No. 1034881

SUPREME COURT OF THE STATE OF WASHINGTON

LISA M. AZORIT-WORTHAM, Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON and ALASKA AIRLINES, INC.,

Respondents.

ALASKA AIRLINES ANSWER TO PETITIONER'S PETITION FOR REVIEW

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I. INTRODUCTION

Alaska Airlines (Employer) provides this answer to the Petition for Review filed by Lisa Azorit-Wortham (Worker) in this court. The Worker seeks review in this Court of a decision rendered by the Court of Appeals, Division II, remanding this case for a new trial due to an improper instruction to the jury, which prejudiced the employer. The Court of Appeals correctly held that the trial court committed prejudicial error when it gave Jury Instruction No. 9, regarding the Traveling Employee Doctrine, in this occupational disease case. The bases for discretionary review by this Court are not applicable in this case. The employer requests that this Court deny review.

II. STATEMENT OF THE CASE

Ms. Azorit-Wortham (Worker) filed a workers' compensation claim with Alaska Airlines (Employer) after testing positive for COVID-19. The claim was identified as SY10090. The Department of Labor and Industries

(Department) issued an order on August 18, 2020, allowing the claim as an occupational disease. Following a protest by the employer, the Department affirmed the determination on December 2, 2020. The employer appealed allowance of the claim to the Board of Industrial Insurance Appeals (Board). Board hearings were conducted and evidence was taken. Following the presentation of evidence, the Industrial Appeals Judge issued a Proposed Decision and Order on April 4, 2022. Clerk's Papers (CP), at 43-53. Within the Proposed Decision and Order, the judge reversed the Department order and directed denial of the claim. The worker filed a Petition for Review to the Board, which was denied on May 26, 2022. CP, at 3. The worker then appealed the Board decision to Superior Court. At the close of the worker's case at trial, the employer moved for judgment as a matter of law, requesting affirmation of the Board order. Verbatim Report of Proceedings (VRP) Vol. III, at 102. This was denied and the matter submitted to the jury. The jury concluded the Board was incorrect to direct rejection of the

claim. CP, at 522-524. The employer appealed the jury verdict to the Court of Appeals, Division II. The employer raised two issues, insufficient evidence to support the verdict and an erroneous statement of the law that prejudiced the employer, which occurred when the trial court gave Jury Instruction No. 9 regarding the Traveling Employee Doctrine. The Court of Appeals agreed with the employer regarding the erroneous instruction and remanded the case for a new trial.

The following is a summary of the evidence:

Ms. Azorit-Wortham worked for Alaska Airlines as a flight attendant. CP, at 286. She testified that at the beginning of March 2020, everything was normal. However, it then got to the point where there were less passengers. *Id.* For example, the flight that she took to Boston on March 27 would hold 175 passengers and only had 17 passengers on it. *Id.* at 307.

She testified that she had a positive COVID-19 test on April 1, 2020. *Id.* at 287. Ms. Azorit-Wortham testified that at the time of the alleged exposure, she was being "super careful."

Ms. Azorit-Wortham testified that she was barely around anyone in her personal life other than going out for necessities and interacting with the people she lived with. *Id.* at 300-01. She claimed they were not even seeing their close family at that point. *Id.* at 289.

Ms. Azorit-Wortham testified regarding the multiple flights that she worked leading up to March 17. *Id.* at 296. The crew and passengers were not required to wear masks at that time. *Id.* at 299-300. She then provided her version of events regarding Flight 15 from Boston to Seattle, which arrived in Seattle on the evening of March 27. *Id.* at 289-294. She was not working the flight but was "deadheading" back to Seattle. *Id.* at 289. She sat in first class. *Id.* at 290. On the flight, food was not served by the crew and she ate what she had packed. *Id.* at 295. She was told that a pilot who was not on Flight 15, but who was on the aircraft earlier in the day, had tested positive for COVID-19. Ms. Azorit-Wortham testified that her symptoms began on the evening of March 29. *Id.* at 294.

