

66973-7

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NO. 66973-7-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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MICHAEL T. AUSTIN and DEPARTMENT OF LABOR AND INDUSTRIES,

Appellants,

v.

PILCHUCK CONTRACTORS, INC.,

Respondent.

FILED  
COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON  
2011 NOV 14 PM 2:43




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APPELLANT'S REPLY BRIEF

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**TABLE OF CONTENTS**

A. Mr. Austin properly preserved the issue of the verdict form for appeal when he 1) submitted his own proposed verdict form which did not force the jury to consider his both of his injuries in an all-or-nothing fashion; and 2) objected to the verdict form proposed by the Plaintiff/Employer and the Department that used the compound and misleading language of the Industrial Appeals Judge. ....1

B. The Attorney General took neither a “passive” nor a “neutral” role with regard to the Department’s position during the superior court trial; her actions were prejudicial to the co-defendant, Michael Austin. ....3

**TABLE OF AUTHORITIES**

**CASES**

*Aloha Lumbar Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 466 P.2d 151  
(1970).....3, 4

*Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 864 P.2d 996 (1994). ..2

**STATUTES**

RCW 51.32.010.....2

**OTHER SOURCES**

BLACK'S LAW DICTIONARY (8<sup>th</sup> Ed. 2004).....4, 5

WPI 155.14 .....1, 2

**A. Mr. Austin properly preserved the issue of the verdict form for appeal when he 1) submitted his own proposed verdict form which did not force the jury to consider his both of his injuries in an all-or-nothing fashion; and 2) objected to the verdict form proposed by the Plaintiff/Employer and the Department that used the compound and misleading language of the Industrial Appeals Judge.**

The Department makes several misstatements in its brief, most notably that the injured worker, Michael Austin, did not preserve the issue of the jury instruction for appeal. Br. of Resp. at 19. Mr. Austin properly objected to the verdict form submitted by the Department and the Self-Insured Employer, and used by the Court. CP Sub 7, Verbatim Report of Proceedings, 11/10/40 at 6/19-25; 7/1-11. The form was too specific and misleading in that it required the jury to find Mr. Austin sustained both a lumbar sprain/strain and a left knee contusion. Both the Department and the Self-Insured Employer argue that the objection was not precise enough to preserve the issue; however, the object was to using the exact language of the Board, which was compound and contained diagnoses different than what the claimant's medical providers testified to during hearings before the Board. The injured worker, Mr. Austin, instead proposed an instruction that did not require a finding of both an injury to the knee (specifically, a left knee contusion) and an injury to the low back (specifically a low back sprain/strain). The objection was sufficient to preserve the issue on appeal.

Because the instruction misstates the law by forcing Mr. Austin to prove entitlement to workers' compensation benefits based on both injuries when he need only prove he sustained one injury, de novo is the proper standard of review. *See Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). However, even under an abuse of discretion standard, the verdict form was erroneous and prejudicial because it did not correctly state the law, it misled the jury and did not in fact allow Mr. Austin to argue his theory of the case. *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 864 P.2d 996 (1994). The law requires only that a worker sustain a physical injury requiring treatment while in the course of employment in order to have a valid claim for benefits. *See* RCW 51.32.010. Although Mr. Austin received treatment for both his low back and his left knee, he did not need to prove that both his low back and left knee were injured in order to have an allowable claim. It is sufficient if he proved an injury to his low back, or an injury to his left knee. The jury verdict form erred by misstating the law and leading the jury to believe that Mr. Austin had to prove injury to both his low back and left knee in order to have an allowable workers' compensation claim. Again, at least one juror admitted to being confused by the instructions given after the trial had concluded. CP Sub 7, Verbatim Report of Proceedings, 11/10/10 at 56/21-25; 57/1-6.

As the Department concedes, WPI 155.14 does not require an exact recitation of the Board's findings or conclusions and instead requires a summarization. Br. of Resp. at 21. By requiring a summary of the findings, it is clear that the Washington Pattern Instruction invites the parties and the Court to correct or modify the exact language used by the Industrial Appeals Judge in order to clarify the issues on appeal. *Washington Pattern Jury Instructions* Volume 6A, Fifth Ed., WPI 155.14 stating "[t]he blank line in Question 1 should be completed by summarizing the ultimate conclusions of the Board of Industrial Insurance Appeals."

