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NO. 63199-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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SHEILA M. WIMBERLY,

Appellant,

v.

KING COUNTY AND  
THE DEPARTMENT OF LABOR AND INDUSTRIES,  
STATE OF WASHINGTON,

Respondents.

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BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR AND ISSUES RELATING THERETO**

### **A. Assignments of Error.**

1. The trial court erred by rendering judgment against the injured worker, Sheila M. Wimberly, and in favor of the self insured employer, King County.
2. The trial court erred by entering Judgment affirming the Board of Industrial Insurance Appeal's Finding of Fact in its order dated February 10, 2009 which determined that Mrs. Wimberly did not have a psychiatric condition causally related to her accepted occupational disease Bilateral Carpal Tunnel, that she was not totally temporarily disabled from September 11, 2004 to June 17, 2005 and she had no permanent impairment causally related to her occupational disease of September 27, 1995.
3. The trial court erred in overruling plaintiff's objections to ad hominen attacks against plaintiff all of which is and was irrelevant under authority of ER 401 and ER 403.
4. The trial court erred by withholding from the jury's consideration one or more issues upon which the parties submitted evidence before the Board and upon which the Board by virtue of adopting as its own a Proposed Decision and Order made finding.
5. The trial court erred by instructing the jury in such a manner as to withdraw from the jury's consideration the nature of plaintiff's psychiatric condition which was an issue before the Board and upon which the Board by virtue of adopting as its own, a Proposed Decision and Order made findings.
6. The Trial Court erred by failing to properly instruct the jury. Court's Instruction No. 11, failed to properly state the law with regards to the Lighting Up doctrine.

7. The trial Court erred by failing to instruct the jury as the legal standard for medical probability.
8. The trial court erred by entering Judgment affirming as correct the Conclusions of Law in the Board of Industrial Insurance Appeals order dated January 9, 2007 adopting as its own its Proposed Decision and Order.

**B. Issues Relating to Assignments of Error**

1. On Appeal to Superior Court from an Order of the Board of Industrial Insurance Appeals, is the trial court obligated to submit to the jury all issues of fact that were properly before the Board of Industrial Insurance Appeals

2. Whether Court Instruction No. 11 erroneously instructed the Jury on the lighting up doctrine which prejudiced the Plaintiff's case.

3. Whether the Court erred by not instructing the jury on the legal standard of medical probability.

**II. STATEMENT OF THE CASE AND PROCEDURE**

This is an industrial insurance appeal. On June 23, 2005 Mrs. Wimberly appealed a Department order dated June 17, 2005, which closed her claim with no permanent partial disability and with time loss compensation ended as paid to September 10, 2004. (CP pp. 47-48) Mrs. Wimberly filed a Notice of Appeal to the Department's order identifying treatment, time loss compensation, acceptance of her psychiatric condition, and permanent disability all as issues she intended to pursue

before the Board of Industrial Insurance Appeals. (CP p. 49) Mrs. Wimberly's appeal was accepted by the Board. (CP p. 50) Both Mrs. Wimberly and King County presented evidence at the Board which was consistent with her Notice of Appeal. The Board issued a Proposed Decision and Order which affirmed the Department order of June 17, 2005, and issued the following Findings of Fact:

1. On October 12, 1995, the claimant, Sheila M. Wimberly, filed an application for benefits alleging that she had sustained an industrial injury or disease in the course of her employment with King County. On June 17, 2005, the Department of Labor and Industries issued an order closing her claim with time loss ended September 10, 2004, and no permanent partial disability award. On June 27, 2005, Ms. Wimberly filed a notice of appeal with the Board of Industrial Insurance Appeals. On July 7, 2005, the Board issued an order granting the notice of appeal, assigning it Docket No. 05 16555, and directing that proceedings be held on the issues raised by the notice of appeal.
2. From December 1994 through December 1995, Sheila M. Wimberly worked as a payroll clerk for King County. Her work involved data entry, with two to three hours of hand writing, and five to six hours of computer keyboarding every day. The repetitive writing and keyboarding constitute distinctive conditions of her employment with King County.
3. As of September 27, 1995, Ms. Wimberly's hands suffered from bilateral carpal tunnel syndrome and overuse tendonitis, which arose naturally and proximately from the distinctive conditions of her employment with King County.
4. Ms. Wimberly did not develop any psychiatric condition which was proximately caused by her

occupational exposure or disease. Conditions diagnosed as depression and associated anxiety were neither caused nor aggravated by her occupational exposure or disease.

5. Ms. Wimberly's carpal tunnel syndrome has been neither symptomatic nor disabling. By September 10, 2004, the overuse tendonitis proximately cause by her 1995 occupational exposure had resolved, and her continuing complaints were unrelated to her occupational exposure.

