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STATE OF WASHINGTON
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No. 36268-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

SIMPSON TIMBER COMPANY, *Appellant*,

v.

CINDY J. LEWIS, *Respondent*.

APPEAL FROM THE SUPERIOR COURT FOR MASON COUNTY
HONORABLE TONI A. SHELDON

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

Simpson supplements its “Statement of the Case” to reflect that the brand of fungicide it used before switching to Mycostat was “Brightwood S.” [See Simpson’s opening brief at page 7/1-2; CP—CABR—Bollen 62/22-26; 63/1-2; 67/6-8]. Ms. Lewis did not proffer any evidence to establish that the solvents in Brightwood S did not include xylene or toluene.

Ms. Lewis’ “Restatement of the Case,” apart from being unnecessarily rhetorical, is partly inaccurate. First, Ms. Lewis’ co-workers had physical complaints significantly different from her constellation of complaints. [Compare Respondent’s Brief at pages 3-4 with CP—CABR--Miller 28-29 (no complaints from him; no mention of complaints from employees about bleeding from the ears); Stewart 111-112 (short lived sore throat; sneezing; watery and irritated eyes); Magee 119-120 (short lived sore throat; dry eyes; and irritated sinus); Hurst 130 (short lived irritated eyes and nose); see CP—CABR—Burton 21/13-25; 22/9-24]. None of these employees complained about “bleeding from the ears” [Respondent’s Brief at page 4/15] or bleeding from the nose or rashes or weight gain or dilated eyes or loss of coordination or disorientation or an inability to communicate.

Secondly, Mr. Lee testified that he did not know what was in Mycostat to the required standard of proof—that is, he could not say to “a reasonable degree of probability” (*viz.*, more likely than not) that Mycostat contained xylene or toluene. [Compare Respondent’s Brief at pages 5-6 with CP—CABR—Lee 15/17-20 & 17/12-20].

Thirdly, Dr. Montanaro did not agree with Mr. Lee that Mycostat contained xylene or toluene. [Compare Respondent’s Brief at page 6 with CP—CABR—Montanaro 41/1-5 & 15-25; 42/1-2; 51/3-8; 45/19-22; 46/1-11, as explained in Simpson’s Reply Brief at pages 17-19].

Fourthly, Mr. Lee’s report was excluded from evidence because it was hearsay and irrelevant to the issues in Ms. Lewis’ case. [Compare Respondent’s Brief at page 5-7 with CP—CABR—Miller 37/8-26; 40/19-21]. Simpson did not hide that report from anyone. [Respondent’s Brief at page 8]. If Simpson did not provide that misleading report directly to Drs. Montanaro and Martin, they certainly reviewed the report when they reviewed the records of Drs. Buscher and Ranheim, both of whom had a copy of the report. [Compare Respondent’s Brief at page 7/1-2 with CP—CABR—Martin 42/1-3; Montanaro 23/13-16].

Fifthly, Drs. Burton and Martin did not consider Ms. Lewis’ constellation of symptoms to be consistent with exposure to xylene. [Compare Respondent’s Brief at page 8-9 with CP—CABR—Burton

15/16-18; 18/16-18 & 22-25; 19/1-2; 23/19-25; 24/1-6; 27/10-14; 37/2-25; 38/1-15; 46/10-25; 47/1-9; Martin 30/13-25; 31/1 & 6-12; 47/8-16; 51/10-14; 60/9-14]. Nor did any of the many other medical experts who examined Ms. Lewis, with the exception of her forensic experts, Drs. Buscher and Ranheim. [See Simpson's Statement of the Case at pages 9-10; CP—CABR—Montanaro 31/1-2].

Finally, Simpson's attorneys did not attempt to "coach" Dr. Ranheim into believing anything about the constituents of Mycostat. At all relevant times, neither Drs. Ranheim nor Buscher had a basis to *know* whether Mycostat contained xylene or toluene. [Compare Respondent's Brief at pages 7-9 with CP—CABR Ranheim 43/15-25; Miller 18/22-24; 19/1-11 & 23-26; 20/1-10; 33/12-13; Lee 15/17-20 & 17/12-20]. They in fact appear to have merely *assumed* that Mycostat contained xylene or toluene based on Mr. Lee's report even though Mr. Lee testified that "on the more-probable-than-not basis, I really don't know what that solvents were [in Mycostat]." [CP—CABR--Lee 15/17-20]. "I really have no idea what was in that [Mycostat]." "... I don't know whether xylene is in that product or not." [CP—CABR--Lee 17/12-20].

