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NO. 66973-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL T. AUSTIN and DEPARTMENT OF LABOR AND INDUSTRIES,

Appellants,

v.

PILCHUCK CONTRACTORS, INC.,

Respondent.

APPELLANT'S BRIEF

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STATE OF WASHINGTON
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INTRODUCTION

This is an appeal from a Superior Court decision denying the injured worker, Michael T. Austin's, Motion for a New Trial.

ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The Superior Court erred as a matter of law in using a verdict form that did not allow the jury to consider each of Mr. Austin's injuries individually and instead forced them to decide that he had either sustained all of the injuries or none of the injuries. CP 32.
2. The Superior Court erred as a matter of law in not granting a new trial based on the confusing and prejudicial conduct of the representative for the Department of Labor and Industries, who was also a named defendant in the trial. CP 141-142.

B. Issues Pertaining to Assignments of Error

1. Whether the Superior Court erred when it submitted to the jury a verdict form that 1) was misleading in that Mr. Austin claimed two separate injuries under his claim; 2) misstated the law which would allow a jury to find that Mr. Austin had a valid claim based on only one of his injuries; and 3) resulted in prejudice to Mr. Austin? (Assignment of Error 1)

2. Whether the Superior Court erred in not granting a new trial when the Assistant Attorney General, representing a named Defendant in the trial: 1) physically aligned herself to sit with Plaintiff's counsel throughout the case; 2) refused to reposition herself at the request of Defense Counsel; 3) appeared and participated during the trial but did not make any arguments in support of the Department Order being appealed by the Plaintiff; and 4) did not ask the jury to affirm the Department Order on appeal? (Assignment of Error 2)

STATEMENT OF THE CASE

A. Procedural and Factual History

Mr. Austin filed an application for benefits on November 30, 2007. *See* CP 89-104. On December 17, 2008, the Department allowed Mr. Austin's claim for an injury occurring on or about November 29, 2007 to his low back and/or his left knee. *See* CP 89-104. The employer appealed the decision and on February 4, 2009, the Board granted the appeal. *See* CP 89-104. Evidence and testimony was presented both live before the Board hearings and by way of perpetuation deposition. *See* CP 89-104. On January 21, 2010, Industrial Appeals Judge Christopher S. Cicierski issued a Proposed Decision and Order affirming the Department Order which allowed Mr. Austin's industrial injury claim. *See* CP 89-104.

On February 22, 2010, the Employer filed a Petition for Review arguing that the claim should be rejected. *See* CP 105. The Employer's Petition for Review was denied by the Board of Industrial Insurance Appeals on March 12, 2010. CP 105. The Employer filed a timely appeal to Superior Court. CP 1-3.

Trial in this matter commenced on November 8, 2010, before the Honorable Gregory P. Canova. *See* CP 73. Trial continued for two days and consisted of reading the testimony from the Board hearings and depositions to a jury. *See* CP 73. Throughout the trial, the Department's counsel sat with Plaintiff's counsel. CP 66; 73. Jury instructions were read to the jury on Wednesday, November 10, 2010. At that time, Defendant Michael Austin objected to the verdict form. CP Sub 7, Verbatim Report of Proceedings, 11/10/10 at 6/19-25; 7/1-11. Closing arguments were heard that same day. Counsel for the Department did not make any arguments and did not ask the jury to affirm the Department Order being appealed. Counsel for Mr. Austin objected to the confusing actions of Department's counsel. CP Sub 7, Verbatim Report of Proceedings, 11/10/10 at 8/1-17. That same day, the jury deliberated and returned a verdict reversing the Board of Industrial Insurance Appeals' Decision affirming the Department Order which allowed Mr. Austin's claim for an industrial injury. When the jury was polled, at least one juror

stated that she was confused by the jury instructions they were given. CP Sub 7, Verbatim Report of Proceedings, 11/10/10 at 56/21-25; 57/1-6. Similarly, after the trial, at least one juror stated that she did not know what position the Department represented during the trial. *See* CP 87. Judgment was entered on February 2, 2011. CP 53-55.

On February 11, 2011, defendant Michael Austin filed a Motion for a New Trial. CP 56-67. Co-defendant, the Department of Labor and Industries, and Plaintiff each filed responses opposing the motion. CP 68-134. Mr. Austin filed a reply on February 24, 2011. CP 135-138. On March 7, 2011, the Court denied Mr. Austin's Motion. CP 141-142. On April 6, 2011, Mr. Austin timely filed an appeal to the Court of Appeals. CP 143.