6. Between September 11, 2004 and June 17, 2005, Ms. Wimberly was not precluded by the effects of her occupational disease from engaging in gainful employment on a reasonably continuous basis.

7. As of June 17, 2005, Ms. Wimberly's occupational disease was at maximum medical improvement, and resulted in no permanent impairment.

8. As of June 17, 2005, Ms. Wimberly was capable of gainful employment on a reasonably continuous basis, taking into consideration her occupational disease, as well as her age, education, training and work experience.

(CP pp. 44-45)

Mrs. Wimberly filed a petition for review on December 20, 2006, and on January 9, 2007 the Board issued a Decision and Order affirming its Proposed Decision and Order. Pursuant to RCW 51.52.110 et seq. Mrs. Wimberly appealed the Decisions by the Board to Superior Court on January 31, 2007. (CP pp. 1-3) The claim was assigned Cause No. 07-2-04265-2 SEA and tried by jury before Judge William L. Downing at King County Superior Court.

Plaintiff filed a trial brief, identifying all of the issues contained in her Notice of Appeal to the Board as issues that were before the Court.

The stated issues in her trial brief were as follows:

- 1) Whether Ms. Wimberly sustained a psychiatric condition that was proximately caused and/or aggravated by the industrial injury of September 27, 1995.
- 2) Whether Ms. Wimberly's inability to engage in reasonable continuous employment between September 11, 2004 and June 17, 2005, was proximately related to her industrial injury of September 27, 1995.
- 3) Whether Ms. Wimberly was totally and permanently disabled of June 17, 2005 as a proximate result of her industrial injury.
- 4) Whether Ms. Wimberly bilaterally carpal tunnel syndrome caused her to be permanently partially disabled as of June 17, 2005.
- 5) Whether Ms. Wimberly mental health condition caused her to be permanently partially disabled as of June 17, 2005.

(CP pp. 1054-1055)

Similar issues were identified by King County in its trial brief.

(CP p. 1071)

Trial in this matter began on January 21, 2009. Both parties presented evidence consistent with the issues raised by Mrs. Wimberly's Notice of Appeal. Jury Instructions were submitted by both Mrs. Wimberly and King County. Plaintiff took exception to Court's Instruction No. 11 (CP p. 1039) and that Plaintiff's proposed "lighting up"

instruction (CP p. 1014) was not given. Plaintiff also took exception that the Court did not give Plaintiff's proposed instruction on Hypothetical Questions (CP p. 1013) Additionally, Plaintiff took exception that Plaintiff's proposed instruction on Medical Probability (CP p. 1011) was not given in the court's instructions. Finally Plaintiff took exception to the Court's verdict form that excluded the issue of Mrs. Wimberly's psychiatric condition, and that Plaintiff's proposed verdict form that included the psychiatric issue was not given. This case was submitted to the Jury and a verdict was entered on January 27, 2009, resulting in findings of fact, conclusions of law and Judgment dated February 10, 2009 affirming the Board. Plaintiff filed this appeal thereafter.

### **FACTS**

Mrs. Wimberly is a 40-year-old married woman, mother of three, a high school graduate, and has two and half years of college. (CP p. 149, ll. 17-20) She has had primarily a singular work history in data entry. (CP p. 130, ll. 22-26; p. 131)

In 1994, Mrs. Wimberly began working for King County Metro (King County) performing paper and keyboard payroll data entry. (CP p. 131, ll. 13-26) At that time Mrs. Wimberly was processing some thirty time-sheets on a daily basis. (CP p. 131, ll. 26; p. 132 ll. 1-4) This

involved approximately two to three hours of writing and five and a half to maybe six hours of computer data entry daily. (CP p. 132 ll. 1-4)

In July of 1995 Mrs. Wimberly began to have severe pain in her hands that radiated up her arms and gave her tingling sensations. (CP p. 134, ll. 14-16, 19-23) Her arm and hands were feeling numb and she was dropping things. (CP p. 134, ll. 16-18) The swelling, numbness and tingling in her hands were affecting her job performance. (CP p. 137, ll. 16-26) The symptoms continued to worsen while at King County, until she could only write for two to three minutes before she began to experience the symptoms in her hands. (CP p. 138, ll. 11-26; p. 139, ll. 8-10) The persistent and increasing symptoms in her wrist caused her to seek treatment from Lawrence Holland M.D., an orthopedic surgeon, in June 1996. (CP p. 351, l. 4) Dr. Holland diagnosed two conditions; carpal tunnel syndrome and overuse tendonitis. (CP p. 351, ll.18-25) In January of 1997 her condition worsened to the point where Dr. Holland performed surgery on Mrs. Wimberly's right hand for the carpal tunnel syndrome. (CP p. 141, ll. 5-24; p 357, ll. 7-9) Unfortunately, Mrs. Wimberly continued to experience symptoms after the surgery. (CP p. 142, ll.2-5, p. 357, ll.14-16) To address her persistent pain in the wrists, Dr. Holland prescribed splints which stopped her from flexing and extending her wrists. (CP p. 360, ll. 12-25, p 361, ll.1-4) The splints were helpful with

the pain, regrettably they caused Mrs. Wimberly's hands to get raw and breakout. Consequently, she would need to remove the splints and allow her hands and arms to heal. (CP p. 142, ll. 23-26)

