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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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**ORIGINAL**

COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

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Case No. 48256-8-II

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LIBERTY MUTUAL,  
Appellant,

v.

LISA K. JOHNSON,  
Respondent.

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Opposition to Superior Court judgment allowing medical conditions under this worker's compensation claim, remanding for reconsideration of medical benefits and time loss compensation, and rulings regarding jury instructions and the special verdict form.

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**Brief for Appellant**

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### **Assignments of Error**

The employer, Liberty Mutual, assigns error to the conclusions of the Superior Court: first, finding Ms. Johnson had thoracic outlet syndrome related to her employment with Liberty Mutual, as those findings are not supported by substantial evidence; second, directing which benefits must be provided by Liberty Mutual, as that authority remains solely with the Department of Labor and Industries (“Department”); third, failing to include a question regarding a primary issue in the special verdict form; and fourth, issuing improper and misleading jury instructions.

### **Summary of the Facts**

Ms. Lisa Johnson filed a 2009 occupational disease claim for numbness and tingling in her right pinkie finger, and pain in the elbow and upper arm.<sup>1</sup> Prior to 2009, Ms. Johnson experienced left elbow pain and underwent elbow surgery under her private insurance.<sup>2</sup> The Department allowed the occupational disease claim on June 4, 2010.<sup>3</sup> Ms. Johnson’s doctors diagnosed lateral epicondylitis, and she underwent surgery for that condition in 2010.<sup>4</sup> She continued to complain of right arm and hand

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<sup>1</sup> CABR 26, Board of Industrial Insurance Appeals (BIIA) Proposed Decision and Order.

<sup>2</sup> *Id.*

<sup>3</sup> CABR 40, BIIA Jurisdictional History.

<sup>4</sup> CABR 26, Board of Industrial Insurance Appeals (BIIA) Proposed Decision and Order.

pain/numbness, and she was eventually referred to Dr. Kaj Johansen, who diagnosed neurogenic thoracic outlet syndrome.<sup>5</sup> Ms. Johnson underwent a variety of tests with a number of physicians to identify the presence of neurogenic thoracic outlet syndrome, to include MRI studies, x-ray films, and electrodiagnostic testing.<sup>6</sup> None of these tests identified the presence of neurogenic thoracic outlet syndrome.<sup>7</sup> Regardless, she underwent thoracic outlet decompression surgery in April 2012, and Dr. Johansen performed a second such surgery in November 2013.<sup>8</sup>

Liberty Mutual referred Ms. Johnson to Board-certified specialists in neurology, orthopedic surgery, and vascular surgery.<sup>9</sup> None of these specialists diagnosed the presence of neurogenic thoracic outlet syndrome, and none related any such condition to Ms. Johnson's work with Liberty Mutual.<sup>10</sup>

### **Actions of the Lower Courts**

#### **Department of Labor and Industries:**

Ms. Johnson filed an application for benefits with the Department of Labor and Industries alleging development of right arm and hand

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<sup>5</sup> *Id.*

<sup>6</sup> Johansen Dep. 67:20-68:21, March 31, 2014.

<sup>7</sup> Johansen Dep. 68:14-23.

<sup>8</sup> CABR 26, Board of Industrial Insurance Appeals (BIIA) Proposed Decision and Order.

<sup>9</sup> Johansen Dep. 69:1-70:10.

<sup>10</sup> Johansen Dep. 71:1-12.

conditions as a result of an occupational disease developing on or around July 1, 2009.<sup>11</sup> On July 4, 2010, the Department issued an order that allowed the claim and benefits were paid.<sup>12</sup> The Department assigned claim number SE40315.<sup>13</sup>

On July 17, 2013, the Department issued an order that affirmed the December 24, 2012 order closing the claim.<sup>14</sup> The Department also denied the compensability of the alleged thoracic outlet syndrome.<sup>15</sup>

**Board of Industrial Insurance Appeals:**

On July 24, 2013, Ms. Johnson appealed the Department's July 17, 2013 order to the Board of Industrial Insurance Appeals.<sup>16</sup> The Board granted the appeal and assigned docket number 13 18648.<sup>17</sup>

On August 8, 2014, the Board issued an order affirming the Department order on appeal.<sup>18</sup> The Board held that Ms. Johnson did not develop neurogenic thoracic outlet syndrome in relation to her occupational disease, and that her conditions were fixed and stable and not in need of proper and necessary treatment as of July 17, 2013.<sup>19</sup>

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<sup>11</sup> CABR 40, BIIA Jurisdictional History.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> CABR 1, BIIA Order Denying Petition for Review.

