

No. 72716-8-1

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

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JOYCE SHOEMAKE,

Appellant,

v.

ELI LILLY & COMPANY,

Respondent.

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APPELLANT'S CORRECTED OPENING BRIEF

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## **I. INTRODUCTION**

Appellant Joyce Shoemake, the plaintiff in the trial court action, by and through her attorney of record, Tara Jayne Reck of Foster Law, P.C., offers this opening brief in support of her appeal.

This case originates from an administrative law review (ALR) appeal from a Decision and Order of the Board of Industrial Insurance Appeals (Board) dated January 23, 2012, wherein the Board adopted the Proposed Decision and Order of the Industrial Appeals Judge affirming that the September 3, 2010 order issued by the Department of Labor and Industries (Department) was correct in rejecting Ms. Shoemake's claim as being neither an industrial injury nor an occupational disease. She appealed the Board's decision to Superior Court and the Douglas North. The jury affirmed the Board's decision, and the Defendant's proposed judgment and order was signed on October 24, 2014, and filed on October 27, 2014.

Ms. Shoemake seeks appellate review on multiple grounds: (1) that the Court improperly allowed the testimony of Dr. Darby to be presented to the jury; (2) that the Court improperly rejected MSDS exhibits and corresponding expert testimony; (3) that the

Court improperly rejected certain probative portions of lay witness testimony from Christy Kurts and Shelley Carpenter; and (4) that the Court improperly gave instruction number 17. Based upon these errors that occurred during the trial and to which appellant objected at the time of trial, a new trial should be granted.

## **II. ASSIGNMENTS OF ERROR**

- A. THE COURT BELOW ERRED BY ALLOWING THE CUMULATIVE TESTIMONY OF DR. DARB Y.
- B. THE COURT BELOW ERRED BY NOT ALLOWING MSDS EXHIBITS AND RELATED EXPERT TESTIMONY.
- C. THE COURT BELOW ERRED BY NOT ALLOWING SIGNIFICANT PROBATIVE LAY WITNESS TESTIMONY.
- D. THE COURT BELOW ERRED BY GIVING INSTRUCTION NUMBER 17.

## **III. ISSUES**

- A. Whether the Court erred in allowing the cumulative expert testimony of Dr. Darby.
- B. Whether the Court erred by rejecting probative MSDS exhibits and corresponding expert testimony.
- C. Whether the Court erred in excluding significant probative lay witness testimony.
- D. Whether the Court erred in giving instruction number 17.

#### **IV. STATEMENT OF THE CASE**

##### **A. FACTUAL AND PROCEDURAL HISTORY**

###### **1. Jurisdictional Background**

On or about December 16, 1991, the Department received Ms. Shoemake's application for workers' compensation benefits under the Industrial Insurance Act (Act) for chemical exposure/poisoning occurring as a result of an eight-month remodeling project occurring on Physio Control's premises during the course of her employment there. On January 2, 1992, the Department issued an order allowing Ms. Shoemake's claim under claim number T582517. The employer protested claim allowance, and the Department issued a subsequent order on June 30, 1993, rejecting the claim. After the June 30, 1993 order was protested the Department issued an order on July 22, 1996, affirming the June 30, 1993 order. On December 30, 1996, the Department issued an order affirming the June 30, 1993 order.

Ms. Shoemake timely appealed the December 30, 1996 order to the Board of Industrial Insurance Appeals (Board) but further adjudication of the appeal stalled. Finally, on March 22, 2000, the Board issued an Order on Agreement of Parties (OAP) reversing the December 30, 1996 order and remanding the claim to

the Department for further investigation. The Department issued a ministerial order on April 5, 2000, consistent with the OAP. Once again, further adjudication of the claim stalled and the Department took no further action for nearly nine years despite the Board's directive. Finally, on September 3, 2010, the Department issued an order again rejecting the claim as neither an industrial injury nor an occupational disease.

Ms. Shoemake protested the order on September 24, 2010. On September 30, 2010, the Department issued an order affirming the September 3, 2010 order. On October 20, 2010, Ms. Shoemake filed an appeal with the Board, and on November 29, 2010, the Board issued an order granting the appeal and assigning it Docket No. 10 20030. The Industrial Appeals Judge issued a Proposed Decision and Order on November 22, 2011, affirming the September 3, 2010 Department order. On January 23, 2012, the Board adopted the Proposed Decision and Order as the final Decision and Order of the Board. Ms. Shoemake filed an appeal in King County Superior Court from the January 23, 2012, Decision and Order.

