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No. 36268-6-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FILED
2020
APR 14 10:11 AM
CLERK OF COURT
COURT OF APPEALS
DIVISION II
1000 4TH AVENUE
SEASIDE, WA 98148
Camm

Simpson Timber Company

v.

Cindy Lewis

BRIEF OF RESPONDENT

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I. RESTATEMENT OF THE CASE

Prior to August, 2002, the respondent Cindy Lewis was healthy. Beginning right after high school, Ms. Lewis was one of the first women to work in the Simpson Timber Mill (hereinafter Simpson) in Shelton, Washington. For the next 30 years, Ms. Lewis worked continuously at Simpson. Ms. Lewis held a second full time job as a waitress for most of that period. Ms. Lewis loved her work at Simpson, and considered her co-workers to be family. That all changed beginning in August, 2002. [Certified Appeal Board Record (hereinafter CABR), Cindy Lewis Test. p. 33-35; John Lewis Test. p. 6-8]

The parties agree that in August, 2002, Simpson introduced a new chemical agent into the workplace at its Shelton facility. In order to keep its dimension-cut lumber free of mold and mildew, Simpson began spraying a product named Mycostat (later Mycostat-P)¹ on its lumber. (CABR, Miller Test. p. 17-18) Almost immediately, Ms. Lewis and many of her co-workers, began feeling the ill effects of this product being introduced into their workplace.

¹ The collective family of Mycostat products will be referred to as "MSP" hereafter.

(CABR, Cindy Lewis Test. p. 38-41; Miller Test. p. 28-29) In its Statement of the Case, Simpson provides only its version of the facts. At trial, virtually all the statements presented in its Statement of the Facts were met with contradictory and contravening testimony, exhibits, and expert opinions.

During the 2002-2003 time frame, Ms. Lewis worked on the ground floor of the north planer portion of the Simpson mill. Ms. Lewis' job primarily consisted of cleaning up debris which fell down from the planer machinery located on the floor immediately above her work location. This would include lumber parts, chips, and wood dust. (CABR, Cindy Lewis Test. p. 40-43; Bollen Test. p. 52-54) The floor above Ms. Lewis' work area contained tongue and groove type wood slats. There were holes in various locations in the floor above which would permit debris to fall to the ground floor where Ms. Lewis would access the debris and remove it. (CABR, Cindy Lewis Test. p. 74-78; Bollen Test. p. 53-56; Hurst Test. p. 127-128)

The MSP product was mixed in vats on the main floor of the north planer facility, near Ms. Lewis' work facility. It was then pumped through piping up to the floor where the finished lumber was planed. The lumber, on a conveyer, would pass through a

spray booth, where the lumber was automatically sprayed with a nozzle. The overspray would leak onto the floor above, and then through the floor onto the ground floor where Ms. Lewis worked. The chemical would drip directly onto Ms. Lewis' work area, and sometimes actually overflow onto the floor. On several occasions, it would actually accumulate to several inches on the floor in Ms. Lewis' work area. (CABR, Cindy Lewis Test. p. 74-78; Hurst Test. p. 124-128; Bollen Test. p. 52-56, 70)

Ms. Lewis was one of the employees who was in the most contact with the chemical. (CABR, Magee Test. p. 116) The chemical dripped onto her clothing and skin, and she had to remove saturated lumber debris on a daily basis. (CABR, Cindy Lewis Test. p. 74-78; Stewart Test. p. 108-109; Bollen Test. p. 52-56) Exhibits 3, 4, and 5, depict the ceiling stains where the chemical would leak through the floor directly above Ms. Lewis' work area. (CABR, Cindy Lewis Test. p. 67-68)

Immediately after the August, 2002, initiation of the MSP spray, Ms. Lewis began suffering rashes, bleeding in the ears, bloody noses, sensitive skin, digestive problems, ringing in the ears, headaches, and rapid weight gain (starting at 160 pounds up

to 230 pounds) in just a couple months.² (CABR, Cindy Lewis Test. p. 38-40) Additionally, the weight gain was unusual in that it was described as “puffy” and located primarily in Ms. Lewis’ upper and lower extremities. Several of Ms. Lewis’ co-workers observed her odd weight gain, rashes on her neck and chest, dilated eyes, disorientation, loss of coordination, bleeding from her ears and nose, and her inability to communicate. None of the witnesses observed these objective changes in Ms. Lewis prior to the commencement of the MSP spraying in 2002. (CABR, Trail Test. p. 59-63; Stewart Test. p. 109-112 Magee Test. 117-118; Hurst Test. 129-130; John Lewis Test. p. 11-13; Bollen Test. p. 66-67)

Other Simpson employees experienced physical symptoms beginning with the MSP spraying in 2002. This included unpleasant smells and tastes, light headedness, raw throat, upper sinus irritation, burning in the nose and eyes, and bleeding from the ears. (CABR, Miller Test. p. 28-29; Stewart Test. p. 112; Magee Test. p. 119-120; Hurst Test. p. 130) At one point, Simpson launched an investigation when the complaints began, to determine how wide spread the problems were. (CABR, Miller Test. p. 30)

² In its Statement of the Case, page five, Simpson states Ms. Lewis at all relevant times, was an “obese” mill worker. Simpson omits a discussion of how Ms. Lewis’ rapid weight gain relates to its obesity comment.

