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No. 70754-0

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

KATHY STEVENS
Appellant

vs.

DEPARTMENT OF LABOR AND INDUSTRIES
Respondent

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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 Brief of Appellant in the above captioned.

This case arose as an appeal from a Decision of the Board of Industrial Insurance Appeals (Board) brought pursuant to the Industrial Insurance Act (Act), RCW Title 51.

The Appellant had developed significant breathing difficulties while an employee of JAMCO, an aircraft parts manufacturer. She filed a claim for labor and industries benefits for occupational asthma seeking treatment and time loss compensation benefits. The Department of Labor and Industries (Department) denied the application for benefits on the basis that the Appellant's condition was neither an industrial injury nor an occupational disease as contemplated by the Industrial Insurance Act. The Appellant timely protested the denial and the Department issued an order dated 2/22/11 which affirmed the original denial order.

The Appellant filed a timely appeal to the Board of Industrial Insurance Appeals (Board).

Hearings were held before an Industrial Appeals Judge. A Proposed Decision and Order (PD&O) was issued by the Hearings Judge on 3/29/12 in which the Judge affirmed the Department order.

On 5/16/12 the Appellant filed a timely Petition for Review (PFR) of the PD&O, with the Board of Industrial Insurance Appeals. By Order dated 6/1/12 the Board denied the PFR without further comment. A timely appeal was then taken to Snohomish County Superior Court under Docket No. 12-2-05854-5.

Commencing January 28, 2013, a jury trial was held, the Honorable Marybeth Dingledy presiding, at the end of which a Verdict was returned in favor of the Respondent. The Judgment reflecting that determination was filed on 7/17/13.

Appellant timely filed a Motion for a New Trial pursuant to CR 59(a)(1),(7),(8)&(9), on the basis that the verdict and judgment were contrary to the law and facts, that the court had improperly instructed the jury on the law and, as a result, substantial justice had not been done.

After briefing and oral argument, the Appellant's Motion for New Trial was denied. Pursuant to RCW 51.52.140, this appeal was timely taken.

I. ASSIGNMENTS OF ERROR

The Appellant submits and assigns as error that the Findings of the Board of Industrial Insurance Appeals and the Snohomish County Superior Court are not supported by the law or the facts.

The Appellant further submits that the use of the Court's Jury Instruction No. 15 over the Appellant's objection was an error of law.

The Appellant further submits that the Verdict of the Jury in the present case and the resulting Judgment are not supported by substantial credible evidence.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Whether the Superior Court's use of Jury Instruction No. 15 was a prejudicial error of law.

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

Whether the Superior Court erred as a matter of law in failing to Grant the Appellant's Motion for New Trial.

III. STATEMENT OF THE CASE

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.)[1] 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 Mislang at pg. 91.)

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

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

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

Court's Jury Instruction No. 15

The sole issue on appeal in *Kathy Stevens v. Department of Labor and Industries,* Snohomish County Cause No. 12-2-05854-5, was whether the Appellant's industrial exposure to dust was a cause of her occupational asthma. The issue was not whether her industrial exposure was "the" proximate of her asthma. After the record had been read to the Jury, Counsel for the Appellant and the Defendant proposed Jury Instructions. The Appellant made a timely objection to Defendant's proposed Jury Instruction No. 13, (CP#13, pg.7) which read:

> "Ms. Stevens' condition and the proximate cause of that condition must be established by medical testimony".
>
> "Medical testimony of this causal relationship must be in terms of medical probability, not possibility".
>
> "Testimony as to possibility means testimony confined to words of speculation and conjecture. Medical testimony that an

incident could cause, or probably could cause such a condition is not sufficient." (CP#15.)

This instruction 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. Based on the objection and the briefing provided by Department's counsel, the issue of the propriety of the instruction was clearly and squarely before the Judge.

The Court, having heard argument from both counsel, reviewed the briefing and having been fully advised on the problems in the use of the instruction overruled Appellant's objection and provided this instruction to the Jury as Court's Instruction No. 15. (CP#17.)

As the Jury deliberated, it became apparent that the confusion predicted by the use of the instruction had come to pass as the Jury made specific inquires regarding the definition of proximate cause and burden of

proof. The Jury's confusion is clear in the correspondence the presiding juror sent to the court. (CP#s 18, 19, 20.)

A verdict was returned in favor of the Department but the Jury continued to voice concerns and confusion directly related to the Instruction. The Appellant was compelled to file a Motion for a New Trial and in support of the Motion attached the declaration of the presiding juror confirming that the objected to instruction caused the Jury to reach a verdict contrary to the beliefs of a majority of the Jury. (CP#22, 23, 24.)