II. REPLY ARGUMENT

Reply Argument On Assignment of Error No. 1

In response to Simpson's argument that Ms. Lewis had the "burden of producing evidence" under *Ruse v Dep't of Labor & Indus.*, 90 Wn. App. 448, 453, 966 P.2d 909, 911 (1998), *affirmed*, *Ruse v Dep't of Labor & Indus.*, 138 Wn. 2d 1 (1999) ("It is Mr. Ruse who has the burden of producing evidence which supports his claim"), Ms. Lewis argues that *Ruse* is distinguishable. She argues that it can be distinguished on the following two bases: (1) *Ruse* merely held that plaintiff has the "burden of proof" and (2) *Ruse* involved a bench trial, not a jury trial. In reply, Simpson argues that, as to item (1), *Ruse* involved both the "burden of proof" (aka "burden of persuasion") and the "burden of producing evidence," and, as to item (2), whether *Ruse* involved a bench trial or not is irrelevant. The nature of the trier of fact does not have legal bearing on which party has the burden of producing its evidence first.

Ms. Lewis attempts to justify the trial court's decision to require Simpson to present its evidence first by complaining that to do otherwise would create a "jumble" of incoherent testimony, citing to Drs. Buscher's and Ranheim's critique of Dr. Martin's testimony. This example is certainly not compelling. Both Drs. Bushcer and Ranheim, after having been quoted Dr. Martin's deposition statement verbatim, were asked

whether or not they agreed with that statement. In response, both testified in a way that is not “jumbled,” and is clear whatever the order of presentation of witnesses.

As Simpson has argued in its opening brief, the trial court’s error of requiring Simpson to present its evidence first before the jury was not harmless.

Reply Argument On Assignment of Error No. 2

Over Simpson’s objection, the trial court instructed the jury on an aspect of the issue of causation as follows:

[1] “The Worker’s Compensation Act does not require the claimant to identify the precise chemical in the work place that caused his or her disease.” [2] “However, evidence is not sufficient to prove causation unless, from the facts and circumstances and the medical testimony given, a reasonable person can infer that a causal connection exists.” [CP Plaintiff’s Proposed Jury Instruction No. 12; Trial Court’s Jury Instruction No. 14; RP 101/17-18; RP 102/4-25; 103/1-6].

Simpson has argued that this jury instruction was, in the context of the evidence, an incorrect statement of the law, misleading and a comment on the evidence. In her response, Ms. Lewis has not engaged these issues. In reply, first, Simpson contends that Ms. Lewis’ statement of the law is correct as far as it goes, but is incomplete. Not only should a jury instruction not be an incorrect statement of the law or misleading but it should not comment on the evidence.

Secondly, Ms. Lewis errs when she argues that jury instruction number 14 (JI #14) is consistent with *Ruff* and *Intalco*. *Ruff* and *Intalco*, read together, compel the conclusion that JI #14 is misleading and is a comment on the evidence. In *Ruff*, the court of appeals wrote:

“The *Intalco* court rejected the employer's claim that there was insufficient evidence to support the jury's finding of proximate cause between the claimants' disease and their workplace exposure because no physician could identify the specific toxic agent or agents in the pot room that proximately caused the claimants' disease. The court declined to require proof of the precise chemical that caused the claimants' disease because several neurotoxins were identified in the pot room, it was undisputed that the neurotoxins cause symptoms similar to that exhibited by the claimants, and their symptoms did not fit the diagnostic criteria of any known disease. In contrast, no one knows what chemicals Ruff was exposed to during the week-long building remodel.” *Ruff v Dep't of Labor & Indus.*, 107 Wn. App. 289, 306, 28 P.3d 1, 10 (2001).

