Brief, 27-28. Although the Employer understands the holding of *Harbor Plywood Corp. v. Dep't of Labor & Indus.*, 48 Wn.2d 553, 295 P.2d 310 (1956), that case, which contained expert medical testimony that the injury was a proximate cause of the acceleration of the condition, is not on point with this case where substantial evidence to support the threshold issue of proximate cause is lacking. In this regard, the Court specifically noted as follows:

In *Petersen v. Department of Labor & Industries*, 40 Wash.2d 635, 245 P.2d 1161, 1164, in denying a pension to the widow of a workman who had suffered a heart attack while engaged in his usual employment activities, where the medical testimony fell

short of establishing any causal relationship between the activity and the attack, we said:

‘We have never dispensed with a minimum showing that the employment or an incident occurring during employment must have been, more likely than not, a contributing factor to the death, without which the death, would not have occurred when it did.’

Harbor Plywood, 48 Wn.2d at 557. The Court will further note the ‘but for’ causation language upheld by the Court in *Harbor Plywood* that the trial court rejected in Miller’s case.

Miller also asserts the Employer’s requested instructions do not address inconsistent and contradictory testimony. Respondent’s Brief, 29. The Court will note the Employer’s proposed hypothetical instructions to address these issues were rejected.

Miller’s argument regarding Instruction 19 is not well taken. Respondent’s Brief. As Miller notes, as in *Chalmers v. Dep’t of Labor & Indus.*, 72 Wn.2d 595, 434 P.2d 720 (1967), Dr. Mann based his opinion on causation on incomplete facts and hypothetical based on self-serving, contradictory testimony. Accordingly, he is not in a better position to assess causation. Miller’s argument as to the combined effects pension instruction is likewise baseless. Respondent’s Brief, 30. As with the total and permanent disability instruction, there was no evidence in the record to support a combined effects pension, and the jury should not have been

given these Instructions 20 and 21 because it prejudicially caused the jury to confuse the issues. Further, there was not evidence in the record to support them. *Young v. Group Health Co-op. of Puget Sound*, 85 Wn.2d 332, 339, 534 P.2d 1349 (1975).

3. THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE OF MILLER'S REPORTED COMPLAINTS TO HER TREATMENT PROVIDERS.

Miller states that Dr. Fleming's testimony regarding complaints Miller made to her massage therapist was properly excluded by the trial court because 1) a massage therapist cannot establish a foundation as to proximate cause, and 2) because Miller's statements do not fall within the hearsay exclusion of ER 803(a)(4). Respondent's Brief, 34.² In the event it is not obvious from the Employer's arguments that the record lacks substantial evidence (expert medical evidence stated on a more-probable-than-not basis), the Employer is not asserting that a massage therapist can provide the requisite expert medical testimony stated on a more-probable-than-not basis to establish proximate cause between the event and the condition. Rather, the Employer maintains that exclusion of the evidence was reversible error because the timing of Miller's complaints is a key

² Miller stated the Employer "does not cite to any part of the record to know specifically what they are complaining about. Respondent's Brief, 34. The Employer did cite to the record in its opening brief as CP 540-541; VRP 4/8/08 4-12; VRP 4/9/08 2-7. The CP citation was inadvertently to a trial brief which cited to the testimony. The actual citation to the testimony is CP 389-396.

component of the causation analysis and the credibility of the testimony she provided at hearing as compared to her documented complaints in the contemporaneous records. Notably, Miller did not object when the Employer first presented a massage therapy note to Dr. Fleming, and arguably the objection was waived. CP 389-391.

In fact, Miller's complaints to her massage therapist are not hearsay at all. First, the statements do not fall within the hearsay definition because they are offered against a party opponent and are the party's own statements. ER 801(d)(2). For example, in *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994), an employment termination matter, the Washington Supreme Court determined that a party's diary entries were not inadmissible hearsay and could qualify as admissions where inconsistent with the party's testimony at trial because they "were evidence of what was going on at the time of the employment relationship and were at least circumstantial evidence of the parties' 'chemistry.'" *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. 609, 623, 1 P.3d 579 (2000), citing *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 168. Likewise, in this case, the evidence was not offered as expert medical evidence, but as contemporaneous fact evidence of Miller's contemporaneous complaints.

In the alternative, and contrary to Miller's unsupported representation that statements admissible under ER 803(a)(4) must be made to a physician, the Employer submits the evidence is admissible under ER 803(a)(4). Indeed, testimony regarding Miller's complaints to massage therapists were contemporaneous statements made for purposes of treatment, when she had the least incentive to be creative, and fall under the hearsay exception of ER 803(a)(4). CP 389-396, 540-541; VRP 4/8/08 4-12; VRP 4/9/08 2-7.