The worker admitted that by March 16 there were about a third less passengers on each flight as compared to the first half of the month. *Id.* at 306. She also admitted she attended a baby shower with 10 to 15 people in early March. *Id.* at 309-10. She never spoke with or had contact with the pilot who had the positive test on the prior flight. *Id.* at 307. She washed her hands after using the bathroom on Flight 15 but did not recall washing after touching the coffee pot. *Id.* at 312.

Ms. Azorit-Wortham testified that she was only leaving her house for absolute necessities in March. However, her credit card statement indicated she had gone to a yogurt shop, Walmart, Costco, Mod Pizza, Fred Meyer, Trader Joe's, Safeway, and a landscape supply store. *Id.* at 320. Regarding Flight 15, she testified that the three flight attendants who were deadheading all sat in first class with only one other passenger. Ms. Azorit-Wortham sat next to her crewmate. *Id.* at 323. Her husband developed symptoms several days after she did and is

not a flight attendant. Her best friend got COVID-19 and is a stay-at-home mom. *Id.* at 328.

Rachi Wortham, the worker's husband, testified. He was working both from home and in the office at the end of March. CP, at 334. His symptoms started eight to ten days after his wife returned from Boston. He never got tested. *Id.* at 336. He is a coach and was engaging in activities helping kids in sports in the spring of 2020. He agreed that the people in his life whom he has heard of contracting COVID-19 have a number of different types of occupations. *Id.* at 340.

Dr. Boswell, a board-certified physician in occupational medicine and environmental health, testified. CP, at 350-51. He has specialty training in work exposures and occupational injuries. *Id.* at 351. He treats patients in an occupational medicine clinic and acts as an attending provider for workers. *Id.* at 353-54. He conducted an independent medical examination of the worker on July 20, 2021. *Id.* at 354. Dr. Boswell testified that the worker did contract COVID-19.

Id. at 357. She reported to him that there was a pilot who had been told that he had COVID-19 who was on a prior flight that took place before she came on the same aircraft. Ms. Azorit-Wortham reported to Dr. Boswell that she became ill within 48 hours of that flight and claimed to have long-haul symptoms. *Id.* at 357. Dr. Boswell testified that if the worker simply believed she may have touched a surface contaminated by the pilot, specifically the lavatory or galley, this history would make it very unlikely that the exposure occurred at work. *Id.* at 360-61

Dr. Boswell testified that it is highly unlikely that aerosolized COVID-19 would have still been present on the plane if the worker got on the plane an hour after the positive pilot departed. *Id.* at 361. One in six people at that time would have had some kind of exposure to COVID-19. He found it interesting that the worker would become sick so quickly following the alleged exposure. It takes about three to five days to develop COVID-19. Getting sick that quickly would also

lend further doubt to the conclusion that the pilot was the source of exposure. *Id.* at 362. Dr. Boswell discussed the unlikelihood of a person contracting COVID-19 from touching a surface. *Id.* at 362-364.

Dr. Boswell addressed the worker's treatment dated March 30, 2020. The time of the visit was 11:55 a.m. The worker's chief complaint at that time was an upper respiratory infection. *Id.* at 369-70. The note indicated that it had been 24 hours since the exposure, but the onset of symptoms was two days ago. *Id.* at 371. Therefore, the timeline of getting on the plane after the positive pilot at about 1:30 p.m. on March 27 did not line up with the timeline from the March 30 chart note. *Id.*

Dr. Boswell testified that the worker's exposure would likely have occurred three to four days prior to the start of the symptoms, which was the 28th or 29th of March. *Id.* at 372. The incubation period, meaning the period between exposure to the virus and the onset of symptoms, is 2 to 14 days, with the average being 3 to 4 days. *Id.* at 375-76. Assuming the

claimant would testify that her symptom onset was 5:00 p.m. on March 29, 2020, there is no way to say on a more-probable-than-not basis that she contracted the disease at work. *Id.* at 377-78. Dr. Boswell found it highly improbable that she contracted COVID from the flight between Boston and Seattle on March 27. *Id.* at 372.