Given this statement, is there a difference between the following two scenarios: *Scenario One*: Claimant offers proof that she has been exposed to three toxins each of which is capable of causing her symptoms and one of which caused her symptoms, but she cannot prove which one of these three toxins caused her symptoms. *Scenario Two*: Claimant fails to offer proof to a reasonable degree of probability that she was exposed to any toxin in the workplace.

Obviously, there is a difference. If the claimant need not prove that he or she was exposed to a toxin in the workplace, then both *Intalco*

and *Ruff* would have been decided differently. In *Intalco*, the court would not have been concerned with whether there was evidence of three particular toxins capable of causing each claimant's symptoms. It would have merely accepted as sufficient that claimants proffered evidence that they each developed a disease while employed with Intalco. The court in *Intalco* accepts as an accomplished fact that claimants had proffered evidence of a toxin in the workplace. The court was instead concerned with the contended legal requirement that claimant had to prove which of the toxins in the workplace capable of causing claimant's symptoms, in fact, caused those symptoms. In *Ruff*, the court would not have been concerned with whether or not Ms. Ruff proffered evidence of a toxin in the workplace; just her suspicion of a toxin being in the workplace would have sufficed.

In the context of the evidence in scenario one (the *Intalco* scenario), is there a difference between the trial court instructing the jury as follows:

JI #1 (*Intalco* scenario): A claimant need not identify the *precise* chemical in the work place that caused his or her disease.

JI #2 (*Intalco* scenario): A claimant need not prove that he or she was exposed to a toxin in the workplace.

Obviously, there is a difference. JI #1 makes legal sense in light of the evidence that the claimant was exposed to three known toxins capable of causing her symptoms. JI #2 makes no legal sense in light of the legal requirement in *Intalco* that there be evidence of the presence of at least one toxin in the workplace capable of causing claimant's symptoms.

In the context of the evidence in scenario two (the *Ruff* scenario), is there a difference between the trial court instructing the jury as follows:

JI #1 (*Ruff scenario*): A claimant need not identify the *precise* chemical in the work place that caused his or her disease.

JI #2 (*Ruff scenario*): A claimant need not identify that he or she was exposed to a toxin in the workplace.

Obviously, in this context, there is no substantive difference between these two jury instructions. The reason is simple: Given that it is disputed whether claimant has proffered evidence of at least one toxin in the workplace, the court cannot assume, as it does in JI #1, that several such toxins exist in the workplace such that the jury need not identify which precise one is the cause of claimant's symptoms.

Ms. Lewis was unable to proffer adequate evidence that she was exposed to any toxin in the workplace. Her proffer of evidence is analogous to that of Ms. Ruff in *Ruff*, not to that of the three claimants in *Intalco*. That is why JI #14 is misleading.

Moreover, Ms. Lewis has not addressed Simpson's argument that the trial court commented on the evidence in giving JI #14. The trial court essentially took Ms. Lewis' closing argument (as assembled by Ms. Lewis' counsel) and made it into a jury instruction.

When there is no proffer of evidence to a reasonable degree of probability that a toxin exists in the workplace, is there a difference between a party on closing argument making the following argument and the trial court in instructing the jury stating as follows:

Party: [~~“However, evidence is not sufficient to prove causation unless,] From [the facts and circumstances and the medical testimony given] Mr. Lee’s testimony and from the testimony of Drs. Buscher and Ranheim, you [a reasonable person] can infer that xylene caused Ms. Lewis’s symptoms [causal connection exists].” [“The Worker’s Compensation Act] The law does not require Ms. Lewis to identify the any [precise] chemical in the work place that caused her disease.” That is, you do not need to rely upon Mr. Lee’s testimony in order to find for Ms. Lewis.~~

Trial Court: [1] “The Worker’s Compensation Act does not require the claimant to identify the precise chemical in the work place that caused his or her disease.” [2] “However, evidence is not sufficient to prove causation unless, from the facts and circumstances and the medical testimony given, a reasonable person can infer that a causal connection exists.”