Finally, the verdict form used did not allow Mr. Austin to argue his exact theory of the case. The medical testimony submitted by Mr. Austin's treating medical providers were that he suffered a low back bilateral spondylolysis and a left knee mass or chondroma, as shown on diagnostic testing, as a proximate result of his industrial injury. See CP 98. These are injuries which are much more significant than merely a sprain/strain and contusion. The verdict form asked only about a low back sprain/strain and a left knee contusion, and did not ask the jury to consider the spondylolysis and/or chondroma. Even if the jury found Mr. Austin had sustained either the spondylolysis or the chondroma, the verdict form did not allow them to consider these diagnoses or their relationship to the

industrial injury, or to convey their findings to the Court.

**B. The Attorney General did not take either a “passive” or “neutral” role with regard to the Department’s position in the superior court trial; her actions were prejudicial to the co-defendant, Michael Austin.**

The Department’s reliance on *Aloha Lumber* is misleading. In *Aloha Lumbar*, the Department had issued an order denying a claim for benefits by two workers. *Aloha Lumbar Corp. v. Dep’t of Labor & Indus.*, 77 Wn.2d 763, 764, 466 P.2d 151 (1970). The workers appealed the decision to the Board of Industrial Insurance Appeals and, after hearing the evidence, the Board reversed the Department order, allowing the claims for injuries. *Id.* The Employer of the workers appealed the Board’s decision to superior court. *Id.* The Superior Court upheld the Board decision allowing the claims (and reversing the Department Order on appeal). *Id.* at 773. During the trial, it appears that the Attorney General believed that because he did not have the right to appeal from the Board decision, he could not attack the Board’s Decision in Superior Court. *Id.* at 775. Both the Department and the Employer asked for clarification of the Attorney General’s duty on an appeal to Superior Court. *Id.* at 773-74.

Notably, the Employer in that case conceded that “since the appeals were heard by the court and not by a jury, it was not prejudiced by

the Attorney General's change of posture in the superior court." *Id.* at 775. Unlike the facts of *Aloha Lumber*, Mr. Austin's case was heard by a jury and the claimant has objected to the prejudice caused by the Attorney General's change in posture at the superior court.

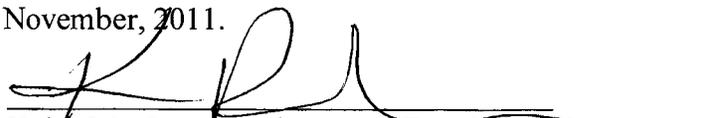
The Court's holding was that the Department remains the client of the Attorney General, even if the Department Order is reversed at the Board. *Id.* There was no question of who the Attorney General represented here because the Board upheld the Department's Order on appeal. However, the Court went on to note in dicta that there may be times the Attorney General will play only a *passive* role before the superior court. *Id.* at 776.

"Passive" means "not involving active participation." BLACK'S LAW DICTIONARY (8<sup>th</sup> Ed. 2004). The Attorney General in this case did not take a "passive" role while the case was before the Superior Court. She submitted jury instructions, crafted and proposed a jury verdict form, participated in jury selection, and gave an opening instruction. In fact, the only part of the jury trial she did not participate in was the closing argument. The Attorney General's role was quite *active* during the trial. Further, the Attorney General has never argued or described her actions during trial as "passive." She has consistently argued that her actions were "neutral."

“Neutral” means “indifferent” or “refraining from taking sides.” BLACK’S LAW DICTIONARY (8<sup>th</sup> Ed. 2004). In this case, the actions of the Attorney General were not indifferent as she had clearly aligned herself with the Plaintiff/Employer. By actively participating in the trial process, the Attorney General was influencing the outcome of the trial. By telling the jury her role was “neutral,” the Attorney General was telling the jury that the Department was not acting as a co-defendant and was no longer aligned with the injured worker. Moreover, by sitting with the Employer, the Attorney General was showing the jury that the Department was now aligned with the Plaintiff/Employer. The Department has offered absolutely no authority to support that it may take a “neutral” role during trial; however, even if such authority existed, the Department did not take a “neutral” role during the course of this trial. The Attorney General’s actions and active participation in the trial process openly contradicted the Department’s position as a named co-defendant at trial.

For these reasons, the claimant, Mr. Austin, respectfully requests that this court grant the injured worker a new trial.

Dated this 14<sup>th</sup> day of November, 2011.

  
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DECLARATION OF SERVICE OF APPELLANT'S REPLY BRIEF

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I hereby certify under penalty of perjury under the laws of the State of Washington that on November 14, 2011, I caused to be served the APPELLANT'S REPLY BRIEF on the following individuals in the manner indicated:

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Tammy Bundle