

TABLE OF CONTENTS

TABLE OF AUTHORITIES	-----	ii
I. INTRODUCTION	-----	1
II. ISSUES	-----	2
III. STANDARD OF REVIEW	-----	2
IV. ARGUMENT	-----	3
A. The Board Had Jurisdiction	-----	3
B. Dr. Becker's Testimony Properly Admitted	-----	8
C. Jury Instruction 11 Proper	-----	23
D. Jury Instruction 8 Proper	-----	25
IV. CONCLUSION	-----	27
APPENDIX	-----	28

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Brakus v. Dep't of Labor & Indus.</i> , 48 Wn.2d 218, 292 P.2d 865 (1956)	-----	5,6
<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994)	-----	18
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001)	-----	2,3,9,19
<i>Frye v. U.S.</i> , 293 F. 1013 (App. D.C. 1923)	-----	15
<i>Johnson v. Weyerhaeuser Co.</i> , 134 Wn.2d 795, 953 P.2d 800 (1998)	-----	2
<i>Kingery v. Dep't of Labor & Indus.</i> , 132 Wn.2d 162, 937 P.2d 565 (1997)	-----	5,6
<i>Moore v. Harley-Davidson Motor Co. Group, Inc.</i> , 158 Wn. App. 407, 241 P.3d 808 (2010)	-----	15
<i>Reese v. Stroh</i> , 128 Wn.2d 300, 907 P.2d 282 (1995)	-----	16
<i>Ruff v. Dep't of Labor & Indus.</i> , 107 Wn. App. 289, 28 P.3d 1 (2001)	-----	16
<i>State v. Gould</i> , 58 Wn. App. 175, 791 P.2d 569 (1990)	-----	14
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994), <i>cert. denied</i> , 514 U.S. 1129, 131 L. Ed 2d 1005, 115 S. Ct 2004 (1995)	-----	16

<i>Sullivan v. Purvis</i> , 90 Wn. App. 456, 966 P.2d 912 (1998)	-----	7,8
<i>Thompson v. King Feed & Nutrition Serv., Inc.</i> , 153 Wn.2d 447, 105 P.3d 378 (2005)	-----	2,23,25
WASHINGTON STATUTES		
<i>Title 51</i>	-----	6
WASHINGTON EVIDENCE CODE		
ER 401	-----	10
ER 402	-----	9,10
ER 403	-----	10,13,14, 15,18
ER 702	-----	9,10,11, 12,14,15, 17
ER 703	-----	14
WASHINGTON ADMINISTRATIVE CODE		
WAC 296-20-01002	-----	24
RULES OF APPELLATE PROCEDURE		
RAP 2.5	-----	3

I. INTRODUCTION

This case concerns an issue of medical causation—namely, the issue whether in February 2007, when Mr. Santos was cranking or jerking the landing gear on a truck-trailer, he “aggravated” a low back injury he sustained in 2003 while employed by UPS. At the time of the alleged “aggravation,” he was not employed by UPS. If he were determined to have “aggravated” his earlier low back injury, UPS would be responsible for the “aggravation.” If he were determined to have had a “new injury,” then Mr. Santos current employer was responsible, not UPS.

Given that issue of medical causation, the Department of Labor and Industries, based on the evidence presented to it, determined that Mr. Santos did not aggravate his earlier low back injury. Mr. Santos appealed to the Board of Industrial Insurance Appeals. The Board, based on the evidence presented to it, decided that Mr. Santos did not aggravate his earlier low back injury. Mr. Santos then appealed to Superior Court. A six person jury in Superior Court, based on the evidence presented to it, decided that Mr. Santos did not aggravate his earlier low back injury. Mr. Santos now appeals sundry issues to the Court of Appeals, as identified below.

II. ISSUES

- A. Did the Board exceed its jurisdiction in issuing an order on the agreement of the parties closing the claim?
- B. Should Dr. Becker's testimony have been excluded?
- C. Was Jury Instruction No. 12 [*sic*] [No. 11] in Error?
- D. Was Jury Instruction No. 8 in Error?

