

NO. 45793-8-II

COURT OF APPEALS,
DIVISION II



OF THE STATE OF WASHINGTON

NATHAN M. COOPER, *APPELLANT/PLAINTIFF*

v.

DEPARTMENT OF LABOR AND INDUSTRIES, *RESPONDENT/DEFENDANT*.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The trial court erred in refusing to give Mr. Cooper's proposed instruction No. 8a on pre-existing conditions being part of the industrial injury.

Issues Pertaining to the First Assignment of Error

- A. Should the issue of pre-existing conditions affecting an industrial injury have been presented to the jury?
- B. Does it make any difference whether the second industrial injury was an accepted claim?
- C. Was the failure to give proposed instruction No. 8a prejudicial error?

Assignment of Error No. 2

The trial court erred in awarding costs incurred by the Department of Labor and Industries for a court reporter to take and transcribe the deposition of an expert witness before the Board of Industrial Insurance Appeals as costs in the superior court action.

Issues Pertaining to Second Assignment of Error

- A. Does *RCW* 4.84.010 on recovery of costs in a superior court action include costs incurred before the Board of Industrial Insurance Appeals?
- B. Since an appeal to superior court from a decision of the Board of Industrial Insurance Appeals invokes the appellate jurisdiction of superior court, rather than general original jurisdiction, does *RCW* 4.84.010 apply to an appeal from the Board?
- C. Do the distinctions between the use of perpetuation depositions in superior court pursuant to *CR* 32(a)(3), and the use of perpetuation depositions before the Board of Industrial Insurance Appeals pursuant to *WAC* 263-12-117, affect the application of *RCW* 4.84.010?

Statement of the Case

The appellant, Nathan Cooper, was born April 12, 1974, stands 5 feet, 4 inches high, and weighs 170 pounds. He had a singular employment history working for Royal Oaks Country Club in Vancouver, Washington, starting in 1991 at age 16 as a dishwasher. Following graduation from high school in 1993, he continued working at Royal Oaks and worked his way up

to prep cook, to line cook, to lead line cook, and finally to sous chef, supervising banquets from 50 to 300 people. (CABR, Cooper – Direct, page 5, lines 4, 6, 19, 21 and 23, and page 6, lines 1, 9, 15 and 23)

Nathan Cooper initially injured his low back in July of 2006 working on the cook line at Royal Oaks, when he went back to the refrigerator to retrieve something and slipped on a floor mat covering water on the floor which he did not see. He had health insurance at the time, and did not file a claim with the Department of Labor and Industries. In September 2006, Dr. Hoang Le, a neurosurgeon, performed a two level low back fusion with two plates, six screws, some pins, and two cadaver bones. (CABR, Cooper – Direct, page 7, line 26; page 8, lines 4, 6, 8 and 16; page 9, lines 5, 7, 11, 13, 17, 19 and 23)

Following surgery, Nathan Cooper continued treatment with Dr. Le, was off work for three months, had physical therapy, and was released to go back to work in January of 2007. He resumed his full duties as a sous chef at Royal Oaks Country Club, as well as his recreational activities outdoors, including hiking, hunting and fishing. (CABR, Cooper – Direct, page 10, lines 4, 6, 9, 21 and 25; page 11, lines 1, 5 and 16; and page 12, lines 2, 7 and 26)

Nathan Cooper had another low back injury at Royal Oaks Country Club on March 1, 2007, when a 10 foot long cutting board overhanging a counter in the kitchen fell in back of him, taking his legs out from under him, and he landed on his tailbone and back. He saw Dr. Paul Won at Kaiser Permanente, filed a claim with the Department of Labor and Industries, had six months of physical therapy, was referred to a Dr. Tilson, and his claim was closed on January 22, 2008. (CABR, Cooper – Direct, page 13, lines 8 and 23; page 14, lines 4, 13, 19, 21 and 23; page 15, line 9; and Cross, page 24, lines 11 and 17)

Following claim closure by the Department of Labor and Industries on January 22, 2009, for his second injury, Nathan Cooper was gradually able to resume his regular duties as a sous chef at Royal Oaks Country Club, was able to hunt and fish, but his low back condition was slowly worsening. Then on April 22, 2010, he had a banquet going on with a big crowd and a lot of dishes coming back into the kitchen. The dishwasher was behind, and he went back to help him out. Mr. Cooper had been in the kitchen for a while bending and twisting, when he bent down to pick up a rack and felt something snap in his low back like a rubber band. He went to the floor, got up, and continued working with a pinching sensation in his low back.