Ms. Lewis' supervisor, Jeffrey Bollen, assisted her in filing an action report in April 2003. Ms. Lewis was not anxious to file a claim. (CABR, Bollen Test. p. 51, 61) Eventually, Ms. Lewis was transferred to another part of the facility to lessen the contact with the MSP chemicals. Ms. Lewis continued to suffer symptoms, and eventually had to stop working in the fall of 2003. (CABR, Cindy Lewis Test. p. 96, 34)

In addition to reassigning Ms. Lewis and investigating employee complaints, Simpson took additional cautionary steps, as complaints from its employees continued to be expressed into the fall of 2003. (CABR, Miller Test. p. 34) In November, 2003, a Certified Industrial Hygienist, Laurence Lee, was contacted by Simpson's superintendent, Robert Miller, for the purpose of evaluating the contents of MSP, and how it was affecting welders and mill workers. (Lee Test. p. 10) Mr. Lee visited the work site and was given various materials, including the Material Safety Data Sheets (MSDS) by Mr. Miller. (Lee Test. pg. 10-12) Mr. Lee conducted research and provided Mr. Miller with a written report of his findings on January 12, 2004. (Lee Test. p. 12-13) Mr. Lee found that the MSP antifungal agent utilized a series of solvents (80% of the total ingredients) to deliver the product as a spray.

Solvents likely included a mixture of mineral oil, petroleum solvents, toluene, xylene, glycol, ethers, and alcohols (commonly found in paints). (Lee Test. p. 20-21)

The manner in which Mr. Lee researched the ingredients was similar to the research conducted by one of Simpson's medical witnesses, Dr. Thomas Martin, who utilized the National Library of Medicines Tox Net, to determine the ingredients of the chemical compounds. (Martin. Test. p. 17-18)

Anthony Montanaro, M.D., another Simpson expert, agreed with the conclusions reached by Mr. Lee as to MSP's ingredients. Dr. Montanaro testified:

A. I think I testified earlier that it was my understanding that organic solvents including xylene were used as - - to apply the fungicide.

Q. Okay. And do you think or were you told in what percentages?

A. Well, I think that in one of the Material Safety Data Sheets that it was 80 percent was the alcohol used to apply. But if you look at the active ingredients, they're all less than 20 percent, so I assume it would be a high number in that range, around 80 percent. (CABR Montanaro Test. p. 46, l. 9-20)

The importance of establishing the presence of solvents, such as xylene, was evident by the polarized opinions of

the expert witnesses. Mr. Lee's report was provided to Ms. Lewis' witnesses, David Buscher, M.D., and Phillip Ranheim, M.D. (Buscher Test. p. 20-21; Ranheim Test. p. 19-20, 43) Apparently, knowing the significance of the solvents in the case, Simpson purposely failed to show its experts Mr. Lee's report, or to otherwise show them the actual ingredients contained within MSP. (CABR, Montanaro Test. p. 51; Burton Test. p. 53-54)

Solvent intoxication was Dr. Buscher's suspected diagnosis of his patient, Ms. Lewis. (CABR, Buscher Test. p. 12-14) It is common to see solvents, such as xylene and toluene present in delivery compounds for products such as antifungicides. (Buscher Test. p. 14) Once Dr. Buscher saw the report from Mr. Lee, it eliminated his confusion, and confirmed his diagnosis of toxic exposure to solvents. (Buscher Test. p. 20-21) Solvents such as xylene, are known toxic substances that can affect individuals differently. (Buscher Test. p. 21-23; Ranheim Test. p. 12-14) Also important is the extent of the exposure, and Dr. Buscher accurately believed Ms. Lewis was exposed on a daily basis. (CABR, Buscher Test. p. 23) Dr. Ranheim testified that the report from Mr. Lee expanded his appreciation of what occurred in Ms. Lewis' work place. The adverse reactions that Ms. Lewis suffered are

consistent with evidence of toxic exposure. The observations of Ms. Lewis' co-workers reinforced the impressions and opinions. Solvents affect people differently, depending on their individual characteristics. "It's not the dose makes the poison. It's the dose plus the host." (CABR Ranheim Test. p. 27, l. 22-25)

From the beginning of the litigation, Simpson has zealously taken the position that there were no solvents at the mill where Ms. Lewis worked. Simpson's own retained expert, Mr. Lee, reached the opposite result. This clear question of fact was presented to the jury. In its Post-trial Motion for ER 50 Relief, Simpson stated:

NO EVIDENCE EXISTS THAT TOLUENE OR XYLENE WAS PRESENT IN PLAINTIFF'S WORKPLACE! (CP 36, p. 112, l. 19)

Since Simpson and its attorneys hid Mr. Lee's report from its experts, it is not surprising that Dr. Martin testified that Simpson's lawyer told him prior to a deposition that xylene was alleged, but it was not listed on the MSDS as an ingredient. (CABR Martin Test. p. 42, l. 11-12)

Dr. Burton, Simpson's forensic expert testified that:

...xylene appears to be an imaginary issue. There's nothing in the records to indicate there was ever any xylene in the workplace.