III. STANDARD OF REVIEW

When the Court of Appeals reviews decisions of the Superior Court about issues of law, the Court does so *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

When the Court of Appeals reviews jury instructions, it does so to determine whether they are sufficient to allow counsel to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

The Superior Court, when conducting a *de novo* trial of an appeal from the Board of Industrial Insurance Appeals, acts in an appellate capacity and may consider only evidentiary issues that are objected to at the hearing below on the same grounds and preserved in the record. *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 800, 953 P.2d 800 (1998).

IV. ARGUMENT

A. The Board Had Jurisdiction

Mr. Santos' Objection at the Board

Mr. Santos raised this objection at the Board. [CP—CABR 68-72 & 114-122]. The Board ruled against him. [CP—CABR 134-136].

Mr. Santos' Objection at Superior Court

Mr. Santos did not raise this objection at trial in Superior Court. Despite that fact, Mr. Santos argues that he has not waived that issue on appeal to the Court of Appeals because RAP 2.5 allows a party to raise in the Court of Appeals for the first time lack of trial court jurisdiction.

But the trial court had jurisdiction as an appellate body to determine whether the Board's decision against Mr. Santos was legally warranted. So Mr. Santos has waived this issue in the Court of Appeals.

Standard of Review

The Court of Appeals reviews issue of law *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

UPS's Response

Mr. Santos raises two arguments.

Argument No. 1

First, Mr. Santos argues that the Board exceeded its jurisdiction in 2005 when it entered an order of agreement of the parties, including the

Department of Labor and Industries, closing the claim and awarding permanent partial disability benefits (PPD). Specifically, he targets the following portion of the Board's Finding of Fact No. 1:

On November 22, 2005, the parties entered into an Order on Agreement of Parties. On December 8, 2005, the Department issued their ministerial order pursuant to the Board Order on Agreement of Parties, and the claim was closed with time loss compensation as paid through January 7, 2005, and with a permanent partial disability award of Category 3 for permanent dorso-lumbar and/or lumbosacral impairments.

Mr. Santos argues that the Board only had jurisdiction to hear an appeal of the Department order of April 8, 2005, an order that addressed *only* temporary total disability, not closure or an award of permanent partial disability. The Board exceeded its jurisdiction, Mr. Santos argues, when it entered an Order on Agreement of the Parties (OAP), addressing employability, closure and permanent partial disability. Based on this agreement of the parties, the Board reversed the April 8, 2005 Department order, terminating time loss benefits, effective January 7, 2005, and directed the Department to close the claim and award Mr. Santos permanent partial disability of a Category 3 dorso-lumbar and or low back. Mr. Santos argues that the Department did not issue an order closing the claim or awarding PPD. The Board has jurisdiction only to consider appeals from non-ministerial orders the Department issues. Mr. Santos

cites to *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 937 P.2d 565 (1997) and *Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 292 P.2d 865 (1956).

Hence, Mr. Santos argues, the Board order was invalid to the extent it dealt with the issue of closure. As a result, argues Mr. Santos, the date of closure—December 8, 2005—was an invalid closing date. Given that it was an invalid closing date, Mr. Santos' claim remains open, and so there is no issue of reopening his claim.

UPS's Response to Argument No. 1

Mr. Santos's argument is without merit. The Board did not exceed its subject matter jurisdiction. The Board did not decide the issues of closure and permanent partial disability. The parties to the industrial insurance claim by mutual agreement decided those issues. Those parties were Mr. Santos/claimant, UPS/employer, and the Department of Labor and Industries through its counsel, the Washington Attorney General's office. [CP--CABR—Report of Proceeding Agreement of Parties at pages 129-130]. The parties requested that the Board issue an order reflecting their mutual agreement. The Board did so on November 22, 2005. [CP--CABR—Report of Proceeding Agreement of Parties at pages 128]. On December 8, 2005, the Department issued its ministerial order consistent with the Board order, in turn consistent with the mutual agreement of the

parties, including the Department of Labor & Industries, the body with the initial jurisdictional authority to issue orders closing the claim and awarding PPD. That ministerial order should be considered as in essence a Department non-ministerial order to which Mr. Santos and UPS have no objection.

Neither *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 937 P.2d 565 (1997) nor *Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 292 P.2d 865 (1956) is on point.