In September 1995 Mrs. Wimberly sought treatment with psychiatrist, Dr. Patricia Barnes, a licensed psychiatrist in Washington and board certified in both psychiatry and neurology, (CP pp. 401-402) for a major depressive condition related to several stressors in her life at that time. That depressive condition was treated and had resolved or was in partial remission and she was not impaired in her ordinary functions. (CP p. 405-408) In January 1998 Mrs. Wimberly again sought treatment with Dr. Barnes as the persistent pain, numbness, and swelling in her hands led to Mrs. Wimberly being irritable, short of patience, fatigued, sleepless, unable to concentrate, and anxious. (CP p. 405, ll.12-13; p. 406, ll. 17-20, p. 418, ll. 3-9, p. 431, ll. 19-23; pp. 171-173) Dr. Barnes diagnosed Mrs. Wimberly as having a severe major depression of which she opined the industrial injury was a cause. (CP p. 405, ll. 14-17, pp. 411-413; p. 423. ll. 2-7)

Dr. Barnes testified that in her opinion the depressive episode she diagnosed in 1995 had resolved to a non-clinical level. (CP pp. 407-409) Further, Dr. Barnes testified that she again diagnosed major depression in 1998 as recurrent because it was her second episode, as the first had

resolved. (CP p. 411) She further testified that it was her opinion that the carpal tunnel syndrome was a cause of the major depression that was again diagnosed in 2002. (CP p. 422) Additionally, Dr. Barnes testified that Mrs. Wimberly would need psychiatric treatment to be employable and that her physical condition greatly influenced her depressive condition. (CP pp. 437-438)

During the course of her treatment Dr. Barnes saw Mrs. Wimberly more than twenty times. (CP p. 411, ll. 7-11) In addition to counseling, Dr. Barnes prescribed both Prozac and Wellbutrin for Mrs. Wimberly's depression. (CP p. 416, ll. 8-10) Mrs. Wimberly's psychiatric condition improved while on the medication allowing her to focus better and to sleep. (CP p. 174, ll. 7-16; p. 175, ll. 17-18)

Before her hands began to hurt Mrs. Wimberly's husband described her as energetic. (CP p. 210, ll. 11-19) After Mrs. Wimberly's hands became painful, her husband observed her become temperamental, her patience became short, and pain in her hands caused her to lose sleep. (CP p. 212, ll. 23-26; p. 213, ll.1-12)

In September 1997, in conjunction with Dr. Holland and a vocational counselor, it was determined that Mrs. Wimberly was unable to return to the job of injury and was in need of vocational retraining, due to her singular work history, and medical restrictions.

Dr. Holland reviewed over forty job analyses none of which he could approve of without restrictions. (CP p. 363, ll. 1-10) Those restrictions included restrictions from jobs that involved the frequent need to flex and extend the wrist, or frequently flex and extend at the elbow. (CP p. 359, ll. 10-17) According to Dr. Holland those restrictions limit Mrs. Wimberly's employment involving typing, data entry, and significant writing. (CP p. 360, ll. 4-11) The restrictions also limited the number of times Ms. Wimberly could lift relatively light weight:

Ms. Wimberly went through protracted vocational services during the life of this claim, and was never successfully retrained, nor released to her job of injury by her attending physician Drs. Holland and Barnes.

Dr. Holland and Dr. Barnes both testified that Mrs. Wimberly was left with permanent restrictions; and a permanent partial disability for her bilateral carpal tunnel and psychiatric impairment. Further Dr. Barnes offered testimony as to the combined effects of both conditions on these same issues.

The Board of Industrial Insurance Appeals entered Findings of Facts and Conclusion of Law on the issues of Mrs. Wimberly's bilateral carpal tunnel disease, her psychiatric condition not being causally related to her occupational disease, time loss compensation, treatment, and permanent disability both partial and total. The jury was presented with

the Board's Findings of Facts and Conclusion of Law and were instructed that they were prima facie correct. The Jury was never asked whether the evidence presented at trial rebutted the finding of facts related to Ms. Wimberly's psychiatric condition contained in Board Finding of Fact No. 4. The question was never presented to the Jury for a determination.