There is no substantive difference. The trial court should have instructed under JI #14 that if more than one toxin exists in the workplace capable of causing claimant’s disease, provided that you find that claimant

has a disease, then the Worker's Compensation Act does not require the claimant to identify the precise chemical in the work place that caused his or her disease.

Thirdly, Ms. Lewis' response that JI #14 is consistent with the facts is not only untrue but a red herring. She asserts that JI #14 is consistent with the facts in that here xylene and toluene caused Ms. Lewis' symptoms. The facts are not established before the jury instructions are used by the jury to decide the issues of fact. Ms. Lewis' proffer of evidence that Mycostat-P contained xylene or toluene was not up to the required standard of proof "to a reasonable degree of probability." This is significant because the legal merits of a jury instruction depend not only on the black letter law but also on the nature of the evidence proffered at trial. It does not depend on the "facts." The facts are what the jury decides them to be after considering the evidence in light of the jury instructions. Simpson's argument about the legal merits of JI #14 depends of the state of the law in light of the nature of the evidence offered at trial, not on the "facts." JI #14 is flawed because it assumes as true a contention of fact—the contention that there was a toxin in the workplace.

Fourthly, Ms. Lewis apparently argues that JI #14 is acceptable despite its flaws because Simpson declined to proffer an alternate to JI

#14. In fact, Simpson requested that the trial court give Defendant's Requested Instruction No. 13—WPI 155.06.03, which reads as follows:

“A cause of a condition is a proximate cause if it is related to the condition in two ways: (1) the cause produced the condition in a direct sequence unbroken by any new, independent cause; and (2) the condition would not have happened in the absence of the cause.”

The trial court instructed the jury with a modified version of this jury instruction in its jury instruction number 12 (JI #12). Simpson contends it is more legally appropriate merely to give JI #12, than to give in addition JI #14, a misleading and, in context, legally incorrect jury instruction.

Reply Argument On Assignment of Error No. 3

Much of Ms. Lewis' argument in response is a series of red herrings (Simpson failed to object to Mr. Lee's testimony); *ad hominem* (Simpson did not provide its experts with Mr. Lee's report; Simpson attempted to “coach” Dr. Ranheim that Mycostat-P did not contain xylene); and straw men (Simpson argues that Ms. Lewis must prove the exact chemical composition down to the molecular level; Simpson argues that Mr. Lee must know “for sure” what is in Mycostat-P).

Amidst this tangle of fallacies, there appears to be a core argument. The core argument appears to be that Ms. Lewis' expert, Mr. Lee, provided adequate testimony to create an issue of fact on the issue whether

a toxin was in Ms. Lewis' workplace to which she was exposed in sufficient doses to have caused her constellation of purported symptoms. More specifically, Ms. Lewis argues that her evidence does provide a legally sufficient evidentiary basis for a reasonable jury to find for her in that she has established "through testimony of her co-workers and experts, that a known toxic substance was introduced into her work site, and caused her and others to suffer abnormal body reactions" [Respondent's Response Brief at page 22]. On the *prima facie* element that "a known toxic substance was introduced into her work site," she argues that she merely needs an expert to testify that more likely than not Mycostat-P contains xylene. *Tornova v Hayer*, 133 Wn. App. 244, 250, 135 P3d 536 (2006). [Respondent's Brief at page 21].

As proof of this *prima facie* element, Ms. Lewis cites to the testimony of Mr. Lee. Mr. Lee, she asserts, testified that based on an Internet search "the solvents in MSP 20 most likely include a mixture of mineral oil, petroleum (Stoddard) solvents, toluene, xylene, glycol ethers, and alcohols (commonly found in paints)...." [Respondent's Response Brief at page 18]. She further suggests that Mr. Lee obtained this information from the same internet site that Dr. Martin used to identify the constituents of Mycostat-P. [Respondent's Brief at page 26].

In her response, Ms. Lewis has skirted the issue. First, Simpson is not contending that Ms. Lewis, through Mr. Lee, must establish what is in Mycostat-P “for sure.” [Respondent’s Brief at page 21]. Simpson is contending that she must establish what is in Mycostat-P to the standard of proof of “a reasonable degree of probability” or “more likely than not.”

