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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 38391-8-II

**COURT OF APPEALS OF THE
STATE OF WASHINGTON**

DIVISION TWO

CHUNYK & CONLEY/QUAD C,

Respondent,

v.

PATRICIA BRAY,

Appellant.

BRIEF OF RESPONDENT CHUNYK & CONLEY/QUAD C

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PM 3/14/14

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I. INTRODUCTION

On the appeal by employer Chnyk & Conley Co./Quad C (“Quad C”), a skilled nursing facility, to the Superior Court from an administrative decision at the Board of Industrial Insurance Appeals in 2007, the jury found in favor of Quad C, the Respondent herein. The employee Patricia Bray is the Appellant herein.

The case presented to the jury conformed to the procedure designated for appeal of an administrative hearing, and the trial court judge made no decisions that were beyond her discretion -- and none that could have adversely confused or misled the jury. On the contrary, the evidence was substantial and clear, that Ms. Bray’s aggravation of her wrist injury was not a permanent, compensable work-related injury 2-6 years later. (The time frame for the time-loss award here was 1999-2003). The evidence was overwhelming that her depression arose from years of problems unrelated to simply dropping a binder on her wrist in 1997 (the industrial event and injury). The overwhelming evidence from *objective medical findings*, the standard for determining industrial claims, fully supported Quad C’s position. The jury had ample evidence to decide as they did – a unanimous verdict. (CP 27-29; Attachment 1 hereto)

In particular, the trial court’s refusal to allow bolstering, duplicative testimony of how the injury affected Ms. Bray’s day to day life outside of work was correct and proper. First, evidence of how her injury

affected her life outside of work came before the jury in any event. (See, e.g., Certified Appeal Board Record [hereinafter “CABR”], June 14, 2007, at 54-57) Her self-serving statement about hobbies she could no longer do – the only thing excluded – was irrelevant in an industrial injury case and properly excluded. In addition, it was one answer to one question (id. at 57-58) and hardly leads to an argument that a new trial should be ordered.

Next, the judge’s refusal to give the claimant’s Proposed Instruction No. 8 was correct – it was based on a stipulation at the Board that prior Board decisions for prior time periods would not be re-litigated. Counsel for Ms. Bray attempted to preclude the jury from deciding the issue at hand by bootstrapping the former Board decisions (and former time periods) into the present trial – and attempting to have the judge assert those matters as a matter of law. Such a jury instruction would have been not only wrong, but would have precluded the only issue at hand for the jury.

Moreover, the court’s Instruction No. 5 was appropriate and correct. The parties are allowed by the WPI 155.02.01 to describe generally what they will argue in the case – what their position is -- as Quad C did here. (CP at 37 [Instruction No. 5]). Further, the WPI requires an instruction in appeals to the Superior Court from the Board of Industrial Insurance Appeals that re-states exactly what the Board ruling was. *This instruction was given here, which takes away any confusion the jury may*

have had about what the case was about, from the Board's own words.
(CP at 35-36 [Instruction No. 4]).

The appeal should be denied. Indeed, there are no grounds upon which to reverse the verdict or to challenge the trial court's decisions. The jury was not confused or misled – a unanimous verdict speaks otherwise. The province of the jury should not be disturbed on the issues raised by the Appellant, which are neither weighty nor prejudicial and which, even if incorrect decisions, are harmless errors.

II. STATEMENT OF THE CASE

At issue here is whether the evidence supported the jury's decision to overturn a Board of Industrial Insurance Appeals' decision, which the jury was instructed was "presumed correct". The jury not only knew the weight the Board's decision should be given (CP at 37-38, [Instruction No. 4]), they overcame that presumption and did so unanimously! (CP at 27-29; Attachment 1 hereto) The jury's decision was a resounding correction of the faulty Board analysis and opinion.

We note a few corrections and additions to the factual statements by the Appellant's opening brief:

First, Quad C's evidence to the jury was overwhelming that Ms. Bray was inconsistent as to the injury, her depression, and her ability to work, all along the way:

- She said the "top chart slipped & struck my R hand" (Exh.