### **III. ARGUMENT**

#### **Whether on Appeal to Superior Court From an Order of the Board Of Industrial Insurance Appeals, is the Trial Court Obligated to Submit to the Jury All Issues of Fact That Were Properly Before the Board.**

The trial court erroneously excluded from consideration issues of fact related to Mrs. Wimberly's psychiatric condition for which the Board made findings of fact and conclusions of law in its Proposed Decision and Order that was adopted by its Decision and Order dated January 9, 2007. The statutes, rules, and laws governing industrial insurance claims are clear as to what issues at Superior Court are required to be presented to the jury. In an appeal to Superior Court the hearing shall be De Novo, and the only issues of fact which may be raised are those that were properly included in the Notice of Appeal to the Board or that are in the completed record of the proceedings before the Board. RCW 51.52.115. An aggrieved party has the right to challenge any and all findings and conclusions rendered by the Board as if there had been no finding or

conclusion previously rendered. So long as an issue of fact satisfies one of the two possible avenues proscribed by the statute it may be presented for judicial consideration. The provisions of this statute have been upheld by the court and is a long standing principle within Industrial Insurance Law. *Karlson v. DLI*, 26 Wash.2d 310, 173 P.2d 1001 (1946); *Woodard v. DLI*, 188 Wash. 93, 61 P.2d 1003 (1936) *Brakus v. DLI*, 48 Wash.2d 218, 292 P.2d 865 (1956).

In the case at bar the issue regarding causal relationship of Mrs. Wimberly's psychiatric condition to the accepted occupational disease, bilateral carpal tunnel, satisfies both criteria for judicial consideration set forth in RCW 51.52.115. There is no support in the record to base an exclusion of the psychiatric issue under the statute or the law. A review of the record clearly establishes not only that her Notice of Appeal was in compliance, but the record before the Board confirms that all the issues were fully adjudicated before the Board and that both parties presented evidence on causation, treatment, temporary total disability, and permanent disability. (CP p. 401-402; p. 36 ll 6-9)

Equally there is no ambiguity in Mrs. Wimberly's appeal to Superior Court of her intent to challenge all of the findings and conclusions reached by the Board. This was made clear by the issues identified in her trial brief. (CP p. 1054, ll. 25-26; p. 1055, ll. 1-11) King

County in its trial brief also identified Mrs. Wimberly's psychiatric condition as an issue that was properly before the court for consideration. (CP p. 1071, ll. 1-3) All the testimony evidence presented before the Board was presented in Superior Court. (CP pp. 127-866) Finally, in accordance with RCW 51.52.115 the Court instructed the jury as to the Boards findings and conclusions of Law on all of the issues that had been identified in the Notice of Appeal. (CP pp. 1034-1035)

RCW 51.52.115 mandates consideration of all issues that satisfy at least one of the two criteria set forth in the statute. The statute extends to the injured worker a right to specifically challenge and rebut any determination made with regards to her claim. Exclusion of the psychiatric issue from consideration stripped Mrs. Wimberly of her statutorily granted right as an injured worker. Considering that Mrs. Wimberly overwhelmingly satisfied the statutory requirements and that there was no summary judgment motion granted on the issue prior to trial, it remained viable for jury consideration. Hence in the present case the Court lacked the authority to exclude the issue from consideration and manifestly abused its discretion when it did so. The law is clear that when the court takes a view no reasonable person would take, or applies the wrong legal standard to an issue, a trial court abuses its discretion. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *Reese v. Stroh*, 128

Wn.2d 300, 310, 907 P.2d 282 (1995) (citing *Fraser v. Beutel*, 56 Wn. App. 725, 734, 785 P.2d 470 (1990)). The legal standard for what issues are to be submitted to the jury is governed by RCW 51.52.115, which in this case was disregarded. Mrs. Wimberly was substantially prejudiced as a result of the court's exclusion of this critical issue from jury consideration.

The prejudice to Mrs. Wimberly's case resulting from the Court's refusal to submit the issue of her psychiatric condition to jury affects the entire verdict that was rendered in this case. First, by refusing to submit the question to the jury for consideration the Court effectively denied Ms. Wimberly her statutory rights pursuant to RCW 51.52.060 and 51.52.110 to appeal any adverse decision rendered regarding her claim. Additionally, she was denied her right to a trial De Novo provided for under RCW 51.52.115, on all the issues that were considered by the Board of Industrial Insurance Appeals.

