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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY Cm

IN THE
COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

Case No. 48256-8-II

LIBERTY MUTUAL,
Appellant,

v.

LISA K. JOHNSON
Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR AND ISSUES 1

1. Substantial evidence supports the Jury's verdict that Lisa Johnson has thoracic outlet syndrome proximately caused by her work activities. 1

2. The Superior Court did not usurp the power of the Department to determine reasonable and necessary. 1

3. The Superior Court did not err by limiting the Special Verdict Form to a single question. 1

4. The Superior Court did not err in excluding the testimony of Dr. James Harris. 1

5. The Superior Court Jury Instruction No. 4 appropriately defines the term "occupational disease." 1

6. The Superior Court Jury Instruction No. 13 does not improperly shift the burden of proof. 1

7. The Superior Court Jury Instruction No. 14 is an accurate statement of the law. 1

8. Liberty Mutual Proposed Instruction No. 13 and No. 14 were unnecessary. 1

II. SUMMARY OF THE FACTS 1

III. ARGUMENT 2

A. Standard of Review 2

B. Substantial Evidence Supports the Jury Verdict 3

C. The Superior Court did not usurp the Power of the Department to determine reasonable and necessary medical

treatment or time loss 5

D. The Superior Court did not err by limiting the Special Verdict Form to a single question 6

E. The Superior Court did not err in excluding expert testimony of Dr. James Harris 7

F. The Superior Court properly instructed the jury 9

1. Jury Instruction No. 4 appropriately defines the term occupational disease 9

2. Jury Instruction NO. 13 does not improperly shift the burden of proof 10

3. Jury Instruction No. 14 is an accurate statement of the law 11

4. Liberty Mutual Proposed Instruction Nos. 13 and 14 were unnecessary 11

IV. ATTORNEY FEE REQUEST 12

Case Law Allowing Fee for Legal Staff 12

V. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Absher Const. Co. v. Kent School Dist. No. 415
79 Wash.App. 841 (1995) 12, 13

Alfredson v. Department of Labor and Industries
5 Wn2d 648, 653, 105 P.2d 37 (1940) 4

Bruce v. Byrne-Stevens & Assoc. Eng'rs, Inc.
113 Wash.2d 123, 130, 776 P.2d 666 (1989) 7, 8

Christianson v. Munson
123 Wn.2d 234, 241 867 P.2d 626 8

Clark County v. McManus
185 Wn 2d 466, -P3d- (2016) 9, 11

Dennis v. Department of Labor and Industries
109 Wn 2d 467, 481, 745 P.2d 1295 (1987) 9, 10, 11

Department of Labor and Industries v. Kinville
35 Wn App 80, 664 P2d 1311 (1983) 10

Guijosa v. Wal-Mart Stores, Inc.
144 Wash. 2d 907, 915, 32 P.3d 250 (2001) 3

Miller v. Peterson
42 Wn.App. 822, 714 P.2d 695 (1986) 7

Mullin v. Builders Dev. & Fin. Serv., Inc.
Wash.App. 618/, 620-21, 519 P.2d 970 (1963) 8

Orion Corp. V. State
103 Wash.2d 441, 462, 693 P.2d 1369 (1985) 7, 8

Sons of Norway v. Boomer
10 Wash.App. 618, 620-21, 519 P.2d 28 (1974) 8

State v. Barnes
153 Wn 2d 378, 382, 103 P3d 1219 (2005) 9

Stiley v. Block
130 Wn 2d 486, 498, 925 P.2d 194 (1996) 9

Young v. Dept. of Labor & Indus.
81 Wn.App. 123, 128, 913 P.2d 402 (1996) 3

Vasquez v. Markin
46 Wn.App.480, 731 P.2d 510 (1986) 7

Statutes

RCW 51.12.010 11

RCW 51.52.130 12

Other Authority

CR(a)(4) 7

ER 403 8

RAP 18.1 12

I. ASSIGNMENTS OF ERROR AND ISSUES

1. Substantial evidence supports the Jury's verdict that Lisa Johnson has thoracic outlet syndrome proximately caused by her work activities.

