

COURT OF APPEALS
DIVISION II

NO. 38891-01-II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

Paige Sagen,

Appellant,

v.

State of Washington Department of Labor and Industries,

Respondent.

RESPONDENT'S BRIEF

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I. NATURE OF THE CASE

This is a workers' compensation case arising under the Industrial Insurance Act, RCW Title 51. After providing Mr. Sagen with extensive benefits, the Department of Labor and Industries (Department) closed his injury claim. He appealed to the Board of Industrial Insurance Appeals (Board), seeking a pension (permanent total disability compensation) and other relief. After a hearing, the Board's Industrial Appeals Judge (IAJ) denied Mr. Sagen's request for a pension and for certain other relief, though granting certain additional temporary wage replacement benefits. The three-member governing Board then denied Mr. Sagen's Petition for Review.

Mr. Sagen then appealed to superior court, where a jury affirmed the Board's decision. Mr. Sagen's appeal to this Court primarily presents two challenges, one attacking the Superior Court's instruction defining permanent total disability, and the other attacking the Superior Court's discretionary evidentiary ruling striking two questions and answers in the Board record. This Court should affirm the judgment on jury verdict because no instructional or evidence-law error occurred. Moreover, even assuming for argument that an evidence-law error occurred, Mr. Sagen was not prejudiced by such assumed error because the evidence at issue is duplicative of other evidence that was presented to the jury.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the superior court commit reversible error in instructing the jury on the issue of total disability, when the instruction provided an accurate statement of the law, did not confuse or mislead the jury, and fully allowed Mr. Sagen to argue his theory of the case?

2. Under the abuse of discretion standard, did the superior court commit reversible error under ER 801(d)(2) or under ER 705 in striking as inadmissible hearsay two questions posed to, and two answers provided by, Mr. Sagen's vocational witness in testimony regarding what previous vocational counselors had written in reports regarding what Mr. Sagen's employer had allegedly said regarding his motivation for making job offers to Mr. Sagen?

3. Assuming for the sake of argument striking either or both of the questions and answers as inadmissible hearsay was error, was any such error harmless and non-prejudicial where the witness ultimately was able to state his opinion and provide an explanation for his opinion, and when the evidence in question was duplicative of other evidence that was presented to the jury?

4. Does substantial evidence support the jury's verdict that the Board was correct to find that Mr. Sagen's industrial injury did not proximately cause Mr. Sagen: (1) to develop an elbow condition known as

left lateral epicondylitis; (2) to be incapable of obtaining and maintaining reasonably continuous gainful employment during the six-and-a-half months prior to June 21, 2004; or (3) to be a permanently and totally disabled worker as of June 20, 2004?

III. COUNTERSTATEMENT OF THE CASE

A. Facts

1. The Industrial Injury And Subsequent Job Offers From The Employer Of Injury

In 1998, Bob Wahl, the owner of Sound Overhead Door an overhead door and installation service company, hired Paige Sagen as a service technician.¹ Wahl at 4-6. All of Mr. Wahl's employees had been there for five years or longer. Wahl at 6. Per Mr. Sagen, the job offer from Sound Overhead Door offered Mr. Sagen advancement and, to use Mr. Sagen's words, "sounded prosperous." Sagen at 38-39. He expected to move up rapidly and get into sales. Sagen at 39-40.

¹ All evidence was presented at the Board. All references in this brief to testimony contained in the Certified Appeal Board Record (CABR) will be to the name of the witness, followed by the page number of the testimony. Reference to Mr. Sagen's testimony is to "Sagen," while reference to his mother's testimony is to "Joan Sagen." Exhibits, which are separately collected in the CABR, will be referred to by Exhibit number. All references to pleadings and orders contained in the CABR will be to the large numbers stamped on the lower right side of the page. All references to the Appellant's Brief will be denoted by AB. Dr. Johnson's testimony was taken in two parts. Reference to his cross-examination testimony will be noted as Johnson (cross exam).

On February 19, 1998, Mr. Sagen, then age 39,² fell from a ladder and was injured while working for Sound Overhead Door. Sagen at 34, 43-44. Mr. Sagen filed an industrial injury claim with the Department, which allowed and administered the claim, providing medical treatment, time loss compensation, and vocational services. CABR at 52-55.

By Mr. Sagen's account, his interactions with Bob Wahl were "pretty good" until he got hurt. Sagen at 55. After his injury, Mr. Sagen did not maintain contact with Mr. Wahl or fellow employees at Sound Door. Sagen at 56, 67.

Sometime in 1999, Mr. Wahl offered Mr. Sagen a light duty job as a dispatcher. Wahl at 9-10. Mr. Sagen did not accept it. Wahl at 10-11. In November 2003, Mr. Wahl again sent Mr. Sagen a written job offer to allow Mr. Sagen to return to work as a dispatcher. Wahl at 12, 14. Mr. Wahl identified the dispatcher job as a service-department oriented job. Wahl at 17. Mr. Wahl sent the November 2003 job offer letter directly to Mr. Sagen and sent copies to Mr. Sagen's attorney, the Department, Vocational Counselor Angela Westling, and Mr. Sagen's physician, Dr. Cove. Wahl at 49-50.

The dispatcher job duties included taking and writing service orders, answering the phone, dispatching service orders to the crew in the

² Mr. Sagen's date of birth is November 13, 1958. Sagen at 34.

field over a two-way radio, ordering material for the particular job, getting ready for the next day, and setting up a schedule. Wahl at 15, 17, 30-32, 59; Ex. 4. The job did not entail much lifting, carrying, or bending, could be conducted by alternating sitting, standing and walking; the job involved mostly phone and paperwork duties. Wahl at 20-21. In addition, the employer was willing to accommodate Mr. Sagen's physical capacities, Wahl at 29-30, including two ergonomic chairs and a couch in the dispatcher's office. Wahl at 42-43.

The dispatcher position and duties had existed at Sound Overhead since the company was founded and continued to exist when the testimony was taken in this matter, thus at all times relevant to this appeal. Wahl at 17. The dispatcher position held opportunities for advancement including sales, service manager, and office manager. Wahl at 17-18.

Mr. Sagen did not respond in any way to Mr. Wahl's November 2003 job offer letter. Wahl at 15-16.

2. Medical Testimony Regarding Mr. Sagen's Elbow

Dr. Winegar, an orthopedist, examined Mr. Sagen on May 27, 2004. Winegar at 63. Mr. Sagen told Dr. Winegar his elbow had resolved. Winegar at 64. At that time, Mr. Sagen's complaint was lower back pain created by a fall to concrete. Winegar at 63-64. Mr. Sagen did not indicate any other area of concerns. Winegar at 64. Mr. Sagen had

full motion at the elbows. Winegar at 75-76. Mr. Sagen's left elbow contusion had resolved at the time of Dr. Winegar's examination. Winegar at 81-82. Likewise, Dr. Jarvis found no problems with Mr. Sagen's upper extremities. Jarvis at 12. During the course of Mr. Sagen's participation in the pain clinic with Dr. Jarvis, he did not complain about his elbow. Jarvis at 26.

During a 2001 examination by his hired doctor, Dr. Johnson, Mr. Sagen did not report any problems with his elbow. Sagen at 82. Mr. Sagen himself testified that his elbow condition is probably not very important. Sagen at 82-83. Dr. Johnson acknowledged that the only documentation in the medical records of a left elbow problem characterized the problem as an elbow contusion, and that there was no indication in the records that Mr. Sagen made any complaints of elbow pain after 1999. Johnson (cross exam) at 16.