<sup>19</sup> CABR 32, BIIA Proposed Decision and Order

**Superior Court<sup>20</sup>:**

Ms. Johnson appealed the Board decision to Pierce County Superior Court under Cause No. 14-2-12062-7. The case was tried to a twelve-person jury. The jury concluded that Johnson's work activities with Liberty did proximately cause or aggravate the condition of thoracic outlet syndrome. The Superior Court remanded the case to the Department to issue an order directing Liberty Mutual to allow the claim for thoracic outlet syndrome and pay medical expenses, time loss, and all other benefits associated with the claim. The Superior Court further awarded Ms. Johnson \$41,280.00 in attorney fees and \$953.33 in costs (\$42,233.33 total), representing the total attorney's fees attributed to the Superior Court appeal.

**Argument and Authorities**

**A. With regard to thoracic outlet syndrome, the Superior Court's judgment should be reversed for lack of substantial evidence.**

The Appellate Court is charged with reviewing superior court judgments to determine if they are supported by substantial evidence.<sup>21</sup> If the Appellate Court is convinced the judgment is wrong and there is no

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<sup>20</sup> Pierce County Superior Court Judgment, October 16, 2015.

<sup>21</sup> *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128 (1996).

evidence, if believed, which would support the verdict, the Appellate Court may substitute its judgment for that of the jury.<sup>22</sup>

**1. Ms. Johnson does not have thoracic outlet syndrome related to her 2009 claim.**

The only expert witness who testified that Ms. Johnson had thoracic outlet syndrome related to her 2009 worker's compensation claim is an outlier. His opinions are inconsistent with the majority of the medical community, his own objective findings, the mechanism of the 2009 injury, and the timing of Ms. Johnson's symptoms. Accordingly, those opinions are not substantial and the Superior Court judgment attributing Ms. Johnson's alleged thoracic outlet syndrome to the 2009 claim should be reversed.

There is controversy in the medical community with regard to the diagnosis of thoracic outlet syndrome.<sup>23</sup> All other doctors who testified in this matter believe thoracic outlet syndrome is very uncommon.<sup>24</sup> In fact, Dr. Johansen acknowledges that he is the only individual in the state of Washington to surgically manage injured workers for alleged neurogenic thoracic outlet syndrome.<sup>25</sup> In light of the thoracic outlet syndrome

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<sup>22</sup> *Raum v. City of Bellevue*, 171 Wn. App. 124, 151 (2012) *review denied* 176 Wn.2d 1024 (2013).

<sup>23</sup> Neuzil Dep. 31:13-23;35:12-36:1, May 13, 2014; Almaraz Dep. 25:24-26:18, April 23, 2014.

<sup>24</sup> *Id.*

<sup>25</sup> Johansen Dep. 57:5-16, March 31, 2014.

controversy, the Department of Labor and Industries has medical guidelines for diagnosis and/or surgical treatment for this condition in injured workers.<sup>26</sup> Those guidelines require specific electro-diagnostic findings before performing thoracic outlet surgery.<sup>27</sup> None of Ms. Johnson's electro-diagnostic studies have shown those findings.<sup>28</sup>

Despite Ms. Johansen's normal electro-diagnostic findings, Dr. Johansen diagnosed neurogenic thoracic outlet syndrome and performed two surgeries for this condition. His diagnostic criteria are based largely on subjective complaints, and he does not require corroboration by objective testing.<sup>29</sup> Thoracic outlet syndrome is a rare diagnosis, particularly when the cause is not congenital—such as in this case.<sup>30</sup> The other cause of neurogenic thoracic outlet syndrome is repetitive above-the-shoulder arm motion.<sup>31</sup> This kind of motion activates the scalene muscle, and will shorten the muscle so that it impinges on the thoracic outlet and irritates the nerve bodies.<sup>32</sup> Ms. Johnson alleges her work activities of keyboarding would cause this irritation of the nerve bodies, but such activities with her arms down do not engage the scalene muscles.<sup>33</sup> Given

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<sup>26</sup> Almaraz Dep. 35:15-25, April 23, 2014.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 31:20-32:2; Johansen Dep. 67:20-68:21, March 31, 2014.