Pre-trial proceedings included a motion for summary judgment filed by the Plaintiff as well as a cross motion for summary judgment filed by the Defendant. After argument was presented on November 8, 2013, both motions were denied. Additional motions in limine were heard and ruled upon by the Court prior to the commencement of the six person jury trial on June 5, 2014. Following deliberations, the jury rendered a verdict affirming the Board's decision, and the Defendant's proposed judgment and order was signed on October 24, 2014, and filed on October 27, 2014. As a result, Ms. Shoemake has appealed to the Washington State Court of Appeals, Division One.

## 2. Factual Background

Ms. Shoemake began working at Physio Control in 1979. By 1989, she was the manager of compensation development for the 1,100-employee company. (CP - CABR - Shoemake Test., p. 21.) By 1991, she was very accomplished, serving on several boards, speaking at seminars, teaching classes, and was well-respected by her peers. (CP - CABR - Shoemake Test., pp. 28 - 29.) She was also married with one young child. (CP - CABR - Shoemake Test., p. 26.) She skied, sailed, traveled, and entertained.

Prior to the Physio Control complex remodel that commenced in January 1991, Ms. Shoemake experienced some food and animal allergies as a child but none that resulted in the need for ongoing treatment or medications. (CP - CABR - Shoemake Test., p. 31.) She suffered from recurrent sinus and upper respiratory infections, including occasional pneumonia for which she received antibiotics and other medications. (CP - CABR - Shoemake Test., p. 34.) She also saw a mental health counselor prior to 1991 for a handful of sessions after her divorce in 1985. (CP - CABR - Shoemake Test., p. 35.) Ms. Shoemake believes she was diagnosed with a heart murmur at age 12 or 13 and received Inderal, a medication with the side-effect of fatigue, in her 20s. (Shoemake Test., p. 37) Ms. Shoemake lost her father in February of 1990 and her mother in 1993. (CP - CABR - Shoemake Test., p. 39.)

The 1991 remodel began with the interior south building where Ms. Shoemake and the rest of the human resources team worked. (CP - CABR - Shoemake Test., p. 58; per parties' stipulation). Over the course of the project, construction spanned two floors and included scraping existing floor tile, carpet removal, sanding floor surfaces, constructing walls, painting, and carpeting.

(CP - CABR - Shoemake Test., p. 62.) Ms. Shoemake was extensively involved in the administrative aspects of the project including participating in meetings as one of two department liaisons with the remodel team. Admitted exhibits 3 through 10 detail the remodeling timeline from January 1991 through September 1991, the office move (human resources was located on the second floor and relocated to the first floor even before work was completed on the first floor), and the extensive work involved in the remodeling project (e.g., constructing new walls, sanding, painting, pulling out old carpet, and installing new carpet). Ms. Shoemake recalls the remodeling work being accompanied by distinct odors of new paint and vinyl tile adhesive, which she could smell from her office. (CP - CABR - Shoemake Test., p. 69.) She testified that during construction the air hung heavy with fumes and there was no ventilation. (CP - CABR - Shoemake Test., p. 145.)

Near the end of July 1991 or beginning of August 1991, Ms. Shoemake began experiencing severe headaches and dizziness and had trouble breathing. She was also severely fatigued. She hurt all over and her symptoms were acute. By mid-September 1991 she stopped working, but with the expectation that she would return soon. (CP - CABR - Shoemake Test., p. 157.) As a result of

her symptoms, Ms. Shoemake requested the material safety data sheets (MSDSs) for the products used during the remodel. (Exhibits 15 through 18 and 32 through 34 contained in the original CABR)

Ms. Shoemake was not the only individual at Physio Control to develop medical problems due to the remodeling project in 1991. Christy Kurts, one of Ms. Shoemake's supervisees, suffered physical symptoms including frequent headaches during the remodel. (CP - CABR - Kurts Test., pp. 123 – 124.) She also noticed that her work area smelled like tar or asphalt, and there was no air circulation. (CP - CABR - Kurts Test., p. 125.) As a result of her symptoms, Ms. Kurts filed a workers' compensation claim and received workers' compensation benefits including time loss compensation for the several months she could not work. (CP - CABR - Kurts Test., p. 126.) She left the company in October 1991 because she could not return to the building that caused her headaches. Ms. Kurts associated her symptoms and inability to work at Physio Control with the remodeling project. (CP - CABR - Kurts Test., p. 128.)