Dr. Johnson nonetheless diagnosed "left lateral epicondylitis." Johnson at 38.

3. Medical Testimony Regarding Mr. Sagen's Pain Behavior, Physical Abilities And Restrictions, And Ability To Perform The Dispatcher's Job Offered By Sound Overhead Door

Dr. Cove, an orthopedic surgeon, diagnosed Mr. Sagen with chronic low back pain on the basis of degenerative disk changes in the

lumbar spine as a result of his industrial injury in 1998. Cove at 3, 5. Dr. Cove initially felt Mr. Sagen was a candidate for lumbar surgery; however, he later changed his opinion about surgery. Cove at 6-8. Dr. Cove questioned Mr. Sagen's motivation to go ahead with treatment. Cove at 8.

Both Drs. Winegar and Cove testified that Mr. Sagen had some non-organic pain behavior. Cove at 7-10; Winegar at 72-73. For example, Mr. Sagen had a normal appearing disk but complained of back pain. Cove at 11. Dr. Winegar explained that Mr. Sagen may have symptom magnification, pain behavior or exaggeration. Winegar at 72-73. Some of Dr. Winegar's findings on examination raised his suspicion of exaggeration of pain by Mr. Sagen. Winegar at 73-75.

In March 2003, Dr. Cove referred Mr. Sagen to Dr. Jarvis at the Tacoma Chronic Pain Management Program. Cove at 11. In October 2003, Dr. Cove reviewed and approved the functional job analysis for Mr. Sagen's dispatcher job, which included protective conditions that Mr. Sagen should be able to sit, stand and walk as needed and should be provided with a headset. Cove at 13, 15. Dr. Cove, in large part, deferred to Dr. Jarvis' recommendations about the job analysis. Jarvis at 15, 17-18.

In May 2003, Dr. Jarvis, an expert in physical medicine and rehabilitation, first evaluated and saw Mr. Sagen in his role as the pain

clinic physician. Jarvis at 5, 7. After a break from the clinic, Mr. Sagen returned to the program in September and completed the three week intensive treatment phase. Jarvis at 7-8. Ultimately, Mr. Sagen completed the program on December 9, 2003. Jarvis at 8.

Mr. Sagen almost always walked with a right limp. Jarvis at 13-14; Joan Sagen at 20, 21. Neither Dr. Jarvis nor the therapists could come up with any reason why Mr. Sagen had the limp. Jarvis at 13-14. The physical and occupational therapists worked with Mr. Sagen to teach him not to limp but were unsuccessful. Jarvis at 14. The cause of Mr. Sagen's limp remained a mystery and he continued with the limp. Jarvis at 14, 23.

In December 2003 at the completion of the out-patient pain management program, Dr. Jarvis and the occupational therapist involved in Mr. Sagen's program developed an activity tolerance summary for Mr. Sagen dated December 15, 2003. Jarvis at 15-17; Ex. 2. They concluded that Mr. Sagen could alternatively sit, stand, and walk for eight hours at a time and that he could lift a maximum of 30 to 40 pounds. Jarvis at 17.

Mr. Sagen was capable of engaging in activities that involved bending, stooping squatting, or crouching on an occasional basis. Jarvis at 17. Mr. Sagen had no limitations in regard to simple grasp or fine manipulation in the use of his upper extremities. Jarvis at 17. Both

Dr. Jarvis and Occupational Therapist, Larry Woodard, signed the December 15, 2003 Activity Tolerance Summary. Ex. 2.

A job analysis was prepared for the dispatcher position that the owner of Sound Overhead Door, Mr. Wahl, confirmed accurately reflected the actual job in the job offer of November 2003. Wahl at 42, 60. Dr. Jarvis reviewed the job analysis for the dispatcher position and concluded that Mr. Sagen could perform the duties of a dispatcher with some minor modifications. Jarvis at 19-20, 22. Dr. Jarvis went over the job analysis with the Occupational Therapist, Mr. Woodard, and compared the requirements in the activity tolerance summary. Jarvis at 18.

Dr. Jarvis recommended modifications that included ability for Mr. Sagen to be free to sit, stand, and walk about the work station, as well as the accommodation of a headset. Jarvis at 20. Dr. Jarvis added that Mr. Sagen would benefit from an ergonomic chair. Jarvis at 20. Dr. Jarvis explained that he and Mr. Sagen had discussed his working as a dispatcher and that it was a central or main vocational expectation during Mr. Sagen's time with Dr. Jarvis at the pain clinic. Jarvis at 20.

At the end of his treatment at the pain clinic, Dr. Jarvis documented improvement in Mr. Sagen's situation including improved mobility, activity tolerances, sitting tolerances and body mechanics. Jarvis at 22-23. Mr. Sagen made significant gains in lifting through the out-

patient, follow-up phase of the program. Jarvis at 23. As of January 30, 2004, Dr. Jarvis opined that Mr. Sagen was fixed and stable with regard to the problems related to his industrial injury. Jarvis at 27.

4. Mr. Sagen's Reasons For Rejecting The Dispatcher Job Offer Were Not Medically-Based Or Disability-Based

During his testimony and in response to a question of whether he thought he could work as a dispatcher, Mr. Sagen responded, "If I could get up and move around, maybe I could, I don't know. I've never done it." Sagen at 53. Mr. Sagen was asked specifically about job duties of a dispatcher that he thought he could not do because of his injury. He was posed the following question, and provided the following answer:

Q: What is it about the position and job duties of a dispatcher that you believe you cannot do as a result of the injuries sustained in your February 1998 accident?

A: "It's not so much that, it's I never had no interest to be a dispatcher. It don't even interest me."

Sagen at 87. Mr. Sagen explained that he is not "one of these clerical type people" and that it would be tough for him to adapt. Sagen at 93.

At some point Mr. Sagen read Exhibit 1, the employer's response to the application for benefits. Sagen at 61.³ Ex. 1. Apparently Mr. Sagen's reading of this document affected the way he felt about

³ Prior to submitting the case to the jury the parties agreed to strike testimony on page 61 l. 21 through page 66 l. 43. The Board judge set most of this testimony in colloquy. See page 66 l. 7.

Mr. Wahl. Sagen at 85. Mr. Sagen *felt* that Mr. Wahl blamed him for the accident. (emphasis added) Sagen at 61. When asked, “What did he (Mr. Wahl) say to make you think that he blamed you for the accident,” Mr. Sagen responded, “It’s probably more or less what he didn’t say (indicating).” Sagen at 85. Mr. Sagen testified that Mr. Wahl didn’t care about him and that made him not want to go back to work for him. Sagen at 85.

Mr. Sagen thought he could not return to work for Mr. Wahl as it was his understanding several years back that he did not have to return to work for Mr. Wahl. Mr. Sagen thought he would never work for Mr. Wahl again and didn’t like the “atmosphere” as “it wasn’t friendly.” Sagen at 66. Mr. Sagen felt that Mr. Wahl showed him no care and he did not want to work for a man “like that.” Sagen at 67. Mr. Sagen did not believe he could get along with Mr. Wahl. Sagen at 67. Mr. Sagen did not feel liked or welcomed at Sound Door, and would rather work where he was liked and welcomed. Sagen at 67. He would not like to be forced to go back to work for Mr. Wahl. Sagen at 67.

Yet, as noted above, Mr. Sagen never spoke with Mr. Wahl about the job offer to return to work as a dispatcher. Sagen at 68. Mr. Sagen was told that if he did not arrive to work on a certain date, that his time

loss benefits would be affected. Sagen at 68. He felt that was pretty harsh and an ugly deal. Sagen at 68-69.