The Jury Instruction as used in the context of this trial was in error on its face. This instruction makes reference to "**the** proximate cause" when the Appellant's burden is only to establish that work conditions were "**a** proximate cause" of her asthma. This clearly contributed to the Jury's misunderstanding of the law and its confusion during deliberations. The Jury repeatedly requested that the Court provide clarification or additional definitions of proximate cause. This is reflected in the Jury's repeated written questions to the Court. (CP#s 18, 19, 20.) It contributed to a misunderstanding of the law because it was a misstatement of the law.

When called upon to review the sufficiency of jury instructions in an appeal from a Superior Court Judgment, the Court of Appeals may deem instructions sufficient if they:

> "(1) Permit each party to argue his or her theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law." *Ruchert v. Freeman School District*, 106 Wash.App. 203, 208, 22 P.3d 841, 845 (2001), citing *Caruso v. Local Union No. 690*, 107 Wash.2d 524, 529, 730 P.2d 1299 (1987).

In the present case, although there is a question of whether using Court's Instruction No. 15 allowed both parties the ability to argue their theories of the case, there is no doubt that the use of this instruction was in fact misleading, and, when read in conjunction with the other jury instructions as a whole, did not properly inform the trier of fact of the applicable law. To the contrary, Court's Instruction No. 15 conflicted with other instructions as to the appropriate burden of proof and created significant confusion for the jurors which became obvious even as they deliberated. (CP#s 18, 19, 20.)

That this Instruction led to a miscarriage of the law in the present case became crystal clear once the Verdict was entered and then effectively repudiated by the Jury. (CPs# 23 and 24.)

<u>The Verdict Was Not Supported by Substantial Evidence</u>

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).

The Appellant recognizes that a jury verdict upholding findings of the Board will be presumed correct. *Sacred Heart Med. Ctr. v. Carrado*, 92 Waqsh.2d 631, 635, 600 P.2d 1015 (1979). The Appellant also recognizes that the evidence will be reviewed in the light most favorable to the Respondent. *Spino v. Dept. of Labor & Indus.*, 1 Wash.App.730, 731, 463 P.2d 256 (1969). However, once again, a verdict such as has been returned in the present case must be supported by substantial evidence.

In the present case there has been testimony from lay witnesses, an industrial hygienist, Appellant's co-workers and two attending physicians. (CP#7.)

The Department presented one medical witness: Robert Cox, M.D. Dr. Cox is a pulmonologist, retained by the Department to perform an "Independent" Medical Examination of the Appellant and who agreed that pertinent parts of his testimony were based on mistakes, misunderstandings and a lack of knowledge of the evidence.

Dr. Cox agreed with both of the Appellant's testifying and treating doctors that the Appellant was properly diagnosed with asthma. (CP#7;

CABR - Dr. Cox at pgs. 42 & 63, lines 1 – 3.)He testified that it was unrelated to her job duties at JAMCO. (CP#7; CABR - Dr. Cox at pg. 44.)

He testified that his opinion that her asthma was not occupationally related was based, in significant part, on reports of an air quality study performed by Chris Jacomme of the Department of Labor & Industries. (CP#7; CABR - Dr. Cox at pg. 63.) and a chronology of the Appellant's treatment with Dale Ranheim, M.D. (CP#7; CABR - Dr. Cox at pgs. 21, 49 & 52.)

He testified that he was unaware that the sanding table ventilation system was not tested or even examined on the day of the studies. (CP#7; CABR - Dr. Cox at pg. 64.) He testified that he was unaware that the router table was being operated on the day of the studies with a second person using a shop vacuum to remove dust but that this was not the normal daily procedure. (CP#7; CABR - Dr. Cox at pg. 65.) He testified that he was unaware that the Labor and Industries Industrial Hygienist had testified that his findings *could not duplicate a normal work day dust exposure*. (CP#7; CABR - Dr. Cox at pg. 69.)

He testified that he was unaware that not only the Appellant, but a co-worker in the same work area testified that the mezzanine where the Appellant worked was a dust filled environment because of its proximity to the vents for the sanding operations. He was unaware that the venting

system used on the sanding area vented directly into the Appellant's primary work area. (CP#7; CABR - Dr. Cox at pg. 62.)

He testified that he was unaware that at least one co-worker had complained of irritation in breathing while working in the same environment and had been forced to seek medical attention. (CP#7; CABR - Dr. Cox at pg. 62).