Second, Mrs. Wimberly was prejudiced by the Court's action because of how the jury was instructed as to the issues of facts in this case. It is a long standing principal that all parties are entitled to have their theory of the case presented to the jury by proper instruction, if there is any evidence to support it. *DeKoning v. Williams*, 47 Wash. 2d 139, 141, 286 P.2d 694 (1955). There is substantial evidence in the record to

support the court presenting the psychiatric condition to the jury. By the Court giving Court's Instruction No. 7 which states:

This is an appeal from the findings and decision of the Board of Industrial Insurance Appeals. The Board made the following material findings of fact:

1. On October 12, 1995, the claimant, Sheila M. Wimberly, filed an application for benefits alleging that she had sustained an industrial injury or disease in the course of her employment with King County. On June 17, 2005, the Department of Labor and Industries issued an order closing her claim with time loss ended September 10, 2004, and no permanent partial disability award. On June 27, 2005, Ms. Wimberly filed a notice of appeal with the Board of Industrial Insurance Appeals. On July 7, 2005, the Board issued an order granting the notice of appeal, assigning it Docket No. 05 16555, and directing that proceedings be held on the issues raised by the notice of appeal.
2. From December 1994 through December 1995, Sheila M. Wimberly worked as a payroll clerk for King County. Her work involved data entry, with two to three hours of hand writing, and five to six hours of computer keyboarding every day. The repetitive writing and keyboarding constitute distinctive conditions of her employment with King County.
3. As of September 27, 1995, Ms. Wimberly's hands suffered from bilateral carpal tunnel syndrome and overuse tendonitis, which arose naturally and proximately from the distinctive conditions of her employment with King County.
4. Ms. Wimberly did not develop any psychiatric condition which was proximately caused by her occupational exposure or disease. Conditions

diagnosed as depression and associated anxiety were neither caused nor aggravated by her occupational exposure or disease.

5. Ms. Wimberly's carpal tunnel syndrome has been neither symptomatic nor disabling. By September 10, 2004, the overuse tendonitis proximately cause by her 1995 occupational exposure had resolved, and her continuing complaints were unrelated to her occupational exposure.
6. Between September 11, 2004 and June 17, 2005, Ms. Wimberly was not precluded by the effects of her occupational disease from engaging in gainful employment on a reasonably continuous basis.
7. As of June 17, 2005, Ms. Wimberly's occupational disease was at maximum medical improvement, and resulted in no permanent impairment.
8. As of June 17, 2005, Ms. Wimberly was capable of gainful employment on a reasonably continuous basis, taking into consideration her occupational disease, as well as her age, education, training and work experience.

By informing you of these findings the court does not intend to express any opinion on the correctness or incorrectness of the Board's findings.

(CP pp. 1034-1035)

And Court's Instruction No. 8, that states:

The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable and it is for you to determine whether it is rebutted by the evidence. The burden of proof is on Sheila Wimberly to establish by a preponderance of the evidence that the decision is incorrect.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

(CP p. 1036)

It has acknowledged the psychiatric condition, and then instructed the jury to presume the correctness of the Board’s findings, unless it is rebutted by the evidence. The burden of proof is on Mrs. Wimberly to prove that it has been rebutted. However if the issue is never sent to the jury to render a decision as to whether Mrs. Wimberley met her burden of proof with respect to the Board’s Finding of Fact No. 4, the jury is left to accept the finality and correctness of the finding of fact to which there is no corresponding question on the Court’s verdict form. The jury is at liberty to take this information as fact, in its deliberation regarding all other issues that have been presented for resolution. The Court is required to give both of these instructions, however, both of these instructions are given with the understanding that the findings of facts which are being challenged will not only be enumerated in the body of the Court’s Instructions, but will be

addressed as well in the Court's verdict form. Board Findings of Facts that are unchallenged at Superior Court are deemed final, and are binding on all parties. The effect of the Court's exclusion of the psychiatric issue has made the Board's findings on this issue binding on all parties. This binding decision is prejudicial to the plaintiff, as it inherently means that if she did not have a psychiatric condition proximately caused by her occupational disease, then it could not have caused her to be temporarily totally disabled, nor would there be any permanent impairment associated with the same. Further the only conclusion that the jury could have reached with regards to Question No. 4 on the verdict form was no, as the jury had been instructed that she had no psychiatric condition related to her occupational disease. The jury was without recourse to decide differently.

Likewise, the jury's decision with regards to temporary total disability and permanent disability were also tainted, by the exclusion of the psychiatric condition from consideration. Absent the issue of the psychiatric condition the deliberation by the jury on the issues of temporary total disability and permanent disability, both total and partial were tainted, as the jury was denied the opportunity to assess whether Mrs. Wimberly was entitled to temporary total disability, permanent partial

disability, or total permanent disability as a result of her Carpal Tunnel Syndrome or Psychiatric condition independent of each other or whether she may have been entitled as a result of the combination of her conditions. Had all the issues that were properly before the court, been submitted to the jury for consideration there is sufficient evidence in the record for the jury to have decided in Mrs. Wimberly's favor on these issues. The jury could have rendered a decision that took into account both conditions, when determining whether she was temporarily totally disabled from September 11, 2004 to June 17, 2005 or whether she was permanently disabled, either partially or totally, as it related to either of the conditions or the combination of both. As it stands, Mrs. Wimberly was denied the opportunity to have her theory of the case presented to the jury. Plaintiff's proposed verdict form sought resolution of all the issues that were properly before the court and would not have prejudiced King County. She sought to have the jury respond to the following questions

Question No. 1:

Did Sheila Wimberly's occupational disease(s) of September 27, 1995, proximately caused her to be temporarily totally disabled from September 11, 2004 through June 17, 2005?