2. The Superior Court did not usurp the power of the Department to determine reasonable and necessary.

3. The Superior Court did not err by limiting the Special Verdict Form to a single question.

4. The Superior Court did not err in excluding the testimony of Dr. James Harris.

5. The Superior Court Jury Instruction No. 4 appropriately defines the term "occupational disease."

6. The Superior Court Jury Instruction No. 13 does not improperly shift the burden of proof.

7. The Superior Court Jury Instruction No. 14 is an accurate statement of the law.

8. Liberty Mutual Proposed Instruction No. 13 and No. 14 were unnecessary.

II. SUMMARY OF THE FACTS

Lisa Johnson is employed with Liberty Mutual subsidiary, Safeco Insurance as a claims specialist 2. *CP 60.* She has a 27 year history as an employee with Safeco and prior insurance companies purchased by Safeco. *CP 91.* Ms. Johnson filed a 2009 occupational disease claim for numbness and tingling in her right pointer finger, and pain in the elbow and upper arm. *CABR 26 PDO.* The claim was allowed on June 4, 2010. *CP 57 BIIA.* She

was diagnosed with lateral epicondylitus and underwent surgery with Dr. Carleton Keck, as part of her ongoing occupational disease claim. *CP 61.* She continued to suffer from right arm and hand pain and numbness, and began treating with Dr. Johansen on March 8, 2012. *CP 61.*

The Department issued an Order on July 17, 2013 affirming the December 24, 2012 order closing the claim and denying compensability of Thoracic outlet syndrome. *CP 57.* On July 24, 2013 Ms. Johnson appealed the July 17, 2013 Order to the Board of Industrial Insurance Appeals. *Id.* The Board Affirmed the Department order finding that Liberty Mutual, the employer, was not responsible for the condition of neurogenic thoracic outlet syndrome as a result of her occupational disease, and allowed the closing of the claim. *CP 60.*

Ms. Johnson appealed the Board decision to Pierce County Superior Court under cause no. 14-2-12062-7. A twelve person jury determined the Board was incorrect when it determined Ms. Johnson's work activities did not proximately cause or aggravate thoracic outlet syndrome. *CP 633.* The employer, Liberty Mutual, filed this appeal of the jury determination.

III. ARGUMENT

A. Standard of Review

For claims under the Industrial Insurance Act, "review is limited to

examination of the record to see whether substantial evidence supports the findings made after the superior court's *de novo* review, and whether the court's conclusion of law flow from the findings." *Young v. Dept. of Labor & Indus.*, 81 Wn.App. 123, 128, 913 P.2d 402 (1996) (citations omitted).

B. Substantial Evidence Supports the Jury Verdict

"Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Guijosa v. Wal-Mart Stores, Inc.,* 144 Wash. 2d 907, 915, 32 P.3d 250 (2001).

Substantial evidence supports the jury's verdict. Dr. Kaj Johansen was Ms. Johnson's treating physician. *Johansen Dep p14 line 13.* Dr. Johansen is Board Certified in vascular surgery. *Johansen Dep p.6 line 13.* Historically, thoracic outlet syndrome has generally been managed by vascular surgeons. Vascular surgeons are the only specialists that train formally about thoracic outlet syndrome. *Johansen Dep. p.6 lines 6-11.* Dr. Johansen has been performing thoracic outlet syndrome surgeries for the last 16 years as of 2014. *Johansen Dep p.8 lines 5-6.* He is a member of a thoracic outlet specialists group. He is an author of three chapters of a text entitled "Thoracic Outlet Syndrome." *Johansen Dep. p.11-12 lines 22-25, 3-5.* Dr. Johansen testified that twenty-five percent of his 97 thoracic outlet syndrome surgeries in 2013 involved clerical workers. *Johansen Dep. p. 8*

line 20 and p.48 lines 15-16. He testified, on a more probable than not basis that, Lisa Johnson, developed neurogenic thoracic outlet syndrome as a result of workplace activities. *Johansen Dep. p.48 lines 17-23.* Finally, Dr. Johansen testified Ms. Johnson would not have been medically fixed and stable until at least one year following her second surgery in November 2013. *Johansen Dep. p. 53-54 lines 12-16, 22-25, 1-2.*

The employer did present testimony of three different doctors who all disagreed with Dr. Johansen. All three defense doctors testified they had limited experience in treating thoracic outlet syndrome. The jury heard all the medical testimony, and agreed with Dr. Johansen.