Shelly Carpenter also worked full-time in the Physio Control human resources department in 1991 with Ms. Shoemake. (CP -

CABR - Carpenter Test., p. 5.) She described Ms. Shoemake as professional and competent prior to the 1991 remodel, and noticeably absent following the onset of the modeling. (CP - CABR - Carpenter Test., p. 5.) Ms. Carpenter specifically recalled a poignant glue odor when the carpet was installed, which resulted in her suffering a headache and upset stomach, and the company allowed her and others to leave work. (CP - CABR - Carpenter Test., p. 9.) She returned to work but immediately left again because her symptoms returned. She also witnessed Ms. Shoemake's ill appearance during the remodeling project and her leaving work early because she did not feel well. (CP - CABR - Carpenter Test., pp. 19 – 20.) Much of the testimony from Ms. Kurts and Ms. Carpenter concerning their individual symptoms during the remodel was excluded and never heard by the jury.

Two medical experts, Jordan Firestone, M.D., and David Buscher, M.D., and a toxicologist, Harriet Amman, Ph.D., testified on behalf of Ms. Shoemake. Their review of her medical records revealed Ms. Shoemake did not see a medical provider for approximately the first five months of 1991. She saw Larry Johnson, M.D., on June 6, 1991, and described symptoms of fatigue, arthralgia, numbness, stress, and difficulty concentrating.

At a July 22, 2011 appointment with Dr. Johnson, she mentioned she had had an upper respiratory infection and inflammation symptoms for the past three weeks. On July 17, 2011, she described numbness in her hands and feet and a sore throat to Dr. Buscher. This was followed by an evaluation on August 29, 1991, with Dr. Buscher when she described throat and sinus irritations, lightheadedness, and dizziness. She had the same symptoms at her appointment on September 17, 2011.

Dr. Firestone is Board-certified in Neurology and also Board-certified in Occupational and Environmental Medicine with a special area of interest in the overlap between the two. (CP - CABR - Firestone Test., p. 17.) Until recently, he was the Director of the Occupational Medicine Clinic at Harborview Medical Center. He recently became the Medical Director of Occupational Services at Stanford Hospital. (CP - CABR - Firestone Test., pp. 19 – 22.) Dr. Firestone's evaluation process to determine whether a worker's exposure to chemicals at work results in a medical condition is extensive. (CP - CABR - Firestone Test., pp. 36 – 37.) In addition to reviewing Ms. Shoemake's considerable medical records, Dr. Firestone personally examined her. Based upon his experience, review of her medical records and history, and his evaluation, Dr.

Firestone concluded on a more-probable-than-not medical basis that during the time of the remodel Ms. Shoemake had features of respiratory inflammation or irritation with sinus congestion, sore throat and symptoms of dizziness, nausea, and headache proximately caused or aggravated by her prolonged exposure to chemicals and solvents during the course of her employment with Physio Control. He diagnosed a resulting acute respiratory irritation syndrome and chemical rhinitis, which are physical not mental conditions. Dr. Firestone's opinion was based on his knowledge of the materials used in jobs of that nature and Ms. Shoemake's symptoms as recorded in contemporaneous medical records. (CP - CABR - Firestone Test., pp. 59 – 61.) Dr. Firestone noted it would be important to a causation inquiry regarding chemical exposures and subsequent medical conditions to learn whether other people complained about similar symptoms including odors. (CP - CABR - Firestone Test., p. 89.)

Harriett Amman, Ph.D., is a Board-certified toxicologist who previously worked for the Environmental Protection Agency, focusing on indoor air quality and air toxic team ("hazardous air pollution") including commissioning a report for Congress assessing indoor air quality and the health effects of industrial exposures to

chemicals and solvents. (CP - CABR - Amman Test., pp. 97 – 99.)

Dr. Amman testified that the standard of care in 1991 for a remodel was to remove people from the area. However, if that was not possible it would have been necessary to provide a visqueen barrier and to put negative air into the space being remodeled; although visqueen alone would not completely stop the movement of chemical vapors. (CP - CABR - Amman Test., pp. 106 – 108.)