In *Brakus*, the Department issued an order closing the claim with an award of PPD. The worker appealed only the award of PPD; he did not seek to reopen the claim. The Superior Court issued an order requiring the Department to reopen the claim and award no PPD. That trial court order was not agreed to by the worker or the Department.

In *Kingery*, a worker's widow sought to vacate a final Department order denying her widow's benefits eight years after the order became final on the grounds that she had discovered new evidence of the cause of her husband's death. The appellate court ruled that under Title 51, neither the Board or Superior Court had authority to vacate an unappealed final order. In *Kingery*, there was no agreement of all necessary parties to that litigation to agree to close an open claim.

Mr. Santos' Argument No. 2

Next, Mr. Santos argues that the Board order on the agreement of the parties (OAP) is invalid. The reasons it is invalid, he argues, is that the parties could not confer subject matter jurisdiction on the Board to issue an order on the agreement of the parties concerning issues not covered by the Department order being appealed.

Mr. Santos cites to *Sullivan v. Purvis*, 90 Wn. App. 456, 966 P.2d 912 (1998) (“Jurisdiction cannot ... be conferred by agreement or stipulation of the parties”).

UPS's Response to Argument No. 2

Mr. Santos' argument is without merit. The parties can enter into an agreement as to the underlying industrial insurance claim as to issues not on appeal as well as to issues on appeal. As to issues on appeal, that agreement as to such appealed issues may be accepted by the Board, thereby resolving the issue on appeal.

As to issues not on appeal, that agreement on those unappealed issues would resolve those unappealed issues. The parties hold the rights on those issues. In this case, contrary to the Mr. Santos' assertion above, the Department was a party to the agreement. So all *necessary* parties reached the agreement. As a result, the Department order of December 8, 2005 would necessarily be ministerial to reflect the agreement of the

parties, including the agreement or approval of the Department of Labor and Industries through its attorney, the Washington Attorney General.

By the agreement, the parties are not conferring subject matter jurisdiction on the Board to resolve unappealed issues not before the Board. The parties, as is their right, are resolving those issues *themselves*. The Board, in its order on the agreement of the parties, is, by its order, resolving the issue before it on temporary total disability and, otherwise, on issues not appealed to the Board, merely memorializing the agreement of the parties, including the party with original jurisdiction over the unappealed issues, the Department of Labor and Industries.

Sullivan v. Purvis, 90 Wn. App. 456, 966 P.2d 912 (1998) is not on point. In *Sullivan*, a landlord brought an action for unlawful detainer for a covenant breach without complying with the statutory predicate to such a statutory action. The appellate court held that the Superior Court had no jurisdiction to adjudicate the controversy. This case does not involve Title 51. Nor does not involve a situation where all necessary parties stipulate to a resolution of their dispute.

B. Dr. Becker's Testimony was Properly Admitted

Mr. Santos' Objection at the Board

Mr. Santos raised this objection at the Board. [CP—CABR Becker 4-5].

Mr. Santos' Objection at Superior Court

Mr. Santos raised this objection at trial in Superior Court.

[RP 4 7].

Standard of Review

The Court of Appeals reviews issue of law *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

UPS's Response

Mr. Santos moved to strike the testimony of Theodore Becker, Ph.D. Mr. Santos asserted three arguments to support his motion to strike Dr. Becker's testimony: (1) Dr. Becker's testimony was outside his expertise; (2) a study should have been excluded; and (3) UPS failed to provide Mr. Santos with the study before his case in chief. The Board and the Superior Court denied this motion. [CP--CABR—28; RP 11].

1. Outside Scope of Expertise

Mr. Santos asserts in this appeal that the issue is causation—namely, did the Mr. Santos' act of jerking the landing gear mechanism cause an “aggravation” of a prior disc injury or did it cause a “new injury.”

With that issue as a backdrop, under subpart a of his brief, Mr. Santos offers several reasons why Dr. Becker's testimony should be excluded: (1.1) ER 402--it is irrelevant; (1.2) ER 702—(1.2.1) it is beyond the scope of Dr. Becker's expertise and (1.2.2) it has no potential to assist the

jury to understand the evidence or determine a fact in issue; and (1.3) ER 403--its evidential or probative value is outweighed by its potential for confusion.

