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No. 63199-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SHEILA M. WIMBERLY,

Appellant.

v.

THE DEPARTMENT OF LABOR AND INDUSTRIES,

and

KING COUNTY,

Respondents,

BRIEF OF RESPONDENT KING COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES **2**

A. INTRODUCTION **5**

B. RESPONSES TO ASSIGNMENTS OF ERROR AND ISSUES RELATING THERETO **5**

1. Reponses to Assignments of Error 5
2. Issues Relating to Assignments of Error 6

C. COUNTERSTATEMENT OF THE CASE **6**

1. Nature of the Action 6
2. Combined Statement of Facts and Procedure. 7

D. ARGUMENT **12**

1. Standard of Review for Jury Instructions and Verdict Form. 12
2. The Trial Court Submitted Questions to the Jury on Every Type of Industrial Insurance Benefit Wimberly Sought, Whether Arising From Physical or Psychiatric Conditions. 13
3. Wimberly Did Not Propose a Proper Verdict Form. 21
4. Jury Instruction Number 11 Properly Instructed the Jury on the Lighting Up Doctrine and Therefore did not Prejudice Wimberly's Case. 21
5. Instructing the Jury as to the Legal Standard of Medical Probability was not Necessary. 27
6. Wimberly Presented no Argument in Support of Her Assignment of Error Regarding "ad hominem" Attacks Against Her, Thereby Waiving that Issue 32

E. CONCLUSION **33**

TABLE OF AUTHORITIES

CASES

Adcox v. Children's Orthopedic Hosp., 123 Wn.2d 15, 35, 864 P.2d 921 (1993) 19

Anthis v. Department of Labor & Industries, 16 Wn.App. 335, 340, 555 P.2d 1009 (1976) 20

Austin v. Department of Labor & Indus., 6 Wn.App. 394, 395, 492 P.2d 1382 (1971) 24

Boeing v. Harker-Lott, 93 Wn.App. 181, 186, 968 P.2d 14 (1998) 27

Boeing v. Key, 101 Wn.App. 629, 633, 5 P.3d 16 (2000) 25

Braxton v. Rotec Indus., Inc., 30Wn.App. 221, 633 P.2d 897 (1981) 22

Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107-08, 864 P.2d. 937 (1994) 19

Capers v. Bon Marche, Div. of Allied Stores, 91 Wn.App. 138, 142, 955 P.2d 822 (1998) 12, 18

Clausen v. Dep't of Labor & Indus., 15 Wn.2d 62, 129 P.2d 777 (1942) 27

Connor v. Skagit Corp., 30 Wn. App. 725, 731, 638 P.2d 115 (1981), aff'd, 99 Wn.2d 709, 664 P.2d 1208 (1983) 22

Cyr v. Dep't. of Labor & Indus., 47 Wn.2d 92, 286 P.2d 1038 (1955) 27

Gammon v. Clark Equipment, 104 Wn.2d 613, 617, 707 P.2d 685 (1985) 22, 23

Goodman v. Boeing Co., 75 Wn.App. 60, 68, 877 P.2d 703 (1994), review granted, 125 Wn.2d 1020 (1995) 23

Herring v. Department of Social and Health Services, 81 Wn.App. 1, 15-16, 914 P.2d 67 (1996) 19

Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 916, 792 P.2d 520 (1990) 19

Keller v. City of Spokane, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002) . 12

Loushin v. ITT Rayonier, 84 Wn.App. 113, 122, 924 P.2d 953 (1996).... 29

McClelland v. ITT Rayonier, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992) 27

Micro Enhancement Intern., Inc. v. Coopers and Lybrand, LLP, 110 Wn.App. 412, 430, 40 P.3d 1206 (2002) 12

Miller v. Department of Labor & Industries, 200 Wash. 674, 682-83, 94 P.2d 764 (1939) 25

Olympia Brewing Co., v. Dep't of Labor & Indus., 34 Wn.2d 505, 208 P.2d 1181 (1941) 27

Puget Sound Bank v. Richardson, 54 Wn.App. 295, 298, 773 P.2d 429 (1989) 32

Roberts v. Goerig, 68 Wn.2d 442, 455, 413 P.2d 626 (1966) 22

Singh v. Edwards Lifesciences Corp., 151 Wn.App. 137, 150-51, 210 P.3d 337 (2009) 12

Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986) 32

State v. Henderson, 26 Wn. App. 187, 192, 611 P.2d 1365, review denied, 94 Wn.2d 1008 (1980) 19

State v. Mark, 94 Wn.2d 520, 618 P.2d 73 (1980) 22

Summerlin v. Department of Labor & Indus., 8 Wn.2d 43, 60, 111 P.2d 603 (1941) 30

Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) 22

Thompson v. King Feed & Nutrition Serv. Inc., 153 Wn.2d 447, 453, 105 P.3d 378 (2005) 17, 28

Wendt v. Department of Labor & Indus., 18 Wn.App. 674, 571 P.2d 229 (1979) 24

Windust v. Dep't of Labor & Indus., 52 Wn.2d 33, 323 P.2d 241 (1958) 27

Zipp v. Seattle School District, 36 Wn.App. 598, 606, 676 P.2d 538 (1984) 23, 24, 29