1);

- Then she said it “hit the cast” (CABR, June 14, 2007, at 62);
- Ms. Bray “saw stars” because of pain, but did not report it for two days (id. at 64);
- Yet, she *worked* without complaint during the next two days (id. at 66);
- Dr. Langer testified she told him she “tripped” and had pain from “falling with the charts” (CABR, April 23, 2007, at 29, 63);
- Ms. Bray “felt her problems were a result of the tight cast”, not the fall (CABR, May 7, 2007, at [Hassan] 11);
- She failed to “recall” 1985 counseling with Dr. Smith for depression (CABR, June 14, 2007, at 76);
- Ms. Bray produced OBRA record from another facility (Exh. 11), claiming it was a poor review of her work, but they were **not a Highlands -- Quad C -- document** (CABR, at July 11, 2007, at [Williams] 18);
- Ms. Bray claimed her work suffered at Highlands, yet the State survey in for 1998 was “excellent” (id. at 15);
- For 18 months she worked in administrative duties, despite supposed pain and depression (CABR, June 14, 2007, at 70);
- She never asked for accommodations (id. at 70);
- She had no impairment in day to day work (CABR, June 13, 2007, at [Stone] 14);
- She did at least an “adequate”, if not “excellent” job (id. at 13, 25);
- She was never placed on probation (CABR, June 13, 2007, at 69);

- She quit the Highlands -- not fired -- and took job at Montesano (id. at 69, 71);
- Depression was not a hindrance in getting a new job, and her hand was “less painful” at Montesano (CABR, July 7, 2007, at [Von Wilson] 22);
- Ms. Bray received a promotion and a raise, to go to Cathlamet, two jobs after she left the Highlands (Quad C)! (CABR, June 14, 2007, at 73); and
- She took a cruise in May 2002, had a “good time” and “enjoyed herself”, but she claimed she could not work during that time (CABR, April 23, 2007, at [Langer] 42).

These contradictions to her claim that she could not work were certainly enough for the jury to conclude she could in fact work, if she tried. Moreover, the jury had a terrific amount of evidence that she did not even look for work in her field during the time frame at issue:

- She did not seek work in nursing (CABR, June 14, 2007, at 74);
- She did not seek work in nursing administration (id.);
- She did not seek any paid employment (id.);
- No doctor told her she could not work (id. at 75);
- No one told her they would not hire her (id.);
- **Highlands would have hired her back!** (CABR, June 13, 2007, at [Stone] 15); and
- She sought no vocational counseling (CABR, June 14, 2007, at 75).

The jury had plenty of factual background and substantial evidence upon

which to decide that the Board was incorrect in its determination.

In addition, the jury had abundant evidence that the depression during the four-year period at issue related to things other than her hand:

- Ms. Bray's mother had mental illness (schizophrenia or borderline), she had mother/child abandonment issues, her father was an alcoholic, and sister has mental illness (Bray, Dr. Friedman, Dr. Langer, and Dr. Schneider, *passim*);
- Her sexual orientation, marriage break-up, relationship break-up affected her deeply (CABR, June 14, 2007, at 55);
- She took medication for depression before the time period at issue here (id. at 77);
- 1985 – marriage break-up and 3 years of counseling (id. at 55-56);
- 1995 – Dr. Smith counseling; depression; amitriptyline (id. at 77);
- 1996 – relationship break-up; “months” of counseling (id. at 56);
- “I believe Ms. Bray is capable of doing the kind of work that she had done at the time of her injury, [when] I saw her in 2001” (Dr. Freidman, CABR, May 11, 2007, at 58);
- “Chronic suicidal ideation”, “obsessional rituals”, and “serious impairment in occupational functioning” have “nothing to do with an industrial injury of this kind. It would preexist” (id. at 59);
- “[H]er present mental condition was unrelated to her industrial injury” (id. at 60);
- Her need for further counseling “would have no relation to the claim. [It] would just be the inevitable disappointments in life.” (Dr. Schneider, CABR, May 10, 2007, at 19);
- “From an emotional standpoint, she was not precluded

from work.” (id. at 59); and

- Ms. Bray believes her problems can be traced back to the softball game – not the industrial injury (id. at 60).