He testified that he was unaware that the sanding and routing tables created a dusty work environment in the production area which the Appellant had to traverse as a regular part of her job. (CP#7; CABR - Dr. Cox at pg. 62) In fact he did not know that the Appellant's job included working in that area. (CP#7; CABR - Dr. Cox at pg. 62)

The fact of the matter is that Dr. Cox testified that dust exposure such as that to which the Appellant was exposed on a daily basis at work could cause or aggravate an asthmatic condition. (CP#7; CABR - Dr. Cox at pgs. 60, 86.) He testified that in her case it did not. However, he also testified:

> Q. Doctor, the types of particulate that is created by sanding, the dust created by sanding fiberglass panels, that sort of thing, is that the type of dust that can aggravate an asthmatic condition?
>
> A. It depends on the size of the particles.

Q. Okay. Would it depend on the quantity of particles?

A. The quantity, the size, the nature of them.

Q. And the length of exposure?

A. Yes, the usual – length of exposure, duration, et cetera.

Q. And you don't have any documentation other than the air quality studies as to size of particles, the amount of particles, the length of exposure to the particles, or anything else related to the actual job of sanding in that building. Correct?

A. Correct.

(CP#7; CABR - Dr. Cox at pg. 86, line 16 – pg. 87. Line 6)

In short, Dr. Cox did what he was retained to do: he formulated and offered an opinion consistent with the Department's theory of the case as contemplated by *Intalco Aluminum v. Dept. of Labor & Indus.*, 66 Wash.App. 644, 654, 853 P.2d 390 (1992). He offered an opinion as to the effect of the Appellant's work environment on her health without having any actual knowledge of her work environment. It was within the authority of the Superior Court to refuse to accept this testimony and the Court should have done so on the Appellant's Motion for a New Trial. *Brewer v. Copeland*, 86 Wash.2d 58, 74, 542 P.2d 445 (1975).

It is testimony like Dr. Cox's that led to the basic tenet of Worker's Compensation law that the testimony of an attending physician must be given special consideration. *Hamilton v. Department of Labor and Industries,* 111 Wn.2d 569, 761 P.2d 618 (1988). The basis for this tenet is stated in *Intalco Aluminum v. Department of Labor & Indus.*, 66 Wn. App. 644, 654 (1992). "This is because an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case."

Dr. Cox's testimony is not substantial evidence. If he had any knowledge at all about the Appellant's work environment at least an argument could be made for giving his testimony some weight. As it is, he admitted to testifying to something he did not understand. This testimony does not merit serious consideration nor does it constitute substantial evidence.

Denial of Motion for New Trial

Once the verdict had been returned in the present case, it became apparent that the Court's decision to use Court's Jury Instruction No. 15 had fatally confused the Jury. It was not possible for the Jury to properly understand the law of proximate cause and medical causation due to the confusion presented by this instruction. On its face, this instruction improperly told the Jury the Appellant had the burden of proving an

industrial exposure was the proximate cause of the Appellant's medical condition. This is not the law. The law was properly stated in Court's Instruction No. 12 (CP#17) which instructs the jury as to multiple proximate causes.

When the Jury reviewed Instruction No. 12 next to Instruction No. 15, the inconsistencies became insurmountable.

Once the Board of Industrial Insurance Appeals has made a final determination, an injured worker's only means of obtaining relief from an erroneous decision is by appeal to the Superior Court. If, during the presentation of the case, the Jury is instructed in such a manner that it cannot understand the law as it is to be applied to the facts of the case, there is no way that an injured worker can obtain proper consideration of her claim. In that situation, substantial justice has been denied.

The appropriate procedure for providing the injured worker redress in this situation would have been to grant a new trial. A Motion for a New Trial pursuant to CR 59(a)(1),(7),(8)&(9), was timely filed on the basis that the verdict and judgment were contrary to the law and facts, that the court had improperly instructed the jury on the law and, as a result, substantial justice had not been done. (CP#s 22, 23,24.)

A review of the evidence, the Jury Instructions and the Jury's obvious confusion arising therefrom, reveals that substantial justice has

not been done in this case and the Superior Court should have granted a new trial. In light of the obvious error of law on the face of Court's Instruction No. 15, the Superior Court's denial of the Motion for New trial constituted an abuse of discretion and should be overturned. *Alcoa v. Aetna Cas. & Sur.*, 140 Wash.2d 517, 537, 998 P.2d 856 (2000).

The *repeatedly* stated fundamental purpose of the Industrial Insurance Act is to give sure and certain relief to injured workers and to resolve all doubts in favor of the worker. RCW 51.12.010; *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001); *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 915 P.2d 624 (1995); *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 600 P.2d 1015 (1979). When this legislative mandate is applied to the present case, at a minimum the Appellant's Motion for New Trial should have been granted.

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 more fully above, 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 28th day of October 2013

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