<sup>29</sup> Johansen Dep. 88:10-92:18.

<sup>30</sup> Neuzil Dep. 20:8-11.

<sup>31</sup> *Id.* at 20:10-17.

<sup>32</sup> *Id.* at 20:18-21:3.

<sup>33</sup> *Id.* at 21:4-13.

the rarity of this diagnosis and the risk of significant morbidity, surgery on the scalene muscle should only be performed in severe cases.<sup>34</sup>

In light of Ms. Johnson's normal electrodiagnostic studies, specialists in neurology (Dr. Almaraz), general and vascular surgery (Dr. Neuzil and Dr. Kremer) determined Ms. Johnson did not have thoracic outlet syndrome and thoracic outlet surgery was not appropriate.<sup>35</sup> Further, these opinions are consistent with the onset of Ms. Johnson's symptoms. The evidence establishes that she does not have a congenital condition that would give rise to thoracic outlet syndrome.<sup>36</sup> The other cause of this condition specifically relates to trauma, and requires an actual structural injury to the clavicle or shoulder girdle.<sup>37</sup> Ms. Johnson suffered no significant trauma in her daily clerical activities.

Moreover, Ms. Johnson's work activities – keyboarding with her arms below shoulder level – are not logically the type of activities to cause thoracic outlet syndrome. It is important to consider the human anatomy when determining if Ms. Johnson's work activities were a likely cause of this condition. The thoracic outlet is the space where nerves and veins run

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<sup>34</sup> *Id.* at 24:1-10.

<sup>35</sup> Almaraz Dep. 30:1-19, April 23, 2014; Neuzil Dep. 18:3-12, May 13, 2014; Dr. Kremer Dep. 19:6-18, May 27, 2014.

<sup>36</sup> Neuzil Dep. 22:14-23:13, May 13, 2014.

<sup>37</sup> Harris Dep. 42:1-8, May 13, 2014.

from the chest to the arm.<sup>38</sup> Thoracic outlet syndrome occurs when veins in that space become compressed, or nerves are stretched.<sup>39</sup> For a traumatic incident to cause thoracic outlet syndrome, the shoulder must be impacted dramatically, with significant force. No such trauma occurred in this case.

Dr. Johansen's isolated opinion is not supported by substantial evidence, in light of the vast majority of well-reasoned expert medical opinion and the reality of the human anatomy. The Superior Court's conclusion was based entirely on Dr. Johansen's outlier opinion, and should be reversed.

**2. The two surgeries performed by Dr. Johansen were not medically reasonable and necessary.**

Even in the case of a compensable condition under the Industrial Insurance Act, medical treatment must be "proper and necessary."<sup>40</sup> Dr. Johansen performed two surgeries on Ms. Johnson based on his disputed thoracic outlet syndrome diagnosis, even without definitive and objective evidence the condition existed.<sup>41</sup> By her own report, Ms. Johnson continues to experience pain and numbness after the first and second

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<sup>38</sup> Kremer Dep. 12:14-16, May 27, 2014.

<sup>39</sup> *Id.* at 12:19-24.

<sup>40</sup> RCW 51.36.010(2)(a) reads: "Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive *proper and necessary* medical and surgical services ..." (Emphasis added).

<sup>41</sup> Johansen Dep. 67:20-68:21.

surgeries.<sup>42</sup> In fact, she testified that her same complaints returned after the first surgery.<sup>43</sup> Her current complaints include pain and numbness, which are substantially the same symptoms as described prior to her surgeries.<sup>44</sup> The two surgeries, then, failed. The treatment provided by Dr. Johansen was not proper and necessary for a condition with no definitive diagnosis. The failure of surgical treatment further illustrates this point: proper and necessary treatment was not provided by Dr. Johansen in this case.