(1.1) *ER 402--Relevance*

Evidence Rule 401 provides:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action, more probable or less probable than it would be without the evidence.

Dr. Becker testified that the act of jerking the landing gear mechanism can biomechanically result in a disc herniation in a healthy disc. [CP--CABR—Becker 29-31]. That testimony is directly relevant to the issue of causation.

(1.2) *ER 702*

Evidence Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the Trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Jury Instruction No. 10

Any determination on whether plaintiff's condition was proximately caused by the industrial injury must be supported by medical testimony. However, you may consider all of the testimony, both lay and

medical, in evaluating whether plaintiff's condition was proximately caused by the industrial accident.

(1.2.1) *ER 702--Scope of Expertise*

Mr. Santos argues that Dr. Becker' is licensed physical therapist, not a medical doctor. Yet, as Mr. Santos argues, he offers "medical opinions" about the biomechanical force necessary to herniate a healthy disc. Given that Dr. Becker is a mere physical therapist, so argues Mr. Santos, he cannot offer opinions helpful in assisting the jury to understand the issue in this case.

Mr. Santos' argument is without merit. ER 702 states very broadly that "a witness qualified as an expert by knowledge, skill, experience, training, *or* education, may testify thereto in the form of an opinion or otherwise." [Emphasis added.] Dr. Becker is not a mere physical therapist as Mr. Santos wants to suggest. Dr. Becker is qualified both as a licensed physical therapist and as having a Ph.D. in human performance, a discipline that involves graduate level training in biomechanics. [CP—CABR Becker 7/13-22].

In that latter regard, he has performed research in the orthopedic research department at the University of Texas to establish "quantification principles associated with the lumbar spine." [CP—CABR Becker 13/19-25; 14/1-25]. He has long experience in making biomechanical

assessments. [CP—CABR Becker 16/5-24; 17-18]. In that regard, he has experience in assessing the physiological impact of raising and lowering landing gears on trucks. [CP—CABR Becker 20/22-25; 21-27]. He has knowledge and experience in biomechanically assessing the amount of force on the lumbar spine that can herniate a disc. [CP—CABR Becker 29-30].

In short, he is qualified by training, education and experience to assess the biomechanical forces acting on the low back and the harm to the discs in the low back associated with those forces. Dr. Becker's testimony on the biomechanical forces necessary to herniate a healthy disc is relevant to the issue in dispute. [CP—CABR Becker 7-17; 24/17-25; 25/8-17 & 20-25; 26/1-25; 29/15-25; 30/1-3 & 8-17 & 20-24; 31/2-8 & 12-15 & 17-25; 32/1-18 & 22-25; 33/1-3 & 23-25; 34/1-25; 35/1-12 & 15-24].

(1.2.2) *ER 702-- No Potential to Assist the Jury*

Mr. Santos argues that Dr. Becker's testimony cannot assist the jury understand the issue in this case. That argument is without merit. Mr. Santos appears to argue that only a medical physician may testify about the biomechanical forces needed to herniate a disc. [Appellant's Brief at page 22]. But that is too narrow a construction of what is appropriate expert testimony. Given Dr. Becker's training, education and

experience in biomechanics, Dr. Becker's testimony will help the jury understand what force is needed to herniate a healthy disc. The issue about what force is needed to herniate a disc is beyond common understanding. But it is generally accepted in the scientific community that external forces can herniate discs. [CP—CABR Bays 28; Sarno 22 & 24; and Johnson 105]. An expert in biomechanics as well as medical doctors can provide that kind of evidence to a jury to assist it understand that biomechanical process.

(1.3) *ER 403--Probative Value Outweighed by Potential for Confusion*

Evidence Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The purported prejudice is presumably that Dr. Becker's testimony might cause the jury to find against Mr. Santos because Dr. Becker has expertise in biomechanics. Of course, that would be true of any evidence that has probative value. But this is not the sense of "prejudice" in which the term is used in ER 403. *See State v. Gould*, 58 Wn. App. 175, 791 P.2d 569 (1990) (Division I).