5. The Vocational Testimony And Opinions Regarding Mr. Sagen's Ability To Perform Reasonably Continuous Gainful Employment Generally, And The Dispatcher Job Specifically

Two vocational experts testified before the Board. Mr. Sagen called Vocational Rehabilitation Counselor (VRC) John Fontaine. The Department called VRC Andrea Westling.

Mr. Fontaine ultimately concluded that Mr. Sagen was not employable. Fontaine at 57. Mr. Fontaine opined that Mr. Sagen could not perform the job of dispatcher with Sound Overhead Door Systems because to his understanding Mr. Sagen could not work a full eight-hour day, which would preclude Mr. Sagen from any work as he would not be employable on a full-time basis. Fontaine at 27, 35, 55. Mr. Fontaine also believed (incorrectly) that there was no job for Mr. Sagen at Sound Overhead Door, that as of December 2004, the employer did not have a full-time dispatcher job. Fontaine at 9, 35.

Mr. Fontaine testified that, based on 1998 notes he reviewed, the employer was "very unhappy" with Mr. Sagen about his accident and that Mr. Sagen did not want to go back to work for the employer of injury. Fontaine at 19-20. Mr. Fontaine reviewed a vocational chart note from

March 1999 and believed the employer would do anything to get Mr. Sagen off of L&I. Fountaine at 11. Mr. Fountaine expounded that there was clearly relationship erosion as a result of some problems with communication. Fountaine at 36.

However, substantial portions of the testimony presented rendered Mr. Fountaine's opinion questionable. Mr. Fountaine conceded that if he would have seen a document from Dr. Jarvis dated December 15, 2003, that indicated Mr. Sagen could sit, stand, and walk for eight hours at a time, then that document could have changed Mr. Fountaine's position as to whether or not Mr. Sagen could work an eight-hour day as of December 2003. Fountaine at 55-56. Mr. Fountaine was also aware that Mr. Sagen's attending physician, Dr. Cove, had approved the dispatcher job. Fountaine at 62. Mr. Fountaine also reviewed a job analysis for the dispatcher position that was approved by Dr. Jarvis on October 8, 2003. Fountaine at 46.

Additionally, while Mr. Fountaine made contact with someone at the employer's business in December 2004 about a dispatcher job, he did not inquire about the availability of a dispatcher job in 2003. Fountaine at 41-43, 54. He did not speak with the employer, Mr. Wahl, nor did he have any questions for Mr. Wahl. Fountaine at 43. Mr. Fountaine reviewed the previous counselor's records, but did not verify the written information

with Mr. Wahl. Fontaine at 6, 43. Specifically, Mr. Fontaine did not inquire of Mr. Wahl at Sound Overhead Door whether or not the job of dispatcher was available at the time the job was offered to Mr. Sagen in December of 2003. Fontaine at 54.

The Department's vocational expert, Andrea Westling, worked with Mr. Sagen from March 2003 to December 21, 2003. Westling at 6. In contrast to Mr. Fontaine's testimony, Ms. Westling testified that contact was made with Bob Wahl's brother, John, co-owner of the employer, Sound Overhead Door, and they were still interested in offering a light duty return to work position in the position of dispatcher. Westling at 10-11. Ms. Westling explained the four return-to-work priorities that guide vocational counselors. Westling at 19-20. Ms. Westling was familiar with a functional job analysis for the position of dispatcher, which was a position the employer reported as a return-to-work option for Mr. Sagen. Westling at 22. She prepared the functional job analysis and made sure that it accurately reflected the actual job demands. Westling at 45. She re-contacted the employer to confirm the physical demands of the position. Westling at 22. Westling reviewed Ex. 3. She learned that Dr. Jarvis had approved Mr. Sagen for the dispatcher position and had added protective conditions that Mr. Sagen would need to be free to sit, stand, or walk about at a work station and that he would benefit from a

headset. Westling at 21, 23-24. At Ms. Westling's request, the job analysis and other documents were sent to Dr. Cove, Mr. Sagen's attending physician, to review. Westling at 24-25.

A signed document dated October 22, 2003, indicated that Dr. Cove concurred with the pain clinic program and the job analysis reviewed by the pain clinic. Westling at 24. On October 30, 2003, Ms. Westling received Dr. Cove's concurrence to Dr. Jarvis' recommendations. Westling at 29. On November 6, 2003, Ms. Westling contacted Sound Overhead Door to inform them the dispatcher position was approved by Dr. Jarvis and Dr. Cove. Westling at 29.

The employer agreed to offer the return to work. Westling at 29. Ms. Westling worked with the employer to draft a return-to-work letter on the employer's behalf. Westling at 29. Ms. Westling wrote to Mr. Sagen in care of his attorney and asked them to answer whether or not Mr. Sagen was going to accept the return to work offer by November 17, 2003. Westling at 29. On November 24, 2003, Ms. Westling contacted the employer and learned that Mr. Sagen had not returned to work. Westling at 30. Prior to recommending closure of Mr. Sagen's vocational services, Ms. Westling's office contacted Mr. Sagen's attorney's office, and she learned that the attorneys had communicated the offer to Mr. Sagen but had never heard back from Mr. Sagen. Westling at 30.

Ms. Westling next recommended that Mr. Sagen's vocational services be closed as he had not shown for work or expressed his interest in returning to work by November 24, 2003. Westling at 30. Ms. Westling never heard back from Mr. Sagen as to whether or not he would accept the job. Westling at 31.

Ms. Westling was asked on cross-examination whether it would be important to her to know how many trucks the employer owned in determining whether this (the dispatcher job) was a "genuine bonafide permanent" job. Westling at 37-38. Ms. Westling responded that the employer has a right to offer employment. Westling at 38. The employer informed her they had a regular dispatcher position for Mr. Sagen to perform. Westling at 38. Ms. Westling testified that the dispatcher job was a modified light duty position, and her opinion was that the job was not an "odd lot" job. Westling at 38-39.

On further cross-examination, Mr. Sagen's counsel asked Ms. Westling some specific questions about the notes in the vocational records that she reviewed. Westling at 44-45. Mr. Sagen's counsel elicited responses from Ms. Westling to the effect that the employer had stated that he no longer considered Mr. Sagen an employee and had expressed frustration that Mr. Sagen had not shown up for the job offer, but the claim still remained open. Westling at 44-45.

Ms. Westling confirmed that there was a report of frustration on the employer's behalf because Mr. Sagen had not returned or shown up three times before and the claim was still open. Westling at 47, 49. Ms. Westling explained that it is not unusual for an employer to express frustration when a claim has been open for five or more years. Westling at 51.

B. The Department Order On Appeal And Procedural History Leading To Hearings Before The Board⁴

On April 9, 2004, the Department issued an order affirming an earlier order declaring an overpayment and seeking reimbursement of \$466.90 on grounds that Mr. Sagen had been released for return to work during a short period for which the Department had paid time loss compensation. CABR at 39-40.

On June 21, 2004, the Department issued an order closing Mr. Sagen's claim. CABR at 91. The June 21, 2004 order also ended time-loss benefits as paid through November 23, 2003, ended medical benefits, and awarded no permanent partial impairment disability benefits additional to those previously awarded by the Department. CABR at 91.

⁴ Mr. Sagen appealed two separate orders issued by the Department in this matter. One of the orders contained a typographical error for a date. The parties agreed at the Board to correct the typographical error. CABR December 2, 2004, (Transcript colloquy) at 3-5. The dates listed in this section of the Department's brief reflect the corrected date.