ANSWER: \_\_\_\_\_ (Yes or No)

Question No. 2:

Whether Sheila Wimberly's depression and associated anxiety were proximately caused by her occupational disease of September 27, 1995?

ANSWER: \_\_\_\_\_ (Yes or No)

Question No. 3:

Did Sheila Wimberly's occupational disease(s) of September 27, 1995, proximately cause her to be totally permanently disabled as of June 17, 2005?

ANSWER: \_\_\_\_\_ (Yes or No)

**If your answer to Question 3 is "Yes" do not answer any further questions. If your answer to Question 3 is "No," please proceed to Question 4.**

Question No. 4:

As of June 17, 2005 did Sheila Wimberly have any permanent partial disability proximately caused by her September 27, 1995 occupational disease?

ANSWER: \_\_\_\_\_ (Yes or No)

**If your answer to Question 4 is "Yes," please proceed to Question 5. If your answer to Question 3 [sic] is "No," do not answer any further questions.**

Question No. 5:

What was the extent of permanent partial disability for Sheila Wimberly's bilateral carpal tunnel syndrome and overuse tendonitis as of June 17, 2005, proximately caused by her occupational disease of September 27, 1995?

\_\_\_\_\_ % of the amputation value of the RIGHT arm at or above the shoulder (choose a percentage 0 to 10%)

\_\_\_\_\_ % of the amputation value of the LEFT arm at or above the shoulder (choose a percentage 0 to 10%)

Question No. 6:

What category of permanent mental health impairment most accurately describes Sheila Wimberly's level of permanent partial disability as of June 17, 2005, proximately caused by her occupational exposure or disease of September 27, 1995?

Answer: (Check only one category)

\_\_\_\_\_ Category 1 of permanent mental health impairments

\_\_\_\_\_ Category 2 of permanent mental health impairments

(CP pp. 1020-1022)

The Court rejected plaintiff's proposed verdict form; however, the Court's verdict form failed to address all of the issues being challenged in the Board's Findings of Facts or Conclusions of Law. Admittedly the Court's verdict form did include a question regarding permanent disability of a mental health condition. However, for the reasons stated above, any response to this question is tainted, nor does this question expressly address the acceptance issue related to the psychiatric condition. The Court is bound by the statutes and laws that govern the Industrial Insurance Act, and provided all criteria have been satisfied, all issues must be submitted to the jury. In this case the Court erroneously excluded the psychiatric issue from consideration and as a result Mrs. Wimberly has

been substantially prejudiced and the entire verdict rendered has been irretrievably tainted as all of the issues were interrelated.

In summary, the scope of Mrs. Wimberly's appeal to Superior Court is bound by her Notice of Appeal to the Board of Industrial Insurance Appeals and the complete record before the Court. Mrs. Wimberly satisfied the requirements to have all of the issues submitted to the jury and exclusion of any of them was erroneous and prejudicial to Mrs. Wimberly and the County received a windfall from the trial court's error. As such this Court should reverse and remand this matter to the trial court with the direction for a trial de novo on all of the issues that were on appeal from the Industrial Appeals order dated January 9, 2007.

**Whether Court Instruction No. 11 Erroneously Instructed the Jury on the Lighting Up Doctrine and Prejudiced the Plaintiff's Case**

It was erroneous for the Court not to give Plaintiff's proposed Lighting Up instruction. The Court offered a modified "Lighting Up" instruction in Court Instruction No. 11 which states:

The Industrial Insurance Act provides for benefits when a disability has been proximately caused by an industrial injury. This does not involve any consideration of "fault" or "negligence" by either the employer or the worker.

The term "proximate cause" means a cause which in a direct sequence produces the disability complained of and without which such disability would not have happened.

There may be more than one proximate cause of a disability. For a worker to recover benefits under the Act, the industrial injury must be a proximate cause of the alleged disability but it is not required that the industrial injury was the sole proximate cause of such disability. If the industrial injury was a proximate cause of the disability, the claimant is entitled to recovery for the full disability regardless of any preexisting condition.