The preponderance of the medical evidence indicates that surgery was not medically proper and necessary in this case. Dr. Almaraz, neurologist, testified that based on his review of the totality of the record, there was no clinical indication for Ms. Johnson to undergo two thoracic outlet surgeries.<sup>45</sup> In fact, Dr. Almaraz noted that such surgery would not be medically reasonable and necessary because Ms. Johnson does not have true neurogenic thoracic outlet syndrome.<sup>46</sup>

Similarly, vascular surgeon Dr. Neuzil testified that Ms. Johnson did not have a condition that would requires the kind of surgery performed

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<sup>42</sup> Johnson Hearing Test. 12:17-25; 13:12-21; 16:8-10, April 14, 2014.

<sup>43</sup> *Id.* at 13:12-21.

<sup>44</sup> *Id.* at 16:8-10.

<sup>45</sup> Almaraz Dep. 32:13-33:2.

<sup>46</sup> *Id.*

by Dr. Johansen.<sup>47</sup> Dr. Neuzil evaluated Ms. Johnson after the second surgery, and at that time she continued to complain of similar symptoms.<sup>48</sup> Dr. Kremer, also a vascular surgeon, similarly found no evidence of neurogenic thoracic outlet syndrome when he evaluated Ms. Johnson.<sup>49</sup> Dr. Kremer further testified that he did not believe, on a more probable than not basis that the surgeries performed by Dr. Johansen were medically reasonable, medically necessary, or related to Ms. Johnson's work activities.<sup>50</sup>

Thus, Dr. Johansen's opinion continues to be an outlier. The preponderance of reasoned medical opinion, as expressed by board-certified doctors, indicates that these two surgeries were not medically reasonable and necessary in this case.

**B. The Superior Court's judgment with regard to time loss compensation does not flow from the jury's verdict.**

The Court of Appeals may reverse a Superior Court judgment if the Superior Court's conclusions of law do not flow from the jury's findings.<sup>51</sup> Further, the board and the trial court considering matters not

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<sup>47</sup> Neuzil Dep. 23:3-14.

<sup>48</sup> Neuzil Dep. 36:3-17.

<sup>49</sup> Kremer Dep. 6:6-18.

<sup>50</sup> Kremer Dep. 31:21-25.

<sup>51</sup> *Young*, 81 Wn. App. at 128.

first determined by the Department would usurp the prerogatives of the agency that is vested by statute with original jurisdiction.<sup>52</sup>

Here, the portion of the Superior Court's judgment remanding the issue of Ms. Johnson's entitlement to medical expenses, time loss, and all other benefits to the Department of Labor and Industries does not flow from the jury's verdict and must be reversed.<sup>53</sup> Specifically, the Superior Court's judgment states:

It is hereby ordered, adjudged, and decreed that the July 7, 2014 order of the Board of Industrial Insurance Appeals, is hereby reversed, and the claim is remanded to the Department of Labor and Industries with instructions to issue an order that directs the Self-Insured Employer, Liberty Mutual, to allow the claim of Thoracic Outlet Syndrome and pay medical expenses, time loss, and all other benefits associated with that condition.

The Superior Court added "if any" to the end of the final sentence, at the prompting of counsel for Liberty Mutual. However, a blanket statement authorizing benefits does not flow from the jury's verdict. The jury was presented with the following question:

Was the Board of Industrial Insurance Appeals correct when it found that plaintiff's work activities with defendant did not proximately cause or aggravate Thoracic Outlet Syndrome?

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<sup>52</sup> *Lenk v. Dep't of Labor & Indus.*, 3 Wash. App. 977, 981, 478 P.2d 761, 764 (1970)

<sup>53</sup> See Judgment 2:19-20, October 16, 2015.

The jury answered “No.”<sup>54</sup> The authority to direct payment of medical benefits, time loss, and other benefits under a claim is vested with the Department, the agency with original jurisdiction in this matter. The Department has not had the opportunity to address the payment of medical benefits, time loss, and other benefits in this claim. Respectfully, the Superior Court lacks the authority to direct the extent and type of benefit without the Department first addressing those questions.