Mr. Sagen timely appealed both Department orders to the Board. CABR at 34. The Board granted Mr. Sagen's appeals, providing him the opportunity to present evidence on the issues raised by the appeal. CABR at 97.

C. The Board Proceedings

The IAJ heard or reviewed testimony from ten witnesses, and reviewed and admitted exhibits. The IAJ issued a Proposed Decision and Order (PD&O). CABR at 17-36. The PD&O upheld the Department's closing order in some aspects and determined that Mr. Sagen's industrial injury did not proximately cause a condition known as "left lateral epicondylitis," but the PD&O reversed the Department's orders in certain other aspects. *Id.*⁵ The Department did not seek review of the adverse rulings in the PD&O, so those rulings are no longer at issue.

In addition to denying acceptance of the epicondylitis condition, the PD&O determined that Mr. Sagen had not met his burden of proving entitlement to time-loss compensation benefits from December 10, 2003, the date of which Mr. Sagen was medically fixed and stable, through

⁵ Contrary to the Department orders on appeal, the Board determined that Mr. Sagen was entitled to: (1) an increased award for permanent partial disability for his low back condition (CABR at 34-36); (2) time loss compensation benefits from November 24, 2003 through December 9, 2003, thus, among other things, negating the overpayment order (CABR at 34-36); and (3) loss of earning power (partial time loss compensation) benefits, but not full time loss compensation benefits, from December 10, 2003 through June 20, 2004. CABR at 27-30, 34-36.

June 21, 2004. CABR at 29. That was because the evidence persuaded the hearing judge that the employer made Mr. Sagen a valid job offer via a November 6, 2003 letter. CABR at 29.

Furthermore, the PD&O determined that Mr. Sagen was medically fixed and stable and capable of gainful employment on a reasonably continuous basis as of June 21, 2004. CABR at 31. Therefore, Mr. Sagen was not totally and permanently disabled and was not entitled to be placed on the pension rolls. CABR at 31.

On April, 27, 2005, Mr. Sagen filed a Petition for Review per RCW 51.52.104 asking the three-member governing Board to review the IAJ's PD&O. CABR at 3-14. The Petitioner argued on the permanent total disability issue that the dispatcher job offered to Mr. Sagen was an "odd lot" job that he could not physically perform. CABR at 9-12. The Board denied review, thus making the PD&O the final decision of the Board. CABR at 1; RCW 51.52.106.

D. The Superior Court Proceedings

1. Overview

Mr. Sagen timely appealed the Board's final decision to Pierce County Superior Court and requested a jury trial per RCW 51.52.115. CP at 1. Prior to presenting the case to the jury, the parties re-raised some objections to evidence and the superior court made rulings on the record.

RP (Sept. 22, 2008) at 6-43. After reading the record to the jury per RCW 51.52.115, the parties presented proposed instructions to the court. CP at 13, 14. RP (Sept. 24, 2008) at 19.

After the court instructed the jury, counsel presented their arguments to the jury. RP (Sept. 25, 2008) at 33-103. Mr. Sagen's argument to the jury focused on his theory of the case, which was that the dispatcher job was a made-up "odd lot" job that Mr. Sagen could not perform, and that the job was a sham made up by Bob Wahl in order to get the industrial insurance claim closed. *E.g.*, RP (Sept. 26, 2008) at 93-99. The Department argued to the jury that the dispatcher job was a bona fide regular job with the employer, that it was not an "odd lot" job, and that Mr. Sagen could perform the job. RP (Sept. 25, 2008) at 54.

After considering the Board evidence, the trial court's instructions, and the arguments of counsel, the jury affirmed the Board's decision in all respects (i.e., denial of acceptance of the elbow condition and denial of any additional time loss compensation or pension). CP at 18, 19.

2. The Evidentiary Rulings By The Superior Court

At superior court, the Department renewed its standing hearsay objection to Mr. Fontaine's testimony regarding his review of records.⁶

⁶ The Department filed a written motion to renew evidentiary objections, but inexplicably that motion is not included in the Superior Court file, though the trial judge refers to reading the Department motion regarding evidentiary objections. RP (Sept. 22,

RP at 25; Fontaine at 14. The superior court struck two questions and answers from Mr. Fontaine's testimony.

First, the superior court struck the following question and answer in which the claimant's vocational expert described what a previous vocational counselor had recorded in a report regarding a conversation that the previous counselor had with the employer regarding the employer's motivation for offering Mr. Sagen a job:

Q: What did you learn with respect to the employer's interpretation of the injury?

A: The employer shared *with the vocational counselor at that time* that he thought that Mr. Sagen was faking his injury and that the employer would do anything to get his claim closed.

Fontaine at 20, ll. 37-45 (emphasis added); RP (Sept. 22, 2008) at 31.⁷

Mr. Sagen argued this testimony was not hearsay based upon the exception (or definitional exclusion) for admissions by a party opponent in ER 801(d)(2), and that any hearsay was in any event admissible for the limited purpose of explaining the basis for the expert's opinion. RP (Sept. 22, 2008) at 31-32. The Department countered, and the superior court agreed, that the testimony was inadmissible hearsay under ER 801 because it involved multiple levels of hearsay to get back to the party

2008) at 6; *see also* RP (Sept. 22, 2008) at 8, 15. The parties agreed on some evidentiary issues and re-raised some evidentiary objections. RP at 6.

⁷ The parties previously agreed to strike various portions of testimony. The parties previously agreed to strike Mr. Fontaine's testimony at 18 ll. 17-52, 19 ll. 1-19.

opponent in the case, and that, even if offered for the sole purpose of explaining the basis for the expert's opinion, it was reasonable to exclude the evidence. RP (Sept. 22, 2008) at 32-35.

The superior court also struck a second question and answer in Mr. Fontaine's testimony to which the Department renewed an evidentiary objection based on hearsay and legal conclusion. RP (Sept. 22, 2008) at 36, 41. The trial court struck the following question and answer from Mr. Fontaine's testimony, again describing what other persons (presumably vocational counselors and certainly not the employer) had recorded in the claim file in the past:

Q: Mr. Fontaine, with respect to the particular job offer, having reviewed all the information in the vocational history and your contact with the employer, was the job offer in November of 2003 a bona fide permanent position?

A: Oh, ah, I mean, to answer that I guess I can tell you that I know from reviewing the file. I know in 1999 they didn't have a job of dispatcher. I know that the vocational counselor pulled a dispatcher job from their job bank formulated to fit Mr. Sagen and send it to the employer. They also sent the employer a job offer letter form which they had him put on his letterhead.

The expectations of a job that's offered is for that job to last for a continuous period of time. There wasn't a job then. There's not a job now. And if there was a job in the period of time intervening, it certainly wouldn't have been one that I would have expected to be continuous because it's not there now.

Fontaine at 36 ll. 21-51, 37 ll. 1-9 (objection omitted). The trial judge sustained the Department's renewed objection and excluded that particular question and answer. RP (Sept. 22, 2008) at 41.

As discussed below in Section VI.C, however, Mr. Sagen was able to get into evidence through other testimony the information that was stricken in these two rulings. Mr. Sagen's rebuttal argument to the jury, without objection, focused on this information. RP (Sept. 26, 2008) at 93-99.

3. The Superior Court's Selection Of The Department's Proposed Instruction On Permanent Total Disability

The superior court's Instruction No. 11⁸ defined total disability and permanent total disability. CP at 15. Instruction No. 11 included all of the text of the WPI 5th 155.07 instruction, and merely added three sentences (which are in italics below), reading as follows:

Total disability is an impairment of mind or body that renders a worker unable to perform or obtain a gainful occupation with a reasonable degree of success and continuity. It is the loss of all reasonable wage-earning capacity.