...It is difficult to prove a negative, but I have no information to indicate the xylene was in Ms. Lewis' workspace. (CABR, Burton Test. p. 53, l. 24-25 and p. 54, l. 1)

Dr. Martin, although he did not believe xylene was present, did acknowledge that if such a chemical was present in the workplace, symptoms of dizziness, headaches, and dermatitis (rashes) would be consistent with that type of exposure. However, for most people, those symptoms are short-lived. Dr. Martin acknowledged that everybody does not respond the same way, and there is not always a medical explanation as to why someone is more sensitive than a co-worker, who might be working right next to them, when both are exposed to the same chemicals. (CABR, Dr. Martin Test. p. 52, l. 9-22)

Keeping the presence of xylene secret was so important to Simpson, that one of its attorneys visited the office of Dr. Ranheim and attempted to coach him into believing that there was no xylene in MSP. When Dr. Ranheim presented the attorney with Mr. Lee's report showing the presence of xylene, the attorney wanted to know where the doctor had obtained the report. (CABR, Ranheim Test. p. 43, l. 15-25)

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Does the de novo appeal protocol mandated by RCW 51.52.115 require the Superior Court rearrange the order of witnesses depending upon who prevailed at the administrative level? (Assignment of Error No. 1)

B. Did Simpson waive its right to object to Instruction No. 14 by failing to propose an appropriate alternative instruction? (Assignment of Error No. 2)

C. Did Simpson waive its right to object to the testimonial opinions offered by expert witness Laurence Lee by failing to object at the administrative level or in Superior Court? (Assignment of Error No. 3)

D. Did the trial court err by denying Simpson's CR 50 Motions for the suggested rationale that Simpson's witnesses were more persuasive? (Assignment of Error No. 2 and 3)

E. Was there competent evidence that the respondent was exposed to a known toxic substance at her work site that proximately caused her occupational disease sufficient to

instruct the jury under *Intalco Aluminum vs. Department of Labor and Industries*?³

F. Did Simpson violate the Board's⁴ order prohibiting any witness from expressing a psychiatric opinion by attempting to offer medical testimony that the respondent's symptoms were due to depression? (Assignment of Error No. 4)

G. Did the court err by permitting demonstrative photographs, taken and developed during the course of the administrative hearing, into evidence? (Assignment of Error No. 5)

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

Simpson suggests the law involving burden of proof means the Superior Court should rearrange testimony taken before the Board. Simpson's only authority for this proposition is a case of *Ruse v. Department of Labor and Industries*, 90 Wa. App. 448, 966 P.2d 909 (1998) affirmed, 138 Wn.2d 1 (1999). Simpson's reliance upon *Ruse* is misplaced. *Ruse* was a bench trial and not a jury trial, as we have here. The *Ruse* decision does not instruct the Superior Court to alter the order of witnesses from the sequence taken before the Board. *Ruse* simply recites numerous decisions which stand for the proposition that a plaintiff in an industrial

³ 66 Wn. App. 644, 883 P.2d 390 (1992); Instruction No. 14, CP 26, p. 43.

⁴ "Board" refers to the Board of Industrial Insurance Appeals.

insurance case has the burden of proof to produce evidence that supports his or her claim. Simpson does not explain how this would direct the Superior Court to rearrange the order of witnesses.

RCW 51.52.115 provides, in part:

The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court...

The *Ruse* case does not support Simpson's statement that the order of witnesses should be rearranged. If done, this would be evidence "other than" that offered before the Board.

The only authority that would be persuasive on that issue, by analogy, would be found in the Mandatory Arbitration Rules. In that setting, when a trial de novo is heard in Superior Court, the evidence is presented as if no arbitration proceeding had occurred. MAR 7.2(b).

In the current case, the Superior Court ruled that:

The witnesses, unless there is some specific reason to change their order, will come as they came presented to the administrative law judge on behalf of the Board of Industrial Insurance Appeals. Otherwise, it will create a jumble, in that witnesses will be testifying about things that didn't yet happen. (Report of Proceedings RP 62)

Examples in the record support the Superior Court's belief that "jumbled" testimony would create confusion when presented to the jury. For instance, the prior testimony of Dr. Martin was presented to both Dr. Buscher and Dr. Ranheim for comment during their testimony. (CABR Buscher Test. p. 33-34; Ranheim Test. p. 13-15) If Dr. Martin's testimony was rearranged so that it followed the testimony of Dr. Buscher and Dr. Ranheim, it would be, to say the least, confusing and not a true de novo presentation of the case.

It appears Simpson is mixing the issue of burden of proof with the order of the presentation of the evidence. The jury was clearly instructed appropriately, through Instruction No. 6, that Ms. Lewis had the burden of proof to establish the decision of the Board was incorrect. (CP 26, p. 35) This is precisely the holding in *Ruse*, when the court ruled that the injured worker has "the burden of producing evidence which supports his claim." Review is limited to an examination of the record to see whether substantial evidence supports the trial courts findings, and whether its conclusions flow from the findings. *Ruse*, 90 Wn. App. 453; RCW 51.52.140.

Simpson also asserts in Assignment of Error No. 1, that the order of witnesses somehow affected the court's hearing of

Simpson's CR 50(a)(1) Motion. To the contrary, the Superior Court did specifically rule on Simpson's request to take the matter from the jury, looking at only the evidence in the plaintiff's case.⁵ The court looked only at "essentially just taking plaintiff's witnesses that were called in the second half of the case" and denied the CR 50(a)(1) Motion. (RP 95) The order of the witnesses had nothing whatsoever to do with the weighing of a *prima facie* case, and Simpson had a full opportunity to argue the quantity and quality of the evidence in Ms. Lewis' case.