Mr. Santos further argues that Dr. Becker's testimony is prejudicial because it might confuse the jury about the nature of his expertise. This is because his testimony uses medical terms, offers medical conclusions, refers to his affiliation with the Washington University Medical School, and because he is referred to as "doctor." These complaints are red herrings. Technically, he is a doctor. He used anatomical terms. He offered biomechanical conclusions. He has explained the nature of his affiliation with the University of Washington Medical School. Mr. Santos had every opportunity to argue to the jury the distinctions he draws here in its Brief. These are jury arguments, not errors of law.

2. Study Not Generally Accepted in Medical Community

Under subpart b of his argument, Mr. Santos offers several reasons why Dr. Becker's testimony about "the study"¹ should have been excluded: (2.1) ER 702—scientific literature/theory is only admissible if the theory has achieved general acceptance in the relevant scientific community; (2.2) factual or jury argument why Dr. Becker's testimony should not be accorded much weight; (2.3) ER 403—the probative value

¹ The study is referred to as the Ergonomic Evaluation, Haman, Angus Ranch Mint Trailer Landing Gear Power Unit, May 2001. [CP—CABR Becker 41]. Dr. Becker describes the study at CP—CABR Becker 36-38. The study was not introduced into evidence, but formed a partial basis for Dr. Becker's testimony under ER 703.

of Dr. Becker's testimony about the study is outweighed by its potential prejudice. None of these arguments has merit.

(2.1) *ER 702 and Frye*² *Argument*

Evidence Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Jury Instruction No. 10

Any determination on whether plaintiff's condition was proximately caused by the industrial injury must be supported by medical testimony. However, you may consider all of the testimony, both lay and medical, in evaluating whether plaintiff's condition was proximately caused by the industrial accident.

Mr. Santos argues that ER 702 should exclude Dr. Becker's testimony about the study. From the brief, it is unclear why ER 702 applies. Mr. Santos asserts, apparently as a general rule, that under ER 702, "scientific literature/theory is only admissible if the theory has achieved general acceptance in the relevant scientific community." [Appellant's Brief 23]. Then, Mr. Santos adds the qualifier that this rule is concerned only with whether the expert's underlying theories and methods are generally accepted,

² *Frye v. U.S.*, 293 F. 1013 (App. D.C. 1923); *Moore v. Harley-Davidson Motor Co. Group, Inc.*, 158 Wn. App. 407, 241 P.3d 808 (2010) (Division II).

citing to *Ruff v. Dep't of Labor & Indus.*, 107 Wn. App. 289, 28 P.3d 1 (2001).

In *Ruff*, the Court of Appeals held that a *Frye* analysis need not be undertaken as to evidence not involving new methods of proof or new scientific principles from which conclusions are drawn, citing to *State v. Russell*, 125 Wn.2d 24, 69, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 131 L. Ed 2d 1005, 115 S. Ct 2004 (1995) and *Reese v. Stroh*, 128 Wn.2d 300, 307, 907 P.2d 282 (1995). So apparently, Mr. Santos thereby abandons a *Frye* objection to the study. He asserts no argument that the study involved new methods of proof or new scientific principles.

If he has been misread and does not abandon that argument, the argument has no merit for the following reason. Although Mr. Santos fails to identify the “underlying theory” that might make his argument somewhat understandable, the underlying theory is that, biomechanically, external forces, such as those exerted in cranking or jerking the landing gear mechanism on a truck or trailer, can herniate a vertebral disc. This theory is not novel. It is subscribed to by Drs. Bays and Sarno and by Dr. Johnson. The only dispute between the experts is the degree of force required to herniate a healthy disc, although the medical expert Dr. Sarno agreed that the degree of force required to herniate a healthy disc is minimal. [CP—CABR Sarno 22-24].

Yet, apparently on another tangent, Mr. Santos believes ER 702 applies because “a majority of the data and opinions Dr. Becker presented were based upon little foundation and a single study.” [Appellant’s Brief 23]. But this argument pertains to Dr. Becker’s opinions generally rather than to the usefulness of the study to which he referred. An opinion based on a little foundation and a single study is based on a foundation; the relative size or supportive power of that foundation is not a basis to exclude the opinion on which it rests under ER 702. The supportive power of the foundation goes to the weight of the opinion, not its admissibility.

