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No. 70754-0

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COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON

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KATHY STEVENS  
Appellant

vs.

DEPARTMENT OF LABOR AND INDUSTRIES  
Respondent

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**REPLY BRIEF OF APPELLANT KATHY STEVENS**

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## **INTRODUCTION/ HISTORY**

Comes now the Appellant, Kathy Stevens, by and through her attorneys of record, the Walthew Law Firm per Robert J. Heller, and hereby files this Reply Brief of Appellant in the above captioned in order to address issues raised in the Respondent's Response Brief.

The Appellant maintains her position on the issues addressed in her Appeals Brief as Supplemented by Arguments raised in this Reply.

## **I. ASSIGNMENTS OF ERROR**

The Appellant submits and assigns as error those Errors identified in her Appeal Brief.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

For purposes of this Reply, the Appellant addresses whether the Superior Court's use of Jury Instruction No. 15 was a prejudicial error of law, and

Whether the Verdict returned on 1/31/13 and the Judgment entered on 7/17/13 were supported by substantial credible evidence.

The Appellant relies on her previously filed Appeal Brief to address any other issues raised by this appeal.

### III. STATEMENT OF THE CASE

For purposes of this Reply Brief, the Appellant hereby restates the Statement of the Case as set forth in the Appellant's Appeal Brief:

The record reflects that all parties agree that the Appellant, Kathy Stevens, suffers from asthma. The evidence pertaining to the nature of the Appellant's employment is actually straight forward. For all times material to this appeal, she was employed by JAMCO, an aerospace industries manufacturer. (CP#7; CABR - Appellant at pg. 6.)<sup>1</sup> At different times, she has worked as an assembler in the wire shop in Building 2, performing inventory control and order "picking" for the wire shop in Building 1 and inventory control in Building 3. (CP#7; CABR - Appellant at pgs. 6 – 7.)

It is her employment in Building 3 that is of significance to the current appeal. The Appellant worked in Building 3 initially from December 2008 through June 2010. (CP#7; CABR - Appellant at pg. 12.) Because of her breathing difficulties she was pulled off that job site but returned to that same building in March 2011. (CP#7; CABR - Appellant at pg. 12; Michelle Mislant at pg. 91.)

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<sup>1</sup> References to testimony presented in this matter are references to the Certified Appeal Board Record (CABR) appearing in Clerk's Papers (CP) Item 7.

The inventory control position in Building 3 involved work picking out and delivering parts and panels located in an open mezzanine located above the manufacturing floor. (CP#7; CABR - R. Klein at pg. 39.) On the manufacturing floor the Employer operated a router and a down draft sanding table. (CP#7; CABR - R. Klein at pg.41.) Panels were routed and sanded for use in bulkheads on airplanes. They were made of fiberglass, aluminum and phenolic resin honeycomb. The down draft table was an industrial sander with essentially a vacuum type ventilation system that drew in dust and particulates from the sanding operation and vented them away from the sanders. Unfortunately for anyone working in the mezzanine, the ventilation system emptied directly into the inventory control area in the mezzanine. (CP#7; CABR - R. Klein at Pg. 41, lines 20-23.) Both the Appellant and her co-worker, Richard Klein, testified that dust was vented into the inventory storage area where the Appellant worked and that the heaviest concentration was in the Appellant's work area. (CP#7; CABR - R. Klein at pg. 43.) Had the ventilation system been working as designed, there should not have been any dust or particulate in the mezzanine. However, on March 25, 2010, the Department sent an industrial hygienist to JAMCO to conduct air quality studies. While the air was being tested, there was no sanding being performed. (CP#7; CABR - C. Jacomme at page 108; R. Klein at pg. 45.) Routers were being used in

a separate area of the manufacturing floor, but contrary to normal procedures, the routing was being performed as a two person job: one doing the routing, the other using a shop vac to remove dust and particulate. On a normal work day this was a one person job with no one removing dust or particulates. (CP#7; CABR - R. Klein at pg. 45.) Even so, the Department of Labor & Industries industrial hygienist testified that there was dust clearly present in the mezzanine even when the sanders were not operating. (CP#7; CABR - Chris Jacomme at pg. 111.)