The court found there was no legal authority to alter the order of witnesses called before the Board, and that rearranging the order of the witnesses would be confusing to the jury.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

Simpson assigns error to the trial court by contending Jury Instruction No. 14 was an inaccurate and incomplete statement of the law, constituted a comment on the evidence, and required the respondent, Ms. Lewis, to identify a precise chemical in the workplace which caused her disease. Simpson offered no jury instruction as to the manner of proof necessary to establish an occupational disease due to chemical exposure. If a party is

⁵ The sufficiency of the evidence is discussed more fully in the Response to Assignment of Error No. 3.

dissatisfied with a proposed instruction, it is the duty of that party to propose an appropriate alternative instruction. *Locke v. City of Seattle*, 133 Wn. App. 696, p. 714, paragraph 51, 137 P.2d 52 (2006). Petition for Review granted, 158 Wn.2d 1025, 152 P.3d 347 (2007). Simpson provides no authority for the proposition that, in an occupational disease claim related to toxic exposure, the jury should receive no instruction whatsoever to aid them in their deliberations.

The jury should be fully and correctly instructed on the law. Jury instructions are proper if they are not misleading, are a correct statement of the law, and allow the parties to argue their theories of the case. *State v. McReynolds*, 104 Wn. App. 560, 581, 17 P.3d 608 (2000). Simpson suggests that the correct result would be to tell the jury nothing about the extent of proof necessary in a toxic exposure occupational disease matter, even though there are recent appellate court decisions on exactly that subject. The issue here is whether Instruction No. 14 was a correct statement of the law, and did both sides have the opportunity to argue their theory of the case, given this instruction.

A simple comparison between Simpson's Statement of the Case, and the Respondent's Restatement of the Case,

shows a wide split between the parties' view as to how the facts should be interpreted. This is particularly true with regard to the medical experts and their respective knowledge of what each knew about the ingredients contained within the MSP line of products. Simpson's point of view is that a jury instruction that quotes an appellate court decision verbatim is a comment on the evidence. For factual reasons, Simpson contends the *Intalco* case is not applicable. Simpson says the *Ruff* case should apply because of similar facts. *Ruff v. Department of Labor and Industries*, 107 Wn. App. 289, 305, 28 P.3d 1 (2001). Yet, Simpson offered no alternative instruction to fully instruct the jury on this subject matter.

Simpson is correct that the *Intalco* case does not relieve an injured worker of his or her burden of proof. The *Ruff* court did not overrule or reject *Intalco*. Rather, *Ruff* stated that *Intalco* "does not mandate a contrary result as it is distinguishable from this case." *Ruff*, 107 Wn. App. at 305. Because of the unique facts, the *Ruff* case invoked the *Frye* test.⁶ *Ruff* involved medical testimony which was being challenged as presenting novel scientific evidence not generally accepted in the medical community (a remodel that included new carpet and painting. A

⁶ *Frye v. The United States*, 293 F. 1013 (D.C. Cir. 1923)

chemical odor was said to lead to the claimant's porphyria, a rare, mostly hereditary disorder of blood enzymes.) *Ruff*, 107 Wn. App. p. 299-301. See *Grant v. Boccia*, 133 Wn. App. 176, 180-181, 137 P.3d 20 (2006).

In Ms. Lewis' case, there was ample scientific evidence presented that toxic exposure from solvents, like xylene and toluene, could cause symptoms for which Ms. Lewis was suffering. Admittedly, the experts disagreed on the reasons for the longevity of the symptoms. However, there was significant evidence regarding the cause and effect of those specific chemicals. Simpson simply took the position that the chemicals were not present in the work setting, and wanted the trial court, and now this court, to accept its version of the facts. As discussed under a response to Assignment of Error No. 3, *infra*, ample evidence existed to use the *Intalco* instruction, and the instruction was a correct statement of the law. In short, both parties were able to adequately argue their respective theories to the jury. Thus, Instruction No. 14 was appropriately given.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

Without objecting to the testimony of Laurence Lee at the Industrial Appeals Judge level, the Board level, or prior to

submitting to the testimony of the Superior Court jury, Simpson nonetheless insisted in its CR 50 Motions that the Superior Court should remove from consideration Mr. Lee's expert opinions, and the opinions of all those experts that relied upon them, because they were based upon speculation, due to "inconsistencies" in Mr. Lee's testimony. CP 36, p. 105-109.

Simpson successfully objected to the introduction of Exhibit 1, Mr. Lee's report, at the Board level.⁷ However, at no time, prior to the conclusion of the trial at Superior Court, did Simpson ever object to the testimony of Mr. Lee in which he expressed his opinion as to the chemical contents of MSP. Mr. Lee testified, without objection, as follows:

Q. In your report, Mr. Lee, you state, 'MSP 20 contains 20 percent propiconazole and 80 percent solvents.' Do you stand by that conclusion today?

A. Yes.

Q. Further down you state, '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) based on a review of industry information.' Do you also stand by that statement as well today?

⁷ The Superior Court affirmed the rejection of Exhibit 1 on the grounds of hearsay, and since Mr. Lee testified to its contents (without objection from Simpson) it was cumulative. RP 12-14.