A worker is totally disabled if unable to perform or obtain regular gainful employment within the range of the worker's capabilities, training, education, and experience. *If Paige Sagen can do any regular work at any gainful*

⁸ The Total Disability instruction is court's Instruction No. 11, not No. 10 as referenced in Appellant's Brief. The worker's error of reference likely stems from the fact that the Department's proposed identical instruction was labeled as Department Instruction No. 10. CP at 14, 15.

occupation, he is not permanently and totally disabled. The work may be light or heavy, sedentary or manual, but it must be some regular employment within his physical and mental capabilities.

A worker is not totally disabled solely because of inability to return to the worker's former occupation. *If Paige Sagen is capable of performing light work of a general nature, then he is not permanently and totally disabled solely because of inability to return to his former occupation.*

Total disability does not mean that the worker must have become physically or mentally helpless. Total disability is permanent when it is reasonably probably to continue for the foreseeable future.

Court's Instruction No. 11, CP at 15 (emphasis added to show the non-WPI language). Mr. Sagen excepted to this instruction, which was proposed by the Department, and to the exclusion of his proposed instruction quoting WPI 155.07 verbatim. RP (Sept. 25, 2008) at 4-6. The trial court accepted the Department's proposed "total" disability instruction. RP (Sept. 25, 2008) at 6; *see* App. A and B (Court's Instruction No. 11 and Mr. Sagen's proposed Instruction).

IV. STANDARD OF REVIEW

Review in this Court is controlled by RCW 51.52.140, which provides in relevant part that "[a]ppeal shall lie from the judgment of the superior court as in other civil cases."

Whether a worker's compensation case is tried at superior court to

a jury or the bench, this Court's review is of the superior court decision, not the Board decision, and is limited to examining the record that was made at the Board to see if substantial evidence supports the findings made after the superior court's de novo review, and if the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (case tried to bench); *Layrite Products Co. v. Degenstein*, 74 Wn. App. 881, 887, 880 P.2d 535 (1994) (case tried to a jury).

Evidence is substantial if "sufficient to persuade a fair-minded, rational person of the truth of the matter." *R & G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). In determining whether substantial evidence exists, the Court must take the "record in the light most favorable to the party who prevailed in superior court," here, the Department. *Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

While the superior court conducts de novo review of the Board's evidentiary rulings (*Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969)), this Court reviews *the superior court* evidentiary rulings under the abuse of discretion standard. RCW 51.52.140 ("Appeal shall lie . . . as in other civil cases."); *Havens v. C.D.*

Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994).⁹ Harmless error in admitting or excluding evidence is not a basis for reversal. See generally 5 Teglund, *Wash. Practice, Evidence Law and Practice*, § 103.24 (2007).

Only the statements of law in jury instructions are reviewed de novo. *Hue v Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Even if there is an error of law in a jury instruction, the error does not require reversal unless prejudice is shown, and error is not prejudicial unless it affects the outcome of the trial. *Hue*, 127 Wn.2d at 92; *Boeing Co. v. Key*, 101 Wn. App. 629, 633, 5 P.3d 16 (2000); see also *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 703 (1994), *aff'd*, 127 Wn. 2d 401 (1995).

Unless a jury instruction incorrectly states the law, this Court reviews the superior court's refusal to give a requested instruction for an abuse of discretion. *Boeing Co. v Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). "A trial court abuses its discretion if its decisions are manifestly unreasonable, or its discretion was exercised on untenable grounds, or for untenable reasons." *Harker-Lott*, 93 Wn. App. at 186.

Jury instructions are sufficient when they allow parties to argue

⁹ Mr. Sagen misplaces reliance on an Administrative Procedure Act case and erroneously argues that the evidentiary ruling of superior court cannot stand if the Board evidentiary rulings do not constitute an abuse of discretion. AB at 18-19. As noted, the ordinary civil case standards of review apply to this appeal per RCW 51.52.140.

their case theories, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). Trial courts are given considerable discretion, however, regarding the wording of instructions and regarding how many instructions are necessary to fairly present each party's theories. *Key*, 101 Wn. App. at 632.

Contrary to Mr. Sagen's implications (AB at 8-12), the Industrial Insurance Act's remedial nature and liberal construction have no bearing upon and does not alter the standard of review on appeal for adequacy of jury instructions. The rule of liberal construction likewise does not apply to questions of fact. *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 286 P.2d 1038 (1955). Thus, the worker has the burden of convincing this Court that an error was made by the trial court in accordance with these well-established standards of review for jury instructions.

V. SUMMARY OF THE ARGUMENT

The superior court did not abuse its discretion or commit reversible error in Instruction No. 11. That instruction pertains to "permanent total disability." It contains the entirety of the text of Washington Pattern Instruction 155.07 on total disability, and then supplements the WPI by accurately informing the jury that an ability to perform light or sedentary work of a general nature precludes a finding of total disability. The

superior court also provided to the jury Mr. Sagen's proposed "Odd Job" instruction. Taken in whole, the jury instructions accurately state the law and allowed Mr. Sagen to fully argue his theory of the case to the jury.

Similarly, the superior court did not abuse its discretion or commit reversible error in striking two questions and answers in the testimony of Mr. Sagen's vocational expert, both of which contained hearsay. Mr. Sagen's vocational expert described out-of-court statements by previous vocational counselors who had reported past out-of-court statements by Mr. Sagen's former employer allegedly reflecting animosity by the employer toward Mr. Sagen. No hearsay exception applies to one vocational expert's reporting of what another vocational expert has written in a report. Both hearsay rulings were well-founded in law and well within the discretion of the court.

In any event, even if either or both of the superior court's evidentiary rulings were erroneous, they did not rise to reversible error. That is because (1) the remainder of the presented testimony amply provided Mr. Sagen's vocational expert witness the opportunity to provide his opinions and the bases for those opinions, and (2) the evidence at issue is duplicative of other evidence in the record. On the latter point, Mr. Sagen fully exercised his opportunity to cross-examine the employer and the Department's vocational witness about the same area of inquiry - -

alleged bias and animosity the employer has against Mr. Sagen, which purportedly undercut the bona fides of the dispatcher job offer - - that was the subject of the Department's evidentiary objections. Thus, Mr. Sagen was able to, and did, present evidence on his theory of the case, and to argue this theory to the jury.

Finally, substantial evidence supports the jury's verdict. Mr. Sagen simply did not convince the jury that he was totally and permanently disabled and thus entitled to a pension. To the contrary, overwhelming medical evidence and convincing vocational evidence established that Mr. Sagen did not develop an elbow condition and that he was capable of obtaining and maintaining reasonably continuous gainful employment.

As had the Department and the Board, the jury ruled against Mr. Sagen's pension request because the evidence was clear that he was capable of work and refused a valid job offer that was within his medical limitations.

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VI. ARGUMENT

A. **The Trial Court Properly Instructed The Jury On Total Disability, As The Instruction Both Accurately States The Washington Pattern Instruction And Provides An Accurate Statement Regarding The Impact Of A Worker's Ability To Perform Work Within His Physical And Mental Capacities**

Mr. Sagen alleges that Instruction No. 11 (set forth in full above in Section III.D.3) contains legal error. AB at 14-17. However, in advancing this argument Mr. Sagen fails to point to any error in any of the text that the superior court added to the WPI instruction on permanent total disability. Rather, Mr. Sagen essentially argues, without any supporting authority, that because the instruction is not the WPI it must be inaccurate and misleading. AB at 14-17.