The Department tester testified that the day he performed the test could he not duplicate the Appellant's actual work environment on a normal work day. (CP#7; CABR - C, Jacomme at pg. 110.)

While working in the mezzanine, the Appellant started having significant breathing difficulties which were different both in type and duration from episodes of bronchitis she had experienced in the past. She sought care from her primary care physician, Susana Escobar, M.D. who, in addition to treating her, referred her to Dale Ranheim, M.D. an environmental medicine/allergist. Dr. Ranheim treated the Appellant in conjunction with Dr. Escobar. (CP#7; CABR – Depositions of Drs. Escobar and Ranheim.)

Drs. Escobar and Ranheim determined that the Appellant had developed occupational asthma as a result of her exposure to the dust and

particulates generated on the manufacturing floor at JAMCO. (CP#7; CABR – Dr. Escobar at pg 26, Dr. Ranheim at pgs 13-17.) The Department denied the claim and this appeal followed.

During the appeal of the Department's denial. Drs. Escobar and Ranheim testified at the request of the Appellant. (CP#7; CABR – Depositions of Drs. Escobar and Ranheim.)

The Department presented the testimony of Robert Cox, M.D., a pulmonologist who testified that the Appellant's work environment was not a factor in the development of her asthma despite the fact that he had no knowledge of the nature of her work environment. (CP#7; CABR – Deposition of Dr. Cox.)

For the reasons set forth below, the Judgment of the Superior Court should be set aside and an order entered granting the Appellant's application for Industrial Insurance Benefits.

#### **IV. ARGUMENT**

The two issues raised in the Respondent's Responsive Brief which the Appellant briefly addresses in this Reply are the use of Jury Instruction No. 15 and whether there is substantial evidence to support the Superior Court's Verdict. The Appellant's primary arguments are set forth in her previously filed Appeals Brief. This Reply is to briefly address discussions raised by the Respondent in its Response.

**Court's Jury Instruction No. 15**

As a preface to this section, it should be understood that there was no court reporter present for the argument of jury instructions. The record relied upon is that set forth in the Trial Minutes (CP#13, pg. 7.) and the other filings of record.

Court's Instruction 15 was objected to on the grounds that it was potentially confusing to the Jury. It combined language from other appropriate instructions regarding medical testimony with language on proximate cause. Counsel advised the Court that the Department was able to make its arguments on proximate cause and the weight of medical evidence without recourse to this language. The objection was noted on the record. (CP#13, pg. 7.)

The Counsel for the Department opposed the Appellant's objection and filed a Memorandum of Law supportive of the use of the instruction. (CP#16.) Both parties argued their positions to the Judge.

The Respondent has argued that the issue of the propriety of the use of this instruction, based on the objection, has not been properly preserved by the Appellant based on the record.

The Respondent apparently argues that the Trial Court was not aware of the issue pertaining to the use of the Instruction No. 15. Clearly the intent of CR 51(f) was to assure that an unambiguous record is established and the Trial Court is made aware of the party's objection and is afforded the opportunity to remedy any errors before the case is submitted to the jury. *Memer v. Reimer*, 85 Wn.2d 685, 538 P.2d 517 (1975); *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers*, 114 Wn.App. 80, 55 P.3d 1208 (2002). The *Memel* court went further indicating even when a party had failed to meet the specific requirements pertaining to stating its objection, the Court of Appeals will consider error assigned to specific instructions when the trial court was apprised of the action desired and the grounds relied on, and was not misled or prejudiced in any way. *Memel, supra* at 687.

The fact that the Appellant did object to instructions is in the record and the fact that the issue of the use of Instruction No. 15 was before the Trial Judge for consideration, is confirmed by the Respondent's briefing on the issue which became part of the record and clearly establishes that this issue was before the Trial Judge. (CP#16.)