A. Yes. (CABR Lee Test. p. 20, l. 24 through p. 21, l. 9)

In Superior Court, Simpson filed a Motion to Reconsider Evidentiary Rulings of Hearings Judge. CP 9. Simpson failed to object to or request the court to exclude the foregoing testimony from being read to the jury. Thus, the quoted testimony was read to the jury. The first objection to the expert testimony was following the case in a CR 50 Motion. Objections to evidence can be considered only upon the specific grounds made before the Board. *Sepich v. Department of Labor and Industries*, 75 W.2d 312, 316, 450 P. 2d 940 (1969). The reason for the rule is if proper objection is made before the Board, the party offering the evidence has the opportunity to obviate the objection, or waive it intelligently. If new objections were made in the trial court, it would be too late for the opponent to correct or complete the record. *Sepich*, 317, 450 P.2d 940. See also *Carnation Co., Inc. v. Hill*, 54 Wn. App. 806, 810, 776 P.2d 158 (1989), and *Intalco Aluminum v. Department of Labor and Industries*, 66 Wn. App. 644, 663, 883 P.2d 390 (1992).

A CR 50 motion can only be granted if it can be said, as a matter of law, that no evidence or reasonable inferences

existed to sustain a verdict for the party opposing the motion. All evidence must be considered in the light most favorable to the non-moving party. *Hill v. BCTI Income Fund – I*, 97 Wn. App. 657, 986 P.2d 137 (1999). In ruling on the motion for a directed verdict, a trial court must accept the truth of the non-moving party's evidence and draw all reasonable inferences in the light most favorable to that party. *McPhaden v. Scott*, 95 Wn. App. 431, 975 P.2d 1033 (1999). If any justifiable evidence exists from which reasonable minds could reach a verdict in the non-moving party's favor, the question is for the jury and the CR 50 motion should be denied. *McPhaden*, 95 Wn. App. 431.

The trial court has no discretion in ruling on a motion for a judgment as a matter of law. The Court must accept the evidence and all reasonable inferences there from to support the view of a party against whom the motion is made. *Wold v. Jones*, 60 Wn.2d 327, 373 P.2d 805 (1962). The trial court is not permitted to weigh evidence and simply substitute its judgment for that of a jury. *Alpine Industries, Inc. v. Gohl*, 30 Wn. App. 750, 637 P.2d 998 (1981).

A motion for judgment as a matter of law may be overcome by direct or circumstantial evidence. The court will not

grant a motion directed against the plaintiff's case, when the sole basis of that motion is that the plaintiff has presented no direct evidence of the facts sought to be established, but merely circumstantial evidence. See McCormick on Evidence, Section 338 (5th Edition).

Mr. Lee, who had conducted hundreds of similar reviews of the contents of industry chemical compounds, researched the Material Safety Data Sheets, the industry data bases, and reached an expert opinion on a more probable than not basis, as to what MSP contained. Mr. Lee believed, in his expert opinion, that MSP contains 80 percent (80%) solvents, including xylene and toluene. Simpson, asks Mr. Lee if he knows "for sure" what the contents are. Of course, he did not, because the manufacturer keeps the exact ingredients secret to the public. Nevertheless, Mr. Lee approached this matter as an expert Certified Industrial Hygienist would, and expressed his opinion in a report originally to Simpson Timber, who hired him for precisely that reason. The test for the expression of an expert opinion, is not exactitude, but on a more likely than not basis. *Torno vs. Hayer*, 133 Wn. App. 244, 250, 135 P.3d 536 (2006). There is no basis to totally exclude Mr. Lee's testimony, because it was a competent

expert opinion based upon valid research. Simpson was free to argue, and in fact did argue, to the jury that Mr. Lee should not be believed. But, there is no basis to exclude the testimony of an expert witness, especially when Simpson failed to object to Mr. Lee's testimony at the Board level.

Beginning on page 19 of its brief, Simpson discussed the test for meeting the burden of proof using the motions of general and specific causation. In its CR 50 Motion, Simpson argued that Ms. Lewis failed to meet her burden on causation by failing to identify the precise toxic chemicals that were in the workplace. Simpson claimed:

NO EVIDENCE EXISTS THAT
TOLUENE OR XYLENE WAS
PRESENT IN PLAINTIFF'S
WORKPLACE! (CP 36, p. 112, l. 19)

Ms. Lewis met her burden by establishing 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. Nevertheless, Ms. Lewis went beyond the requirements of a prima facie case and proved that solvents within the MSP were the likely cause of her symptoms. Simpson's contentions that Ms. Lewis is required to

prove the exact chemical composition, down to perhaps a molecular level, is not supported by the *Intalco* line of cases. Was there “no evidence” of the chemical composition to which Ms. Lewis was exposed? Was Industrial Hygienist Laurence Lee’s opinion the only proof on that subject? To the contrary, there were ample sources of information supplying what chemicals were in the workplace. Furthermore, competent medical experts testified that Ms. Lewis was subjected to exposure, and that her illness was proximately caused by her exposure to those chemicals. Simpson’s experts disagreed, thereby establishing a question of fact, which the jury resolved by its verdict.

Simpson understates the breadth of the evidence upon which the jury could have relied regarding causation. In both Instruction No. 14, and Instruction No. 8, the jury was told it could rely upon both direct and circumstantial evidence to reach its verdict. (CP 26, p. 43, 37) Both forms of evidence were present here to support the elements of causation.

Simpson contends that Ms. Lewis would have to meet the following elements to establish a preponderance of evidence⁸:

⁸ CP 36, p. 105

(1) “That an agent exists on the premises where she worked.”