> "It is true that the testimony of many well-qualified physicians upheld the decision of the joint board. However, in cases tried to a jury, the jury determines the weight of the evidence, secured from a consideration of all the evidence introduced, and its verdict does not depend upon the number of witnesses that may testify upon a given point. *Alfredson v. Department of Labor and Industries,* 5 Wn2d 648, 653, 105 P.2d 37 (1940).

The Jury in this case, heard the conflicting expert witness testimony and made the determination that Dr. Johansen was correct. The self-insured employer should not be allowed to "win" simply because they can afford more expert witnesses than the employee. Numerical superiority is not the legal standard.

C. The Superior Court did not usurp the Power of the Department to determine reasonable and necessary medical treatment or time loss.

The jury made a determination, based on substantial evidence, Lisa Johnson developed thoracic outlet syndrome as a result of workplace activities. The Judgment entered on October 16, 2015 remands the claim back to the Department of Labor and Industries with instructions to issue an Order that directs Liberty Mutual to allow the claim for thoracic outlet syndrome. *CP 634*. The Judgment goes on to specifically state, "and pay medical expenses, time loss, and all other benefits associated with that condition, if any." *Id.*

This language leaves the decision of what treatment is reasonable and necessary and what time loss or other benefits are necessary as part of the claim, for the Department to determine. Nothing in the Judgment requires the Department to pay for medical expenses, time loss or other benefits unless or until the Department determines they are as a result of the accepted condition of thoracic outlet syndrome.

It is not surprising three defense medical experts who testified Ms. Johnson does not have thoracic outlet syndrome, also testified surgery was not reasonable and necessary. The jury determined Dr. Johansen was correct. No determination was made by the jury whether the surgeries performed by

Dr. Johansen, were sucessful or failed. Dr. Johansen, himself testified, Ms. Johnson would not be medically fixed and stable until at least November 2014. *Johansen Dep p. 53-54, lines 12-16, 22-25, 1-2.* All the testimony in this case was taken in the spring of 2014.

D. The Superior Court did not err by limiting the Special Verdict Form to a single question.

The employer's proposed second question on the Special Verdict Form was not necessary. The Board decision on appeal determined the condition of thoracic outlet sydrome was not related to work activities. Because the thoracic outlet syndrome wasn't related, the second finding, that Ms. Johnson was fixed and stable as of July 17, 2013, related only to the accepted condition of epicondolytis. The Judgment, as entered, directs the condition of thoracic outlet syndrome to be accepted. The Judgment then directs the Department to determine what medical expenses, time loss, and other benefits flow from the accepted condition.

The Judgment itself allows the Department the opportunity to decide if Ms. Johnson was truly fixed and stable or, if instead, additional benefits were appropriate given the newly accepted condition. Because the thoracic outlet syndrome had not previously been accepted, the Department had not made a determination on appropriate benefits related to that specific condition.

It is self-evident, given Dr. Johansen's testimony, if thoracic outlet syndrome is an accepted condition, Ms. Johnson was not fixed and stable on July 1, 2013. He testified that surgery was reasonable and necessary and related to her thoracic outlet syndrome caused by workplace activities. *Johansen Dep p. 53-54, lines 12-16, 22-25, 1-2.*

If anything, leaving off the proposed second question was harmless error. The jury believed Dr. Johansen that the condition of thoracic outlet syndrome was related to work activities. The jury believed Dr. Johansen over the three medical experts who testified on behalf of the employer. It makes no sense for the jury to determine the thoracic outlet syndrome is related to work but not agree she needs treatment for the condition.

E. The Superior Court did not err in excluding expert testimony of Dr. James Harris.

Court's have the authority to limit or exclude cumulative or repetitive evidence. Courts have the authority to limit the number of expert witnesses. *Vasquez v. Markin,* 46 Wn.App.480, 731 P.2d 510 (1986); *Bruce v. Byrne-Stevens & Assoc. Eng'rs, Inc.,* 113 Wash.2d 123, 130, 776 P.2d 666 (1989); *Orion Corp. V. State*, 103 Wash.2d 441, 462, 693 P.2d 1369 (1985). Similarly, a trial judge may exercise discretion to exclude cumulative or repetitive witness testimony. *See, Miller v. Peterson,* 42 Wn.App. 822, 714 P.2d 695 (1986) (citing CR 16(a)(4)).