(CABR, Cooper – Direct, page 13, line 10; page 15, lines 11, 19 and 26; page 16, lines 4, 10 and 25; page 17, line 10; and page 19, lines 2 and 4)

Nathan Cooper filed a claim with the Department of Labor and Industries for the incident occurring on April 22, 2010, but his doctor at the time, Dr. Baertlein, could not identify a specific injury and the claim was denied. He then filed an application to reopen his claim for the injury of March 1, 2007, and that was denied. Mr. Cooper then appealed the denial of the reopening application to the Board of Industrial Insurance Appeals and proceeded to hearing before an Industrial Appeals Judge. The Industrial Appeals Judge affirmed the Department denial of the reopening and the Board of Industrial Insurance Appeals upheld the denial, and Mr. Cooper appealed to Superior Court for Clark County. (CABR pages 2, 21, 33, 34 and 35)

On November 26, 2013, a jury by a 10-2 decision decided that Mr. Cooper's low back condition had not objectively worsened as proximately caused by the industrial injury of March 1, 2007. Mr. Cooper proposed instruction No. 8a on pre-existing conditions. *i.e.* whether the accepted injury of March 1, 2007, makes disabling a pre-existing infirmity or weakened condition from the July 2006 injury and fusion, and the trial court denied the instruction. Proposed Instruction No. 8a is included as

Appendix A. The trial court then imposed the costs of the court reporter for the depositions of the Department's expert witness before the Board of Industrial Insurance Appeals as costs in superior court pursuant to RCW 4.84.010, and this appeal followed. (Clerk's Papers, pages 2, 26 and 60)

Key to the presentation of Mr. Cooper's case was the testimony of Thomas Gritzka, MD, an occupational orthopedist who is Board Certified by the American Academy of Orthopedic Surgery and by the American Board of Independent Medical Examiners. Dr. Gritzka examined Nathan Cooper on October 17, 2011. His chief complaint was midline low back pain, and pain and weakness in the back part of his right leg between his knee and ankle. Mr. Cooper used a cane in his right hand to prevent give-way collapse of his right leg. He walked with a halting cautious gait, and stood with a flattened lumbar lordosis. His low back muscles were swollen from the L2 level of the spine down to L4, the level at the top of his fusion. He was tender to palpation in the lumbar midline, and he had fixed muscle spasm on the right side. Using the dual inclinometer technique, which separates low back motion from hip motion, Mr. Cooper could lean forward 20°, normal being 60°, bending backwards was 0°, normal being 20°, and bending to the side right and left 10°, normal being 25°. (CABR, Dr. Gritzka

– Direct, page 3, line 18; page 8, line 21; page 11, line 16; page 12, line 4; page 24, lines 6, 14 and 18; page 25, line 3; and page 27, lines 15 and 23)

In reviewing his prior medical records, Dr. Gritzka found that Mr. Cooper had been diagnosed by Dr. Hoang Le on July 31, 2006, with a crack through the posterior facets of the spine, with the L5 vertebrae sliding forward on the S1 vertebrae, and on September 5, 2006, had a two level fusion from L4 to S1. By a post surgery x-ray on November 22, 2006, Mr. Cooper had good alignment of the vertebrae and a complete reduction in the slippage of the L5-S1 vertebrae. Then on January 26, 2007, Dr. Le discharged Mr. Cooper from care with a good result from surgery. (CABR, Dr. Gritzka – Direct, page 14, line 21; page 17, lines 9, 13 and 25; page 18, lines 3, 21 and 24; and page 19, lines 2, 16 and 22)

Then on March 1, 2007, Mr. Cooper was struck in the back of his legs by a heavy cutting board in the kitchen at Royal Oaks Country Club, and he collapsed and fell backward to the floor, landing on his back. Mr. Cooper injured his lumbar spine above the level of his spinal fusion, that level being fragile and at risk because of the previous fusion. When Dr. Gritzka palpated Mr. Cooper's low back, there was a step off between L3-4 that was tender, and muscle swelling was adjacent to this area. Mr. Cooper had conservative treatment for the injury of March 1, 2007, and his

claim was closed on January 22, 2008. (CABR, Dr. Gritzka – Direct, page 21, lines 4 and 20; page 32, line 18; and page 33, lines 14 and 22)