In the summer of 2002, Simpson began spraying a new product (MSP). (CABR Miller Test. p. 17) Ms. Lewis immediately began suffering a variety of symptoms after the introduction of MSP in her work area. These symptoms included bleeding from the ears, rash on her arms, puffy arms and legs, bad cough, coordination problems, and tingling under the skin. None of these symptoms existed prior to the MSP being introduced in Ms. Lewis' work site. (CABR Lewis Test. p. 38 through page 40)

Several co-workers noticed objective changes in Ms. Lewis, including weight gain, memory problems, coordination, and rashes on her skin. (CABR Trail Test. p. 61; Magee Test. p. 118; Hurst Test. p. 129; Bollen Test. p. 66)

Other employees suffered symptoms when exposed to MSP's odor as well, although they were shorter in duration. (CABR Stuart Test. p. 112; Magee Test. p. 119; Hurst Test. p. 130; Trail Test. p. 60)

Robert Miller was the supervisor of the finish area at Simpson. Beginning in 2002, Mr. Miller began hearing complaints about problems related to the new spray. This included watery

eyes, runny noses, and other symptoms. (CABR Miller Test. p. 28)

Mr. Miller acknowledged that employees other than Ms. Lewis complained of bloody ears and redness on their skin when they came in contact with the chemical. Mr. Miller and his subordinates conducted an investigation to find out how wide spread the problems were. (CABR Miller Test. p. 30) On cross examination, Mr. Miller initially denied that he commissioned a study on the use of MSP. Later he changed his testimony to include, "We did have some complaints from welders" regarding the fumes radiating from the metal sprayed with MSP. (CABR Miller Test. p. 34) Mr. Miller agreed that in January, 2004, he had requested Laurence Lee, a Certified Industrial Hygienist, to prepare a report as to Simpson's use of MSP. (CABR Miller Test. p. 34) Mr. Lee conducted a study. In addition to Ms. Lee's opinions that he expressed regarding the ingredients of MSP (which were included in the report to Simpson in January, 2004), he also testified that the manufacturer itself stated that there was 80 percent (80%) solvents in the MSP product, based upon the Material Safety Data Sheets. (CABR Lee Test. p. 20-22) Simpson criticized Mr. Lee's utilization of an internet database used by the industry to determine the probable ingredients which constituted the

eighty percent (80%) of solvents in MSP. Despite its criticisms of Mr. Lee and his research protocol, Simpson's witness, Dr. Martin, did the same thing:

Q. Describe for us your understanding of what that chemical [MSP-P] contains.

A. ... chemical contained a compound called Propiconazole, which is an antifungal compound...the information that we found on it by looking in the National Library of Medicines Tox Net, which is an extensive database....we found on Mycostat suggested that it could cause some irritation and short-lasting effects, such as headache and dizziness, but that long-lasting effects had not been reported and would not be expected. (CABR Martin Test. p. 17-18)

Simpson appears to be arguing that Mr. Lee's database research amounts to pure speculation, where Dr. Martin's same approach is competent and professional research.

Simpson's witness, Dr. Montanaro also testified of his knowledge of the ingredients of MSP as follows:

Q. ...what is your assumption when you testify today as to what agent, delivery agent or solvent, was used with Mycostat-P during the course of Mr. Lewis' employment?

A. I think I testified earlier that it was my understanding that organic solvents

including xylene were used as - - to apply the fungicide.

Q. Okay. And do you think or were you told in what percentages?

A. Well, I think that in one of the Material Safety Data Sheets that it was 80 percent was the alcohol used to apply. But if you look at the active ingredients, they're all less than 20 percent, so I assume it would be a high number in that range, around 80 percent. (CABR Montanaro Test. p. 46)

All of the foregoing reveals there were clear factual questions for the jury. To suggest that the testimony was pure speculation, as Simpson is saying here, simply looks at small portions of the competent expert testimony that was presented to the jury.

(2) "That the agent present can cause injury or disease in humans of the kind the plaintiff alleges."

Dr. Ranheim and Dr. Buscher clearly agree that solvents of the kind included in the MSP Material Safety Data Sheets, and those alluded to in Mr. Lee's report, can cause the symptoms from which Mr. Lewis was suffering. (CABR Ranheim Test. p. 12 through 14; Dr. Buscher Test. p. 22 through p. 23) Even Dr. Martin agreed that Ms. Lewis' "symptoms could be related to

workplace exposure to xylene. They would be short-lived.” (CABR Martin Test. p. 51) Dr. Martin also stated “It would be fair to say” that there is not a medical explanation for why some people are more sensitive to chemical exposures than others. (CABR Martin Test. p. 52)

(3) “Ms. Lewis, in fact, was exposed to that Agent.”

There is overwhelming evidence that Ms. Lewis had daily, physical contact with MSP. Supervisors, co-workers, and Ms. Lewis herself, testified to observing her clothing and skin being saturated on a regular basis. (CABR Cindy Lewis Test. p. 75; Bollen Test. p. 62 through p. 70)

(4) “Ms. Lewis has, in fact, the injury or disease.”

For reasons that have not yet been explained, Simpson failed to supply Mr. Lee’s report to Dr. Montanaro, Dr. Martin, or Dr. Burton. It is hard to understand how Simpson could hire an Industrial Hygienist, obtain his opinion as to the ingredients of a chemical being used in the workplace, but failed to show the opinions to its medical witnesses. No wonder Dr. Burton testified that:

“...xylene appears to be an imaginary issue. There is nothing in the records to indicate there was ever any xylene in the workplace.” (CABR Burton Test. p. 53 through p. 54)

Dr. Burton had no information to indicate xylene was in Ms. Lewis' workspace. Nevertheless, Simpson continues to point to their informationally deprived experts as a basis to contend that there was no proof that Ms. Lewis suffered any occupational disease. In the end, there was a clear difference of opinion between the experts.