B. Summary of Argument

A new trial is warranted in this matter and is being sought by the injured worker because of the misleading nature of the verdict form and the confusing conduct of the Department's counsel. The verdict form submitted to the jury was misleading and was not a proper statement of the law. The form asked the jury "Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Austin's conditions diagnosed as lumbar sprain/strain and left knee contusion were proximately caused by a November 29, 2007 industrial injury?" The question did not allow the

jury to consider the injury to the low back separately from the injury to the left knee. Instead, the question required the jury to find that there was an injury either to both the left knee and low back or that there was not an injury to either the low back or left knee. The Industrial Insurance Act allows a claim for benefits whenever there is a physical injury which occurs during the course of employment. There is no requirement that an injured worker suffer more than one injury or that he or she must show entitlement to benefits based on every injury alleged in her application for benefits if more than one injury is alleged.

Similarly, defendant Michael T. Austin, requests this Court remand this matter to Superior Court for a new trial because of the confusing conduct of counsel for the Department of Labor and Industries. The Department's counsel stated her intention to the Court to be a "neutral" party; however, her presence and actions during the trial were confusing and prejudicial to the co-defendant, Michael Austin. Such conduct included physically aligning herself with the employer/plaintiff's attorney throughout the trial despite being a named co-defendant; proposing jury instructions which contradicted those presented by co-defendant Mr. Austin; and failing to ask the jury to affirm the Department Order on appeal. The actions of the Department's counsel were improper and prejudicial to the injured worker and confusing and misleading to the

jurors.

ARGUMENT

A. The injured worker, Michael T. Austin, is entitled to a new trial based on the narrowly construed and unduly limiting language of the verdict form submitted to the jury.

Errors in jury instructions are reviewed de novo. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004). Jury instructions are inadequate if they prevent a party from arguing their theory of the case, mislead the jury or misstate the applicable law. *Id.* at 266 citing *Bell v. State*, 147 Wn.2d 166, 176, 52 P.2d 503 (2002). Even if an instruction is misleading, it will not be reversed unless prejudice is shown. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). To the extent that an instruction misstates the law, it is presumed to be prejudicial. *Id.*

In *Keller*, the court instructed the jury, in relevant part, that:

A city has a duty to exercise ordinary care in the signing and maintaining of its public streets to keep them in a condition that is reasonably safe for ordinary travel by persons using them in a proper manner and exercising ordinary care for their own safety.

Id. at 241.

Plaintiff Keller objected to the instruction because it seemed to predicate the City's duty to exercise ordinary care upon the drivers' duty to use the streets in a proper manner. *Id.* That is, a jury could erroneously find that the City did not have a duty of ordinary care if it also found that a

driver was negligent. Keller, the plaintiff/driver argued that the instruction was erroneous in that the jury should consider the City's negligence independent of his own negligence. *Id.*

The Court agreed with Keller that the instruction was misleading and legally erroneous. *Id.* at 251. They noted that, taken as a whole, the instruction did not allow Keller to argue his theory of the case. *Id.* The Court noted that although it is unclear whether the jury would have reached a different conclusion had it been properly instructed, prejudice was assumed because the instruction misstated the law. *Id.*

Mr. Austin's claim was allowed by the Department as simply an industrial injury, although he received treatment for both his low back and his left knee under the claim. The Board, in upholding the Department's decision, allowed the claim specifically for a lumbar sprain/strain and a left knee contusion. The verdict form submitted to jury asked:

“Was the board of Industrial Insurance Appeals correct in deciding that Mr. Austin's conditions diagnosed as lumbar sprain/strain **and** left knee contusion were proximately caused by a November 29, 2007 industrial injury?”
(Emphasis added.)

The verdict form did not allow the jury to consider the evidence presented concerning the two injuries independently from each other and instead forced them to decide the case in an all-or-nothing fashion. Similar to the erroneous and prejudicial instruction in *Keller*, the verdict

form in this case is misleading and limiting because the jury did not need to find both types of injuries in order for Mr. Austin's claim allowance to be affirmed. A claim for workers' compensation may be had for any injury that is timely filed and occurs during the course of employment. *See* RCW 51.32.010. There is no requirement in the Industrial Insurance Act that an injured worker is required to prove entitlement to benefits based on more than one injury, or upon every injury alleged in his application for benefits.

In discussing how the special verdict form should be used in a workers' compensation trial, WPI 155.14 states "[t]he blank line in Question 1 should be completed by summarizing the ultimate conclusions of the Board of Industrial Insurance Appeals." WPI 155.14 *Washington Pattern Jury Instructions* Volume 6A, Fifth Ed. (Emphasis added). The instruction does not require an exact recitation of any of the Board's conclusions. It is quite common for the parties to edit or change the exact language of the Board's Decision when preparing the verdict form so that the form better reflects the issues being appealed. CP 139-140.