STATUTES

RCW 51.52.115 ..... 16, 17, 28

OTHER AUTHORITIES

RAP 10.3(a)(6) 33

WAC 296-20-340(1) 19

WAC 296-20-680(6) 19
WPI 155.14 (5th ed.) 17, 21

A. INTRODUCTION

The Department of Labor and Industries, the agency charged with the administration of RCW Title 51, the Industrial Insurance Act, will be referred to as the "Department." The Board of Industrial Insurance Appeals, a separate, quasi-judicial agency which hears appeals from the Department's orders, will be referred to as the "Board." The Appellant, Sheila M. Wimberly, will be referred to as "Wimberly." The Respondent, the self-insured employer, King County, will be referred to as "King County."

B. RESPONSES TO ASSIGNMENTS OF ERROR AND ISSUES RELATING THERETO

1. Reponses to Assignments of Error.

   a. The trial court correctly rendered judgment in favor of King County.

   b. The trial court correctly affirmed the Board's order dated January 9, 2007, which determined that Wimberly was not entitled to further industrial insurance benefits for either physical or psychiatric conditions.

   c. If there were "ad hominem attacks" against Wimberly, which the employer does not concede, the trial court correctly overruled Wimberly's objections to same. Further, Wimberly provided no argument in her brief regarding this assignment of error, and has therefore waived it.

   d. The trial court presented all the issues for the jury's consideration.

   e. The trial court's instructions were complete, accurate statements of the applicable law.

2. Issues Relating to Assignments of Error.

a. Was the trial court required to submit questions to the jury on every Finding of Fact made by the Board, when the jury was asked to determine whether Wimberly was entitled to each type of industrial insurance benefit she sought, arising from either a physical condition or a psychiatric condition?

b. Should the court have instructed the jury on the "lighting up" theory when there was no testimony of "lighting up," and other instructions allowed Wimberly to argue her theory?

c. Should the court instruct the jury on the necessity of testimony of "medical probability" to prove causation of her condition when no one challenges that she, as the party with the burden of proof, presented a prima facie case?

C. COUNTERSTATEMENT OF THE CASE

1. Nature of the Action.

This is an industrial insurance appeal under RCW Title 51, the Industrial Insurance Act. Upon Wimberly's appeal from the Board's denial of her Petition for Review, the King County Superior Court, following a jury trial, affirmed the decision of the Board. Wimberly appeals the Superior Court's February 10, 2009 judgment that decided the following: (1) Wimberly was not temporarily totally disabled between September 11, 2004, and June 17, 2005, within the meaning of RCW 51.32.090, CP 45; (2) as of June 17, 2005, Wimberly was not a permanently totally disabled worker within the meaning of RCW 51.32.160, CP 45; and (3) as of June 17, 2005, Wimberly had no

permanent partial disability within the meaning of RCW 51.32.080, CP 45.

2. Combined Statement of Facts and Procedure.

Wimberly filed a claim for industrial insurance benefits with a date of injury of September 27, 1995. CP 57. On April 16, 1996, the Department allowed her claim. CP 57. On June 17, 2005, the Department closed the claim with time-loss compensation ended as paid to September 10, 2004, and no award for permanent partial disability ("PPD"). CP 47. Wimberly appealed to the Board. CP 49. On October 30, 2006, Industrial Appeals Judge Carol J. Molchior issued a Proposed Decision and Order affirming the June 17, 2005 Department order. CP 35-46. Wimberly filed a Petition for Review, which the Board denied. CP 8. Wimberly appealed to the King County Superior Court. CP 1-2. Following a jury trial, the Superior Court affirmed the Board. This appeal followed.

Wimberly was treated for carpal tunnel syndrome and tendonitis in 1995 and 1996. However, as of 1997 Lawrence Holland, M.D., her attending physician, felt her condition was fixed and stable and Wimberly was capable of performing any work that did not involve frequent flexion and extension of her wrists. CP 382-83.

In 1996 and 2003, Alfred I. Blue, M.D., plastic surgeon and hand surgeon, examined Wimberly. CP 770; 774; 779. In 1996, Dr. Blue felt

that Wimberly had progressive carpal tunnel syndrome, by history related to her work. CP 778. By 2003, however, Dr. Blue found no objective evidence of tendonitis and did not feel Wimberly had active carpal tunnel syndrome at that time. CP 804. In 2003, Dr. Blue opined that he could not diagnose Wimberly with any condition that was caused by her work activities with King County in 1995. CP 806-07. Dr. Blue further stated that he did not know of any medical basis for Wimberly's work-related carpal tunnel syndrome, if she in fact had such a condition related to her 1995 work activities, to continue ten years after such employment activity ended. CP 807. To the contrary, the medical evidence of which he was aware indicated that such a repetitive stress injury should quickly dissipate in a short period of time. CP 807.