Dr. Gritzka concluded, based on reasonable medical probability, that there were objective findings of worsening of Mr. Cooper’s industrial injury of March 1, 2007, between the terminal dates on January 22, 2008, and July 27, 2011. The objective findings of worsening were fixed muscle spasm in the right paravertebral muscles, swelling on each side of the lumbar spine, tenderness on top of the fusion, and an increase in the wedge deformity of the L4 vertebrae. The L4 vertebrae deformity was described as mild prior to the MRI of May 27, 2010, where it was described as moderate to severe. (CABR, Dr. Gritzka – Direct, page 34, line 17; and page 39, lines 11, 13, 16 and 24)

Mr. Cooper needs a three phase bone scan to determine whether there is instability at the L3-4 level. There is an irritative problem whenever hot spots show up on the bone scan, and Dr. Gritzka would expect they would show up at L3-4. If there are hot spots, Mr. Cooper should be referred to a neurosurgeon to consider extending the fusion to include L3-4. The need for further treatment is proximately caused by the industrial injury of March 1, 2007. (CABR, Dr. Gritzka – Direct, page 40, line 20; page 41, lines 13; 17 and 23; and page 42, line 7)

Dr. Clarence Fossier, a retired orthopedic surgeon, examined Mr. Cooper on October 11, 2010, at the request of the Department of Labor and Industries. The stated purpose of Dr. Fossier's examination was to determine whether an on the job injury occurred on April 22, 2010. Dr. Fossier testified that no injury occurred on April 22, 2010, nor even on March 1, 2007, and that Mr. Cooper's condition was merely the natural progression of his previous low back fusion. (CABR, Dr. Fossier – Direct, page 5, lines 10 and 23; page 12, line 6; Cross page 33, lines 6 and 23; and page 37, line 10)

ARGUMENT

Assignment of Error No. 1

The trial court erred in refusing to give Mr. Cooper's proposed instruction No. 8a on pre-existing conditions being part of the industrial injury.

Issues Pertaining to the First Assignment of Error

- A. Should the issue of pre-existing conditions affecting an industrial injury have been presented to the jury?

- B. Does it make any difference whether the second industrial injury was an accepted claim?
- C. Was the failure to give proposed instruction No. 8a prejudicial error?

The appellate courts have repeatedly held that benefits are not limited to those workers previously in perfect health. It is a fundamental principle that if the industrial injury proximately caused the disability for which compensation is sought, the previous physical condition of the worker is immaterial, and recovery may be had for the full disability independent of any pre-existing weaknesses. The principle is founded on the premise that the worker's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the cause operated. The worker is to be taken as she or he is, with all of his pre-existing frailties and bodily infirmities. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d, 467, 471, 745 P.2d 1295(1987); citing *Miller v. Dep't of Labor & Indus.*, 200 Wn. App. 674, 682-683, 94 P.2d 764 (1939).

Mr. Cooper's proposed instruction No. 8a was specifically approved over challenge in *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 740-741, 981 P.2d 878 (1999), and states:

If an industrial injury lights up, or makes disabling, a latent or pre-existing infirmity, or weakened condition, then

the resulting disability is to be attributed to the industrial injury. If the industrial injury is a proximate cause of the condition from which the worker suffers, then the previous physical or mental condition of the worker is immaterial, and the industrial injury is considered to be the legal cause of the full disability, regardless of any pre-existing or congenital weakness or infirmity.

A similar instruction was proposed in *Wendt v. Dep't Labor & Indus.*, 18 Wn. App. 674, 676, 571 P.2d 229, (1977). There, based upon the evidence, the jury could have found that his pre-existing condition rendered Mr. Wendt more disabled than he was at the time of claim closure, and that instruction should have been given. *Wendt v. Dep't Labor & Indus.*, 18 Wn. App. at page 678.

Here, Mr. Cooper had a pre-existing two level fusion from L4-S1. Mr. Cooper had a good recovery and was able to return to work and resume his full duties as a sous chef, conducting banquets at Royal Oaks Country Club for 50 to 300 people, as well as his recreational activities of hiking, hunting and fishing. A few years later, he had suffered a second on the job low back injury in the kitchen at Royal Oaks Country Club. A heavy cutting board fell off a counter behind him, hitting him in the back of the legs, causing him to collapse and fall backward to the floor landing on his back.