Dr. Boswell testified that even if he were to assume that the worker contracted COVID-19 while working, it still did not arise naturally and proximately from the distinctive conditions of her employment as a flight attendant with Alaska Airlines. *Id.* at 372. People frequently contract COVID-19 outside of work or from coworkers and that would be true across all employment sectors as it is a variation of the cold and the flu. *Id.* at 372, 374. This disease is ubiquitous. It is everywhere and highly contagious. *Id.* at 380. Whether exposed in a work setting or a non-work setting, one could not say. They were equally probable. *Id.* at 387-90. Further, any employee in any job could catch the virus. *Id.* at 414.

Dr. Boswell testified that two individuals can have the same shared exposure, but one develops symptoms faster than the other. Simply because the worker's husband developed symptoms after she did does not mean that he contracted the disease after she did. *Id.* at 402-03.

The Managing Director of Station Operations Support for Alaska Airlines, Celley Buchanan, testified. Clerk's Papers (CP), at 206. She is responsible for 110-plus airport locations on areas of de-icing, charter, baggage operations, cabin cleaning, safety programs, FAA liaison, passenger remuneration, and business partner accountability and support. *Id.* She described the lavatory cleaning protocols that were in place on all "turn flights" like the one the claimant was on. *Id.* at 209-10. The lavatory protocols had not changed since the pandemic because they were already very strong. After the pandemic, there were additional cleaning adjustments, however, made throughout the rest of the cabin. *Id.* at 211, 217. She, as a part of management, was regularly involved in

cleaning aircrafts early in the pandemic. *Id.* at 215-16. She was not aware of any issues with cleaning requirements not being followed by the Boston contractor at the time of the alleged exposure. *Id.* at 212. There was a very low likelihood that there would be a surface of the bathroom that the claimant would have touched that was not cleaned between flights. As for the galley, that was wiped down as needed. *Id.*

Kaliko Howell testified. He is the in-flight supervisor for the Seattle base, managing the flight attendant team for that base. CP, at 226. He testified that the claimant was on Flight 15 from Boston on the date of the alleged exposure. It left Boston at 11:55 a.m. Boston time and arrived in Seattle at 8:32 p.m. Seattle time. *Id.* at 227. The prior flight was Flight 12 from Seattle to Boston. It arrived in Boston at 10:37 a.m. Boston time and had a different crew than Flight 15. *Id.* When Flight 15 arrived in Seattle, Mr. Howell spoke with the flight crew and the other individuals "deadheading" that flight, which included Ms. Azorit-Wortham. *Id.* at 228. He told them that

the first officer on Flight 12 had received a message that he had tested positive for COVID-19. The crew of Flight 15 and the deadhead crew traveling on Flight 15 were informed as a courtesy. They were not quarantined and were able to continue working. The worker had reported that she was concerned with contamination because she had used the lavatory. *Id.* at 228. Mr. Howell testified that he was not aware of any other crew members from Flight 12 or Flight 15, or any other person on the deadhead crew traveling on Flight 15, who contracted COVID-19 in March of 2020. No one else reported that. *Id.* at 230-31.

A vocational rehabilitation counselor, Julie Busch, testified. She has been performing job analyses and labor market surveys since 1996. CP, at 246. Based on her experience in performing job analyses for the position of flight attendant, a flight attendant's duties would not include working within 6 feet of a particular passenger for 15 minutes or more in a 24-hour period. *Id.* at 252-53. Further, it would not be

likely that any exposure the worker had deadheading would be different than any other first-class passenger. *Id.* at 255. In her opinion, there were no distinctive conditions of employment of a flight attendant as it relates to COVID-19 exposure. *Id.* at 262.