As of October 30, 2003, Dr. Blue opined that Wimberly had no ratable permanent impairment because he could find no objective basis for providing a rating. CP 807. Dr. Blue further opined that there were no objective findings on which to base work restrictions. CP 809. Dr. Blue approved two job analyses on that date. CP 809. Based on hypotheticals, Dr. Blue stated that his opinions would have been the same for the period from September 10, 2004, to June 17, 2005. CP 810-11.

As of 2005, according to Kenneth R. Tucker, M.D., plastic surgeon and hand surgeon, Wimberly had no objective evidence of organic, or

anatomical, disease. CP 618-19; 634-35. Further, at that time there was no evidence that she still suffered from tendonitis, and even if she had tendonitis in 2005 it could not have been related to work activities from nine or ten years prior. CP 635-36. Even if Wimberly's symptoms had worsened in the prior two years as she claimed, there would be no medical basis to relate such worsening to an injury that occurred more than six or seven years before. CP 637.

On November 12, 1998, Michael Friedman, D.O., psychiatrist, examined Wimberly. Based on the records he reviewed, Dr. Friedman noted that Wimberly had a history of depression prior to her industrial injury, as well as non-physiologic responses and complaints during evaluations following her industrial injury. CP 485-87. Dr. Friedman noted that Wimberly informed him that in August or September of 1995 she was taken off work for three weeks due to "feeling weird, out of sorts, and there was something wrong with [her]." CP 491. Further, he noted that prior to that three week period, Wimberly was "referred to Harborview Medical Center where she was told she should be admitted for psychiatric reasons." CP 492. To Dr. Friedman, the fact that the hospital was talking about an admission showed "there is something significant with, significantly psychiatrically wrong with this person." CP 492-93.

Dr. Friedman noted that there was a record dated September 20, 1995, indicating that Wimberly was taking the anti-depressant Zoloft. CP 497.

Dr. Friedman diagnosed Wimberly with pain disorder associated with psychological factors, a history of major depressive disorder, and a history of panic disorder with agoraphobia. CP 508. He did not, however, feel that any of these diagnoses were related to her injury or occupational disease associated with her work at King County because they are disorders that have their own developmental nature and relate to longstanding psychological problems. CP 508-09. In Dr. Friedman's opinion, Wimberly did not have any psychiatric condition caused by her work activities at King County that impacted her ability to be employed. CP 511. He further opined that she did not have any permanent mental health impairment caused by her injury or occupational disease. CP 512.

From his review of Harborview records from August of 1995, Dr. Friedman stated these showed that there was a lot more going on in Wimberly's life than just the carpal tunnel syndrome. CP 522-28. Dr. Friedman stated his opinions in this regard would have been the same in 2004 and 2005. CP 529.

While Wimberly's psychiatrist, Dr. Barnes, expressed the opinion that Wimberly had a psychiatric condition caused by her occupational disease, her records over her years of treatment show Wimberly's

overarching complaints were about her marriage. CP 444; 447; 448-49; 451-52; 453; and 456-58.

In September of 2003, Wendy Johnson, vocational rehabilitation counselor, was asked to evaluate Wimberly's ability to work. CP 580. Ms. Johnson reviewed pertinent records in Wimberly's file including her work history. CP 580-81. Based on her review Ms. Johnson performed a transferable skills analysis. CP 581. Ms. Johnson determined that Wimberly had the skills to perform the jobs of general office clerk and receptionist. CP 583. Ms. Johnson provided job analyses for these occupations to Dr. Blue, who in October of 2003 approved the job analysis for general office clerk. CP 583-85.

Ms. Johnson conducted a labor market survey in which she determined that Wimberly had the qualifications to perform the general office clerk job, possessed the specific vocational preparation for such job, the job was growing in her area, the job was one that could be performed with her restrictions against frequent wrist flexion and extension, and there were inexpensive ergonomic adjustments to minimize flexion and extension. CP 589-95. Ms. Johnson concluded that Wimberly was capable of reasonably continuous employment on a full-time basis as a general office clerk. CP 596-97.

Based on the information she reviewed, her transferable skills analysis, and her labor market survey, Ms. Johnson opined that as of September 10, 2004, and beyond, Wimberly was capable of obtaining and performing reasonably continuous gainful employment considering her industrially-related conditions, age, experience, education, and training. CP 598-99. Her opinion would have been the same as of June 17, 2005. CP 599.

Dr. Friedman, Dr. Tucker, and Dr. Blue were all of the opinion that Wimberly was capable of working. CP 529; 640; 809. Even her attending physician, Dr. Holland, felt that Wimberly could work in any job that did not involve frequent flexion and extension of her wrists. CP 382-83. In fact, Dr. Holland approved several job analyses with the caveat that Wimberly could perform them as long as they did not involve frequent wrist flexion and extension, including the job of nursery school attendant where he said she could use her splints. CP 389-90.