(CP p. 1039)

Plaintiff took exception to the Court's instruction and in response to

Plaintiff's exception the Court stated:

THE COURT: Let me say that I agree with you as far as the sufficiency of the evidence to support the jury being instructed on that proposition. Where we part company, I guess, is whether or not the Proposed Instruction 11 accomplishes that. What it does not do is make use of the terms "light up," "late" or "quiescent," which are somewhat strange words from the jury's perspective, and none of the witnesses have testified in terms of any one of those three words, not once.

Instead, the Court has an instruction that concludes with the language "If the industrial injury was a proximate cause of the disability, the claimant is entitled to recover for the full disability regardless of any pre-existing condition."

I believe that gives you a complete opportunity to argue that principle of law.

(RP page 4, line 12 to page 5, line 3)

Hence the issue is not whether there was sufficiency of evidence to warrant giving the lighting up instruction, as the Court has determined that

there was sufficient evidence, but whether Court Instruction No. 11

properly states the law. Plaintiff's proposed lighting up instruction states:

If an industrial injury lights up and makes active a latent and quiescent infirmity or condition, then the resulting disability is to be attributed to the injury and not to the pre-existing condition. Under such circumstances the worker may recover for the full disability proximately caused by the industrial injury regardless of any pre-existing condition.

(CP p. 1014)

Plaintiff asserts that this instruction properly states the law established in both *Wendt v. Department of Labor & Indus*, 18 Wn. App. 674, 571 P.2d 229 (1977) and *Miller v. Department of Labor & Indus.*, 200 Wash. 674, 682, 94 P.2d 764 (1939), whereas Court's Instruction No. 11 does not. Additionally Mrs. Wimberly's proposed instruction addresses the multiple proximate cause issue. An aggrieved injured worker is entitled to have the jury properly instructed. However in the case at bar while the Court's intentions to make the lighting up principle more reader friendly, its execution of the same fails to properly state the law. As a result Court Instruction No. 11 did not permit Mrs. Wimberly to present her theory of the case to the jury, which she is entitled to do under the law. In summary there was sufficient evidence for the court to give an instruction on the lighting up doctrine, the instruction given by the Court fails to fully and properly instruct the jury on the law, and Mrs. Wimberly

has been prejudiced by the error. Therefore Mrs. Wimberly seeks to have this court reverse and remand this case for a new trial with the instructions that on retrial an appropriate instruction on this theory should be given, such as the instruction proposed by Mrs. Wimberly.

**Whether the Court Erred By Not Instructing the Jury  
on the Legal Standard of Medical Probability.**

Case law is clear that for a party to prove causation the medical testimony must establish that it is more probable than not that the industrial injury or occupational disease caused the subsequent disability. *Grimes v. Lakeside*, 78 Wn. App. 560, 561, 897 P.2d 431 (1995) (quoting *Zipp v. Seattle School Dist.*, 36 Wn. App. 598, 601, 676 P.2d 538, review denied, 101 Wn.2d 1023 (1984)). In the present case none of the Court's instructions properly describes this requirement for the jury. While the Court has the discretion to use terminology to assist the jury's understanding, the Court is still obligated to properly state the law and to fully instruct the jury. It is clear from Court Instruction Nos. 15 and 17 that the Court instructed the jury that Mrs. Wimberly; 1) had to prove a causal relationship between her occupational disease and her psychiatric condition, temporary total disability and permanent disability by a preponderance of evidence; and 2) that medical testimony was needed to prove causation. However the Court did not instruct the jury that for the

medical testimony to satisfy the causal relationship standard it had to be more than possibility or conjecture. Plaintiff proposed the following instruction to address the probability standard missing in the Court's Instruction.

Medical testimony is necessary to establish the proximate cause relationship between the occupational disease and/or the mental health condition for which compensation is sought and the need for medical treatment or the extent of disability proximately caused by an occupational exposure.

Medical testimony as to the possibility of a causal relationship is not sufficient to establish such relationship. Testimony as to possibility means testimony which is confined to words of speculation, surmise and conjecture. It is not sufficient to establish that the occupational disease might cause, could cause, can cause, or probably could cause such condition.

(CP p. 1011)

In the present case the testimony of Dr. Michael Friedman as to the causal relationship of Mrs. Wimberly's occupational disease to her psychiatric condition does not satisfy the probability standard. On direct Dr. Friedman was asked:

Q. . . do you have an opinion whether on and after September 10, 2005, 2004, Ms. Wimberly had a psychiatric condition proximately caused by her 1995 industrial injury with King County?

A. I do.

Q. What is your opinion?

- A. I do not feel that she has a psychiatric condition related to her employment or her condition while working with the County.
- Q. In 2004, and 2005 did she have any psychiatric condition caused by her industrial injury that interfered with her ability to work on or after September 10, 2004?
- A. I do not believe so.
- Q. Is that the same reason you stated earlier?
- A. It is.
- Q. Did she have any psychiatric condition caused by her industrial injury in your opinion, in need of further treatment?
- A. I did not feel that.
- Q. Why is that?
- A. Again I didn't feel that there was a psychiatric condition related to the injury proper.
- Q. And did she have any permanent mental health impairment caused by her industrial injury as of June 17, 2005?
- A. No.