Mr. Sagen's apparent argument that the WPI's cannot be modified should be rejected for his failure to provide any support for it. *See generally In re Dependency of Chubb*, 112 Wn.2d 719, 726, 773 P.2d 851 (1989) (unsupported argument generally should not be considered). Moreover, in its research the Department can find no support in this or other jurisdictions for this novel argument. The WPI's are recommendations, not law. *See generally Henderson v. Tyrell*, 80 Wn. App. 592, 612-13, 910 P.2d 522 (1996) (characterizing a WPI instruction as a "recommendation"); *Joyce v. Dep't of Corrections*, 155 Wn.2d 306, 324, 119 P.3d 825 (2005) ("When policy directives are offered as

evidence of negligence, the jury should be provided WPI 60.03, . . . *or a similar instruction* which clarifies that a violation is not negligence per se.”).

The superior court correctly instructed the jury in Court’s Instruction No. 11 because the instruction gives additional legal context for the jury to decide the issue of permanent total disability in view of Mr. Sagen’s particular physical limitations. The additional context in no way mis-states the law or misleads or confuses, and it allowed Mr. Sagen to argue his theory of the case, which was that the dispatcher job offered by his former employer was an odd lot job and that his industrial injury had rendered him physically incapable of doing the job.

Finally, Mr. Sagen’s argument also fails to take into consideration the “Odd Job” or “Odd Lot” instruction, Instruction No. 19-A, that was also provided to the jury by the trial judge. Together, jury Instructions Nos. 11 and 19-A allowed Mr. Sagen to argue his theory of the case as to total disability and odd job.

As noted above in Section IV (Standard of Review), only the statements of law in jury instructions are reviewed de novo. *Hue*, 127 Wn.2d at 92. Even if there is an error of law in a jury instruction, the error does not require reversal unless prejudice is shown, and error is not prejudicial unless it affects the outcome of the trial. *Id.* Unless a jury

instruction incorrectly states the law, this Court reviews the superior court's refusal to give a requested instruction for an abuse of discretion. *Harker-Lott*, 93 Wn. App. at 186. "A trial court abuses its discretion if its decisions are manifestly unreasonable, or its discretion was exercised on untenable grounds, or for untenable reasons." *Harker-Lott*, 93 Wn. App. at 186.

Jury instructions are sufficient when they allow parties to argue their case theories, do not mislead or confuse the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Cox*, 141 Wn.2d at 442. Trial courts are given considerable discretion, however, regarding the wording of instructions and regarding how many instructions are necessary to fairly present each party's theories. *Key*, 101 Wn. App. at 632.

Court's Instruction No. 11 accurately modifies the WPI instruction because an ability to perform light or sedentary work of general nature precludes a finding of total disability. Court's Instruction No. 11, CP at 15; see *Herr v. Dep't of Labor & Indus.*, 74 Wn. App. 632, 636, 875 P.2d 11 (1994) ("An ability to perform light or sedentary work of a general nature precludes a finding of total disability.") (citing *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 918, 640 P.2d 1 (1982)). Thus, Instruction No. 11 was the better choice to instruct the jury, as it not only

provided a verbatim statement of the WPI 155.07, but also was tailored to the particular facts of Mr. Sagen's situation, referencing light, heavy, sedentary and manual work of a general nature. Court's Instruction No. 11, CP at 15.

To see the relevance of this additional information, one need look no further than Mr. Sagen's own vocational expert, Mr. Fontaine, who testified that Mr. Sagen was limited to sedentary work. Fontaine at 37. But additionally, the medical witnesses presented in this matter commented on Mr. Sagen's specific physical abilities and restrictions as they pertained to his ability to perform light duty work. *See, e.g.,* Jarvis at 17.

Thus, Mr. Sagen's argument fails to demonstrate any inaccuracies of law, any misleading or confusing of the jury, or any impingement on his ability to argue his theory of the case. But additionally, his argument fails to account for the importance of the "Odd Job" instruction.

The importance of the "Odd Job" instruction to Mr. Sagen's theory of the case must be underscored. The Court's "Odd Job" instruction, Instruction No. 19-A is that proposed by the worker and reads as follows:

If, as a result of an industrial injury, a worker is able to perform only odd jobs or special work not generally available, then the worker is totally disabled, unless the Department shows that odd jobs or special work which he

or she can perform is available to the worker on a reasonably continuous basis.

CP at 15.

Court's "Odd Job" Instruction 19-A intersects with the Total Permanent Disability Instruction No. 11, serving as a potential burden-shifting mechanism in Mr. Sagen's favor. If Mr. Sagen had convinced the jury that he was able to perform *only* odd jobs or special work not generally available, then the "Odd Job" instruction would have shifted the burden to the Department, which would have had to convince the jury that such odd jobs or special work was available to Mr. Sagen on a reasonably continuous basis. *Spring*, 96 Wn.2d at 918-20.

Mr. Sagen argued his "Odd Job" theory to the jury in both opening statement and closing argument. Thus, during opening statements, Mr. Sagen contended to the jury that the *only* job that could be identified was a modified constructed job of a dispatcher. RP (Sept. 23, 2008) at 16. In closing argument, Mr. Sagen contended that his case boiled down to whether he was able to perform the one modified job at Sound Overhead Door. RP (Sept. 25, 2008) at 37, 50. Mr. Sagen argued that there was no testimony that he could do anything other than that one modified job. RP (Sept. 25, 2008) at 37-38, 40.

When read in whole, the jury instructions accurately stated the law, did not mislead or confuse, and allowed Mr. Sagen to argue his theory that he was permanently totally disabled under Court's Instruction No. 11 and that, in any event, the *only* job possible for him to perform was an "Odd Job" that he was physically unable to do.

B. The Trial Court Correctly Struck Two Questions And Answers Because They Contained Hearsay

1. Mr. Fontaine's Testimony About What Other Vocational Counselors Reported From Conversations With Mr. Sagen's Former Employer Was Hearsay Under ER 801

The superior court struck two questions and answers in the testimony of vocational counselor Fontaine. RP (Sept. 22, 2008) at 26-42. In each instance, the superior court's exclusion of evidence was based on the hearsay rule.

"Hearsay is not admissible except as provided by these rules, other court rules or statute." ER 802. In instances of multiple hearsay, each level of hearsay must be independently admissible. ER 805; *State v. Rice*, 120 Wn.2d 549, 564, 844 P.2d 416 (1993). Mr. Sagen's attacks on both of the hearsay rulings by the superior court have the same flaw in common - - he is asking this court to improperly ignore a level of hearsay.

Mr. Sagen argues that "[t]he statements contained within the vocational records were comments made by Mr. Sagen's former

employer.” AB at 19. As noted above in Section III.D.2, the superior court struck the following question and answer that included the claimant’s vocational expert describing what a previous Department vocational counselor recorded in a report regarding a conversation that the previous counselor had with the employer:

Q: What did you learn with respect to the employer’s interpretation of the injury?

A: The employer shared *with the vocational counselor at that time* that he thought that Mr. Sagen was faking his injury and that the employer would do anything to get his claim closed.

Fontaine at 20, ll. 37-45 (emphasis added); RP (Sept. 22, 2008) at 31.

Mr. Sagen argued this testimony was not hearsay based upon the exception (or definitional exclusion) for admissions by a party opponent in ER 801(d)(2), and that any hearsay was in any event admissible to explain the basis for the expert’s opinion. RP (Sept. 22, 2008) at 31-32. The Department countered, and the superior court agreed, that the testimony was inadmissible hearsay under ER 801 because it involved multiple levels of hearsay to get back to the party opponent in the case, and that under ER 703 it was reasonable to exclude the evidence in light of the context of the evidence. RP (Sept. 22, 2008) at 32-35.