In 1993, Dr. Amman was asked to review materials in an effort to help clarify what happened to Ms. Shoemake as the result of her industrial chemical/solvent exposure during the Physio Control remodel. Based on her review of documents, knowledge, vast experience, and discussions with Ms. Shoemake, Dr. Amman concluded on a more-probable-than-not basis that Ms. Shoemake was exposed to neurotoxins and chemicals during the 1991 remodel. She testified that it was significant that company documents suggested that the building became hot and smelly and the ventilation system had malfunctioned. (CP - CABR - Amman Test., p. 120) Dr. Amman reviewed the MSDS reports provided to Ms. Shoemake by Physio Control and testified that, assuming these were the products used, they would certainly cause symptoms of the type Ms. Shoemake experienced. She also testified that

regardless of the type of paint used, all paints in 1991 contained neurotoxin agents that could result in dizziness, lack of attention, confusion, and headaches because they are respiratory irritants. Additionally, adhesives in 1991 contained neurotoxic substances causing respiratory and eye irritation. (CP - CABR - Amman Test., pp. 130 – 131) Their effect on somebody depends upon a person's susceptibility such as their age, state of health, genetic predisposition, and previous and concomitant exposures. In summary, Dr. Amman concluded that Ms. Shoemake was exposed to dust solvents and vapors from the remodeling project beginning with the tearing up of carpet and demolition of walls followed by the use of solvents and paints and sanding. (CP - CABR - Amman Test., p. 135)

Board-certified in Family Medicine, David Buscher, M.D., has been licensed to practice medicine in the state of Washington since 1978. He began treating Ms. Shoemake in 1989. He gathered a thorough history from her to determine whether her environment was a factor relative to the causation of her symptoms. (CP - CABR - Buscher Test., pp. 13 – 16) He evaluated Ms. Shoemake on November 28, 1990, and December 10, 1990, and then not again until July 17, 1991. (CP - CABR - Buscher Test., pp. 22 – 23) Dr.

Buscher treated Ms. Shoemake during the summer and fall of 1991 at which time he observed her pre-existing conditions were far worse as was her overall condition. He was quite concerned that the remodeling project and Ms. Shoemake's prolonged exposure to neurotoxins and other chemicals were causing her illnesses. Therefore, beginning approximately September 12, 1991, he took her off work. He also diagnosed her with toxic effects of fumes, vapors, gases and toxic encephalopathy proximately caused by her industrial chemical exposure. (CP - CABR - Buscher Test., pp 49 – 50, 55) His conclusion was not based on any singular product or ingredient used during the remodeling project but the fact that paint, adhesives, and glues contain neurotoxins which caused Ms. Shoemake's symptoms including irritating her nasal and sinus membranes. (CP - CABR - Buscher Test., p. 50)

Dr. John Caner, a rheumatologist, testified at the employer's request. Dr. Caner examined Ms. Shoemake on December 9, 2009, for an independent medical examination. Dr. Caner diagnosed her with fibromyalgia and a possible rheumatic disease like lupus or spondyloarthropathy. (CP - CABR - Caner Test, p. 11, and 19-20) It was Dr. Caner's opinion that she did not develop or

exacerbate any condition as a result of her work exposure. (CP - CABR - Caner Test, p. 22-25)

Dr. Garrison Ayars also testified at the employer's request, and is an internal medicine specialist with a focus on adverse reactions to environmental agents. According to Dr. Ayars, Ms. Shoemake had a documented somatoform disorder and upper respiratory conditions prior to the 1991 remodel at Physio Control. (CP - CABR - Ayars Test, p. 12-19) Dr. Ayars documented eleven diagnoses relative to Ms. Shoemake but opined that none were caused or aggravated by any work-related exposure. (CP - CABR - Ayars Test, p. 25, 35)

Dr. Dennis Stumpp is an occupational medicine doctor called at the employer's request. Dr. Stumpp reviewed records related to Ms. Shoemake but did not physically examine her because she did not show up for two separate scheduled examinations. (CP - CABR - Stumpp Test, p. 9-11) It was Dr. Stumpp's opinion that all of Ms. Shoemake's symptoms predated the 1991 remodel project at Physio Control and that these were not caused by any work-related exposure. (CP - CABR - Stumpp Test, p. 33-34)

Dr. John Hamm is a psychiatrist that testified at the employer's request. He opined based upon his examination of Ms. Shoemake on June 19, 1992, that she suffers from a somatoform disorder not caused or aggravated by her work-related exposure. (CP - CABR - Stumpp Test, pp. 27-38)