(2.2) Jury Argument

Mr. Santos then proceeds to emphasize that fact specific aspects of the case—*viz.*, the data in the study are dissimilar to the circumstances of Mr. Santos’ injury; Dr. Becker did not interview or examine Mr. Santos; Dr. Becker did not analyze the particular truck Mr. Santos was operating, and Dr. Becker, so it is argued, did not consider personal variables such as Mr. Santos’ age, weight or height. [Appellant’s Brief 23-24]. These reasons essentially constitute a jury argument why the jury should accord the study little or no weight. It is not a legal argument.

(2.3) ER 403 Argument

Mr. Santos argues that the probative value of Dr. Becker’s testimony about a study to which he referred is outweighed by its potential to confuse

the jury. This appears to be an ER 403 argument, even though Mr. Santos does not refer to ER 403. The particular details of this implied ER 403 argument are unclear.

ER 403 is an extraordinary remedy. Under an ER 403 challenge, Mr. Santos has the burden to show that the probative value is substantially outweighed by its undesirable characteristics, in this case “its potentially confusing content.” *E.g., Carson v. Fine*, 123 Wn. 2d 206, 867 P.2d 610 (1994).

Apparently, the bedrock of Mr. Santos’ ER 403 argument that the study has “potentially confusing content” is that the study involved circumstances that differed in certain respects from those circumstances in which Mr. Santos found himself. The argument must be, by implication, that those differences would be missed by the jury or, if not missed, the jury would be too unsophisticated to appreciate the significance of those differences.

This is an argument as to the weight to be accorded the testimony, not as to whether the evidence would emotionally cloud or obstruct the rational faculties of the jury. Mr. Santos’ counsel had much opportunity to assert jury arguments to diminish the weight of Dr. Becker’s testimony. But the jury was not persuaded.

3. *Failure to Produce Documents*

Mr. Santos's Objection at the Board

Mr. Santos raised this objection at the Board. [CP—CABR Becker 4-5].

Mr. Santos' Objection at Superior Court

Mr. Santos raised this objection at trial in Superior Court. [RP 4-5].

Standard of Review

The Court of Appeals reviews issue of law *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

UPS's Response

Mr. Santos asserts that Dr. Becker's testimony should be stricken because UPS produced copies of biomechanical articles to which Dr. Becker referred in his testimony after Mr. Santos' case in chief. [CP--CABR—Becker 4/15-25].

On February 11, 2008, Mr. Santos served Interrogatory No. 4 on UPS.

“For each witness, lay and expert, intended to be called by the Employer state:

- (a) His/her name;
- (b) Employer and employer's address;

- (c) The subject matter on which he/she is expected to testify;
- (d) The substance of the facts and opinions to which he/she is expected to testify;
- (e) A summary of the grounds for each such opinion;
- (f) All materials, physical objects, textbooks, data or information furnished to or relied upon by each such expert;
- (g) The designation of all courts and case name and file name in which the expert has testified, either at trial, hearing, or deposition or affidavit, in respect to the subject matter of this action;
- (h) Whether or not a report has been issued.

“It is intended that ‘employer’s’ answer or supplemental answers to this interrogatory will identify each expert witness who will testify on any matter of fact pertaining to this action or any related fact or occurrence.” [See Rule 26(b)(4)(A)(1)].

“The term ‘expert’ includes all persons who claim specialized training or expertise in an occupation, trade or profession and who, by virtue of such specialized training or expertise, may render opinions based thereon.” [CP--CABR—Becker 54/14-15].

On April 29, 2008, defendant responded to Interrogatory No. 4 as follows:

“Objection: witness confirmation not yet due.” “The employer will supplement the answer to this interrogatory.” [CP--CABR—Becker 52/21-23].

On May 8, 2008, Mr. Santos confirmed Christine Casady, P.T. as one of his witnesses.

On May 30, 2008, UPS confirmed Dr Becker as one of its witnesses in an effort to counter the testimony of Christine Casady, P.T. [CP--CABR—Becker 52/25; 54/8-11].