Next, the evidence was overwhelming that Ms. Bray should not have been precluded from working because of the hand injury. Ms. Bray’s counsel consistently tried to assert that Quad C was making this a “re-trial” of the RSD issue – but the point of the evidence was not to argue she did not have RSD, but to argue that whatever she had and whatever the “accepted condition” was, she was not precluded from working during the period at issue. Certainly there was enough evidence for the jury to decide she could have been working from 1999 to 2003:

-- **Dr. Michael D. Barnard, her own doctor (Exh. 5)**

- “well healed minimally angulated distal radius fracture”;
- “I am unclear that the injury on the job would have caused a ‘re-fracture’, since she had a cast on. I find that difficult to believe”;
- Contractures caused by “immobilization”; and
- RSD “will take weeks, if not months to recover from the contractures and the pain she has” – not 2-6 years to recover (the time frame for the L&I claim).

-- **Dr. Ivar Birkeland, Orthopedic IME doctor**

- “might take as long as a year”, according to Dr. Hanel (CABR, April 24, 2007, at 14);
- Industrial injury was “minimal”, “just a minor confusing injury” (id. at 15);

- “mild aggravation” (id. at 37);
- Aggravation of hitting cast was 25% responsible for the ongoing RSD (id. at 15);
- Long-term pain pertains to the softball injury, not the on-the-job aggravation (id. at 16);
- “No, there was no evidence of [RSD] at that point” (id. at 17); and
- Nothing “striking”; no dramatic presentation (id. at 29).

The limited RSD, as an accepted condition, could not have been causing the continued, ongoing inability to work from 1999 to 2003. The evidence was sufficient for the jury to conclude this.

Moreover, Dr. Hassan, in his inconsistent testimony, agreed with many of the points we were making. He felt the depression was the problem, not the hand injury. He as the attending physician agreed in deposition that the hand was not the problem (even though the Court precluded us from using his written approvals that the hand issue had resolved by April 1999 – the “real” evidence from him was even stronger than the jury received):

-- Dr. Douglas Hassan, Orthopedist

- Bray’s fracture had a slight angulation, but it healed in an “acceptable” position (CABR, May 7, 2007, at 19);
- Bray “felt her problems were a result of the tight cast” (id. at 11) – she had a cast from the non-work, softball injury, too;

- Bray had “tenderness in both forearms and both wrists” (id. at 34), though the injury was only to one wrist;
- Industrial “aggravation” caused no injury to the nerves or soft tissues (id. at 44);
- Inability to work relates to depression, not the hand (id. at 26, 33)
- Some difficulty in nursing duties with the hand, but she could work (id. at 28); and
- Depression is “not within the scope of my practice” (id at 26).

Finally, there was plenty of evidence from the psychiatrists that her depression, if any coming from the work-related injury, had resolved. Her ongoing depression into 1999 to 2003 was related to underlying issues, not the wrist aggravation. (See, e.g., Dr. Schneider, CABR, May 10, 2007, at 19, 59, 60; Dr. Freidman, CABR, May 11, 2007, at 58-60)

All of this evidence is hardly insubstantial. Rather, it is an avalanche of evidence, significant for a good jury of citizens to render a unanimous decision in about 20 minutes. From an evidentiary standpoint, the evidence is not only sufficient, not only a “fair preponderance”, but rather substantial, in favor of the employer Quad C.

III. ARGUMENT

A. Burden of Proof

The party that moves for review of a Board’s decision at the superior court must bear the burden of proof. The burden of proof for

appeal at that level is beyond a preponderance of the evidence. RCW 51.52.115. The court in *Garrett Freightlines v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 725 P.2d 463 (1986), quoting *Department of Labor & Indus. v. Moser*, 35 Wn. App. 204, 208, 665 P.2d 926 (1983), stated:

This presumption means that the Board's decision will only be overturned "if the trier of fact finds from a fair preponderance of the evidence that such findings and decision of the board are incorrect. It must be a preponderance of the credible evidence. If the trier of fact finds the evidence to be equally balanced then the findings of the board must stand."