D. ARGUMENT

1. Standard of Review for Jury Instructions and Verdict Form.

The standard of review for jury instructions is as follows:

> The court reviews jury instructions de novo. The Washington Supreme Court summarized the standard of review for jury instructions in *Keller v. City of Spokane*: 'jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when

> read as a whole properly inform the trier of fact of the applicable law.' Even if an instruction is misleading, it will not be reversed unless prejudice is shown. But where a jury instruction correctly states the law ... 'the court's decision to give the instruction will not be disturbed absent an abuse of discretion.'

Singh v. Edwards Lifesciences Corp., 151 Wn.App. 137, 150-51, 210 P.3d 337 (2009), *citing Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002); *Micro Enhancement Intern., Inc. v. Coopers and Lybrand, LLP*, 110 Wn.App. 412, 430, 40 P.3d 1206 (2002). "Special verdict forms are reviewed under this same standard. Essentially when read as a whole, and with the general charge, the special verdict must adequately present the contested issues to the jury in an unclouded, fair manner." *Capers v. Bon Marche, Div. of Allied Stores*, 91 Wn.App. 138, 142, 955 P.2d 822 (1998).

2. <u>The Trial Court Submitted Questions to the Jury on Every Type of Industrial Insurance Benefit Wimberly Sought, Whether Arising From Physical or Psychiatric Conditions</u>.

Wimberly argues at page 11 of her "Brief of Appellant" that the trial court "excluded from consideration issues of fact related to Mrs. Wimberly's psychiatric condition..." This is flat out not true.

Both parties presented evidence regarding Wimberly's alleged psychiatric condition and whether a psychiatric condition caused Wimberly to be totally temporarily disabled, totally permanently disabled,

or to have a permanent partial psychiatric disability. The court submitted the following questions to the jury:

> We, the jury, make the following answers to the questions submitted by the court:
>
> Question No. 1.
>
> Was the Board correct in its determination that Sheila Wimberly's September 27, 1995 occupational disease did not proximately cause her to be temporarily totally disabled from September 11, 2004 through June 17, 2005?
>
> Answer: _____ (Yes or No)
>
> Question No. 2.
>
> Was the Board correct in its determination that as of June 17, 2005, Sheila Wimberly had no permanent disability proximately caused by her September 27, 1995 occupational disease?
>
> Answer: _____ (Yes or No)
>
> If your answer to Question 2 is "Yes," do not answer any further questions. If your answer is "No," proceed to Question 3.
>
> Question No. 3.
>
> Did Sheila Wimberly's occupational disease of September 27, 1995 proximately cause her to be permanently totally disabled as of June 17, 2005?
>
> Answer: _____ (Yes or No)
>
> If your answer to Question 3 is "Yes," do not answer any further questions. If your answer to Question 3 is "No," proceed to Questions 4 and 5.

Question No. 4.

What category of permanent mental health impairments most accurately describes Sheila Wimberly's level of permanent mental health impairment as of June 17, 2005, proximately caused by her September 27, 1995 occupational disease?

Answer: (Check only one category)

_____ Category 1 of permanent mental health impairments

_____ Category 2 of permanent mental health impairments

Question No. 5.

What was the extent of Sheila Wimberly's permanent partial physical disability as of June 17, 2005, proximately caused by her occupational disease of September 27, 2005?

Answer:

_____% of the amputation value of the RIGHT arm at the shoulder (choose a percentage 0 to 10%)

_____% of the amputation value of the LEFT arm at the shoulder (choose a percentage 0 to 10%)

CP 1023-24.

If the jury felt Ms. Wimberly had any condition – either physical or psychiatric or both – that caused her to be totally temporarily disabled from September 11, 2004, through June 17, 2005, the jury would have indicated in response to Question No. 1 that the Board was not correct.

If the jury felt Ms. Wimberly had a permanent disability, either total or partial, whether caused by physical or psychiatric conditions or both, they would have so indicated in their answers to questions 2 and 3.

The jury was fully apprised that Ms. Wimberly was alleging a psychiatric condition; they were presented with evidence on the issue; and they were asked to consider whether Ms. Wimberly was entitled to each type of industrial insurance benefit she sought, considering either her physical or psychiatric conditions, or both together. They determined, through their answers to the court's questions, that Wimberly was not entitled to further benefits arising out of either physical or psychiatric conditions, and their decisions are supported by substantial evidence.

The trial court did not "exclude" the issue of Wimberly's psychiatric condition from jury consideration. It is clear from the record that the issue of whether she was entitled to further benefits for a psychiatric condition was squarely before the court and the jury. Wimberly made it very clear in her trial brief that she was seeking benefits for a psychiatric condition proximately caused by her industrially related condition. CP 1055. Likewise, King County made its position clear in its trial brief that Wimberly was not entitled to benefits for a psychiatric condition. CP 1076. The Court also instructed the jury on the parties' contentions regarding Wimberly's psychiatric condition. Court's Instructions 9 and 10; CP 1037 and 1038.

The sole mandate regarding informing the jury of the findings of the Board is contained in RCW 51.52.115 which states: "...Where the

court submits a case to the jury, the court shall by instruction *advise* the jury of the exact findings of the board on each material issue before the court." (Emphasis added). Court's Instruction No. 7 did just this, including the finding of the Board regarding Wimberly's psychiatric condition. CP 1034.