Finally, Dr. Paul Darby is another occupational medicine specialist that testified at the employer's request. Dr. Darby has a specialty focus in toxicology. Dr. Darby reviewed Ms. Shoemake's medical records and diagnosed her with a pre-existing somatization disorder not cause or aggravated by her work-place exposure. Dr. Darby testified that the likelihood of the products used in the remodel construction producing toxic symptoms is extremely low. (CP - CABR - Darby Test, p. 78)

## **V. ARGUMENT**

The Industrial Insurance Act (Act) is specifically designed to reduce to a minimum the suffering and economic loss arising from injuries occurring in the course of employment. Injured workers are the intended beneficiaries of the Act; its provisions must be liberally construed with **all** doubts resolved in favor of the injured worker. RCW 51.52.010; *McIndoe v. Dept. of Labor and Indus.*,

144 Wn.2d 252, 256-57, 26 P.3d 903 (2001); *Wilber v. Dept. of Labor and Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963); *Clauson v. Dept. of Labor and Indus.*, 130 Wn. 2d 580, 925 P.2d 624 (1996). This liberal interpretation applies only to statutory construction under the Act.

#### **A. STANDARD OF REVIEW**

The trial court's jurisdiction to review a decision of the Board is appellate in nature; the trial court can only decide matters previously decided by the Board. *Shufeldt v. Dept. of Labor and Indus.*, 57 Wn.2d 758, 359 P.2d 495 (1961). In an appeal from a superior court's decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007).

The Court of Appeals' review of a trial court decision is limited to an examination of the record to see whether substantial evidence supports the findings made after the trial court's *de novo* review, and whether the court's conclusions of law flow from the findings made. *Rogers v. Dept. of Labor and Indus.*, 151 Wn. App. 174, 210 P.3d 355 (2009).

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). An abuse of discretion occurs when a trial court's exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *Id.* When an error of law is cited as grounds for a new trial under CR59(a)(8), this Court reviews the alleged error or law de novo. *M.R.B. v. Puyallup Sch. Dist.*, 169 Wn. App. 837, 848, 282 P.3d 1124 (2012), *review denied*, 176 Wn.2d 1002, 297 P.3d 67 (2013). An error of law must be shown to have been prejudicial. *Id.* An erroneous jury instruction requires reversal if it is prejudicial and if the error affects the trial's outcome. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998).

**B. THE CUMULATIVE EXPERT TESTIMONY OF DR. DARBY SHOULD HAVE BEEN EXCLUDED.**

At the Board hearing level, in her petition for review to the Board and prior to the commencement of the jury trial, Ms. Shoemake moved for the exclusion of the cumulative expert testimony of Dr. Darby. Her request was overruled and the testimony was heard by the jury despite the fact that Dr. Stumpp, an expert of the same

specialty with access to the same records for review, and with the same opinion had already testified.

A party should not be permitted to present testimony from multiple expert witnesses to offer cumulative evidence on the issues of medical diagnoses and causation. Furthermore, limiting expert witness testimony is within the trial court's discretion. *Vasquez v. Markin*, 46 Wn. App. 480, 731 P.2d 510(1986) (CR 16, which addresses pre-trial procedure and issue formulation, also contemplates the trial court may limit the number of expert witnesses). Pursuant to CR 16(a)(4), the court may in its discretion consider the "limitation of the number of expert witnesses...." (Emphasis added.) A trial judge may exclude expert witness testimony on the basis that it is cumulative. See e.g. *Miller v. Peterson*, 42 Wn. App.822, 714 P.2d 695 (1986).

Limiting the number of expert witnesses is also consistent with ER 403, which provides that evidence may be excluded "if its probative value is substantially outweighed...by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." A balancing test must be done to make this determination.

Here, the employer presented testimony from multiple expert witnesses with the same specialization, offering the same opinions, on the very same issues, leading to needless and unfair stacking of cumulative evidence. Specifically, Dr. Darby's specialization in occupational medicine is the same as Dr. Dennis Stumpp's, who also testified for the employer. While Dr. Darby testified to a sub-specialization in toxicology, Dr. Stumpp testified that, within the field of occupational medicine, he has worked on many exposure cases. In fact, in addition to Dr. Ayars, Dr. Caner, and Dr. Hamm, both Dr. Darby and Dr. Stumpp offered nearly identical testimony and opinions on this point.