Ms. Lewis' experts, who were fully informed of all material facts involving the chemical compounds, were of the opinion that on a more probable than not basis, the exposure in the workplace caused the symptoms which Ms. Lewis was experiencing, and represented a basis of the injury that she sustained. (CABR Ranheim Test. p. 22) The specific diagnosis was toxic exposure to solvents, such as xylene. (CABR Buscher Test. p. 31)

The foregoing discussion shows that all four elements for proving both general and specific causation were supported by

competent evidence, and therefore supported the jury's verdict⁹. In its discussion, Simpson simply leaves out these contrary presentations of fact. Simpson was able to argue to the jury that their doctors were more credible or more credentialed than Ms. Lewis'. Simpson was also able to argue that Mr. Lee's testimony about the presence of solvents in MSP was "wrong" and did so in their closing argument repeatedly. However, that does not mean there was not competent evidence to the contrary. There clearly was. Simpson, in its CR 50 Motions, asked the court over and over again, to weigh evidence and substitute its factual judgment for the jury. CR 50(b) prohibits such an approach.

Simpson insists Ms. Lewis' situation was akin to that in the *Ruff* case where the community college building in which the plaintiff worked was remodeled, including painting and carpeting. The plaintiff in *Ruff* experienced a series of symptoms, including headaches, watering and burning eyes, and nausea. There was a strong smelling chemical odor that caused the plaintiff's symptoms. There is no testimony, whatsoever, as to what chemicals were present in the workplace. No product names or chemical compounds were identified. Ms. Ruff's doctors felt the effects of

⁹ See *Grant v. Boccia*, 135 Wn. App. 176, 137 P.3d 20 (2006).

the chemical smell resulted in multiple chemical sensitivities and porphyra metabolism. The appellate court felt the case was dissimilar to *Intalco*, and that the Frye Rule applied given the novel causation theory suggested by the doctors. In Ms. Lewis' situation, there was significant and extensive testimony about the precise product that was introduced at the time Ms. Lewis' symptoms began. Numerous experts were able to identify MSP as the chemical product in question. They were able to review the Material Safety Data Sheets that the manufacturers supplied to the general public. In addition, further research performed identified the delivery product of the fungicide as solvents.

Expert medical testimony showed solvents are known toxins which can cause the same symptoms suffered by Ms. Lewis. Some of the doctors, however, believed the symptoms should normally resolve in a shorter period of time. This is clearly different than the factual situation surrounding *Ruff*, where no chemical product of any sort was identified. *Intalco* clearly is the law of this case, because all of the elements have been met. There was no error by the Superior Court.

VI. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

Simpson assigns error to the Superior Court's affirming a ruling made by the Industrial Appeals Judge denying the right to introduce a psychiatric opinion at hearing. In short, Simpson was ordered not to introduce a mental health opinion, but did so anyway.

In essence, Simpson is arguing that a BIIA Order permitting a CR 35 physical examination, but specifically prohibiting a mental examination, does not prevent Simpson's doctors from expressing opinions attributing all of the plaintiff's problems to psychiatric causes.

On April 15, 2005, Simpson submitted a CR 35 Motion to the BIIA. In the second paragraph of the Motion, Simpson's attorney stated:

Pursuant to CR 35(a), the employer seeks a Board's order, requiring the claimant to undergo a mental examination. (CP 13, p. 183) (Emphasis added)

On page two of its Motion, Simpson stated:

The individual one-on-one examination by a physician of Claimant's psychiatric condition is at the essence of this case. (CP 13, p. 184)

This request for a psychiatric evaluation of Ms. Lewis led to a dispute and a hearing before the Industrial Appeals Judge, on July 27, 2005. At hearing, the parties agreed that the upcoming CR 35 exam with Dr. Anthony Montanaro was to be performed only as a physical examination and was not to relate to mental health issues. Thus, Simpson dropped its request for a mental health examination. (CP 13, p. 185)

As a result, no mental health expert was named by Ms. Lewis in her list of witnesses before the Board. On August 1, 2005, the Industrial Insurance Judge issued an Order confirming there would be no mental examination. (CP 13, p. 185) After the CR 35 exam was completed, a report was issued by Dr. Montanaro, where he expressed a series of opinions attributing Ms. Lewis' symptoms to depression and other mental health issues.

In response to this opinion expressed by Dr. Montanaro, Ms. Lewis amended her witness list to include a neuropsychologist, Jeffrey Powell, to testify. In the amended witness confirmation, we stated:

This testimony is related to the expression of psychiatric opinion given in the Rule 35 evaluation. (CP 13, p. 186-187)

Simpson then filed a Motion to strike Dr. Powell as an additional witness. (CP 13, p. 188-189)

On November 1, 2005, the very issues addressed in Assignment of Error No. 4 were argued before the Industrial Appeals Judge. Although Simpson has quoted a part of the Industrial Appeals Judge's Order (that the CR 35 examination violated the August 1, 2005 Order and the agreement of the parties) the defendant failed to include the most critical part of the November 9, 2005 Order which said:

The employer's Motion is **GRANTED**. Dr. Powell shall not testify, nor shall any witness testify concerning the expression of psychiatric opinion about the claimant. (CP 13, p. 190-191) (Emphasis supplied)

The matter proceeded to hearing, with Simpson presenting its case first. Since the mental health opinions were ordered stricken, none of Ms. Lewis' witnesses were asked for an opinion regarding her mental health condition. The entire testimony dealt with the physical impact of Ms. Lewis being subjected to certain chemical sprays while working for Simpson in Shelton.