A physician's assistant, Kerry Scarvie, testified. Ms. Scarvie practices family medicine and is not a physician. CP, at 421. She treated Ms. Azorit-Wortham for her COVID-19 condition. *Id.* at 425-26. Ms. Scarvie testified that the worker was diagnosed with COVID-19 on April 1, 2020. The worker claimed she had a known exposure from an airline pilot. *Id.* at 427. Ms. Scarvie testified that based on her treatment of the worker and her review, she was able to opine on a more-probable-than-not basis that the COVID-19 exposure more likely than not occurred during the work setting. She testified this was because the claimant was clearly exposed to many people at the airports, shuttles, hotels, and the airplane. *Id.* at 429-30. Ms. Scarvie believed it was a distinctive condition of

the claimant's employment to have exposure to many people and work in a confined space without a mask. *Id.* at 430. When she learned the claimant was not actually on the same flight with the positive pilot or any known COVID-positive person, she indicated it would not change her conclusion. *Id.* at 431.

Ms. Scarvie confirmed that she did not go to medical school and works under the supervision of a medical doctor. She also agreed that the science is evolving regarding COVID-19. She agreed, for example, that there was initially a heightened concern with touching surfaces, but now that is quite unlikely. *Id.* at 434. Ms. Scarvie did not have the initial urgent care records from when the claimant first sought treatment, including the March 30 note discussed by Dr. Boswell. *Id.* at 435. She agreed that by the time of her testimony, roughly 12.6 percent of the population age five and over in the state of Washington had a reported positive test. *Id.* at 438-39. She also claimed that, based on her clinical practice, people with COVID-19 all have symptoms. However, she

would not acknowledge that typically only people with symptoms would come to her for treatment. *Id.*

Ms. Scarvie did confirm that all of her opinions offered were based on what she sees in her clinical practice. *Id.* at 440. She agreed that a person need not be a flight attendant to contract COVID-19 and that people have contracted the virus from their work activities across all spectrums of work and through non-work activities. *Id.* at 441. Ms. Scarvie also confirmed that a passenger sitting next to another passenger has a greater likelihood of contracting COVID-19 from that person than a flight attendant would. *Id.* at 443. Ms. Scarvie acknowledged that she must have missed the aspect of the claimant's testimony in which the claimant admitted that she was still out and about at grocery stores within two weeks of March 30. *Id.* at 450.

III. ARGUMENT

A Petition for Review will be accepted by the Supreme Court only if the decision of the Court of Appeals is in conflict

with a decision of the Supreme Court; if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; if a significant question of law under the Constitution is involved; or if the Petition involves an issue of substantial public interest that should be determined by the Supreme Court. Rules of Appellate Procedure (RAP) 13.4. None of these scenarios apply to this present case.

In this present case, the employer took exception at trial to the giving of Jury Instruction No. 9, which instructed the jury on the Traveling Employee Doctrine, because the doctrine only applies in the industrial injury context. VRP Vol. III, at 108; *See also*, CP, at 512. No decision from this Court or the Court of Appeals has applied this doctrine to an occupational disease claim. It cannot be logically applied in the occupational disease context without changing the occupational disease definition. When applied to an injury claim, the Traveling Employee Doctrine expands to scope of what a worker can be doing while still being considered "within the course and scope of

employment" when their injury occurs. It does not change the definition of what an injury is. When applied to an occupational disease claim, the Traveling Employee Doctrine changes the well-established definition of an occupational disease. Jury Instruction No. 9, Traveling Employee Doctrine, and Jury Instruction No. 14, the definition of an occupational disease, were both given at trial and are inconsistent with each other. Of note, Instruction No. 9 is not a pattern jury instruction. Instruction No. 14 is a pattern jury instruction defining occupational disease. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 155.30 (7th ed).

The Court of Appeals reviews jury instructions for errors of law *de novo*. An instruction's erroneous statement of the applicable law is reversible error only where it prejudices a party. *Hue v. Farmboy Spray Co.*, 127 Wash.2d 67, 92, 896 P.2d 682 (1995). Error is prejudicial if it affects or presumptively affects the outcome of the trial. *Goodman v. Boeing Co.*, 877 P.2d 703, 75 Wn.App. 60, 68, (Wash. App. 1994).