Here, the verdict form should have simply asked whether the Board was correct in finding that Mr. Austin sustained an industrial injury. Alternatively, the verdict form could have asked the jury whether he sustained an industrial injury to his low back, and in a separate question,

whether he sustained an industrial injury to his left knee. By not allowing the jury to consider each injury separately, the verdict form is misleading, confusing and did not allow Mr. Austin to argue his theory of the case. As a misstatement of the law, the verdict form is presumed to be prejudicial.

B. The injured worker, Michael T. Austin, is entitled to a new trial based on the confusing and prejudicial conduct of counsel for the Department of Labor and Industries, a named defendant, during the trial.

The Court reviews an order denying a motion for a new trial under an abuse of discretion standard. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). The criterion for testing abuse of discretion in a motion for a new trial is “[h]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?” *Id.* quoting *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978). Washington law on the standard for attorney misconduct as a grounds for a new trial is scant. *Id.* at 538. However, it is accepted that a new trial should be granted when 1) the counsel’s remarks or actions were improper and 2) the remarks or actions had a prejudicial effect. *See id.* at 539.

Although the Department’s Order was being appealed by the employer and defended by the injured worker, counsel for the Department declared her intention to take a neutral position. However, during trial

preparation and throughout the trial itself, her actions were anything but neutral. The Assistant Attorney General prepared and submitted instructions on behalf of, or in contradiction to, those prepared and submitted by the injured worker, Michael T. Austin. This includes the misleading verdict form. These proposed instructions were contrary to the defense of the Department's Order. In addition, throughout portions of the trial, including closing arguments, counsel for the Department physically positioned herself to sit with the plaintiff/employer's counsel. Even after the Department's counsel was asked to change seats and sit with counsel for the injured worker, she refused. While she told the Court that the Department was taking a neutral role in the trial, her candid actions throughout the trial gave the jury an unequivocal message: the Department was aligned with the Plaintiff. In particular, her physical alignment with the plaintiff/employer throughout the trial and her refusal to ask the jury to affirm the Department Order being appealed reinforced the message to jury that the Department was not a "neutral" party. There is no way to know what effect such partisan actions had on the jury. At least one juror stated her confusion on the matter when speaking with Department's counsel after the trial had concluded. Where there is a risk of prejudice, and no way to know what value the jury placed on the improper evidence, a new trial is necessary. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673,

230 P.3d 583 (2010) quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983).

C. Mr. Austin is entitled to attorney fees under RCW 51.52.130.

RCW 51.52.130 provides that if, on appeal to an appellate court, the Decision of the Board is reversed or modified and additional relief is granted to a worker or beneficiary, then a reasonable fee for the services of the worker's attorney shall be fixed by the court. Here, Mr. Austin seeks to reverse the Superior Court Order denying a Motion for a New Trial. If successful, Mr. Austin should be entitled to an award of reasonable attorney fees for the work on the matter before this Court.

CONCLUSION

In addition, the jury form submitted to the jury did not allow the jury to find the defendant, Michael Austin, sustained only a low back injury or only a left knee injury. The question presented to the jury required them to find Mr. Austin sustained both injuries or did not sustain any injury. As such, the defendant is entitled to a new trial.

The conduct of the Department of Labor and Industries, a named defendant in this matter, was not in line with defending the Department's Order on appeal. The actions of the Department's counsel, including sitting with the plaintiff/employer's counsel throughout the trial and during closing arguments, and not asking to the jury to affirm the

Department's Order, were contrary to the Department's position as a named defendant and its stated intention to be a neutral party. Such actions revealed to the jury the Department's message and were prejudicial to the injured worker. There is no way to know how such actions influenced the jury. As such, a new trial should be granted.

Dated this 15th day of August, 2011.



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**COURT OF APPEALS, DIVISION I OF THE STATE OF
WASHINGTON**

MICHAEL T. AUSTIN and STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES,)	
Plaintiff/Petitioner,)	NO.: 66973-7
v.)	DECLARATION OF SERVICE OF APPELLANT'S BRIEF
PILCHUCK CONTRACTORS, INC.,)	
<u>Defendant/Respondent.</u>)	

I hereby certify under penalty of perjury under the laws of the State of Washington that on August 15, 2011, I caused to be served the APPELLANT'S BRIEF on the following individuals in the manner indicated:

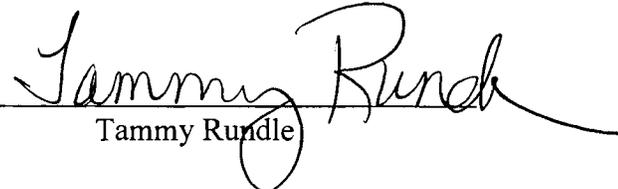
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