Garrett, 45 Wn. App. at 339.

Here, there is both a "fair preponderance of the evidence" and there is "substantial evidence" to support the jury's findings. The factual evidence fully supports their verdict here. (See evidence outlined above) The medical testimony and exhibits were overwhelmingly against Ms. Bray. These are matters left to the jury to weigh, and cannot be disturbed on appeal. See *Bennett v. Dept. of Labor & Indus.*, 95 Wn.2d 531, 534, 627 P.2d 104 (1981).

Moreover, there is no "abuse of discretion", the standard at this level of appeal, that led to prejudice or jury confusion. There is no reason to overturn the jury verdict below.

B. Objective Evidence Versus Subjective Complaints

The law requires, in industrial injury cases, that objective medical evidence support the claim. "A physician may not base an opinion as to

causation of a physical condition on subjective symptoms and self-serving statements. He must base his opinion as to causation on objective medical evidence.” *Cooper v. Department of Labor & Indus.*, 20 Wn.2d 429, 432, 147 P.2d 522 (1944). A claimant must establish a causal relationship between the industrial injury and the new condition (many years later), by competent medical testimony based upon *objective medical findings*. WAC 296-20-280; *Phillips v. Department of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956) (symptoms must be observed by doctor; dismissal affirmed); *Loushin v. ITT Rayonier*, 84 Wash. App. 113, 924 P.2d 953 (1996); *Bennett v. Department of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981).

In *Oien v. Department of Labor & Indus.*, 74 Wn. App. 566, 874 P.2d 876 (1994), an injured worker sought to re-open his case based upon aggravation of a prior work-related back injury, which claim had been paid out and closed. He sought to recover for a two-year time period almost 8 years after the original injury. Since the “only objective findings appear to relate to the existence of Mr. Oien’s preexisting condition”, the Court found that the claimant failed to make his case. Where the physician testified that the “objective findings would be the [degenerative] radiologic changes in the spine . . . supported by the subjective complaints of the patient”, this was not enough. Without a better connection, the present symptoms could be related to any number of factors. *Id.* at 570.

Such is the case here. The Appellant’s medical witnesses relied heavily on subjective complaints of Ms. Bray. (E.g., Dr. Hassan, CABR,

May 7, 2007, at 11) Though such testimony is not good enough, the jury was able to put it aside and make the correct decision.

Indeed, all “medically necessary” treatment must relate to the industrial injury to be covered – not just needed for the “convenience” of the claimant because of various life changes. See WAC 296-20-01002 (as amended as of January 8, 2000); *In Re Housden*, Docket No. 99 20560 (BIIA, 2001).

Rather than submit objective medical evidence on this issue, the Appellant relied on impermissible, speculative medical testimony. The law states, however, that possibility is not enough to establish causation -- it must be “medical probability”. *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). *See also Herskovits v. Group Health*, 99 Wn.2d 609, 664 P.2d 474 (1983); *Young v. Group Health*, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975).

Testimony to the effect that certain acts “might have,” or “could have,” or “possibly did,” cause the condition is insufficient:

In a case such as this, medical testimony must be relied upon to establish the causal relationship between the liability-producing situation and the claimed physical disability resulting therefrom. The evidence will be deemed insufficient to support the jury's verdict, if it can be said that considering the whole of the medical testimony the jury must resort to speculation or conjecture in determining such causal relationship. In many recent decisions of this court we have held that such determination is deemed based on speculation and conjecture if the medical testimony does not go beyond the expression of an opinion that the physical disability “might have” or “possibly did” result from the hypothesized cause. To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained

of "probably" or "more likely than not" caused the subsequent disability.