RCW 51.52.115 does not mandate that the jury be asked to pass on each of the Board's findings of fact. To the contrary, the statute requires the court merely to advise the jury. The court complied to the letter.

The verdict form to be used in Industrial Insurance cases is WPI 155.14. Its "Note on Use" states:

> Use this verdict in worker compensation actions. The blank line in Question 1 should be completed by summarizing the ultimate conclusions of the Board of Industrial Appeals. The remaining interrogatories to the jury should consist of questions relating to the elements of the case, such as aggravation, increase in disability, etc.

WPI 155.14 (5th ed.).

The note, consistent with RCW 51.52.115, does not require that the jury be asked to pass on every finding of fact made by the Board. It directs that the jury be asked about the "ultimate conclusions" of the Board. In this case, the Board's ultimate conclusions were that Wimberly was not temporarily totally disabled between September 11, 2004, and June 17, 2005; that she was not permanently totally disabled as of June 17,

2005; and that she had no permanent partial disability as of June 17, 2005. CP 45. Those were the exact issues the jury was asked to consider in the court's verdict. Because they had been "advised" of the Board's findings in Instruction No. 7, had heard all the evidence (including evidence bearing on the psychiatric condition), and had been instructed on Wimberly's allegations, they did consider whether she had a psychiatric condition entitling her to further benefits, and decided against her based on substantial evidence.

According to the Court of Appeals decision in *Lewis v. Simpson Timber Co.*, 145 Wn.App. 302, 318, 189 P.3d 178 (2008), "jury instructions are sufficient when they 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." *Lewis v. Simpson Timber Co.*, 145 Wn.App. 302, 318, 189 P.3d 178 (2008) *citing Thompson v. King Feed & Nutrition Serv. Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005) (citation omitted). In this case, the instructions allowed Wimberly to argue her theory of the case, properly putting the psychiatric issue before the jury, and providing the jury with a verdict form that allowed them to consider Wimberly's entitlement to further benefits for either a physical condition, a psychiatric condition, or both. The trial court did not abuse its discretion.

Further, Instruction No. 14 instructed the jury about the categories of permanent mental health impairment. In the verdict form the jury was asked to indicate the appropriate category of permanent mental health impairment if they felt Wimberly's occupational disease led to such impairment. CP 1042. It is noteworthy that the jury did not even feel Wimberly had Category 1 impairment, which is described as "Nervousness, irritability, worry or lack of motivation following an injury and commensurate with it and/or other situational responses to injury that do not alter significantly the life adjustment of the patient may be present," and equates to a 0% disability. CP 1042; WAC 296-20-340(1); WAC 296-20-680(6) (although juries, properly, are not instructed on the dollar value of permanent partial disability awards).

The jury instructions and verdict form, when read as a whole, allowed Wimberly to argue her theory of the case. They were not misleading. They properly informed the jury of the applicable law. The trial court did not abuse its discretion in utilizing the instructions and verdict form as presented. There was no prejudice. The verdict form complied with WPI 155.14 and "adequately presented the contested issues to the jury in an unclouded, fair manner." *Capers*, 91 Wn.App. at 142. The jury therefore passed on all benefits Wimberly sought, and, based on substantial evidence, decided in favor of King County.

If, however, the Court determines in this case that the verdict should have contained a separate question to the jury asking whether Wimberly had a psychiatric condition caused by her employment, on remand that is the sole question that should be put to the jury. A jury has already determined that Wimberly is not entitled to any further industrial insurance benefits for any condition, including psychiatric conditions; the jury's determinations are based on substantial evidence, and should not be disturbed.

According to the Court of Appeals in *Herring v. Department of Social and Health Services*, 81 Wn.App. 1, 914 P.2d 67 (1996):

> The jury's role is to weigh the evidence and decide issues of fact. *State v. Henderson*, 26 Wn. App. 187, 192, 611 P.2d 1365, review denied, 94 Wn.2d 1008 (1980). An appellate court will overturn a jury verdict only if it is 'clearly unsupported by substantial evidence.' *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d. 937 (1994); *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 35, 864 P.2d 921 (1993). 'The requirement of substantial evidence necessitates that the evidence be such that it would convince 'an unprejudiced, thinking mind'. . . . The inquiry on appeal is limited to whether the evidence presented was sufficient to sustain the jury's verdict.' *Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990) (citation omitted).

Herring v. Department of Social and Health Services, 81 Wn.App. 1, 15-16, 914 P.2d 67 (1996). Further, in an industrial insurance case, the Court of Appeals held:

> On remand, the sole issue to be submitted to the jury is the extent of permanent partial disability. The question of permanent total disability was answered adversely to the claimant and should not be resubmitted to the jury, nor should the other issues contained in interrogatories Nos. 1, 2 and 3.

Anthis v. Department of Labor & Industries, 16 Wn.App. 335, 340, 555 P.2d 1009 (1976).

The jury, based on substantial evidence, answered the questions on the verdict form adversely to Wimberly. Therefore, submission of those questions to the jury a second time is not warranted nor is such action supported by authority.