The superior court also struck a second question and answer in Mr. Fontaine’s testimony, again based on the hearsay rule. RP (Sept. 22,

2008) at 41. The trial court struck the following question and answer from Mr. Fontaine's testimony, again where Mr. Fontaine was describing what other persons (presumably vocational counselors and certainly not the employer) had recorded in the claim file in the past:

Q: Mr. Fontaine, with respect to the particular job offer, having reviewed all the information in the vocational history and your contact with the employer, was the job offer in November of 2003 a bona fide permanent position?

A: Oh, ah, I mean, to answer that I guess I can tell you that I know from reviewing the file. I know in '99 they didn't have a job of dispatcher. I know that the vocational counselor pulled a dispatcher job from their job bank formulated to fit Mr. Sagen and send it to the employer. They also sent the employer a job offer letter form which they had him put on his letterhead.

The expectations of a job that's offered is for that job to last for a continuous period of time. There wasn't a job then. There's not a job now. And if there was a job in the period of time intervening, it certainly wouldn't have been one that I would have expected to be continuous because it's not there now.

Fontaine at 36 ll. 21-51, 37 ll. 1-9. (objection omitted)

As noted, Mr. Sagen's reliance on the exception (or definitional exclusion) of ER 801(d)(2) is misplaced because he is ignoring a level of hearsay. See ER 805; *State v. Rice*, 120 Wn.2d at 564. As for the second question and answer, it is unclear what statements were in the Department file, but it is clear that Mr. Fontaine in both questions and answers was not referring to any conversation that he himself had with the employer.

Indeed, Mr. Fontaine testified that he never talked to the employer, Mr. Wahl. Fontaine at 43.

Almost certainly, in each question and answer, the statements to which Mr. Fontaine referred were statements by a previous vocational counselor or counselors regarding what the previous counselor(s) remembered hearing from the employer. No exception in the hearsay rules and no case law supports Mr. Sagen's attempt to jump over a level of hearsay to get to the employer's alleged statement.

In addition, as to the first question and answer, the trial judge correctly pointed out that this portion of testimony ran afoul of hearsay because there was a question as to whether the employer actually did or did not say this thing. RP (Sept. 22, 2008) at 34-35. The trial judge stated that we all know admissions against interest are admissible, but in this case we face the problem of the very *existence* of the admission. RP (Sept. 22, 2008) at 34-35.

2. The Superior Court Was Reasonable Under ER 705 In Striking The Hearsay By Mr. Fontaine

Apparently in the alternative, Mr. Sagen argues that if the testimony of Mr. Fontaine set forth above was otherwise inadmissible hearsay, it is admissible for the limited purpose of explaining the basis of Mr. Fontaine's opinion. AB at 18 n. 5. Mr. Sagen concedes in his Brief

of Appellant that the law does not rigidly require admission of such hearsay:

Under ER 705 hearsay is not substantive evidence but admitted for the limited purpose of explaining an expert's opinion. See, e.g., *Group Health Cooperative of Puget Sound, Inc. v. State Through Department of Revenue*, 106 Wn.2d 391, 722 P.2d 787 (1986). If the hearsay basis for an expert's opinion would be misleading, confusing, or unfairly prejudicial, the court may exclude testimony about the basis pursuant to Rule 403.

AB at 18 n. 5. See also *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269-71 (7th Cir. 1988) (allowing expert to base opinion on otherwise inadmissible evidence does not automatically make that evidence admissible).

The leading commentator in Washington has noted that ER 703's usage of the phrase "reasonably relied upon" gives the court a measure of discretion in determining whether the underlying information is sufficiently trustworthy to serve as a basis of the expert's opinion. *5B Tegland, Wash. Practice, Evidence Law and Practice* § 703.5 (2007). Here, the superior court could reasonably have concluded that the statements attributed to the employer were inaccurate paraphrases¹⁰ or

¹⁰ For instance, it is not outside the realm of possibility that instead of saying that Mr. Sagen was "faking his injury" and that Bob Wahl "would do anything to get his claim closed," Bob Wahl instead said something to the following effect: "Mr. Sagen is not that disabled, and I know he can do the dispatcher job. He is a relatively young man who would be better off working. I would do anything within reason to get him back to work and off time loss."

were taken out of context and therefore not sufficiently trustworthy or the superior court could have concluded that the statements were misleading, confusing, or unfairly prejudicial per ER 403.

In any event, this does not matter, because, as explained in the next subsection of the Department's brief, there was no prejudice in the exclusion of the testimony at issue.

C. Assuming For Argument's Sake That The Trial Court Improperly Excluded A Small Portion Of Mr. Sagen's Vocational Witnesses' Testimony, Mr. Sagen Cannot Establish That The Error Was Prejudicial

As noted above in Section IV, harmless or non-prejudicial error in admitting or excluding evidence is not a basis for reversal. *See generally* 5 Tegland, *Wash. Prac., Evidence Law and Practice* § 103.24. For instance, error in excluding evidence that is cumulative is harmless because the party is not prejudiced by the exclusion. *See, e.g., Holmes v. Raffo*, 60 Wn.2d 421, 424-25, 374 P.2d 536 (1962). The exclusion here of the two questions and answers by Mr. Fontaine, if erroneous, was harmless because the evidence was cumulative. Mr. Sagen was able to get the same evidence before the jury, and he was able to argue his theory of the case based on that evidence. RP (Sept. 26, 2008) at 93-99.

Thus, other questioning of Mr. Fontaine contained the following information and elicited the following responses, all of which were presented to the jury in this case:

Q: All right. Did you review a case note dated March 10, 1999.

A: I did.

Q: And what, if anything, of significance did you learn upon reviewing that?

A: The March '99 chart note indicates the employer getting a job offer letter to the injured worker, and notes will do anything to get the injured worker off L&I.

Fontaine at 11.

Q: Mr. Fontaine, what if anything of significance did you learn from those entries [in the claim file]?

A: That July 15, 1998, entry reflects the employer [sic] of injury was very unhappy with the injured worker about his accident.

Fontaine at 19.

Q: Okay. With respect to - - based on your experience as a vocational counselor, with respect to the indication that you found in the vocational records concerning the employer's attitude about Mr. Sagen, would you as a vocational counselor attempt to replace him back with that employer?

A: Would I currently - - knowing what I know now attempt to return him to work with his employer?

Q: Yes.

A: No.

Q: Why not?

A: I think there's clearly a relationship erosion as a result of some problems with communications. And I hate to tell you that that is not uncommon when injured workers become injured and Labor and Industries actions are submitted that unfortunately in many situations in my experience employees become a little polarized from them, their employers. *And just generally, I mean, offers of light duty employment from employers are designed to assist injured workers in returning to viable employment and sustain jobs. They're not designed to close cases.*

Fontaine at 35-36. (emphasis added) (objection omitted)

Q: You thought the fact - - you thought that the information that you saw in writing was sufficient as opposed to getting it straight from the horse's mouth?

A: I didn't think the vocational counselor lied in her notes, no. I think that what she wrote down is probably accurate.

Fontaine at 43.

Questioning of the Department's vocational expert, Ms. Westling, contained the following information and elicited the following responses, all of which were presented to the jury in this case:

Q: Now, what I would like you to assume is that in that case file there are indications that the employer thought that Mr. Sagen was . . . faking his injury and the employer is willing to do anything to get his claim closed. . . . I would like you to assume that the employer indicated in March 1999 they were willing to do anything to get Mr. Sagen off of L& I. . . . I would like you to assume that those records also indicate the employer is very unhappy with Mr. Sagen; that he was only in training at the time he was injured. Now, would that information cause you any

concern about potential working relationship between Mr. Wall and Mr. Sagen?