The judgment, as written by Ms. Johnson’s attorney, does not flow from the broader question before the jury concerning compensability of a particular condition. The issue of benefits, particularly which ones may be directed under this claim, is within the sole purview of the Department. The Superior Court overstepped its authority in this case, and reached a conclusion in the judgment that is beyond the scope of this appeal and does not flow from the jury finding. Liberty Mutual respectfully requests this conclusion be reversed.

**C. The Superior Court erroneously limited the Special Verdict to only one issue, when two are in dispute on appeal.**

The Superior Court incorrectly excluded from the Special Verdict a second question regarding the terminal date on which Ms. Johnson became fixed and stable. An appellate court may review a claimed special

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<sup>54</sup> Special Verdict Form, September 22, 2014.

verdict form error when the party has properly objected by stating distinctly the matter to which she objects and the grounds of the objection.<sup>55</sup> A special verdict form is sufficient if it allows the parties to argue their theories of the case, does not mislead the jury, and properly informs the jury of the law to be applied.<sup>56</sup>

The Board Decision and Order on appeal noted two distinct conclusions<sup>57</sup>:

1. Ms. Johnson did not suffer neurogenic thoracic outlet syndrome proximately caused or aggravated by her occupational disease.
2. Ms. Johnson's conditions proximately caused by her occupational disease were fixed and stable and did not need proper and necessary treatment as of July 17, 2013.

These issues are distinct because the first identifies a specific condition that was not allowed under the claim. This issue is the most-discussed aspect of this litigation. However, the second Board conclusion identified a terminal date on which the allowed conditions became fixed and stable: July 17, 2013.

In Ms. Johnson's Petition for Review, she challenges both conclusions of the Board regarding her claim.<sup>58</sup> The special verdict form

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<sup>55</sup> *Raum v. City of Bellevue*, 171 Wash. App. 124, 145, 286 P.3d 695, 706 (2012)

<sup>56</sup> *Hue v. Farmboy Spray Co.*, 127 Wash.2d 67, 92, 896 P.2d 682 (1995).

<sup>57</sup> CABR 32, BIIA Proposed Decision and Order, July 7, 2014.

<sup>58</sup> CABR 3, Claimant's Petition for Review, July 23, 2014.

selected by the Superior Court contained only one question for the jury, though<sup>59</sup>:

Was the Board of Industrial Insurance Appeals correct when it found that plaintiff's work activities with defendant did not proximately cause or aggravate Thoracic Outlet Syndrome?

This special verdict form misleads the jury about all the issues presented in this case, and did not allow the trier of fact to reach a complete determination at trial. The jury was asked to determine whether the Board reached the correct determination in all respects. The issue of whether Ms. Johnson was medically fixed and stable as of July 17, 2013 is part of that determination and the following question should have also been presented to the jury:

Was Board of Industrial Insurance Appeals correct when it found that plaintiff's claim-related conditions were fixed and stable as of July 17, 2013 and did not need proper and necessary medical treatment?

The Superior Court decision to exclude that second question in the special verdict resulted in a confusion of the issues presented in this matter and misled the jury as to the nature of all the issues on appeal. If a party is dissatisfied with a special verdict form, then that party has a duty to

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<sup>59</sup> Special Verdict Form, September 22, 2015.

propose an appropriate alternative.<sup>60</sup> Liberty Mutual's counsel objected to this omission. He presented an alternative special verdict form with this question included. The issue of medical stability regarding the allowed conditions under this claim was improperly withheld from the jury.

Even in the event the Department allows a claim as compensable, that determination does not guarantee any type of treatment recommended is also compensable. Such treatment needs to be medically reasonable and necessary as required by the statute and Washington Administrative Code. This is a complex question best suited for determination by the agency vested with authority to address such disputes: the Department of Labor and Industries.

**D. The Superior Court erroneously excluded expert witness testimony that provided a different perspective regarding the alleged conditions.**

All relevant evidence is admissible, except as otherwise provided by Washington statutes or the Washington Rules of Evidence.<sup>61</sup> One such provision states:<sup>62</sup>

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.