An occupational disease is one that arises naturally and proximately out of the distinctive conditions of employment. Revised Code of Washington (RCW) 51.08.140. The causal connection between the claimant's physical condition and employment must be established by competent medical testimony which shows that the disease is probably, not possibly, caused by employment. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987). The particular work conditions also must, more probably than not, cause the disease than conditions in everyday life or all employments in general. *Potter v. Dep't of Labor & Indus.*, 172 Wn.App. 301, 315, 289 P.3d 777 (Div. I, 2012) (Quoting *Dennis*, 109 Wn.2d at 481). The worker must establish the occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of her particular employment. The focus is upon conditions giving rise to the occupational disease. *Witherspoon v. Department of Labor and Industries,* 866 P.2d 78, 72 Wn.App. 847, 850

(Wash. App. 1994). A disease is proximately caused by employment conditions when the disease would not have been contracted but for the condition existing in the employment. *City of Bellevue v. Raum*, 171 Wn.App. 124, 141, 286 P.3d 695 (Div. I, 2012). Application of the Traveling Employee Doctrine dismantles and overshadows these well-established definitional elements.

The worker argues that review should be granted because the decision of the Court of Appeals conflicts with "several" prior Supreme Court and Court of Appeals decisions. Petitioner's Petition for Review (PFR), at 1. It is interesting, however, that she also notes this is a case of first impression. This contradicts her hyperbolic, and frankly inaccurate, statement regarding conflict with "several" prior decisions. *See*, PFR, at 12. This is not a persuasive basis to grant review.

The statutes and case law demonstrate that instructing the jury on the Traveling Employee Doctrine in an occupational disease case was an error of law. If applied to an occupational

disease, which has not occurred in the past, the doctrine would change the definition of occupational disease. The Traveling Employee Doctrine clarifies the scope of employment in the context of an industrial injury. *See, Ball-Foster Glass Cont. Co. v. Giovanelli*, 177 P.3d 692, 163 Wn.2d 133 (Wash. 2008). The worker has argued in her petition that the Court of Appeals decision in this case conflicts with *Giovanelli*. However, that argument is misplaced. In *Giovanelli*, the Court indicated: "Consistent with our decisions recognizing exceptions to the coming and going rule, we now recognize that traveling employees are entitled to expanded coverage for travel-related *injuries*." *Id.* at 697 (emphasis added). The existing case law regarding this doctrine is entirely limited to industrial injury cases. *See, e.g., Knight v. Dep't of Labor and Indus.*, 321 P.3d 1275, 181 Wash. App. 788 (Wash. App. 2014); *See also, Westinghouse Elec. Corp. v. Dep't of Labor and Indus.*, 621 P.2d 147, 94 Wn.2d 875 (Wash. 1980).

The rationale of *Giovanelli* does not apply equally to an occupational disease claim, as the worker argues. *See*, PFR, at 16. Rather, the *Giovanelli* Court compared the Traveling Employee Doctrine to an exception to the coming and going rule for expanded coverage. In *Giovanelli,* there was no debate over whether the worker sustained an injury. The only question was whether they were located in a place where their injury would be covered. In this present case, the question is whether the worker even sustained an occupational disease in the first place. It is a separate analysis than what was done by the Court in *Giovanelli.*

Since the worker cannot point to any Washington case demonstrating a conflict, she points to a case from New York and one from Washington, DC. *See*, PFR, at 15. However, even those cases do not support her position. It must be emphasized that neither the employer, nor the Court of Appeals in its published decision, took the position that a worker cannot ever have a compensable occupational disease claim while traveling for work. However, they must be able to prove the elements of

the definition of an occupational disease. The Traveling Employee Doctrine, when applied to an occupational disease, changes the definition of occupational disease. Whereas, when applied to an injury, the definition of an injury is not changed.