Secondly, Ms. Lewis has not established that Mr. Lee has provided testimony that meets that requisite standard of proof. Mr. Lee is not a fact witness with first hand knowledge. He is an expert witness offering an opinion. To be probative, that opinion cannot be mere conjecture. As Simpson has demonstrated in its opening brief, Mr. Lee testified seven (7) times that he did not know whether the solvents toluene and xylene were in Mycostat 20 [Mycostat-P₂₀]. He was merely guessing what might be in Mycostat-P. Here are two examples,

A: “I found a [agricultural] website that had listed solvents that are used for these kinds of products, so that’s what has been listed. Now, how--given your question *on the more-probable-than-not basis*, I really don’t know what that solvents were. I never received confirmation from the manufacturer.” [Emphasis supplied.] [CP—CABR--Lee 15/17-20].

Q. “Now, in assuming that the 80% of solvents for the Mycostat 20, were you assuming that xylene was attached to that solvent?”

A. “I really have no idea what was in that. As I said earlier, from an agricultural website, they listed solvents that are used and blended with propiconazole. And all of them listed here, included xylene, were listed there. But, I don’t

know whether xylene is in that product or not.” [CP—
CABR--Lee 17/12-20].

As is evident, Mr. Lee admits he does not know “more probably than not” whether xylene or toluene are constituents of Mycostat-P. He did not find the purported link between what is in some unspecified agricultural products and what *might* be in Mycostat-P to be strong enough (by analogy) to enable him to testify, in good conscience, to a reasonable degree of probability (more likely than not) that what was true for these certain unidentified agricultural products is also true for Mycostat-P.

The ultimate issue, then, is what probative value does one of two mutually exclusive contradictory propositions have when offered by the same witness--that is, when the witness testifies in the same testimony to the following two propositions:

- (1) “Most likely Mycostat-P contains xylene.”
- (2) “I have no idea (or “do not know more probably than not”) whether or not Mycostat-P contains xylene.”

Both propositions (1) and (2) are mutually exclusive--both cannot be true. Simpson reasonably argues that a party who introduces the testimony of an expert who testifies that Mycostat-P contains xylene and that Mycostat-P does not contain xylene cannot rely on the proposition which supports

the claim and pretend that the contradictory proposition that undermines the claim does not exist.

Simply, if the trial court, in assessing the merits of a CR 50 motion, or if the trier-of-fact, in being tasked to decide the truth, chooses to believe one proposition, on what basis do they have to disbelieve the contradictory proposition? This contradiction is not of the kind that can be resolved through an assessment of the witness's credibility. If the trier of fact deems the witness credible, then which statement is deemed, by virtue of that assessment of credibility, true, given that they both cannot be true? There is no basis. Should the trier-of-fact compare the number of times the witness says that he does not know what is in Mycostat-P with the number of times he says he does know what is in Mycostat-P? If so, then Simpson should prevail because Mr. Lee said he did not know what was in Mycostat-P more often than he said he did know.

By analogy, I know from the Internet that some people have blood type AB negative. I know some people have blood type O positive. From this information, can I then infer that Mr. Jones has blood type AB negative rather than O positive without first analyzing Mr. Jones' blood? The answer is, no. Could I infer that Mr. Jones has blood type O positive on the basis that that blood type is the more prevalent blood type? The answer is, perhaps. But in this case here that analogy breaks down

because there is no testimony that xylene is the more prevalent solvent used in the class of antifungicide products of which Mycostat-P is a member. Indeed, the inference would be to the contrary given that xylene (and toluene) is apparently not a proprietary solvent in that it was identified on the agricultural website as a solvent sometimes used with propiconazole. The solvents used in Mycostat-P, however, are proprietary, suggesting that they do not include xylene or toluene. Robert Miller testified, without equivocation, that xylene is not used or found in “Mycostat” or “Microstat-P.” [CP—CABR--Miller 17/12-26; 18/1-26; 20/11-25]. Nothing in Simpson’s evidence supported directly or indirectly that Mycostat or Microstat-P contained xylene or toluene. So Simpson did not fill in the evidentiary gaps in Ms. Lewis’ failed effort to establish her *prima facie* case that Mycostat contained xylene.