(CP pp. 529, ll. 6 to p. 530, ll. 1-7)

When Dr. Friedman was questioned on cross examination regarding the opinion he had expressed regarding Mrs. Wimberly's mental health condition as of 2005 he admitted that his opinion was speculation stating:

- Q. And you have no idea what her mental health condition was in 2005, is that correct?

A. Correct.

Q. You can only speculate, is that right?

A. That's right

Q. How about 2004?

A. You are right. I can only speculate.

Q. 2003?

A. I have no idea. Haven't seen her since 1998.

(CP pp. 566, ll. 11-19)

It is clear from this testimony of Dr. Friedman that it does not measure up to the probability standard that the law requires.

Likewise the testimony of Dr. Kenneth Tucker presents inadequacy to sufficiently establish probability on the issue of Mrs. Wimberly's ability to engage in reasonably continuous employment. In one breath Dr. Tucker testifies that he feels Mrs. Wimberly is employable in reasonably continuous gainful employment, and but then he is unable to say whether or not she should have some restrictions. He further testifies that he did not examine Mrs. Wimberly. (CP p. 640, ll. 13-19)

Equally striking was the testimony of Drs. Warren Long and Alfred Blue, both presented by the King County. On the issue of permanent impairment Dr. Long was unable to state with any degree of probability Mrs. Wimberly's impairment or lack of impairment related to

her industrially related bilateral carpal tunnel. (CP p. 688) Dr. Blue's testimony as the causal relationship of Mrs. Wimberly's accepted bilateral carpal tunnel syndrome, to her ability to engage in reasonably continuous employment and the resulting permanent impairment also fails to meet the probability standard with respect to both of these issues, Dr. Blue is only able to offer what he thinks and feels not what is medically probable. (CP pp. 806-807; 809-810) In fact Dr. Blue testified that he did not know what Mrs. Wimberly's condition was in June 2005 and that any opinion that he offered regarding her condition in June 2005 would be speculation. (CP p. 841) The testimony of Drs. Friedman, Tucker, Long and Blue were essential to King County being able to address the causal relationship issues in this case. However, when the probability standard is applied to the testimony of these doctors it all fails to meet even the minimum requirement for causal relationship.

By the Court not giving the Medical probability instruction, Mrs. Wimberly was denied the opportunity to challenge the sufficiency of the evidence presented by King County on the issue before the court. Had the Court instructed the jury as to legal standard of medical probability, the jury would have been able to properly assess the evidence presented by both parties' medical experts. Hence, it was erroneous and prejudicial for the court not to instruct the jury on the legal standard of medical

probability. Mrs. Wimberly request that this court reverse and remand this case for a new trial, with the instruction that on retrial an appropriate instruction on this theory should be given, such as the instruction proposed by Mrs. Wimberly,

#### **IV. ATTORNEY FEES**

Pursuant to RAP 18.1(a) Mrs. Wimberly moves the Court for an order awarding attorney fees pursuant to RCW 51.52.130. The court should award Mrs. Wimberly attorney fees for services of her attorney before this court and should also award attorney fees before the Superior Court pursuant to RCW 51.52.130.

Mrs. Wimberly submits her request for attorney fees pursuant to RCW 51.52.130 which reads in pertinent part(s) as follows:

If on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary . . . a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

Lest it be suggested otherwise, this request is not premature. This court should reverse the judgment on appeal and remand to the Superior Court with instructions to order a new trial with regard to all issues.

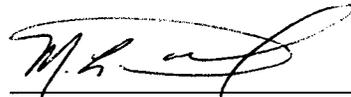
**V. CONCLUSION AND REQUEST FOR RELIEF**

The trial court's judgment is incorrect for the reasons stated hereinabove and for any and all reasons which may come to the Court's attention at or before this Court renders its decision. Mrs. Wimberly requests the court to reverse and remand with the instruction to order a new trial on the all the issues that are properly before the court and for extensive jury instructions. The court should award Mrs. Wimberly her attorney fees, or remand to the Superior Court with the direction to award attorney fees in the Superior Court. This court should award judgment for Mrs. Wimberly's medical witnesses pursuant to RCW 51.52.130 and this court should award judgment for plaintiff's taxable costs in this court and in the Superior Court.

The court should grant all other relief which maybe indicated, authorized or required by law.

Respectively submitted this 14<sup>th</sup> day of August, 2009.

DANIEL LAW OFFICES, P.S.



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