The worker also argues that the Court of Appeals decision is inconsistent with RCW 51.16.040 and RCW 51.32.180. PFR, at 13. RCW 51.16.040 states, "The compensation and benefits provided for occupational diseases shall be paid and in the same manner as compensation and benefits for injuries under this title." This statute addresses the manner of payment for compensation. Similarly, RCW 51.32.180 essentially states that if one has an occupational disease, they should be entitled to the same benefits that one would be entitled to if they have an industrial injury. As a part of this argument, the worker claims that the Court of Appeals decision creates a "two-tiered system." *See*, PFR, at 26. However, the worker ignores the fact that both statutes assume that the worker has an occupational disease. Once it is established that the worker has an occupational

disease, the worker is entitled to the same type of benefits that a worker would receive if they suffered an industrial injury. The question presented to the jury in this case precedes that analysis.

The question at trial in this present case was whether the worker even sustained an occupational disease in the first place. These statutes cited by the worker do not stand for the idea that the definitions of injury and occupational disease are interchangeable or that legal doctrines that apply to the definition of one all apply to the other. If they did, the separate statutory definitions of injury and occupational disease and the enormous body of case law interpreting the definition of occupational disease would be rendered meaningless.

In discussing *Dennis*, it should be noted that the worker actually makes the employer's point. *See,* PFR, at 20. She states that under the Traveling Employee Doctrine, the fact that the worker contracted a disease while traveling would in many cases automatically satisfy the "arising naturally" prong of the occupational disease standard. That runs afoul with the

definition of an occupational disease and makes compensability "automatic" without the need to prove the actual elements of the definition. The occupational disease definition indicates that a disease does not arise naturally out of employment if it is caused by conditions of everyday life or all employments in general. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 155.30 (7th ed) ("This instruction is drawn from the...statute defining the term 'occupational disease' and *Dennis v. Department of Labor & Industries*, 109 WN.2d 467, 745 P.2d 1295 (1987) which interprets the statute.") Application of the Traveling Employee Doctrine to the definition of occupational disease means a disease contracted while traveling is automatically compensable and there is no analysis about whether it was caused by conditions of everyday life or all employments in general. As the Court of Appeals pointed out in this case, there is no requirement that an industrial injury arise out of employment. The worker simply has to be in the scope and course of employment when any injury occurs. Therefore, defining that

scope with the Traveling Employee Doctrine is particularly crucial and applicable to an injury case. *See*, PFR, Appendix A, at 10. In contrast, the "scope" of an occupational disease is already defined by the requirement that the disease arise naturally and proximately out of the distinctive conditions of employment.

Additionally, the Court of Appeals decision does not leave workers "unprotected by workers' compensation when they are required to travel for work" as the worker has argued. *See*, PFR, at 13. If a worker is injured while traveling for their job, there is coverage if the scope of employment rules apply. If the worker can show that they sustained an occupational disease that arose naturally and proximately out of the distinctive conditions of employment while traveling, they are covered for an occupational disease. In her Petition the worker engages in hyperbolic arguments to try to make the point that review should be granted because this is an issue of substantial public interest. However, these arguments should also not be persuasive. The

Court of Appeals decision does not in any way, shape, or form leave workers unprotected from workers' compensation coverage while traveling for work. It simply enforces the longstanding definition of an occupational disease. If the Court of Appeals decision left workers without coverage when traveling, the case would not have been remanded for a new trial. The Court would have simply held that the claim must be denied because she was traveling, which it did not do.