Ms. Lewis also suggests that the Internet site upon which Mr. Lewis relied was the same as that upon which Dr. Martin relied. The sites were not the same. Dr. Martin relied upon the National Library of Medicines Tox Net. CP--CABR--Martin 17-18]. Mr. Lee relied upon some unidentified agricultural site, with unverifiable information, that related that solvents often “used and blended with propiconazole” include xylene and toluene. [CP—CABR--Lee 17/12-20].

Moreover, the site upon which Dr. Martin relied provided data directly about Mycostat-P. The site upon which Mr. Lee relied did not provide data directly about Mycostat-P. It merely provided, vaguely, data about solvents in some agricultural products using propiconazole.

Ms. Lewis also asserts that Dr. Montanaro testified that Mycostat-P contains xylene. [Respondent's Brief at pages 6 & 26]. That assertion is misleading. Specifically, Ms. Lewis has failed to faithfully follow the chain of Dr. Montanaro's testimony. In fact, Dr. Montanaro's *assumption* about what is contained in Mycostat-P is based simply on what Ms. Lewis told him.

The first link in the chain of that testimony begins as follows:

Q. "And were you provided by either Ms. Lewis of Simpson's lawyer a list of chemicals to which she was exposed prior to August of 2002?"

A. "Yes." [CP—CABR—Montanaro 41/1-5].

Q. "Okay. Other than the material [MSDS] that was supplied to you by Mr. Wallace and Simpson's lawyer, the Mycostat family of fungicides, were you told of any other chemicals to which she was exposed at any time?"

A. "I think we went over the Material Safety Data Sheets that I had supplied to me earlier in the testimony, and I don't have others. And I was just going to see whether she [Ms. Lewis] had told me at the time of her evaluation that she had also been exposed to welding fumes, xylene, wood dust, resins, paints, latex, detergents, formaldehyde, glue fumes, inks, benzene, asbestos, and acetone. *So that was from Ms. Lewis's history.*" [Emphasis supplied.] [CP—CABR—Montanaro 41/15-25; 42/1-2].

The next link in that chain of testimony is as follows:

Q. "...--before your exam and before your testimony today Simpson or its lawyers did not give you any precise data as to exactly what chemicals in what quantity were in the workplace where Ms. Lewis was working, correct?"

A. "That's correct." [CP—CABR—Montanaro 51/3-8].

The next link in that chain of testimony is as follows:

Q. "What is your assumption as to what agent, delivery agent or solvent, was used during the course of Ms. Lewis's testimony, along with Mycostat-P, if anything?"

A. "I think *I testified earlier* that it was my understanding that organic solvents including xylene were used—to apply the fungicide." [Emphasis supplied.] [CP—CABR—Montanaro 45/19-22; 46/1-11].

The only earlier testimony to which Dr. Montanaro could be referring is that on pages 41 and 42 of his testimony in which he relates that Ms. Lewis told him about her purported exposure to xylene. From that information, Dr. Montanaro further assumed that the percentage of such organic solvents in Mycostat-P to be 80% consistent with the percentage of solvents generically identified in the Material Safety Data Sheets. [CP—CABR—Montanaro 46/13-20]. In short, Dr. Montanaro *assumes* that xylene is the solvent or one of the solvents based on what Ms. Lewis told him. What Ms. Lewis told him was derived from Mr. Lee. What Mr. Lee knew is that he did not know what were the solvents in

Mycostat-P, as discussed above. [See Simpson's Reply at page 14 and Simpson's opening brief at pages 32-34].

Ms. Lewis complains that Simpson was hiding from its experts and attempting to hide from Ms. Lewis' experts that Mycostat-P contained xylene. This complaint assumes facts not in evidence. In fact, what appears to be the case is that Ms. Lewis was reporting to her experts and to Simpson's experts, either directly or through her medical experts (whose records were provided to Simpson's medical experts), that she was in fact exposed to xylene when in fact that purported exposure was, at best, mere speculation.