O'Donoghue, 73 Wn.2d at 824. Furthermore, the degree of proof from the physician must be sufficient to establish that more likely than not the act was the proximate cause of the alleged injuries to avoid speculation or conjecture. The Supreme Court recommended the following instruction as a statement of the law in *Young*:

You are instructed that the causal relationship of the alleged negligence of the defendants to the resulting conditions of the child must be established by medical testimony beyond speculation and conjecture. The evidence must be more than that the alleged act of the defendants "might have", "may have", "could have", or "possibly did", cause the physical condition. It must rise to the degree of proof that *the resulting condition probably would not have occurred but for the defendants' conduct, to establish a causal relationship.*

85 Wn.2d at 337 (emphasis supplied).

The Supreme Court further upheld the requirement of competent medical testimony to establish causation in industrial injury cases. In *Dennis v. Department of Labor & Indus.*, 109 W.2d 467, 745 P.2d 1295 (1987), the court stated:

The causal connection between a claimant's physical condition and his or her employment must be established by competent medical testimony which shows that the disease is *probably, as opposed to possibly*, caused by the employment.

Id. at 477 (emphasis supplied).

Here, the jury could easily see from the above testimony (in the Statement of Facts here), that the medical providers on behalf of Ms. Bray were stretching it. The facts themselves, including Ms. Bray's

inconsistent information to her providers and elsewhere, showed that there was a tenuous connection, at best, between the industrial aggravation and the inability to work. Fortunately, the jury recognized that this was not a case that should have been condoned by the Board of Industrial Insurance Appeals. The objective evidence was that she could and should work, 2-6 years after the relatively minor aggravation (industrial injury) of the wrist injury she suffered while playing softball (non-covered injury).

C. Exclusion of One Answer about Non-Work Related Damages was Proper and, Even if Not Proper, Certainly Harmless

The trial court's refusal to allow bolstering, duplicative testimony of how the injury affected Ms. Bray's day to day life outside of work, was correct and proper.

First, evidence of how her injury affected her life came before the jury in any event. (See, CABR, June 14, 2007, at 54-57) *Second*, Ms. Bray offered extensive testimony of how her injury affected her work and inability to work. (Id., *passim* and throughout even cross-examination) *Third*, her self-serving statement about hobbies she could no longer do (id. at 57) – the only answer excluded by the trial court – was irrelevant in an industrial injury case and properly excluded. The trial court was correct that “those types of similar things as impeachment would have been relevant, but we’re not doing that at this stage of the game. They’re being used to bolster, essentially, the effect of the difficulty that she’s having in

her work environment, and that's not relevant, since we're here for time loss; whether or not she can work." (RP, Aug. 1, 2008, at 3).

In addition, the trial court precluded just one answer to one question (CABR, June 14, 2007, at 57-58). Certainly, Ms. Bray is not arguing that one answer would have swayed a unanimous jury – an answer that was duplicative in any event. This is harmless error, if anything.

D. Instruction No. 8 Properly Denied – Court Gave it Separately

Jury instructions, or the failure to give one, are reversible error only if it prejudices a party or misleads the jury in such a way that they do not properly inform the jury of the law. *Thompson v. King Feed*, 153 Wash. 2d 447, 453, 105 P.3d 378 (2005). “Even if an instruction is misleading, it will not be reversed unless prejudice is shown.” *Keller v. City of Spokane*, 146 Wash. 2d 237, 249-50, 44 P.3d 845 (2002).

The Court's denial of proposed Instruction No. 8 was correct; there was no prejudice and failure to include it was not misleading to the jury. The Court accurately held that such an instruction was duplicative and an improper comment on the evidence.

The Employer did not at any time argue that the wrist injury did not cause the previously-accepted RSD condition or the depression. (This is what Ms. Bray's counsel wanted to be allowed as the “law” from the judge.) Rather, the entire appeal to the Board and to the Superior Court,

and the Employer's only argument, was that these previous condition did not remain from 1999 to 2003, to prevent her from working.

The instruction proposed by the Employer and given by the Court as No. 5, pursuant to WPI specifically clears this up:

Plaintiff Chunyk & Conley or Quad C, the employer, claims that the findings and decision of the Board are incorrect in that Ms. Bray's aggravated wrist injury and depressive condition had returned to pre-injury status and that she was able to perform gainful employment in her field, but she failed to look for work from April 1999 to May 2003.