As in *Wendt v. Dep't Labor & Indus.*, 18 Wn. App. at page 675, the case here was on an application to reopen claim for aggravation. The

objective findings of worsening on examination by Dr. Thomas Gritzka were muscle spasm in the right paravertebral muscles, swelling on each side of the lumbar spine, tenderness on top of the pre-existing fusion, and an increase in the wedge deformity at the L4 vertebrae substantiated by MRI findings. The jury could have found that pre-existing fusion was a pre-existing infirmity or weakened condition acting upon the industrial injury of March 1, 2007, and had worsened following claim closure on January 28, 2008. *Wendt v. Dep't Labor & Indus.*, 18 Wn. App. at page 678.

The Department of Labor and Industries in *Wendt* argued that the failure to give the instruction proposed was not prejudicial error, because other instructions permitted Mr. Wendt to adequately present and argue his theory of the case. As in *Wendt*, there was the standard instruction given here on proximate cause, instruction No. 10, which is Washington Pattern Instruction No. 155.06. *Wendt v. Dep't Labor & Indus.*, 18 Wn. App. at page 679.

The *Wendt* court responded that such a general instruction might suffice were a less technical proposition involved. But, a jury of lay persons might consider Mr. Wendt's theory of the case too esoteric. In such a case, the law should be explicated by the judge in particular terms to insure the jury grasps the subtleties. Far from involving a fringe or subordinate issue,

the requested instruction embodied the gist or substature of the claim. When such a key issue is involved, a correctly worded and particularized instruction should be given, and a general instruction will not suffice. This is particularly true in worker compensation cases where the court is required to give a liberal interpretation to the Worker Compensation Act in favor of the injured worker. *Wendt v. Dept' Labor & Indus.*, 18 Wn. App. at pages 680-681, citing *Gaines v. Dep't Labor & Indus.*, 1 Wn. App 547, 463 P.2d 269 (1969); and *Wilber v. Dep't Labor & Indus.*, 61 Wn.2d. 439, 378, P.2d 684 (1963).

Based solely on the trial court's failure to give the proposed instruction the jury, the Wendt court determined that a new trial was necessary. *Wendt v. Dep't Labor & Indus.*, 18 Wn. App. at page 680. The appellate court here should determine that a new trial is necessary for failure to give Mr. Cooper's proposed instruction No. 8a, which was specifically approved in *Simpson Timber Co. v. Wentworth*, 96 Wn. App. at page 740-741.

Assignment of Error No. 2

The trial court erred in awarding costs incurred by the Department of Labor and Industries for a court reporter to take and transcribe the deposition

of an expert witness before the Board of Industrial Insurance Appeals as costs in the superior court action.

Issues Pertaining to the Second Assignment of Error

- A. Does *RCW* 4.84.010 on recovery of costs in a superior court action include costs incurred before the Board of Industrial Insurance Appeals?
- B. Since an appeal to superior court from a decision of the Board of Industrial Insurance Appeals invokes the appellate jurisdiction of superior court rather than the general original jurisdiction, does *RCW* 4.84.010 apply to an appeal from the Board?
- C. Do the distinctions between the use of perpetuation depositions in superior court pursuant to *CR* 32(a)(3), and the use of perpetuation depositions before the Board of Industrial Insurance Appeals pursuant to *WAC* 263-12-117, affect the application of *RCW* 4.84.010?

The Department of Labor and Industries is seeking the cost of a court reporter for taking a perpetuation deposition before the Board of Industrial Insurance Appeals as costs in the superior court action in the sum of \$303.00, which Nathan Cooper contests. The Department is also seeking a

statutory attorney fee of \$200.00 in superior court, which Nathan Cooper does not contest.

Pursuant to *RCW* 4.84.030 in any action in superior court, the prevailing party shall be entitled to costs and disbursements. Pursuant to *RCW* 4.84.010, there shall be allowed on the judgment certain sums by way of indemnity for the prevailing party's expenses in the action, which allowances are termed costs in addition to costs otherwise authorized by law, including the following expenses: (7) to the extent the court finds that it was necessary to achieve the successful result, the expenses of the transcription of depositions at trial or at the mandatory arbitration hearing.