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<sup>60</sup> *Wickswat v. Safeco Ins. Co.*, 78 Wash. App. 958, 904 P.2d 767 (1995).

<sup>61</sup> ER 402.

<sup>62</sup> ER 403.

Appellate courts review trial court evidentiary decisions for abuse of discretion.<sup>63</sup> A discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.<sup>64</sup>

The Superior Court excluded the expert witness testimony of James Harris, M.D. on Ms. Johnson's motion. Dr. Harris, a board certified orthopedic surgeon, evaluated Ms. Johnson twice during the life of her claim. The Board of Industrial Insurance Appeals considered Dr. Harris's testimony in this matter.<sup>65</sup> In reviewing the Board's decision here, exclusion of Dr. Harris's testimony was unreasonable. The Superior Court deprived the trier of fact—the jury—of important information that had been considered by the Board judges in deciding this case. The question before the jury was whether the Board correctly decided this case. The jury could not reach that decision without fully evaluating all evidence reviewed by the Board. This exclusion of relevant and important evidence from one of the employer's witnesses was an abuse of discretion on the part of the Superior Court.

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<sup>63</sup> *State v. Dunn*, 125 Wash. App. 582, 588, 105 P.3d 1022, 1025 (2005);

<sup>64</sup> *Mayer v. Sto Indus., Inc.*, 156 Wash. 2d 677, 132 P.3d 115 (2006).

<sup>65</sup> CABR 28, BIIA Proposed Decision and Order, July 7, 2014.

Ms. Johnson's primary argument for exclusion of testimony in this matter relied on the cumulative language provided in Rule 403. However, the issue in this matter is that of an occupational disease claim. Ms. Johnson alleges her work activities as a claims adjuster, keyboarding and mousing mostly, somehow resulted in nerve impingement in the thoracic outlet and necessitated two surgeries by Dr. Johansen.

Testimony from vascular surgeons was presented to the Superior Court, as was the testimony of neurologist Lewis Almaraz, M.D. Dr. Harris, as an orthopedic surgeon, would have provided another distinct perspective of this claim. The employer disputes the compensability and existence of neurogenic thoracic outlet syndrome in this matter entirely. Dr. Harris is trained and certified to address upper extremity conditions. He evaluated Ms. Johnson twice during this claim, and at neither juncture did he diagnose thoracic outlet syndrome. Ms. Johnson's physical condition and complaints were evaluated from all possible perspectives by different specialists, including orthopedic surgeon, neurologist, and vascular surgeon. This information and testimony from an orthopedic surgeon, was necessary information for the jury to determine whether the Board reached the correct conclusion. Exclusion of Dr. Harris's testimony resulted in an incomplete record presented to the jury and was an abuse of discretion by the Superior Court.

**E. The Superior Court provided improper and misleading jury instructions.**

Appellate courts review jury instructions for errors of law de novo, considering the challenged instruction in the context of all of the jury instructions as a whole.<sup>66</sup> Jury instructions are proper if they inform the jury of the applicable law without misleading the jury and allow the parties to argue their theories of the case.<sup>67</sup> However, a jury instruction on a theory unsupported by the evidence presented is improper.<sup>68</sup>

**1. Jury Instruction No. 4 mischaracterizes the applicable law.**

Both parties submitted proposed jury instructions regarding the definition of an occupational disease. The Superior Court erroneously selected Ms. Johnson's proposed instruction, which mischaracterizes the applicable law regarding proximate cause of an occupational disease. This instruction is misleading to the jury, as it states there need not be a real connection between the specific work activities and the resulting condition.

To the contrary, there are two elements that must be met in an occupational disease claim: (1) the work activity must be a proximate or aggravating cause of the condition; and (2) it is more likely the claimed

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<sup>66</sup> *State v. Hayward*, 152 Wn.App. 632, 641–42, 217 P.3d 354 (2009).