The employer should not have been permitted to unfairly stack the testimonial deck against Ms. Shoemake. Allowing this cumulative testimony unfairly prejudiced Ms. Shoemake who could not possibly match the sheer number of cumulative witnesses presented by Physio Control. As a result, a new trial should be granted and the cumulative testimony of Dr. Darby should be excluded.

**C. MSDS EXHIBITS AND CORRESPONDING EXPERT TESTIMONY SHOULD HAVE BEEN ADMITTED.**

- 1. A sufficient foundation was laid for the admissibility*

*of exhibits 16, 18, 32, 33 and 34.*

On August 10, 1992, Ms. Shoemake requested the material safety data sheets (MSDSs) used in the enamel paint from Corporate Safety Administrator Steve Hansen. (CP - CABR - Shoemake testimony, p. 121; Exhibit 33 – Attachment D) On August 25, 1992, Ms. Shoemake received a response to her request from Nance Haydock-Keck, Compensation, Benefits, Training Manager. The letter is on Physio Control letterhead and Ms. Haydock-Keck's signature appears below the heading "PHYSIO-CONTROL CORPORATION". In that letter, Ms. Haydock-Keck states, "A copy of an MSDS that you requested through Steven Hansen is enclosed." (Exhibit 33, p. 1 – Attachment D) The enclosed MSDS was for alkyd semi-gloss enamel paint. (Exhibit 33, pp. 2-3 – Attachment D) Ms. Shoemake testified that Exhibit 33 was the original document. (CP - CABR - Shoemake testimony, p. 123, line 21) On October 23, 1992, Ms. Shoemake received a second letter from Ms. Haydock-Keck again on Physio Control letterhead with a similar signature block stating "the paint used in the bathroom was the paint described in the MSDS I sent to you in my August 25, 1992, letter. This information was confirmed with the painting contractor, as well as with our

internal maintenance staff.” (Exhibit 34 – Attachment D)

Regarding the other three MSDS exhibits, Exhibits 16, 18, and 32, Ms. Shoemake testified on July 27, 2011, and July 29, 2011, that she directly received the other MSDSs from her human resources colleague, Steve Hansen, on the last day of work at Physio Control. (CP - CABR - Shoemake July 27, 2011 testimony, p. 160 line 7 – 169, line 25; CP - CABR - Shoemake July 29, 2011 testimony, p. 124, line 1 – 131, line 4). Ms. Shoemake offered Exhibits 16, 18, 32, 33, and 34 to become part of the record before the Board of Industrial Insurance Appeals (Board). (Attachment D) The employer objected on several grounds, but the main objections were hearsay and authenticity.

Based upon the fact that Ms. Shoemake received self-authenticating business records in the form of two letters from an agent of Physio-Control supplying the MSDS contained in Exhibit number 33, a sufficient foundation was laid for the admissibility of exhibits 33 and 34. The exclusion of exhibits 33 and 34 was unreasonable and lacked any tenable basis. Similarly, because Ms. Shoemake could establish a proper chain of custody for the remaining exhibits 16, 18, and 32, these documents should have

been admitted as well.

2. *The MSDS sheets contained facts and data reasonably relied upon, at least in part, by Ms. Shoemake's expert witnesses.*

Because the MSDS exhibits were rejected at the Board level, Ms. Shoemake requested a de novo decision by the trial court regarding admissibility of the exhibits. In addition, Ms. Shoemake offered testimony from medical experts Jordan Firestone, M.D., and Harriet Amman, Ph.D., regarding usefulness of the MSDSs. At the Board level this testimony was placed in colloquy since the exhibits were ruled inadmissible. (See CP - CABR - Firestone testimony, p. 49, lines 25–58, line 19; CP - CABR - Amman testimony, p. 122, line 11–129, line 22) When asked whether it is a reliable authority in the field of occupational medicine, Dr. Firestone responded the “MSDS is the best first step. Sadly I think we all recognize that they can be flawed and often contain outdated information, but they are something that we rely on with some caveats to interpretation.” Dr. Amman testified that she does not rely on the MSDS sheets exclusively in making her judgment but that these sheets are “required by law to be available when anything that has an MSDS sheet is being used”. (Attachment A)