The only illogical argument would be to assert that the Respondent Department of Labor and Industries submitted a Brief on an issue which

was not contested. The issue of the propriety of the instruction was clearly and squarely before the Trial Judge and is properly before this Court.

**The Verdict Was Not Supported by Substantial Evidence**

Insofar as this is an appeal from a Superior Court de novo review, this Court is called upon to review the record to determine if the Superior Court's findings are supported by substantial evidence and whether the Court's conclusions of law flow from the findings. *Ruse v. Dept. of Labor & Indus.*, 138 Wash.2d 1, 5, 977 P.2d 570 (1999). See also *Rogers v. Department of Labor & Indus.*, 151 Wn.App. 174, 210 P.3d 355 (2009), cited by the Respondent.

This Court is called upon to determine if *substantial evidence* supports the Superior Court Verdict. This does not equate to an inquiry as to whether there is *any evidence* to support the verdict. The evidence must be of "sufficient quality to persuade a fair-minded rational person of the truth of the declared premise." *Bering v. Share*, 106 Wn. 2d 212, 220, 721 P.2d 918 (1986).

The theme of the Appellant's Appeal Brief is that the only evidence supportive of the verdict is the testimony of the Respondent's medical witness Dr. Cox. Testimony which is so lacking in foundation as to the Appellant's work environment and actually exposure to toxic

agents, that it cannot possibly be considered *substantial evidence*. This argument has been set forth in detail in the Appellant's Appeal Brief.

## V. CONCLUSION

This Court's review of the Superior Court's determination is limited to determining if there is substantial evidence to support the lower court's findings of fact and whether that Court's conclusions of law properly flow therefrom. RCW 51.52.140; *Bayliner Marine Corp. v. Perrigoue*, 40 Wn. App. 110, 697 P.2d 277 (1985). The Appellant respectfully submits that, for the reasons set forth above and more fully set forth in the Appellant's Appeal Brief, the Superior Court's determinations were in error as a matter of law and fact.

The Appellant requests this Court to set aside the Judgment of the Superior Court in this matter and enter an Order ruling that the Appellant's asthma is an occupational disease as defined in the Industrial Insurance Act, that the Appellant is entitled to Industrial Injury benefits and remanding this matter to the Department of Labor and Industries to provide such relief as may be available to an injured worker under the law and the facts of this case.

In the alternative, the Appellant requests that this matter be remanded to Superior Court and that a new trial on the issues be granted.

DATED this 6th day of February 2014

WALTHER, THOMPSON, KINDRED,  
COSTELLO & WINEMILLER, P.S.

A handwritten signature in black ink, appearing to read 'R. Heller', is written over a horizontal line.

By Robert J. Heller, WSBA # 12347  
Attorney for Appellant

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

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 Appellant, )  
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 AND INDUSTRIES, )  
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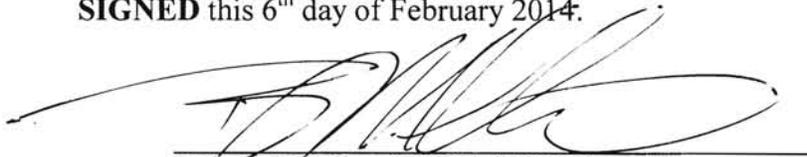
COURT OF APPEALS NO.: 70754-0

DECLARATION OF SERVICE  
OF BRIEF OF APPELLANT

I hereby certify under penalty of perjury under the laws of the State of Washington that the **Reply Brief of Appellant Kathy Stevens** was filed with the Court of Appeals on February 6, 2014, and served by hand delivery on February 6, 2014, on the following:

Dana Tumenova, AAG  
Attorney for Department of Labor & Industries  
Labor & Industries Division  
800 5th Avenue, Suite 2000  
Seattle, WA 98104

**SIGNED** this 6<sup>th</sup> day of February 2014.



Robert J. Heller, WSBA #12347

DECLARATION OF SERVICE  
OF BRIEF OF APPELLANT