3. Wimberly Did Not Propose a Proper Verdict Form.

Wimberly's proposed verdict form did not comply with WPI 155.14. She failed to propose a verdict that asked the jury to address whether the Board's decision was correct. The court's uncontested instructions 7, 8, 9 and 10 (the latter two including the parties' statements of the issues) were all framed with the approved WPI format in mind. Wimberly's failure to propose a proper verdict renders moot her arguments on the substance of the verdict questions.

4. Jury Instruction Number 11 Properly Instructed the Jury on the Lighting Up Doctrine and Therefore did not Prejudice Wimberly's Case.

Before addressing the correctness of the Court's jury instruction, King County submits that testimony exists in the record establishing that

Wimberly's mental health condition was active prior to her occupational disease, therefore a "lighting up" instruction was not appropriate. The testimony of Dr. Friedman shows that shortly before the date on which Wimberly filed her claim, she had been seen in the Harborview Emergency Room for psychiatric reasons and that she was on an anti-depressant. However, since the Court determined that such an instruction was proper, King County will address the fact that the instruction as given by the Court was sufficient to instruct the jury on the "lighting up" doctrine, and allowed Wimberly to argue her theories.

Instruction No. 11 read as follows:

> The Industrial Insurance Act provides for benefits when a disability has been proximately caused by an industrial injury. This does not involve any consideration of "fault" or "negligence" by either the employer or the worker.
>
> The term "proximate cause" means a cause which in a direct sequence produces the disability complained of and without which such disability would not have happened.
>
> There may be more than one proximate cause of a disability. For a worker to recover benefits under the Act, the industrial injury must be a proximate cause of the alleged disability but it is not required that the industrial injury was the sole proximate cause of such disability. If the industrial injury was a proximate cause of the disability, the claimant is entitled to recovery for the full disability regardless of any preexisting condition.

CP 1039.

"Although each party is entitled to have its theory of the case set forth in the jury instructions, the trial court has considerable discretion in deciding how the instructions will be worded." *Gammon v. Clark Equipment*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985). Further, it is up to the "considerable discretion" of the trial court to determine "whether more specific or clarifying instructions are necessary to guard against misleading the jury." *Id. citing Roberts v. Goerig*, 68 Wn.2d 442, 455, 413 P.2d 626 (1966). "The test for sufficiency of instructions is whether the instructions, read as a whole, allow counsel to argue their theory of the case, are not misleading, and properly inform the trier-of-fact of the applicable law." *Id. citing State v. Mark*, 94 Wn.2d 520, 618 P.2d 73 (1980); *Braxton v. Rotec Indus., Inc.*, 30Wn.App. 221, 633 P.2d 897 (1981).

In *Goodman v. Boeing Co.*, the Court of Appeals stated:

> When reviewing a challenge to jury instructions, our inquiry is whether the trial court abused its discretion by giving or refusing to give certain instructions. See *Connor v. Skagit Corp.*, 30 Wn. App. 725, 731, 638 P.2d 115 (1981), aff'd, 99 Wn.2d 709, 664 P.2d 1208 (1983)... Even if an instruction is misleading, and therefore erroneous, it will not require reversal unless prejudice is shown. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). Error is not prejudicial unless it affects or presumptively affects the outcome of the trial. *Thomas*, at 104.

Goodman v. Boeing Co., 75 Wn.App. 60, 68, 877 P.2d 703 (1994), review granted, 125 Wn.2d 1020 (1995).

In the present case, the trial court stated that Instruction No. 11 is an instruction it had utilized in other similar cases to allow the presentation of a "lighting up" argument. RP, pg. 2, l. 18 – pg. 3, l. 4. The wording of Instruction No. 11 was up to the discretion of the trial court. The Court also had the discretion to determine whether a more specific or clarifying instruction was necessary to avoid misleading the jury. *Gammon*, 104 Wn.2d at 617. To this end, the Court stated that "I didn't use the term 'quiescent' or 'lighting up', which are strange terms from the jury's point of view." RP pg. 2, ll. 17-18. From the trial court's point of view a more specific instruction regarding lighting up would have, if anything, served to confuse or possibly mislead the jury.

According to the court, part of the decision with regard to the wording of the instruction was based on the fact that "none of the witnesses have testified in terms of ['light up,' 'latent' or 'quiescent'], not once." RP pg. 4, ll. 17-21. In this sense, the present case is similar to *Zipp v. Seattle School District* where the Court found the "lighting up" doctrine could not support a jury verdict. *Zipp v. Seattle School District*, 36 Wn.App. 598, 606-607, 676 P.2d 538 (1984). The Court in *Zipp* based its conclusion on the fact that "there is no testimony that the preexisting

condition was latent or inactive, testimony that is necessary to trigger the 'lighting up doctrine' as a theory of liability." *Id.*, See *Austin v. Department of Labor & Indus.*, 6 Wn.App. 394, 395, 492 P.2d 1382 (1971).