> The admissibility and scope of expert's testimony is a matter within the court's discretion. [Citations omitted] similarly, the admissibility of cumulative evidence lies within the trial court's discretion. [*Citations omitted*] *Christianson v. Munson,* 123 Wn.2d 234, 241 867 P.2d 626 citing *Bruce v. Byren-Stevens & Assoc. Eng'rs, Inc.* At 130; *Orion Corp. v. State,* at 462, *Mullin v. Builders Dev. & Fin. Serv., Inc.,* Wash.App. 618/, 620-21, 519 P.2d 970 (1963); *Sons of Norway v. Boomer,* 10 Wash.App. 618, 620-21, 519 P.2d 28 (1974).

ER 403 addresses the exclusion of relevant evidence from trial, and states that evidence may be excluded if it would cause unfair prejudice, undue delay, waste of time, or needless presentation of cumulative evidence. ER 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially <u>outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence</u>." [*underlined emphasis added]*.

Dr. James Harris was properly excluded. Dr. Harris is an orthopedic surgeon. *See Johnson Declaration, Exhibit 2, Harris Dep., p. 5, lines 10-15*. Dr. Harris hasn't participated in a TOS surgery since his residency. *Id., p. 46, lines 11-19*. He admits this surgery is typically performed by vascular surgeons. *Id.,* p. 46, lines 1-8. Two of three remaining employer experts, and the treating surgeon testifying for Ms. Johnson, are all vascular surgeons. The exam performed by Dr. Harris was conducted on September 1, 2010. *Id., p. 10, lines 2-6*. This was before the diagnosis of TOS by Dr. Johansen and

while the only issue in the claim related to Ms. Johnson's elbow. Because his exam occurred prior to the TOS diagnosis, during the course he was not even concerned or aware of a possible TOS diagnosis. Dr. Harris does not offer anything more than cumulative expert evidence beyond the three expert witnesses, the employer did call.

F. The Superior Court properly instructed the Jury.

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. *State v. Barnes,* 153 Wn 2d 378, 382, 103 P3d 1219 (2005).

1. Jury Instruction No. 4 appropriately defines the term occupational disease.

"Generally, the trial court has the discretion whether to give a particular jury instruction." *Clark County v. McManus*, 185 Wn 2d 466, -P3d- (2016), citing *Stiley v. Block,* 130 Wn 2d 486, 498, 925 P.2d 194 (1996).

The instruction given comes directly from the Supreme Court decision in *Dennis v. Department of Labor and Industries*, 109 Wn 2d 467, 481, 745 P.2d 1295 (1987). Both parties agree, the *Dennis* decision is the appropriate authority in defining "occupational disease".

The employer's theory of the case is that thoracic outlet syndrome is caused by repetitive activity only when above the shoulder arm movement is involved. *Kremer Dep p. 20, line 10-17.* The employer's expert testified,

keyboarding and moving are not the kinds of activities that engage the scalene muscle, and thus can't be the cause of thoracic outlets syndrome. *Kremer dep p. 12, line 14-16, May 27, 2014.* Dr. Johansen testified twenty-five percent of his thoracic outlet syndrome patients are clerical workers. *Johansen Dep p.8 line 20, and p. 48, lines 15-16.*

The instruction, as given, certainly allowed the employer to argue if keyboarding does not cause thoracic outlet syndrome, then Ms. Johnson's diagnosis could not have "arisen naturally out of employment."

Ms. Johnson's expert certainly provided the evidence necessary to establish her diagnosis arose from particular work conditions.

The employer's proposed instruction attempts to move the definition back to the very definition based on *Department of Labor and Industries v. Kinville,* 35 Wn App 80, 664 P2d 1311 (1983). This holding was specifically rejected in the *Dennis* decision. "To the extent that the decision in *Kinville* suggests that a worker must show that the employment conditions causing his disease-based disability are "**peculiar to**" his employment, it is incorrect." *Dennis, at p. 479.*

2. Jury Instruction No. 13 does not improperly shift the burden of proof.

The Instruction, as given, is an accurate statement of the law as outlined in *Dennis v. Department of Labor and Industries*, 109 Wn 2d 467,

471 (1987).