(CP, at 37) That is what Quad C argued, and that is what the jury believed.

Moreover, the Court in essence gave Ms. Bray's instruction, just in a different form. As it must under the WPI (4th) 155.02, the Court gave the Board's decision below in its entirety. (Instruction No. 4, CP at 35-36) This stated what the Board had already ruled on; this instruction alone makes it near impossible to convince a jury to overturn a Board decision. Then, the jury was instructed that the decision of the Board was presumed correct. (Instruction No. 12, CP at 44) The deck is stacked in these cases against the Employer already; any further comment, additional and duplicative, by the Court in instructions would have been improper. Such is the case with the proposed instruction No. 8 from Ms. Bray about the accepted conditions – it was already outlined by the Board's decision separately.

Counsel for Quad C stipulated below that the appeal to the Board was not seeking to re-litigate or appeal the earlier decisions -- that is all. Counsel never stipulated that from 1999-2003 Mr. Bray was entitled to compensation. She was not so entitled, and that was the point of the appeal to the Board and the Superior Court. Counsel never stipulated, and could not do so, that earlier factual determinations *at that time and for those earlier periods* became the law of the case going forward *for all time periods*. Indeed, these are static labor and industry cases, wherein the status of claimants changes occasionally and claims get re-opened. If the Respondent were correct in her argument here (that the later factual situation of the plaintiff cannot be challenged and should have stated by the trial court in the jury instructions), then the decision of the Department of Labor & Industries from April 12, 1999 should still be “the law of the case” – *case closed, Ms. Bray’s medical condition was stable, Ms. Bray could work, and no increase in permanent partial disability*. Of course, that makes no sense.

On this appeal, the Employer sought to overturn the Board’s refusal to enter an Order setting aside the *Proposed Decision and Order* because:

- (1) The Proposed Decision was not supported by the evidence – it is based on Ms. Bray’s subjective and inconsistent testimony alone (and attending physician Dr. Hassan’s belated inconsistent support);

- (2) The hearing judge failed to consider several pieces of admissible, key evidence supporting the Employer's position;
- (3) Ms. Bray failed to present any evidence that she attempted to pursue nursing administrative work from April 1999 to May 2003, even though she had the ability and her doctors' approval to do so, during the applicable period;
- (4) The Employer's evidence of other probable injury mechanisms (softball injury) was clear and convincing – Ms. Bray did not present additional compelling evidence that the “aggravation” injury at work alone or in part led to her condition two to five years later; and
- (5) Ms. Bray admittedly had a long-standing psychiatric condition; but this was unrelated to her industrial injury.

These were the arguments presented to the jury. The Employer did not at any time stipulate that these were not issues to be presented to the jury, yet that is what Proposed Instruction No. 8 sought to do – broaden the stipulation beyond its pre-1999 intent.

Finally, there is no evidence whatsoever that the additional instruction would have made any difference in the outcome. There is no evidence that the jury was confused – no notes from them asking for clarification, etc. There was, however, a 20-minute deliberation, and there was a unanimous verdict.

E. Instruction No. 5 was Proper, Accurate, and Permissible

The instruction proposed by Quad C and given by the trial court as No. 5, followed the applicable WPI, which allows the parties to state briefly what they will argue:

Plaintiff Chunya & Conley or Quad C, the employer, claims that the findings and decision of the Board are incorrect in that Ms. Bray's aggravated wrist injury and depressive condition had returned to pre-injury status and that she was able to perform gainful employment in her field, but she failed to look for work from April 1999 to May 2003.

(CP, at 37) That is what Quad C argued, and that is what the jury believed.