Ms. Lewis appears argue that she presented proof of an exposure to a toxin in the workplace because she had symptoms consistent with an exposure to xylene. [Respondent's Response Brief at page 24]. Given that she says she had these certain symptoms and given that these certain symptoms are consistent with an exposure to xylene, she, therefore, was exposed to xylene. The form of her argument is this: If X, then Y. Y; therefore, X. This kind of argument is the logical fallacy of "affirmation of the consequent."

Ms. Lewis also appears to argue that she presented proof of an exposure to a toxin in the workplace because she did not have her purported constellation of symptoms before Mycostat-P was used in the

workplace but did have them not long afterwards. [Respondent's Brief at page 24]. This is the logical fallacy of *post hoc, ergo propter hoc* (literally, "after this, therefore because of this"). For example, after I started working here, I discovered I had a basil cell carcinoma on my ear; therefore, something in my workplace causes basil cell carcinomas—a deduction that is nonsense.

Washington law does not sanction that Ms. Lewis can satisfy her burden of proof on the issue of specific causation by merely proving that a toxic chemical *might* be in the workplace. *Intalco Aluminum Corp. v Dep't of Labor & Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992), *rev. den.*, 120 Wash.2d 1031, 847 P.2d 481 (1993); *Ruff v Dep't of Labor & Indus.*, 107 Wn. App. 289, 28 P.3d 1 (2001).

Reply Argument On Assignment of Error No. 4

In her response, Ms. Lewis argues that the IAJ ruled that there would be no CR 35 (1) mental health examination by a mental health expert or (2) by a non-mental health expert in which such expert ascribed a psychological origin to Ms. Lewis' symptoms. [Respondent's Brief at page 35]. She contends that because this ruling puts the parties on the same footing, it is equitable. [Respondent's Brief at page 36].

Ms. Lewis' response has missed the mark. First, the IAJ's ruling should have been limited on its own terms at the very least to CR 35

examinations. Instead, it was unreasonably extended to a non-CR 35 examination, most particularly to that of Dr. Martin, a treating physician.

Secondly, the IAJ's ruling is not equitable. It creates an unnecessary asymmetry in the medical testimony that gives Ms. Lewis a leg up. Simply, Ms. Lewis' experts were not censored but Simpson's experts were censored. Ms. Lewis' experts have no interest in ascribing a psychological origin to her symptoms. Their role, as forensic examiners, was to ascribe the origin of her symptoms to some toxin in the workplace. As a practical matter, they were able to reach their diagnoses without censorship. Simpson's experts--which notably includes a treating physician—as a practical matter were not free to explore whatever might be the cause of Ms. Lewis' odd assortment of symptoms. (It must be remembered that Ms. Lewis was examined by a variety of well respected medical specialists at the request of her primary physicians: Mark Trucksess, M.D., a family physician; Waldo Dagan, M.D., an internist; James McDonnell, a neurologist; Donn Livingstone, an eye, ear, nose and throat specialist; Robert Huck, M.D., a pulmonologist; Thomas G. Martin, M.D. and Austin Sumners, M.D., occupational medicine specialists at the Occupational Medicine Clinic at University of Washington; and Kevin Connolly, a neurologist--none of whom concluded that her symptoms

were the result of a toxic exposure.) Simpson's experts were censored about what they considered to be the source of Ms. Lewis' symptoms.

Simpson's experts' inability to opine about the source of Ms. Lewis's symptoms is significant. A juror listening to expert testimony that merely says what is not causing Ms. Lewis' symptoms but fails to ascribe a cause of those symptoms is going to ask, "if Ms. Lewis' symptoms are not caused by a toxic exposure, then what is causing them?" The juror is going to consider that testimony incomplete and, therefore, unconvincing. The same juror listening to the testimony of Ms. Lewis' experts who do ascribe a cause to her symptoms is going to consider that testimony complete and, therefore, convincing.

Reply Argument On Assignment of Error No. 5

In response, Ms. Lewis argues that the photographs did not violate the discovery order because the superior trial court ruled that they did not. This argument obviously begs the question. [Respondent's Brief at page 36]. (After all, the IAJ refused to allow Ms. Simpson to use the photographs in the first instance.) Did the superior trial court, in reversing the IAJ, err? Simpson believes that it did.