Wash. R. Evid. 801(c) provides that "hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Wash. R. Evid. 802 renders hearsay inadmissible unless it falls within certain exceptions. However, there are many exceptions to hearsay. Most notably, Wash. R. Evid. 703 permits an expert to express an opinion based upon facts or data that are not in and of themselves admissible into evidence. In this case, the excluded exhibits contain significant probative facts and data relied upon by Ms. Shoemake's expert witnesses in rendering their opinions and conclusions of this case. In addition to excluding exhibits 16, 18, 32, 33, and 34, the Court below excluded significant and probative portions of Dr. Amman's testimony related to the MSDS sheets. (Attachment B). This exclusion significantly compromised the testimony presented by Dr. Amman and thereby prejudiced Ms. Shoemake's case in chief. As a result, a new trial must be granted to allow for the inclusion of probative MSDS related evidence identified above including, at a minimum, exhibits 33 and 34, and the related testimony of Dr. Amman. (See Attachment B).

#### **D. SIGNIFICANT PROBATIVE LAY WITNESS TESTIMONY SHOULD HAVE BEEN ALLOWED**

Perhaps one of the most alarming decisions made by the Court below was the decision to exclude certain highly relevant and probative portions of the lay witness testimony presented in Ms. Shoemake's case in chief. Based upon a flawed analytical comparison to *Intalco Aluminum Corp. v. Dep't of Labor & Indus.*, the Court ruled that testimony from Ms. Shoemake's coworkers concerning symptoms they experienced during the remodel should be excluded. *Intalco Aluminum Corp. v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 664-665, 833 P.2d 390 (1992), review denied, 120 Wn.2d 1031 (1993).

The reasoning given by the Court for rejecting certain portions of the lay testimony presented in Ms. Shoemake's case in chief was that in *Intalco* identical testimony was allowed only for rebuttal purposes because in *Intalco* an expert witness had testified that no similar complaints had ever been reported. While the expert testimony in this case is not identical to the expert testimony given in *Intalco*, the presentation of evidence from Ms. Shoemake's coworkers of experiencing similar symptoms in response to exposure to the products used during the remodel is absolutely

relevant, particularly because Dr. Firestone noted it would be important to a causation inquiry regarding chemical exposures and subsequent medical conditions to learn whether other people complained about similar symptoms including odors. (CP - CABR - Firestone Test., p. 89.)

Just as in *Intalco*, the non-prejudicial and appropriate handling of this highly relevant and probative lay testimony would have been to include a limiting instruction that the testimony was not offered to prove that these lay witnesses had the same or a similar medical condition as Ms. Shoemake. The jurors would be specifically instructed to consider the lay testimony only on the question of whether there are other persons working in the area who reported symptoms similar to those described by Ms. Shoemake.

However, rather than giving this appropriate limiting instruction and allowing the lay testimony from Ms. Kurts and Ms. Carpenter, the testimony was stricken from the record and never presented to the jury. Contrary to *Intalco* and significantly compromising Ms. Shoemake's ability to present her case, the decision to exclude this highly probative evidence was both

unreasonable and without a tenable basis. As a result, a new trial must be granted.

**E. JURY INSTRUCTION NUMBER 17 AMOUNTS TO AN INAPPROPRIATE COMMENT ON THE EVIDENCE AND SHOULD NOT HAVE BEEN GIVEN.**

The court reviews jury instructions de novo, and an instruction containing an erroneous statement of the law is reversible error where it prejudices a party. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Jury instructions are sufficient if “they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). The court reviews a challenged jury instruction de novo, within the context of the jury instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Over Ms. Shoemaker’s objection, the Court elected to give instruction number 17 which states:

Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an occupational disease. Examples of mental conditions or mental disabilities caused by stress that do not fall within occupational disease shall include, but are not limited to, those conditions and disabilities arising from work load pressures, subjective perceptions of employment conditions or environment, or fear of exposure to chemicals, radiation biohazards,

or other perceived hazards. (Attachment C)

This instruction is based upon Washington Administrative Code 296-14-300 and is an accurate statement of portions of it. However, the instruction should not have been given because it amounts to a prejudicial comment on the evidence when taking into consideration the facts of this case together with well-established principles under the Act.