Ms. Bray's issue with this statement appears only to be the phrase "pre-injury status". We remind the Court, however, that Ms. Bray has a cast on her wrist from the previous non-work related softball injury and that she was working just fine with that cast prior to the industrial aggravation. Thus, this instruction simply made the point that Quad C did not need to show she was healed, only that she could work the same as she could the day before the industrial aggravation. Ms. Bray wants to make this out as if a complete healing was necessary to prove, and thus she pushed hard to apply part of the standard for time-loss payments -- "continuous, gainful employment", etc. But, she has neglected to go to the end of that time-loss definition: ". . . when considered in conjunction with . . . pre-existing disabilities." (CP 86) Ms. Bray had the softball

injury and she was working in August 1997. Quad C simply proved that the aggravation of the softball injury was not the reason that she was not working from 1999-2003. The jury unanimously agreed.

F. CR 59 Is Not an Appeal Mechanism

A motion for a new trial pursuant to CR 59 should not be utilized as appeal process or a review of what the Court and jury has just gone through. Yet, that is what the claimant sought here. There is nothing new that she propounded. Such a motion below did not allow a re-argument of the issues already addressed. *Anderson v. Farmers Insurance Co.*, 83 Wash. App. 725, 729, 923 P.2d 713 (1996).

First, the jury verdict was unanimous. The jury was polled in open court; there was no dispute about the outcome in their minds. Ms. Bray has submitted no affidavits showing the jury was confused, misled, biased, or even hesitant on any one issue.

Second, there was no motion for a directed verdict after the “plaintiff’s” case. Apparently, Ms. Bray’s counsel felt that the case was close enough that there was “evidence or reasonable inference of evidence to justify a verdict” either way. *See* CR 59(a)(7).

Third, the arguments actually briefed by Ms. Bray go simply to the weight of the evidence considered by the jury. There is nothing in CR 59 that allows a new trial because of the weight of the evidence, absent some

other significant factor. A motion for new trial must be based on the “reasons” set forth in CR 59(a). None apply here:

“Irregularity, Error or Abuse of Discretion Denying a Party a Fair Trial, Rule 59(a)(1) may be used where an error is not covered by other subsections of Rule 59(a). This may occur, for example, when the presiding juror incorrectly fills out the verdict form in a way that exposes the defendant to damages other than what the jury actually found, Marvik, 126 Wn. App. at 663, or when a witness improperly volunteers inadmissible evidence at trial. Storey v Storey, 21 Wn. App. 370, 375, 585 P.2d 183 (1978), or when the trial court fails to recuse itself after an ex parte settlement discussion, Buckley, 61 Wn. App. at 938”

“Substantial Justice Not Done. Rule 59(a)(9) is the catchall provision of Rule 59. This rule confirms that the court has inherent equitable power to grant a new trial and is not restricted to previously listed grounds. See Marvik, 126 Wn. App. at 663 n.6 (stating that the presiding juror's uncontroverted error in recording the amount of damages on the verdict form would justify a new trial under Rule 59(a)(9)); Brammer, 176 Wash. at 631. Counsel should use this ground as a last resort, since motions under Rule 59(a)(9) are rarely granted. See Lian, 106 Wn. App. at 825; Kohfeld v. United Pac. Inc. Co., 85 Wn. App. 34, 40, 931 P.2d 911 (1997); Larson v. Ga. Pac. Corp., 11 Wn. App. 557, 562, 524 P.2d 251 (1974).”

S. Foster, et al., *Washington Court Rules Annotated*, at 700-01 (2007).

There were none of those issues here. There was nothing “irregular” about the proceedings. No was no “substantial injustice”; just the opposite, the rulings went mostly against Quad C (exclusion of testimony and evidentiary reports, etc.). Ms. Bray cites *McIndoe* for the proposition that doubts should favor the claimant, but the jury stated unanimously that it had no doubts.