Despite the clear order, Simpson proceeded to elicit psychiatric opinions from both Dr. Montanaro and Dr. Martin. (CABR, Montanaro Test. p. 54-55; Martin Test. p. 27-28) The

November 9, 2005 Order prohibited either party from calling a mental health expert, or having any witness express a psychiatric opinion. That Order put both parties on equal footing. Based upon the order, no opinion about Ms. Lewis' mental health condition is in the revised record which was considered by the Board.

It should be noted that the November 9, 2005 Order was characterized as "interlocutory" and could have been reviewed by the Chief Industrial Insurance Appeals Judge before further testimony was submitted. WAC 263-12-115(6). Although this procedure is not mandatory, the failure of Simpson to do so is curious given the position it took in Superior Court. Its silence after the Order of November 9, 2005, places Ms. Lewis in a seriously compromised position because Simpson had already asked questions in depositions about mental health issues (later stricken by the ruling). However, because of the ruling, Ms. Lewis was prevented from responding with psychiatric questions to her doctors or from calling mental health experts.

It should be emphasized that in its Motion to strike Dr. Powell, Simpson's lawyer stated that Ms. Lewis never raised the issue of a psychiatric condition. (CP 13, p. 188) Simpson's current position is that, even though mental health was not an issue, and a

psychiatrist should not be allowed to testify, Simpson's medical doctors (not psychiatrists) should still be able to render psychiatric opinions on the ultimate issue of the case, which is the cause of Ms. Lewis' physical conditions. This obviously would place Ms. Lewis in a fundamentally unfair position, which could only be corrected by remanding the case to the BIIA to allow Ms. Lewis to supplement her record with psychiatric testimony. The Superior Court correctly chose to affirm the Board's order below.

VII. RESPONSE TO ASSIGNMENT OF ERROR NO. 5

Simpson is challenging the trial court's decision to admit Exhibits 3 through 9 (for demonstrative purposes). These Exhibits are photographs taken by Ms. Lewis during the course of the administrative hearing. Ms. Lewis explained that each photograph showed a portion of her work site, and how the plant looked. Although some of the photographs contain changes since her employment, she explained what the changes were, if any. (CABR Lewis Test. p. 45 through p. 49, and p. 67 through 70) Simpson's argument that the photographs violated a discovery order was rejected by the Superior Court. The testimony is clear that the photographs were taken on a Friday before Ms. Lewis' testimony after she heard others testify about her work site. Copies

were immediately provided to Simpson's lawyers. Simpson is suggesting that the discovery order should be read to imply that further development of evidence during the course of the hearing is prohibited after the discovery deadline is over. There is no order that says any such thing. It was not a situation where evidence was possessed by Ms. Lewis' side, and not disclosed to Simpson. Rather, the evidence was developed during the course of the hearing itself. There is no legal authority cited that would prevent a litigant from photographing an accident scene during a trial, as long as it is promptly provided to the other side upon development.

The Superior Court ruled that there was extensive testimony about the physical layout where the plaintiff worked, and that Ms. Lewis took the pictures and the copies were provided to Simpson Timber shortly thereafter. Information regarding exactly what Ms. Lewis' physical workplace looked like did not come up until the middle of the testimony. (RP p. 72 through p. 73) The pictures were submitted for demonstrative purposes to show what the workplace looked like. Further, Simpson had the ability to present contrary evidence that showed the photographs were inaccurate or misleading.

Finally, Simpson asserts the only reason Ms. Lewis wanted the jury to see the photographs, was to point out the crudely rendered skull and cross-bones on one of the doors in the work area. That testimony would only apply to Exhibit 8; Exhibits 3 through 7 and 9 would not apply to that argument. The drawing on the door was not something put there by Ms. Lewis. (CABR Cindy Lewis Test. p. 69 and p. 70.)

In sum, there was extensive testimony in the physical setting in which Ms. Lewis worked. This testimony included were numerous references of chemicals dripping through the ceiling. Exhibits 3, 4, and 5, show the ceiling, and were therefore helpful to the jury. Any prejudice to Simpson, if any, was minimal at best. Simpson's argument that the photographs were taken illegally, when Ms. Lewis drove through the front gate of the plant with permission, is without merit. (CABR Cindy Lewis Test, p. 50)

VIII. REQUEST FOR REASONABLE ATTORNEY'S FEES

In accordance with RAP 18.1 and RCW 51.52.130, the respondent hereby requests an award of reasonable attorney's

fees if she is found to be the prevailing party in this matter and upon the filing of an affidavit showing the fees and expenses.

DATED this 1st day of October, 2007.

~~WILLIAMS, WYCKOFF & OSTRANDER, PLLC~~



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Certificate of Service

I, Theresa Long, hereby certify that a true and correct copy of this Brief of Appellant was mailed on this date to each of the following:

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STATE OF WASHINGTON
BY _____ DEPUTY
COURT OF APPEALS
DIVISION II

Dated this 1st day of October, 2007.

Theresa Long