According to instruction number nine, Ms. Shoemake contended the Board incorrectly affirmed occupational disease claim rejection. (Attachment C) She contended that during the Physio Control remodel she was exposed to harmful levels of chemicals and fumes resulting in specific **physical** medical conditions diagnosed by Dr. Firestone and Dr. Buscher. The expert medical witnesses called on Ms. Shoemake's behalf opined that her level of exposure was sufficient to produce the **physical** conditions diagnosed. While not disputing that some level of exposure actually occurred, the employer's expert witnesses argued that Ms. Shoemake had a pre-existing mental health condition known as somatoform disorder that caused her to over-react to the exposure resulting in her symptoms. Instruction number 17

opened the door for the employer to argue that Ms. Shoemake's alleged occupational disease was entirely mental in nature and, therefore, not allowable. However, this assertion and accompanying argument is contrary to the well-established facts of this case and is contrary to the Act itself.

*1. Instruction number 17 is contrary to the facts of this case.*

Ms. Shoemake's exposure was not merely a "subjective perception" or a "fear" of being exposed. It is absolutely undisputed that she was ***in fact*** exposed to dust and fumes during the course of the Physio Control remodel. There may be a legitimate dispute as to whether the extent of exposure was sufficient to produce her ***physical*** conditions, but there is no dispute that she was actually exposed to some extent. Therefore, instruction number 17 unfairly prejudiced Ms. Shoemake's case by implying, contrary to the undisputed facts of the case, that her exposure was merely a "fear" or a "perception" rather than an actual physical exposure. As a result, the instruction amounts to an inappropriate comment on the evidence and should not have been given.

*2. Given the facts of this case, instruction number 17*

*is contrary to the Industrial Insurance Act.*

Instruction number 17 ignores the well-established principle under the Act that the benefits of workers' compensation are not limited to those who are in perfect health at the time they receive their injury or develop their occupational disease. For a claim to be allowed, the injured worker need not be completely free from pre-existing diseases or physical or mental abnormalities. It is irrelevant that the injury or exposure might not have produced the same effect in the case of a person in normal health. In fact, if the injury or exposure complained of is a proximate cause of the disability for which compensation is sought, the previous physical and/or mental condition of the worker is immaterial and recovery may be had for the full disability independent of any pre-existing physical or mental weakness. The theory upon which this principle is found is that the worker's prior physical or mental condition is not deemed the cause, but is merely a condition upon which the real cause operated. *Kallos v. Dept. of Labor and Industries*, 46 Wash.2d 26, 30, 278 P.2d 393, (1955); *Wendt v. Dept. of Labor and Industries*, 18 W. App. 674, 676, 571 P.2d 229 (1977); *Bennett v. Dept. of Labor and*

*Industries*, 95 Wn.2d 531, 627 P.2d 104 (1981); *Miller v. Dept. of Labor and Industries*, 200 Wash. 674, 94 P.2d 764 (1939).

As given, instruction number 17 misled the jury into believing that Ms. Shoemake's pre-existing mental health status was a sufficient basis for disqualifying her from benefits under the Act. As a result, it was improper to give instruction number 17 in this case.

#### **VI. ATTORNEY'S FEES ON APPEAL**

Ms. Shoemake is entitled to an award of attorney fees and expenses on appeal pursuant to RCW 51.52.130. *See also* RAP 18.1. This statute provides that "a reasonable fee for the services of the worker's or beneficiary's attorney" shall be awarded if a decision order is "reversed or modified and additional relief is granted to a worker or beneficiary." RCW 51.52.130. Here, Ms. Shoemake seeks to reverse the Superior Court decision and seeks a new trial. Thus, she should be awarded attorney fees and costs for her attorney's work on the matter before this Court and the trial court, or the opportunity to file a supplemental motion for attorney fees and costs in the event she is successful in reversing the Board order thereby securing additional relief as a direct consequence of her success before this Court. *See Brand v.*

*Dept. of Labor and Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999).

## **VII. CONCLUSION**

In conclusion, the Court below erred on multiple grounds: (1) it improperly allowed the cumulative testimony of Dr. Darby to be presented to the jury; (2) it improperly rejected MSDS exhibits and corresponding expert testimony; (3) it improperly rejected certain probative portions of lay witness testimony from Christy Kurts and Shelley Carpenter; and (4) it improperly gave instruction number 17. Based upon these errors that occurred during the trial and to which appellant objected at the time of trial a new trial should be granted.

**CERTIFICATE OF MAILING**

SIGNED at Seattle, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 28<sup>th</sup> day of July, 2015, the document to which this certificate is attached, Appellant's Corrected Opening Brief, was mailed to each recipient via U.S. postage pre-paid, first class mail:

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