The defense experts presented testimony regarding similar physical complaints of pain and tingling experienced by Ms. Johnson in 2003 in the left upper extremity. *CP [see CABR 26 PD...]*. The defense experts also opined the thoracic outlet syndrome, if it was present, and they didn't think it was, was due to a congenital condition, not work activities.

3. Jury Instruction No. 14 is an accurate statement of the law.

Jury Instruction No. 14 is an accurate summation of the statute of the law concerning the Industrial Insurance Act. It is based on RCW 51.12.10 and other Washington Supreme Court cases from *Dennis v. Department of Labor and Industries,* 142 Wn 2d 801, 16 P.3d 583 (2001). This same holding is found in the recent Supreme Court case of *Clark County v. McManus,* 185 Wn 2d 466, -P3d- (2016). The instruction specifically states the facts of the case are not to be viewed more favorably, only the law. The closing argument emphasized the injured worker gets "the benefit of the doubt" only as to the law.

The instruction did nothing to shift the burden of proof. Taking the instruction packet as a whole, the burden of proof was defined clearly, without objection by the employer, in other instructions.

4. Liberty Mutual Proposed Instruction Nos. 13 and 14 were unnecessary.

Both employer proposed instructions numbered 13 and 14 were only intended to provide guidance as to question two on the employer proposed Special Verdict Form, regarding whether Ms. Johnson medically fixed and stable as of July 17, 2013.

Because the second question on the employer proposed verdict form was not necessary, neither of these proposed instructions were necessary.

There was only one question the jury needed to answer, which was whether Ms. Johnson had thoracic outlet syndrome as a result of work place activities. Neither of proposed instructions provided the jury with any assistance answering this question.

The Judgment entered specifically left the determination of proper and necessary treatment and medical fixity to the Department to determine in light of the accepted condition of thoracic outlet syndrome. Because both instructions are unnecessary, it was proper to exclude them.

IV. ATTORNEY FEE REQUEST

Respondent, Lisa K. Johnson, pursuant to RCW 51.52.130 and RAP 18.1, respectfully requests the Court of Appeals award actual fees and costs incurred in responding to the employers appeal at both the superior court and in this Court.

Case Law Allowing Fee for Legal Staff.

Absher Const. Co. v. Kent School Dist. No. 415, 79 Wash.App. 841

(1995):

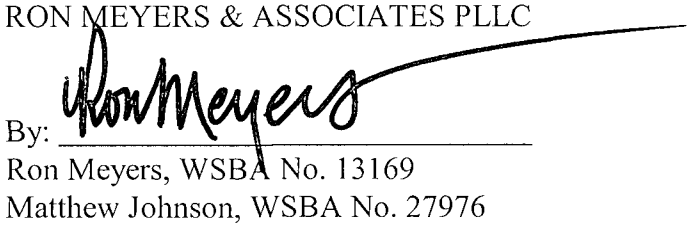
> No case in Washington specifically addresses whether the time of non-lawyer personnel may be included in an attorney fee award.
>
> We find persuasive the reasoning of the Arizona court in *Continental Townhouses East Unit One Ass'n v. Brockbank*, 152 Ariz. 537, 733 P.2d 1120, 73 A.L.R.4th 921 (1986). **Properly employed and supervised non-lawyer personnel can decrease litigation expense. Lawyers should not be forced to perform legal tasks solely so that their time may be compensable in an attorney fee award**. [emphasis added]

V. CONCLUSION

Substantial evidence supports the findings made by the jury in this matter. The Court properly used its discretion in limiting cumulative expert testimony. The Court properly instructed the jury. Respondent, Lisa K. Johnson, respectfully requests that the Court affirm the Jury Verdict. Respondent also respectfully requests her attorney fees and costs.

DATED: July 12, 2016

RON MEYERS & ASSOCIATES PLLC



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COURT OF APPEALS FOR DIVISION II
OF THE STATE OF WASHINGTON

LISA K. JOHNSON, Plaintiff, Respondent/Cross-Appellant, v. LIBERTY MUTUAL INSURANCE COMPANY, Defendant, Appellant/Cross-Respondent.	**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS:
1. Respondent's Brief; and
2. This Declaration of Service.

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