A: I would be concerned.

Westling at 42-43.

Q: And [a report indicated that] someone from Sound Door was expressing frustration because Mr. Sagen had not showed up for the job offer three times, but the claim was still open; correct?

A: Correct.

Q: Now, in your experience as a vocational counselor what's the success rate for employees taking jobs with employer who don't trust them; who think they are lying, and faking injuries; who haven't showed up for work in this kind [of] thing; what's the success of the relationship long-term?

A: I don't have information regarding that. When a persons returns to work, vocational services end.

Westling at 45.

Finally, questioning of the employer, Bob Wahl, contained the following information and elicited the following responses, all of which were presented to the jury in this case:

Q: Do you remember a conversation, in early March of 1999, with a vocational counselor where you indicated that you would do anything to get Mr. Sagen off of L&I?

A: No.

Q: Did you ever make a statement to that effect?

A: No. Maybe to come back to work, but not that statement. No.

Wahl at 37-38.

Q: In July of 1998, did you indicate to the vocational counselor that you're unhappy with Mr. Sagen because he was only in training when he had the accident?

A: No.

Q: Any idea why the vocational counselor's notes would reflect that statement?

A: I have no idea. Who does it say stated that?

Q: I beg your pardon?

A: Who are they saying that stated that? The only thing that was disappointing was when he didn't show up for work. That's the only thing I was disappointed in.

Q: In July of 1988, early in July of 1998, did you indicate to the vocational counselor that Mr. Sagen was faking it, and you were willing to do anything to get the claim closed?

A: No.

Q: Any idea why the vocational counselor's notes would reflect that?

A: I have no idea, but it didn't come from me.

Wahl at 44-45.

In sum, Mr. Sagen was able to get the evidence at issue before the jury, and he was able to argue his theory of the case based on the evidence. RP (9/26/08) at 93-99.

D. Substantial Evidence Supports The Jury's Verdict

Mr. Sagen introduces confusion when he assigns error to some Board findings and conclusions. *See* AB at 1-2. Review in this Court is exclusively of the superior court judgment on jury verdict. *See* Section IV above (Standard of Review). In any event, to the extent that Mr. Sagen's Assignments of Error might suggest a questioning of the support for the jury verdict, he provides no argument attacking the evidentiary support for the jury verdict, and thus has waived any such challenge. *See Cowiche Canyon Conservancy v Bosley*, 118 Wn 2d 801, 809, 828 P.2d 549 (1992) (appellate court will not consider assignments of error not supported by argument); *Diehl v Mason County*, 94 Wn. App. 645, 651, 972 P.2d 543 (1999).

Nonetheless, in an abundance of caution, the Department will provide brief argument to explain that the jury's verdict is supported by substantial evidence. Substantial and convincing evidence was presented in this case, leading the jury to find that Mr. Sagen did not have an elbow condition proximately caused by his industrial injury, was capable of gainful employment, and was not permanently totally disabled. *See* the discussion of the evidence in Section III.A above.

The simple fact is that Mr. Sagen was offered a valid job that fit his physical abilities. Both Drs. Jarvis and Cove, his treating doctors,

approved the job analysis. Jarvis at 19-20; Cove at 13, 15. The decision to offer Mr. Sagen the dispatcher job was not made in a vacuum. Even Mr. Fontaine's testimony underscored the fact that the Department provided extensive vocational services to Mr. Sagen for many years. Fontaine at 6, 8, 10-12, 14-15, 19, 23. Mr. Fontaine did take issue with the efficacy and intent of vocational services and the validity of job offer. Fontaine at 35-36. The jury heard Mr. Fontaine's ultimate opinions on Mr. Sagen's employability given Mr. Sagen's education, work experience and physical abilities. Fontaine at 37-39, 50-53.

Clearly, however, the jury found to be more persuasive the extensive testimony of other witnesses regarding the validity of the job offer. Both Mr. Sagen's medical providers and Mr. Wahl worked with vocational counselors to try to get Mr. Sagen back to work. Cove at 13, 15; Jarvis at 19-20, 22; Wahl at 12, 14.

The Department administered Mr. Sagen's claim with an eye toward returning him to work at gainful employment on a reasonably continuous basis. The dispatcher job existed at Sound Overhead Door. Wahl at 12, 14, 17. Mr. Sagen's subjective feelings toward Mr. Wahl, and Mr. Sagen's lack of desire to be a dispatcher dictated his decision to reject a job with advancement opportunities. Sagen at 87; Wahl at 17-18

Given all of the evidence, Mr. Sagen should not be placed on pension rolls, and this Court should uphold the jury's decision.

VII. ATTORNEY FEES

Mr. Sagen requests that this court award reasonable attorney fees if the superior court decision is reversed. AB at 20. However, by statute a request for such fees may only be granted if the decision and order is reversed or modified *and* additional relief is granted to a worker affecting the accident fund or medical aid fund. RCW 51.52.130 (fourth unnumbered sentence). *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 427, 869 P.2d 14 (1994).

The Department asserts that the decision below should be affirmed and no fees awarded. However, if this matter is reversed and remanded for a new trial based on a determination of reversible error, no fees should be awarded unless or until Mr. Sagen prevails on the merits.

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VIII. CONCLUSION

The trial court did not commit any reversible error of law, and substantial evidence supports the jury's verdict. The decision of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 16 day of October, 2009.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Lisa Dabalos-McMahon". The signature is written in a cursive, flowing style.

Lisa Dabalos-McMahon
Assistant Attorney General
WSBA No. 27833

Appendix A

INSTRUCTION NO. 11

Total disability is an impairment of mind or body that renders a worker unable to perform or obtain a gainful occupation with a reasonable degree of success and continuity. It is the loss of all reasonable wage-earning capacity.

A worker is totally disabled if unable to perform or obtain regular gainful employment within the range of the worker's capabilities, training, education, and experience. If Paige Sagen can do any regular work at any gainful occupation, he is not permanently and totally disabled. The work may be light or heavy, sedentary or manual, but it must be some regular employment within his physical and mental capabilities.

A worker is not totally disabled solely because of inability to return to the worker's former occupation. If Paige Sagen is capable of performing light work of a general nature, then he is not permanently and totally disabled solely because of inability to return to his former occupation.

Total disability does not mean that the worker must have become physically or mentally helpless. Total disability is permanent when it is reasonably probable to continue for the foreseeable future.

Appendix B

INSTRUCTION NO. _____

Total disability is an impairment of mind or body which renders a worker unable to perform or obtain a gainful occupation with a reasonable degree of success and continuity. It is the loss of all reasonable wage earning capacity.

A worker is totally disabled if unable to perform or obtain regular gainful employment within the range of the worker's capabilities, training, education and experience. A worker is not totally disabled solely because of inability to return to the worker's former occupation. *However, total disability does not mean that the worker must have become physically or mentally helpless.*

Total disability is permanent when it is reasonably probable to continue for the foreseeable future.

No. 38891-0-II

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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY _____
DEPUTY

PAIGE SAGEN,

Appellant,

v.

DEPARTMENT OF LABOR &
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

DECLARATION OF
MAILING

DATED at Tacoma, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Respondent's Brief to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Jennifer Cross
P.O. Box 5707
Tacoma, WA 98415

DATED this 14 day of October, 2009.



TRACY LANE-PATTON
Legal Assistant