In *In re: Welfare of J.K.*, 49 Wn. App. 670, 745 P.2d 1304 (1987), the case cited by the Employer in its opening brief, the Court held that a hospital social worker was a part of a team providing treatment, and a child's description of an incident made to the social worker fell within the exception, specifically stating it did not interpret the rule as being limited to statements made to a physician, but included hospital employees. *See also, State v. Ackerman*, 90 Wn. App. 477, 953 P.2d 816 (1998) (statements to child's counselor, not a physician or acting under direction of physician, within exception because made for purpose of treatment); *In re: Dependency of M.P.*, 76 Wn. App. 87, 882 P.2d 1180 (1994) (child's statements to therapist admissible, noting "cannot conclude that therapy for sexual abuse, as an exercise in healing, differs materially from other medical treatment for the purposes of Rule 803(a)(4)"); *In re: Dependency*

of S.S., 61 Wn. App. 488, 814 P.2d 204 (1991) (rejecting father's argument that statements hearsay because not made to medical personnel). In further support, the Court will note ER 904 permits a broad range of health-care related records to be offered under that rule, presumably as with ER 803(a)(4), because of similar indicia of reliability.

In further support of the Employer's argument that the testimony regarding statements made to the massage therapist were admissible, notably, the jury was presented with evidence, through Miller's own testimony, of what she told her massage therapist and physical therapist regarding her complaints after the event, and Miller references that testimony in brief. Respondent's Brief, 8; CP 145-146. Hence, the trial court's unilateral evidentiary rulings are baseless, and Miller's arguments for exclusion meritless.

4. THE TRIAL COURT'S RULINGS RESULTED IN CUMULATIVE ERROR.

Even if the Court concludes that each of the trial court's errors, including the error assigned to the respective instructions or failure to give same, standing alone, are not reversible error, the Employer submits, as asserted in its opening brief, that the cumulative effect of the errors prevented the Employer from obtaining a fair trial. Appellant's Brief, 33. As the Court in *State v. Watkins*, 136 Wn. App. 240, 148 P.3d 1112

(2006), noted, “Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal because the combined effects of the errors denied the defendant a fair trial.” *State v. Watkins*, 136 Wn. App. 240, 248, 148 P.3d 1112 (2006), citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). “It is well-settled that an accumulation of discrete harmless errors may ultimately warrant reversal where ‘the cumulative effect of those errors materially affected the outcome.’” *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). “The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Chino*, 117 Wn. App. 531, 542, 72 P.3d 256 (2003), citing, *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Likewise, in this case, the cumulative effect of what may appear to be relatively minor errors, standing alone, resulted in issues being presented to the jury that should not have been presented, the jury being incorrectly instructed, and in the Employer not receiving a fair trial in this matter.

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5. THE TRIAL COURT ERRONEOUSLY GRANTED MILLER'S REQUEST FOR A MULTIPLIER AND AWARDED EXCESSIVE FEES.

The Employer maintains that the trial court's award of attorney's fees was excessive in terms of the hourly rate used in the lodestar and the addition of a multiplier. The award was manifestly unreasonable and, therefore, an abuse of discretion for the reasons set forth in the Employer's opening brief. "Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *Clark v. Hogan*, 49 Wn.2d 457, 303 P.2d 290 (1956). "An abuse of discretion occurs when a decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Mayer v. Sto Indus. Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006), quoting *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976). "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.'" *Id. citing State v. Rohrich*,

149 Wn.2d 647, 654, 71 P.3d 638 (2003). The award was also given on the untenable grounds of the trial court's improper surmise regarding the hourly rate billed by the Employer's former counsel. The Employer understands the trial court's concern with the timing of the submission of prior counsel's response brief on the attorney fee issue. However, in order to not penalize the Employer, the trial court could have reserved ruling for due consideration. CP 22, VRP 6/13/08.

The fee applicant bears the burden of proving the reasonableness of the requested fees. *Blum v. Stenson*, 465 U.S. 886, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984). The Employer again notes that the fee declaration submitted by Miller's Counsel included an amalgam of past fee awards dating back to 1988 and may be form fee declaration attachments. CP 65-106. Again, the documents, without knowledge of each particular case, provide no guidance as to a reasonable fee in this matter.

The Employer also submits that the trial court's speculation that Employer's Counsel's hourly rate was \$500 per hour for what he considered to be a "partner level case[,]" and using this pure speculation as a basis for adopting Counsel's hourly rate of \$350, was grossly inappropriate. VRP 6/13/08, 20-21.

Likewise, Counsel is not entitled to a multiplier because the factors justifying a multiplier were not present in this case. In *rare* instances, the

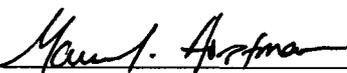
lodestar fee may be adjusted upward or downward in the trial court's discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998). This case did not present such an instance.

B. CONCLUSION

Based on the foregoing, the Employer respectfully requests that the trial court decision be reversed, the Board's decision affirmed, and the fee award vacated or reduced to a reasonable fee if the trial court decision is affirmed.

RESPECTFULLY SUBMITTED this 12th day of June, 2009.

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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

VALLEY GENERAL HOSPITAL MONROE/WASHINGTON HOSPITALS WORKERS' COMPENSATION TRUST, Appellant, v. STEPHANIE MILLER, Respondent.	Case No. 61965-9 I DECLARATION OF MAILING
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I hereby declare under penalty of perjury of the laws of the State of Washington that on the 12th day of June, 2009, I filed and served the Appellant's Reply Brief and this Declaration of Mailing upon all parties of record in this proceeding by mailing a copy thereof, properly addressed with postage pre-paid, to each party or his attorney or authorized representative listed below.

ORIGINAL AND ONE COPY TO:

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DECLARATION OF MAILING - 1

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