<sup>67</sup> *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

<sup>68</sup> *State v. Jarvis*, 160 Wn.App. 111, 120, 246 P.3d 1280 (2011).

condition was caused or aggravated by the distinctive conditions of employment than would have been the case as a result of all other forms of work or non-work related activities.<sup>69</sup>

In Ms. Johnson’s instruction, the one presented to the jury, the following language is emphasized: “The conditions need not be peculiar to, nor unique to, the worker’s particular employment. The focus is upon the conditions giving rise to the occupational disease...and not upon whether the disease itself is common to that particular employment.” Out of context, this statement misconstrues the spirit of the *Dennis* case and leaves out an important qualification: the disease must still *arise out of employment*. The very next sentence in the *Dennis* decision states<sup>70</sup>:

The worker, in attempting to satisfy the “naturally” requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker’s particular employment.

The proposed instruction No. 12 from Liberty Mutual more clearly addresses the “distinctive conditions” analysis, so as to prevent any confusion on the part of the jury in applying this standard to the facts of this case. The instruction provided by the Superior Court, however,

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<sup>69</sup> *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987); see also *City of Bremerton v. Shreeve*, 55 Wash. App. 334, 777 P.2d 568 (1989).

<sup>70</sup> *Dennis*, 109 Wash.2d at 481.

misconstrues the law by emphasizing the language that the particular work activities need not be unique to the employment. What is more clearly, and accurately, noted in Liberty Mutual's instruction is the distinction that the conditions must be more likely to develop as a result of work activities as opposed to any other work or non-work activity. Without this additional clarification, the Superior Court instruction misconstrues the law and misleads the jury as to the proper standard for determining the causation of an occupational disease.

Further, the Superior Court's instruction indicated that the "claimant need not demonstrate a logical relationship between the disease and work." This grossly misstates the law, and completely disregards the proximate cause requirement. This Superior Court committed an error by not including the qualifying language defining what the term "arising" means.

**2. Jury Instruction No. 13 improperly shifts the burden of proof.**

To further confuse the burden of proof in this case, the Superior Court also instructed the jury that it must give the benefit of the doubt to the worker and disregard preexisting frailties and infirmities. While this statement may be facially accurate, the wording chosen by Ms. Johnson expresses the concept in such a way as to absolve her of her burden to

prove that her work activities were a proximate cause of her alleged conditions. The Superior Court's inclusion of this improper instruction misled the jury regarding the necessary burden of proof in an occupational disease claim.

Further, this instruction was improperly given by the Superior Court because no evidence of an aggravation of a preexisting condition was raised by Ms. Johnson in the presentation of her case. By including this instruction, the Superior Court confused the issues before the jury and provided an alternative theory for the jury to consider without proof. This instruction is wholly improper, as it presents a theory unsupported by the evidence.<sup>71</sup>

**3. Jury Instruction No. 14 mischaracterizes the mandate to liberally construe the Industrial Insurance Act.**

The Superior Court also provided an instruction regarding the remedial nature of the Industrial Insurance Act and directing the jury to give the benefit of the doubt to the worker. This also misstates the law. While it is true that the Industrial Insurance Act must be liberally construed in favor of the worker, this is only to resolve questions of law.<sup>72</sup>

The statute specifically states:

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss

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<sup>71</sup> See *State v. Jarvis*, 160 Wn.App. 111, 120, 246 P.3d 1280 (2011).

<sup>72</sup> RCW 51.12.010.

arising from injuries and/or death occurring in the course of employment.

The *facts* of a case, however, do not fall under this liberal construction edict. An injured worker is still held to a strict burden of proving every element of a case.<sup>73</sup> This instruction fails to provide that clarification and creates confusion regarding the burden of proof in this matter by stating “the benefit of the doubt belongs to the injured worker.” This oversimplifies the statutory language and fails to provide important clarification in this context. This instruction is also improper.

**4. Liberty Mutual’s Proposed Instruction No. 13 provided necessary clarification regarding the issues on appeal.**

The Superior Court erred in failing to provide the following instruction:

You are to determine whether the plaintiff was medically fixed and stable regarding any claim-related condition on or about the date that the Department of Labor and Industries closed the claim, which was July 17, 2013.