Wimberly asserts that the Court's Instruction No. 11 failed to properly state the law established in *Wendt v. Department of Labor & Indus.*, 18 Wn.App. 674, 571 P.2d 229 (1979) and *Miller v. Department of Labor & Indus.*, 200 Wash. 674, 682, 94 P.2d 764 (1939). Brief of Appellant, pg. 24. In the present case, the Court's Instruction No. 11 did not run afoul of *Miller*. Because the Court in *Wendt* cited *Miller*, that case is discussed further.

In *Miller v. Department of Labor & Industries*, the Court stated:

> We have held in an unbroken line of decisions that, if an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not to the preexisting physical condition.
>
> ... It is a fundamental principle which most, if not all, courts accept, that, if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness; the theory upon which that principle is founded is that the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated.

Miller v. Department of Labor & Industries, 200 Wash. 674, 682-83, 94 P.2d 764 (1939) (internal citations omitted). The Court's Instruction No. 11 properly conveyed the above fundamental principle which the Court in *Miller* utilized to describe the "lighting up" theory of disability. "The court need not include specific language in a jury instruction, so long as the instructions as a whole correctly state the law." *Boeing v.* Key, 101 Wn.App. 629, 633, 5 P.3d 16 (2000). Without using the specific words requested by Wimberly, which the Court described as "strange terms from the jury's point of view", through Instruction No. 11 the Court properly stated the law and conveyed the principle behind the "lighting up doctrine" thereby allowing the jury to decide the issue.

Instruction No. 11 addressed the fact that Wimberly's occupational disease need not be the <u>sole</u> proximate cause of any condition from which she may suffer. The instruction provided that "There may be more than one proximate cause of a disability...If the industrial injury was <u>a</u> proximate cause of the disability, the claimant is entitled to recovery for the full disability regardless of any preexisting condition." CP 1039 (emphasis added). This instruction allowed Wimberly to argue her theory that the occupational disease made active or worsened her pre-existing mental health condition. Had the jury determined that Wimberly had a pre-existing mental health condition that was impacted by her

occupational disease, causing disability, it would have awarded her "recovery for the full disability" in accordance with this instruction.

As given, Instruction No. 11 allowed Wimberly to argue her theory of the case, was not misleading, and properly informed the jury as to the applicable law.

Further, in Instruction No. 9, Wimberly asserted:

> 1. Ms. Wimberly's psychiatric conditions depression and anxiety *were proximately caused, aggravated and/or lit up by her occupational exposure or disease(s).*

CP 1037. (Emphasis added). When read in conjunction with Instruction No. 11, the Court provided Wimberly the opportunity to present her theory that she was entitled to recovery for her full disability proximately caused by the industrial injury regardless of any pre-existing condition.

5. Instructing the Jury as to the Legal Standard of Medical Probability was not Necessary.

Wimberly asserts the "medical probability" standard should have been contained in a jury instruction. This standard, however, actually applies when determining whether a claimant has made a prima facie case. This standard is appropriate for determining whether a case should even go to the jury.

On appeal from the Board of Industrial Insurance Appeals, the Board's findings and decisions are considered *prima facie* correct. RCW

51.52.115. However, the hearing at Superior Court is a *de novo* review. RCW 51.52.115; *McClelland v. ITT Rayonier*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992).

In any workers' compensation appeal where the issue is a worker's entitlement to benefits, the burden of proof on the issue of entitlement is at all times with the worker. *Olympia Brewing Co., v. Dep't of Labor & Indus.*, 34 Wn.2d 505, 208 P.2d 1181 (1941), *overruled on other grounds*, *Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958); *see also*, *Cyr v. Dep't. of Labor & Indus.*, 47 Wn.2d 92, 286 P.2d 1038 (1955). In fact, regardless of which party brings the appeal, the ultimate burden of proof in cases involving a worker's claim to benefits under the Industrial Insurance Act, remains with the worker. *Olympia Brewing*, 34 Wn.2d at 505; *Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 129 P.2d 777 (1942).

Whether to give a particular jury instruction is within the trial court's discretion. *Boeing v. Harker*-Lott, 93 Wn.App. 181, 186, 968 P.2d 14 (1998). King County reiterates that "jury instructions are sufficient when they 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." *Lewis v. Simpson Timber Co.*, 145 Wn.App. 302, 318, 189 P.3d 178 (2008) *citing Thompson v. King Feed & Nutrition Serv. Inc.*, 153

Wn.2d 447, 453, 105 P.3d 378 (2005) (citation omitted). In the present case, the instructions satisfied the foregoing sufficiency requirements. As such, the jury was informed of the legal standard of medical probability.

Instruction No. 11 informed the jury that the condition complained of must have been proximately caused by the industrial injury. CP 1039. Instruction No. 15 read:

> Any determination on the extent of Sheila Wimberly's disability must be supported by medical testimony. However, you may consider all of the testimony, both lay and medical, in evaluating Sheila Wimberly's disability.

CP 1044. Instruction No. 17 read, in pertinent part:

> The extent of Sheila Wimberly's industrially related physical disability must be supported by medical testimony based at least in part upon one or more objective findings.