The trial court abused its discretion in admitting photographs because the photographs were not produced or generated before the discovery deadline. In response, Ms. Lewis argues, essentially, that the

discovery deadline is meaningless because she can continue to generate evidence through the course of the hearing right up to the time she rests her case. If the discovery “deadline” is meaningless, then why provide a deadline? Ms. Lewis has offered no reasonable excuse for violating the discovery deadline. She could have very easily photographed the premises during the discovery period. If Simpson had denied her permission to enter the premises, she could have obtained a court order to enter the premises. This idea to photograph the premises was not driven by last moment, reasonably unexpected or unanticipated testimony from Simpson. Ms. Lewis has known from the beginning that her claim has concerned her alleged exposure to Mycostat-P while in her usual workspace, the place she photographed.

Ms. Lewis argues that “Simpson had the ability to present contrary evidence that showed the photographs were inaccurate or misleading.” [Respondent’s Brief at page 37]. On cross examination of Ms. Lewis, Simpson did show that the photographs were inaccurate. Apart from cross examination of Ms. Lewis, Simpson had no opportunity to present evidence about the photographs because Simpson had presented its case before Ms. Lewis attempted to use her photographs at the hearing. True, the IAJ has the discretion to allow rebuttal testimony, but it did not grant a request for such rebuttal in this case for the simple reason that Simpson

did not request rebuttal, in turn for the simple reason that it had no need to do so in that the IAJ had declined to allow Ms. Lewis to use the photographs at the BIIA hearing in the first place. [CP—CABR—C. Lewis 53/7-51; 54/1-11].

Ms. Lewis says she photographed Simpson’s premises after she “drove through the front gate of the plant *with permission*,” citing to page 50 of her testimony. [Emphasis supplied.] [Respondent’s Brief at page 38]. There she states as follows:

Q. “And was there anyone with you when you took these pictures?”

A. “No.”

Q. “How did you get into the facility to take these pictures?”

A. “Drove through the front gate.”

Q. Did Simpson—anyone at Simpson know you were there taking pictures?”

A. “No.”

Q. “Have you, since taken these pictures, contacted anyone at Simpson and told them you’ve taken these pictures?”

A. “No.” [CP—CABR—C. Lewis 50/13-32].

At this time, Ms. Lewis was no longer working for Simpson. Despite Ms. Lewis’ assertion that she had permission, her testimony does not imply that she had permission to enter onto Simpson’s premises to take photographs. To the contrary, it indicates she neither sought nor received Simpson’s permission to take those photographs.

Simpson’s focus is on Exhibit 8, the picture with the skull and

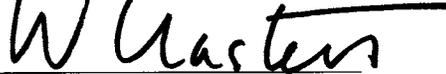
cross bones. That picture is sufficient to establish harmful error. Ms. Lewis argues that if permitting the jury to see Exhibit 8 was error, the prejudice was “minimal.” [Respondent’s Brief at page 38]. She failed to explain how she quantified the prejudice. Prejudice is prejudice. It does not admit to degrees of severity.

III. CONCLUSION

For the preceding reasons, this court should reverse the rulings of the trial court, vacate the judgment entered in favor of Ms. Lewis and enter judgment in favor of Simpson.

Respectfully submitted this 23rd day of October 2007.

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CERTIFICATE OF SERVICE

I hereby certify that ABC Legal will serve the REPLY BRIEF OF APPELLANT on the Court of Appeals of the State of Washington - Division II delivering the original on October 23, 2007, addressed as follows:

ORIGINAL TO: David C. Ponzoha
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FILED
BY
DATE
OCT 23 2007
COURT OF APPEALS
DIVISION II
TACOMA, WA

I further certify that I served the foregoing REPLY BRIEF OF APPELLANT on the following parties on October 23, 2007, by mailing to said parties to this action a true copy thereof, certified by me as such, with postage prepaid, addressed to said parties at their last-known addresses as follows, and deposited in the post office at Lake Oswego, Oregon on said day:

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