RCW 4.84.010 (7) covers situations where the deposition is generated in superior court and used at trial pursuant to the general jurisdiction of that court, not appellate jurisdiction, where the deposition has been taken in an administrative hearing. The statute specifically mentions trial or mandatory arbitration hearings, not hearings prior to filing the action in superior court. An action seeking judicial review of an order of the Board of Industrial Insurance Appeals invokes the appellate jurisdiction of superior court, not its general jurisdiction. Acting in its appellate capacity, the superior court is a court of limited statutory jurisdiction. *Fay v. N.W. Airlines*, 115 Wn.2d 194, 796 P.2d 412 (1990).

The law requires that the appeal to superior court be tried solely on the testimony presented before the Board of Industrial Insurance Appeals. The parties are not permitted to bring witnesses into court and have them

testify. The evidence is limited to that contained in the appeal board record. *RCW 51.52.115, Washington Pattern Instruction 155.01.01*. The evidence is read to the jury from the certified appeal board record. *WPI 155.01*.

Court Rule 32 governs the use of depositions at trial under the general jurisdiction of superior court. *Washington Administrative Code 263-12-117* governs the use of perpetuation depositions at hearing before the Board. Basically, depositions are only used in superior court under limited circumstances, but, at hearing before the Board, perpetuation depositions are used in the discretion of the Industrial Appeals Judge, which is freely given. Since *WAC 263-12-117* is in conflict with *CR 32(a)(3)* as to the use of perpetuation depositions, the Washington Administrative Code controls Board Hearings. *WAC 263-12-125. WAC 263-12-117* also provides:

...Each party shall bear its own costs except when appropriate and requested by a party, the Industrial Appeals Judge may allocate costs to parties or their representatives. ...

There was no request by the Department to allocate costs of depositions at hearing before the Board, though the Department prevailed before the Board.

Allan v. Dep't Labor & Indus., 66 Wn. App. 415, 422, 832 P.2d 489 (1992), holds that a statutory attorney fee is recoverable by the prevailing party in superior court pursuant to *RCW 4.84.030*. Plaintiff is not contesting the award of the \$200.00 statutory attorney fee to the Department as part of the Judgment, which makes sense because the Department was represented

at trial in superior court by the Attorney General of Washington. But, since no depositions were used, or could be used in superior court, which were not part of the record before the Board, *RCW* 4.84.010 (7) should not apply to award costs of depositions before the Board in superior court. The appeal to superior court only invokes the limited appellate jurisdiction of superior court, not general jurisdiction to hear new testimony or to take additional depositions. *Fay*, 115 Wn.2d at 197.

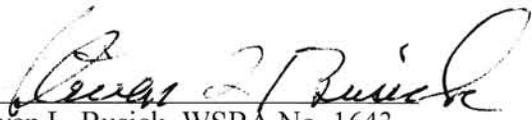
Conclusion

The trial court erred in refusing to give instruction No. 8a on pre-existing conditions becoming disabling as part of the industrial injury, and the trial court should not have imposed the costs of transcription of depositions before the Board of Industrial Insurance Appeals as costs in the superior court action. The Judgment and Order on the jury verdict dated

December 20, 2013, should be reversed and remanded to superior court for a new trial.

Dated May 7, 2014

Respectfully submitted,


Steven L. Busick, WSBA No. 1643
Attorney for Nathan M. Cooper,
Appellant/Plaintiff

INSTRUCTION NO. 8 a

If an industrial injury lights up, or makes disabling, a latent or preexisting infirmity, or weakened condition, then the resulting disability is to be attributed to the industrial injury. If the industrial injury is a proximate cause of the condition from which the worker suffers, then the previous physical or mental condition of the worker is immaterial, and the industrial injury is considered to be the legal cause of the full disability, regardless of any preexisting or congenital weakness or infirmity.

Simpson Timber Co. v. Wentworth, 96 Wn. App. 731, 740 (1999)
Dennis v. Labor & Indus., 109 Wn.2d. 467, 471 (1987)

Plaintiff

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Nathan M. Cooper,)	Court of Appeals Case No. 45793-8-II
)	Clark County Case No. 12-2-03779-9
Appellant,)	PROOF OF SERVICE
v.)	
Department of Labor and Industries,)	
)	
Respondent.)	

The undersigned states that on Thursday, the 8th day of May, 2014, I deposited in the United States Mail, with proper postage prepaid, Brief of Appellant, dated May 8, 2014, addressed as follows:

Kaylynn What, Assistant Attorney General
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800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

May 8, 2014 Vancouver, WA


STEVEN L. BUSICK