Respectfully, the Memorandum of Amici Curiae filed by the Washington State Labor Council, Teamsters 117 & the Association of Flight Attendants is not at all consistent with the issue that was actually addressed by the Court of Appeals in this matter. Their framing of the issue completely misses the mark on the issue in this case. The Memorandum of Amici Curiae frames the issue as whether workers who are traveling for work are excluded from workers' compensation coverage if they contract an infectious disease while traveling. That is not the issue decided by the Court of Appeals and is not the issue

presented to this Court. Workers who travel are covered for an occupational disease if their condition arose naturally and proximately from the distinctive conditions of employment. In other words, they are covered if the facts meet the longstanding and well-established definition of occupational disease. The Traveling Employee Doctrine changes the well-established definition of occupational disease and makes coverage automatic without requiring the worker to establish the elements of the definition. Again, if the Court of Appeals held in this case that a traveling worker could never be covered under workers' compensation, the outcome would have been denial of the claim in favor of the employer. In fact, the employer raised an insufficient evidence argument to the Court of Appeals, which provided the Court an opportunity to order denial of the claim. But, the Court did not do that. The Court remanded the case for a new trial to exclude the confusing and inaccurate Traveling Employee Instruction that changed the definition of an occupational disease.

Finally, the Court of Appeals decision does not run afoul with the liberal construction rule, as the worker argues. *See*, PFR, at 27. That rule indicates that The Act is to be liberally construed in favor of the worker when there are doubts. First, this case does not involve a disputed interpretation of a statute. Second, the claimant's argument that the longstanding and robust case law regarding the definition of an occupational disease should be obliterated by the Traveling Employee Doctrine is not a reasonable interpretation.

In terms of prejudice, instructing the jury on this doctrine in the context of an occupational disease case likely led to confusion and prejudice against the employer because the doctrine trumped the occupational disease definition. When the evidence supporting denial of this claim as an occupational disease is that the disease is everywhere, ubiquitous, and not arising naturally and proximately from distinctive conditions of employment, the erroneously applied Traveling Employee Doctrine tells the jury to use a broader scope. The erroneous

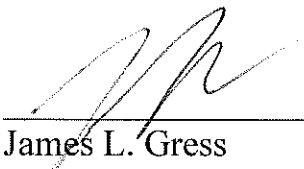
instruction went to the very heart of the only issue at trial and rendered claim allowance nearly automatic. The Court of Appeals was correct to reverse and remand this case for a new trial. Review by this Court should be denied.

IV. CONCLUSION

Based on the arguments set forth above, the employer asks this Court to deny review.

Counsel certifies that this document contains 4992 words and consists of 29 pages.

Respectfully Submitted,



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VI. APPENDIX

Revised Code of Washington 51.08.140:

"Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

Revised Code of Washington 51.16.040 – Occupational Diseases

The compensation and benefits provided for occupational diseases shall be paid and in the same manner as compensation and benefits for injuries under this title.

Revised Code of Washington 51.32.180 – Occupational diseases – Limitation

Every worker who suffers disability from an occupational disease in the course of employment under the mandatory or elective adoption provisions of this title, or his or her family and dependents in case of death of the worker from such disease or infection, shall receive the same compensation benefits and medical, surgical and hospital care and treatment as would be paid and provided for a worker injured or killed in employment under this title, except as follows: (a) [(1)] This section and RCW **51.16.040** shall not apply where the last exposure to the hazards of the disease or infection occurred prior to January 1, 1937; and (b) [(2)] for claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim.

Jury Instruction Number 9:

A traveling employee is subject to workers' compensation coverage throughout the duration of the business trip, including during travel, hotel stays and meals at restaurants. Any occupational disease occurring during such business travel is covered by the Washington State Industrial Insurance Act.

Jury instruction Number 14: (Washington Pattern Civil Jury Instruction 155.30):

An occupational disease is a disease or infection that arises naturally and proximately out of the worker's employment. A disease arises naturally out of employment if the disease comes about as a matter of course as a natural consequence of distinctive conditions of the worker's employment. It is not necessary that the conditions be peculiar to, or unique to, the particular employment. A disease does not arise naturally out of employment if it is caused by conditions of everyday life or of all employments in general. A disease arises proximately out of employment if the conditions of the workers' employment proximately caused or aggravated the worker's disease.

GRESS, CLARK, YOUNG & SCHOEPPER

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