Finally, the jury had plenty of factual evidence to properly make its decision. (See Statement of Facts, above) Ms. Bray lists some of her evidence that she could not work, but that does not prove there was a “lack of evidence”:

“Lack of Evidence to Sustain Verdict. Motions for a new trial based on this ground are seldom brought, since a motion for judgment as a matter of law is governed by the same standard, and the party who is entitled to a judgment under Rule 50 or a new trial under Rule 59(a) would typically prefer the Rule 50 remedy. The standards for prevailing under both Rule 59(a)(7) and Rule 50(b) are the same. *Davis v. Early Constr. Co.*, 63 Wn.2d 252, 254, 386 P.2d 958 (1963) (standard for both rules involves deciding whether evidence justifies verdict when interpreted **in light most favorable to nonmoving party**). A court might be able to grant the remedy of a new trial for insufficiency of evidence to support the verdict in a case where the moving party was nonetheless not entitled to judgment as a matter of law. See *Brammer*, 176 Wash. at 631 (new trial granted although motion for judgment notwithstanding the verdict had been denied).”

Washington Court Rules Annotated, at 701 (emphasis added).

There is no question that the jury had plenty of evidence upon which to make its determination – in whatever light it is viewed. For example, two things alone may have overwhelmed any detailed argument by Ms. Bray’s counsel: (1) Ms. Bray’s numerous inconsistencies – she could not be trusted; and (2) Ms. Bray’s failure to look for work – at all during the 1999 to 2003 period. The evidence on these two issues is heavy and overwhelming, regardless of all the medical testimony and regardless of anything else the judge might or might not have instructed.

IV. CONCLUSION

The trial court properly accepted the verdict of the jury, which is fairly and even substantially supported by the evidence. The trial court also gave proper instructions that were mostly favorable to Ms. Bray, if to anyone. There was certainly no misleading comment on the evidence in the trial courts instructions, and the Appellant presents no evidence or theory on how the jury was confused by the instructions given or not given. Indeed, the jury verdict was unanimous – they were clear and there was no confusion here.

This appeal should be denied and proper fees and costs, including attorney fees pursuant to RCW 51.52.130 and RAP 18, should be awarded to Quad C herein.

Respectfully Submitted this March 2, 2009, at Seattle, Washington.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK

By: 

D. Jeffrey Burnham, WSBA #22679
Attorneys for Respondent Quad C

ATTACHMENT A

RECEIVED & FILED

AUG 01 2008

PAT SWARTOS, Clerk of the Superior Court of Mason Co. Wash.

TOL

WPI 155.14

SPECIAL VERDICT FORM

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR MASON COUNTY

CHUNYK & CONLEY FINANCIAL)
SERVICES/QUAD C.,)
)
Appellant,)
vs.)
)
PATRICIA BRAY,)
Respondent.)
_____)

No. 08 2 00037 4

We, the jury, make the following answers to the questions submitted by the court:

QUESTION NO. 1. Was the Board of Industrial Insurance Appeals correct in deciding that Patricia Bray was unable to obtain or perform reasonably continuous, gainful employment in the competitive labor market from April 1, 1999 through May 30, 2003, because of the residuals of her August 25, 1997 industrial injury, when considered in conjunction with her age, education, work history and pre-existing disabilities?

30

Answer: NO Write Yes or No

Dated: Aug. 1, 2008.

Diane Stephens
Presiding Juror

FILL
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DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

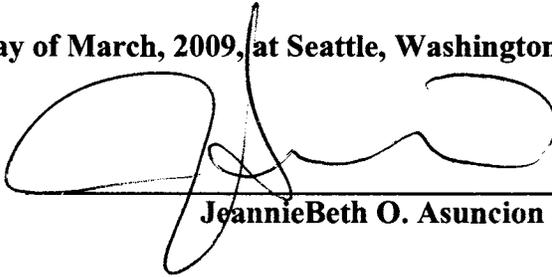
CERTIFICATION OF SERVICE

I, JeannieBeth O. Asuncion, declare under penalty of perjury under the laws of the State of Washington, as follows:

I served the attorneys for the Appellant Patricia Bray, by placing the **BRIEF OF RESPONDENT CHUNYK & CONLEY/QUAD C** into the U.S. Mail, on the date set forth below, and addressed to:

Laurel Smith, Esq.
Laurel Smith & Associates
P.O. Box 310,
Rochester, WA 98579

Dated this 2nd day of March, 2009, at Seattle, Washington.



JeannieBeth O. Asuncion