As discussed above, two issues are on appeal. This jury instruction relates directly to the second issue: that of medical fixity for the allowed conditions. This instruction should have been provided to the jury, with

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<sup>73</sup> *Clausen v. Dep’t of Labor & Indus.*, 15 Wash. 2d 62, 129 P.2d 777 (1942). (In interpretation of the compensation act, the act should be liberally construed in favor of those who come within its terms, but those claiming rights under the act should be held to strict proof of their right to receive benefits provided by the act.).

the second question on the special verdict form, to properly address all the issues raised by Ms. Johnson's appeal. Failure to provide this instruction prevented the jury from making a complete determination in this matter.

**5. Liberty Mutual's Proposed Instruction No. 14 provides guidance to the jury regarding proper and necessary medical treatment under the Act.**

Finally, the Superior Court failed to provide instruction to the jury regarding the issue of proper and necessary medical treatment. Ms. Johnson underwent two surgeries for alleged neurogenic thoracic outlet syndrome.<sup>74</sup> Dr. Johansen testified regarding the medical necessity of his surgical treatment.<sup>75</sup> Failing to give this instruction misled the jury regarding yet another nuanced and technical aspect of workers' compensation law, and deprived Liberty Mutual of the opportunity to argue the standard for proper and necessary treatment.

**Conclusion**

The Superior Court's judgment attributing thoracic outlet syndrome to this claim is incorrect and should be reversed, as should be the judgment that the case is remanded for specified benefits outside the authority of the Superior Court to dictate. Further, the determinations by the Superior Court regarding the special verdict form and certain jury

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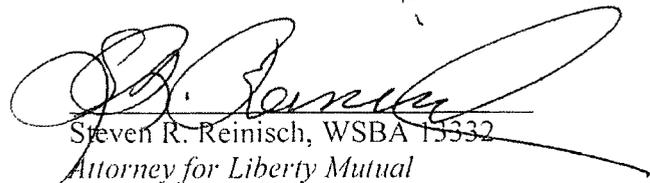
<sup>74</sup> CABR 26, Board of Industrial Insurance Appeals (BIIA) Proposed Decision and Order.

<sup>75</sup> Johansen Dep. At 53, March 31, 2014.

instructions misled the jury as to the issues on appeal and the applicable law. Liberty Mutual respectfully requests:

1. The Superior Court judgment with regard to the compensability of thoracic outlet syndrome be reversed for lack of substantial evidence;
2. The Superior Court judgment remanding the issue of enumerated benefits to the Department of Labor and Industries be reversed because it does not flow from the jury's findings;
3. The Superior Court determination to disregard the issue of medical fixity be reversed for clear error;
4. The Superior Court determination regarding the above-enumerated jury instructions be reversed as improper and misleading to the jury; and
5. This Court affirm the August 8, 2014 order of the Board of Industrial Insurance Appeals.

Respectfully submitted,



Steven R. Reinisch, WSBA 15332  
*Attorney for Liberty Mutual*

CERTIFICATE OF MAILING

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I hereby certify that I caused to be served the foregoing **Appellant's Brief** on  
the following individuals on June 14, 2016 by mailing to said individuals true copies thereof,  
certified by me as such, contained in sealed envelopes, with postage prepaid, addressed to  
said individuals at their last known addresses, to wit:

2016 JUN 15 AM 9:55  
STATE OF WASHINGTON  
BY C. DEPUTY

Mr. Matthew Johnson  
Ron Meyers & Associates, PLLC  
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Lacey, WA 98516

Ms. Anastasia R. Sandstrom  
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800 5th Avenue, Ste. 2000  
Seattle, WA 98104

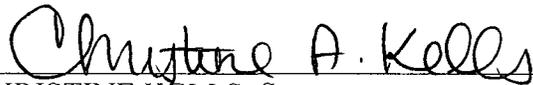
And deposited in the post office at Portland, Oregon on said date.

I further certify that I filed the original of the foregoing with:

Mr. David Ponzoha, Clerk/Administrator  
Washington State Court of Appeals – Division Two  
950 Broadway, Ste. 300  
Tacoma, WA 98402-4454

by hand delivering via messenger it on the 15th day of June, 2016.

**REINISCH WILSON WEIER, P.C.**



CHRISTINE KELLS, Secretary to  
STEVEN R. REINISCH, WSBA #13332  
of Attorneys for Employer