CP 1046. Instruction No. 8 provided:

> The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable and it is for you to determine whether it is rebutted by the evidence. The burden of proof is on Sheila Wimberly to establish by a preponderance of the evidence that the decision is incorrect.
>
> When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

CP 1036.

Wimberly asserts that the Court, through its instructions, failed to properly describe to the jury the requirement that it is more probable than not that the industrial injury or occupational disease caused the subsequent disability. Brief of Appellant, pg. 25. When taken as a whole, the above instructions properly informed the jury of the law to be applied. The instructions provided that it was Wimberly's burden of proof to establish causation, through medical testimony. Further, since Wimberly had the burden of proof for this proposition, Instruction No. 8 provided that the evidence, which includes the medical testimony, must persuade the jury that the proposition "is more probably true than not true." The instructions as a whole therefore describe the medical probability requirement, which according to case law is sufficient.

Wimberly asserts that the testimony of King County's witnesses failed to meet the probability standard, citing snippets of their testimony. The problem with Wimberly's assertion is that King County did not have the burden of proof. "To prove causation, the *claimant's* medical experts must establish that it is 'more probable than not that the industrial injury caused the subsequent disability.'" *Loushin v. ITT Rayonier*, 84 Wn.App. 113, 122, 924 P.2d 953 (1996) (emphasis added); see *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 601, 675 P.2d 538, review denied, 101

Wn.2d 1023 (1984). In the context of the burden of proof in an appeal of a Department order, the Washington State Supreme Court stated:

> By the instruction as given, the jury were informed that, in all appeals from decisions of the department of labor and industries, the decision of the department is presumed to be correct - that is, it is prima facie correct - and the burden is upon the party attacking the order to prove, by a preponderance of the evidence, that the decision of the department was wrong, and that, unless [the claimant] proved by a preponderance of the evidence that her husband died as the result of an injury, the jury's decision must be for the defendant, for the burden was not on the department to disprove [the claimant's] claim.

Summerlin v. Department of Labor & Indus., 8 Wn.2d 43, 60, 111 P.2d 603 (1941). As these cases establish, even if one accepts Wimberly's assertion that the testimony of King County's witnesses failed to reach the probability standard, it is of no consequence because the burden was on Wimberly to prove causation; not on King County to disprove her claim.

The Court instructed the jury on its role in the evaluation of witness testimony. In pertinent part, Instruction No. 1 provided:

> You are the sole judges of the credibility of the witnesses. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's

> statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 1026. With regard to the testimony of expert witnesses, Instruction No. 4 provided:

> A witness who has special training, education or experience may be allowed to express an opinion in addition to giving testimony as to facts.
>
> You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

CP 1031. Based on these instructions, and their evaluation of the witness testimony, the jury found that Wimberly failed to show that the Board was incorrect. In so doing, the jury made its determination as to what it believed was "more probably true than not true" as evidenced by the verdict it returned.

6. Wimberly Presented no Argument in Support of Her Assignment of Error Regarding "ad hominem" Attacks Against Her, Thereby Waiving that Issue.

Wimberly includes the following as her Assignment of Error 3:

> The trial court erred in overruling plaintiff's objections to ad hominem attacks against plaintiff all of which is and was irrelevant under authority of ER 401 and ER 403.

Brief of Appellant, pg. 1. However, Wimberly provides no argument or citation to legal authority within her brief in support of this assignment of error.

Rule of Appellate Procedure 10.3(a)(6) provides that the brief of an appellant should contain "the argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). The Court of Appeals held "assignments of error unsupported by argument or authority are deemed waived" and that it will not consider such assignments of error. *Puget Sound Bank v. Richardson*, 54 Wn.App. 295, 298, 773 P.2d 429 (1989) *citing Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986).

Since Wimberly failed to provide any argument or authority in support of her assignment of error, this issue is deemed waive.

E. CONCLUSION

King County respectfully submits that the King County Superior Court judgment was correct. If this Court decides, however, that a remand is appropriate, which King County does not concede, King County respectfully submits that such remand should solely address the issue whether Wimberly has a psychiatric condition proximately caused by her occupational disease. Her entitlement to any benefits flowing therefrom

has already been decided by the jury, and their verdict is supported by substantial evidence.

Respectfully submitted this 8TH day of October, 2009.

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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

SHEILA M. WIMBERLY, Appellant, v. KING COUNTY AND THE DEPARTMENT OF LABOR AND INDUSTRIES, STATE OF WASHINGTON, Respondent.	No. 63199-3-I DECLARATION OF MAILING

I, OLESYA V. KIFORISHIN, declare under penalty of perjury of the laws of the State of Washington that I caused to be filed with the Court of Appeals, Division I, **Brief of Respondent King County,** with a copy mailed as follows:

ML Daniel
Attorney at Law
Daniel Law Office
3511 SW Alaska Street
Seattle, WA 98126

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2009 OCT -9 AM 11:00

The above and foregoing is true and correct.

DATED this 8th day of October, 2009, at Tacoma, Washington.

Olesya V. Kiforishin

Olesya V. Kiforishin