Mr. Santos asserts that a legal assistant for his counsel called UPS's counsel before Mr. Santos' case in chief (which was July 10, 2008), presumably following up as to UPS's answer to Interrogatory No. 4, requesting additional discovery in response to Interrogatory No. 4. [CP--CABR—Becker 4/24-25; 5/1-3]. In this call, as Mr. Santos asserts, UPS's legal counsel told the unnamed legal assistant that additional discovery would be provided if UPS eventually decided to call Dr. Becker in its case in chief. [CP--CABR—Becker 4/24-25; 5/1-3]. UPS's counsel denied that he received such a call. [CP--CABR—Becker 55/21-23].

On July 7, 2008, three days before the hearing, UPS received notice that Mr. Santos was cancelling Christine Casady, P.T., as a witness in his case in chief. [CP--CABR—Becker 5/24-25; 6/1-2; 51/10-17].

On July 10, 2008, Mr. Santos then presented his evidence to the Board.

After July 10, 2008, given that Mr. Santos had cancelled Christine Casady, P.T., as a witness, UPS, in an effort to determine whether it now

needed to call Dr. Becker, inquired of Dr. Becker about what relevant information he could possibly provide. [CP--CABR—Becker 6/2-11]. In response, Dr. Becker informed UPS that he was aware of articles on the biomechanical forces involved in raising and lower landing gears, and so he could testify about the biomechanical forces involved in that activity. [CP--CABR—Becker 6/7-11]. At that point, UPS decided to have Dr. Becker testify.

On July 24, 2008, UPS received from Dr. Becker the aforementioned articles on the biomechanics of raising and lower landing gears. That same day those articles were provided to Mr. Santos' counsel by facsimile, consistent with defendant's pledge in its answer to Interrogatory No. 4. [CP--CABR—Becker 6/7-11]. Mr. Santos had ample time (six days) to prepare to cross examine Dr. Becker on these articles.

On July 31, 2008, Dr. Becker provided his testimony by perpetuation deposition. [CP--CABR—Becker 4/1-6].

As is apparent from the preceding chronology, UPS did not become aware of the biomechanical article mentioned in Dr. Becker's testimony until after Mr. Santos had presented his evidence to the Board. When UPS became aware of those articles, it promptly provided them to Mr. Santos, consistent UPS's response to Mr. Santos' Interrogatory No. 4.

Mr. Santos did not diligently pursue discovery as to Dr. Becker. After May 30, 2008, Mr. Santos chose not to depose Dr. Becker. [CP--CABR—Becker 54/12-13].

C. JI No. 12 [sic] was Not an Error [JI No. 11]

Mr. Santos' Objection at Trial

Mr. Santos has mislabeled JI No. 11 as JI No. 12. Mr. Santos objected to JI No. 11 at trial. [RP--49].

Standard of Review

When the Court of Appeals reviews jury instructions, it does so to determine whether they are sufficient to allow counsel to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

UPS's Response

Mr. Santos argues that JI #12 [sic] [JI No. 11] should not have been given for the following reasons with UPS's response:

1. *There was a dispute about who was the attending physician.*

If there were a dispute, that dispute would constitute a question of fact for the jury to decide. In fact, there was no dispute. The evidence is substantial that Dr. Sarno was the attending or treating physician and Dr.

Johnson, a forensic expert Mr. Santos' counsel hired, did not treat Mr. Santos.

WAC 296-20-01002 provides in relevant part:

Attending provider: For these rules, means a person licensed to independently practice one or more of the following professions: Medicine and surgery; osteopathic medicine and surgery; chiropractic; naturopathic physician; podiatry; dentistry; optometry; and advanced registered nurse practitioner. An attending provider actively treats an injured or ill worker.

Dr. Sarno was the emergency room physician from whom Mr. Santos sought and received treatment shortly after his industrial event. [CP—CABR Sarno 16/25; 17/1]. He has not affiliation with UPS. Mr. Santos sought him for treatment.

Dr. Johnson was a forensic expert Mr. Santos' counsel hired and was not an "attending provider." [CP—CABR Johnson 102/3-5 & 9-12]. He had not practiced medicine since 1999. [CP—CABR Johnson 61/8-10; 100/25-26; 101/1-2 & 25-26; 102/1-2]. He had no office of his own; he used the office of Mr. Santos' counsel to conduct his forensic examination. [CP—CABR Johnson 57/22-28; 102/3-8].

Dr. Sarno performed an examination for purposes of treatment. Dr. Johnson performed an examination for purposes of testifying as a forensic expert witness.

2. *Dr. Sarno could not be Mr. Santos' attending physician because he only evaluated and treated Mr. Santos once.* WAC 296-20-01002 contradicts Mr. Santos' argument. Moreover, Mr. Santos does not cite to any authority that a physician who examines a patient for purposes of diagnosis and treatment once is not an attending physician. Dr. Sarno actively treated Mr. Santos; Dr. Johnson did not.

3. *The opinions of Drs. Sarno and Johnson conflicted.*

That the opinions of these two physicians conflicted does not warrant not giving JI No. 12 [*sic*] [JI No. 11]. Indeed, that is a reason for giving the jury instruction. The jury instruction is appropriate when two physicians offer conflicting testimony, and only one of them has provided the claimant treatment. The jury should carefully consider the opinion of a treating physician because that physician is less likely to be biased.

D. JI No. 8 was Not an Error

Mr. Santos' Objection at Trial

Mr. Santos objected to JI No. 8 at trial. [RP--51].

Standard of Review

When the Court of Appeals reviews jury instructions, it does so to determine whether they are sufficient to allow counsel to argue their theories of the case, do not mislead the jury and, when taken as a whole,

properly inform the jury of the law to be applied. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

UPS's Response

Mr. Santos argues that “the *sole* question ... was whether or not an accepted industrial injury had become aggravated.” [Appellant’s Brief 31]. In that light, he argues, JI No. 8 allowed the jury to *speculate* whether the 2007 incident was a new injury versus an aggravation. Mr. Santos’ argument is without merit.

A question of fact existed about medical causation—that is, whether the alleged industrial event merely “aggravated” an old industrial injury or whether it caused an entirely “new industrial injury.” If the industrial event would have caused the low back injury even if Mr. Santos had no previous injury, then the industrial event was a new independent cause and not responsible for an aggravation as understood under the Industrial Insurance Act. Indeed, it would have confused the jurors if they had not appreciated this distinction. The confusion would have benefitted only Mr. Santos.

JI No. 8 along with the jury instruction on proximate cause [JI No. 12] and on aggravation [JI No. 7] provided the jury with the context for deciding that issue of medical causation. JI No. 8 in the context of the other jury instructions did not allow the jury to speculate. Those jury

instructions allowed counsel to argue their theories of the case, did not mislead the jury and, when taken as a whole, properly informed the jury of the law to be applied.

V. CONCLUSION

For the preceding reasons, UPS respectfully requests that this Court affirm the Superior Court's judgment affirming the decision of the Board of Industrial Insurance affirming the order of the Department of Labor and Industries.

Respectfully submitted this 28th day of February 2012.

Wallace, Klor & Mann, P.C.



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APPENDIX

Jury Instruction No. 11

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.

Jury Instruction No. 8

An "industrial injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify I filed the foregoing **Brief of Respondent United Parcel Service, Inc.** by U.S.
3 mail by depositing the original thereof in Lake Oswego, Oregon, on today's date, in a sealed envelope,
4 postage thereon prepaid, addressed as follows:
5

6 **ORIGINAL TO:** Clerk of the Court of Appeals of the State of Washington - Division II
7 950 Broadway, Suite 300, MS TB-06
8 Tacoma, WA 98402-4454

9 I further certify that I served the foregoing **Brief of Respondent United Parcel Service, Inc.** on
10 attorneys of record and other parties by mailing copies on February 28, 2012, addressed to said persons
11 at their last known address as follows:

12 **COPIES TO:** Karla E. Rood
13 David B. Vail & Jennifer Cross-Euteneier and Associates
14 P.O. Box 5707
15 Tacoma, WA 98415-0707

16 Sarah L. Martin
17 Assistant Attorney General
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21 Elizabeth Footman (via email and U.S. mail)
22 Gallagher Bassett Services
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DATED: February 28th, 2012.

WALLACE, KLOR & MANN, P.C.



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DIVISION II
12 MAR -1 PM 1:34
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