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NO. 1038984

SUPREME COURT OF THE STATE OF WASHINGTON

LYUBOV ANDRYUSHINA,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**ANSWER TO PETITION FOR REVIEW
DEPARTMENT OF LABOR AND INDUSTRIES**

NICHOLAS W. BROWN
Attorney General

Anastasia Sandstrom
Senior Counsel
WSBA No. 24163
Office Id. No. 91018
800 Fifth Ave., Ste. 2000
Seattle, WA 98104
206-464-6993

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I. INTRODUCTION

This case involves a routine examination of a workers' compensation jury instruction, with no issue warranting review. Lyubov Andryushina was injured in August 2018, but she did not file an industrial injury claim until after the statute of limitations ran. Because of this, she filed an occupational disease claim related to her physical condition at the time of her industrial injury and after. The Department of Labor and Industries denied the occupational disease claim in part because her symptoms were from the industrial injury, not a new occupational disease. Andryushina appealed and later objected to a jury instruction regarding the Board of Industrial Insurance Appeals' findings about the August 2018 injury.

RCW 51.52.115 mandates the superior court to instruct a jury about the Board's material findings when a party appeals a Board decision to superior court. Andryushina argues that the jury should not have been told of Finding No. 1, which said Andryushina sustained a shoulder injury while working on

August 15, 2018, and Finding No. 2, which stated that she did not file a timely claim of benefits for that injury. Andryushina states no basis for review under the Rules of Appellate Procedure. And there is no legal error because the instruction was proper: it informed the jury as to the state of Andryushina's shoulder at the time of her occupational disease claim and avoided jury confusion by clarifying why the claim could not be accepted as an industrial injury. And it allowed both parties to argue their theory of the case: Andryushina could argue she had an occupational disease based on an aggravation of the injury, and the Department could argue her claim could not be allowed as an occupational disease because her condition was entirely due to her injury and not the product of an occupational disease. This Court should deny review.

II. STATEMENT OF THE ISSUE

Did the superior court properly instruct the jury on the Board's findings of fact when RCW 51.52.115 directs a trial

court to inform the jury “of the exact findings of the board on each material issue before the court”?

III. STATEMENT OF THE CASE

A. Background on Industrial Insurance Law

A worker who is injured at work or sustains an occupational disease may file a claim for industrial insurance benefits. RCW 51.28.020. An industrial injury claim is based on “a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.” RCW 51.08.100. So an injury claim is based on a specific event on a specific date, which immediately or promptly produces medical conditions. *See id.*

Conversely, an occupational disease “means such disease or infection as arises naturally and proximately out of employment.” RCW 51.08.140. So occupational disease claims arise from a series of events or exposures over the course of a worker’s employment, not from a single, traumatic event. *See*

Rothwell v. Nine Mile Falls Sch. Dist., 149 Wn. App. 771, 779-82, 206 P.3d 347 (2009) (holding that a condition arising out of “a series of incidents over a period of a few days” is not an industrial injury).

A worker has one year from the date of an industrial injury to file a claim for that injury. RCW 51.28.050. And a worker has two years after a physician notifies the worker of an occupational disease to file a claim for that occupational disease. RCW 51.28.055(1).

B. Andryushina Was Injured at Work on August 15, 2018

Andryushina worked as a spinner for Pendleton Woolen Mills starting in 1998. AR 63-64. As a spinner, Andryushina operated six machines, called frames, which spun wool into thread. AR 64-65. While Andryushina was working on August 15, 2018, she fell to her knees between two frames and twisted her right arm. AR 65-66.

Andryushina got back up and continued working. AR 66. Within a couple hours, she began to feel that “something really

did happen,” and she reported her injury to a supervisor. AR 66.

In the days that followed, Andryushina continued to work light duty even though her shoulder was painful. AR 66-67.

Andryushina had an existing appointment to see her primary care physician, Dr. Nelya Pavlenko, on August 20, 2018. AR 87. Dr. Pavlenko was most concerned about Andryushina’s high blood pressure, but encouraged Andryushina to rest her shoulder and use a heating pad. AR 87. Andryushina took three weeks off from work and then returned to work. AR 89, 118.

From September 10, 2018, Andryushina continued to work, occasionally taking sick leave. AR 71. Her right arm continued to be painful. AR 72.

C. Medical Professionals Disagreed on Whether Andryushina Had an Occupational Disease

In May 2020, Andryushina saw Harold Lee, MD, for her shoulder condition. AR 111, 115. At that time, the Pendleton mill was closed due to the spread of COVID-19, and

Andryushina had not worked since March 19, 2020. AR 122-23.

Dr. Lee believed that Andryushina had a frozen shoulder, also known as adhesive capsulitis, which he believed originated with an aggravation of the August 15, 2018 injury. AR 120, 137-38, 156-57. He also testified that her shoulder condition was an occupational disease that arose naturally and proximately out of her employment. AR 137-38.

Two independent medical examination providers examined Andryushina. The doctors disagreed with Dr. Lee, concluding that the distinctive conditions of Andryushina's employment did not cause an occupational disease and that Andryushina's work after September 10, 2018, did not aggravate her shoulder injury. AR 194, 229-31.

D. The Department Found No Occupational Disease, and the Board Affirmed

Andryushina applied for workers' compensation benefits on October 18, 2019, over a year after the August 15, 2018 injury. *See* AR 54. The Department rejected the injury claim

because it was not filed within a year of the industrial injury.

AR 54; RCW 51.28.050. It also found that Andryushina's condition was not an occupational disease under RCW 51.08.140. AR 54.

Andryushina appealed the denial of the claim to the Board. AR 52. Andryushina did not contest the denial under an industrial injury theory, but rather argued solely that her condition was an occupational disease. AR 52. The Board concluded that Andryushina's shoulder condition was not an occupational disease. AR 31. The Board found that Andryushina injured her shoulder on August 15, 2018, but she never filed a claim relating to that industrial injury. *See* AR 31. The Board determined that Andryushina's ongoing symptoms were caused by the injury and not by any further aggravation caused by her work. AR 30.

E. The Superior Court Instructed the Jury on the Board's Findings, the Jury Agreed with the Department, and the Court of Appeals Affirmed

Andryushina appealed the Board's decision to the superior court. CP 1. The superior court gave an instruction to the jury, Instruction No. 3, regarding the Board's findings. CP 51.

The Board made six findings of fact. AR 30-31. RCW 51.52.115 requires the superior court to instruct the jury of the Board's findings. Jury Instruction No. 3 informed the jury of the Board's findings numbered 2 through 6; it omitted reference to the Board's first finding of fact, as that finding was purely procedural and irrelevant to the merits of the case. *See* CP 51. To avoid confusion, Instruction No. 3 renumbered the Board's five remaining findings as follows:

1. On August 15, 2018, Lyubov Andryushina injured her right shoulder and arm during the course of her employment when she lost her balance while reaching for a loose handrail and fell between the metal frames onto her knees while twisting her right arm and shoulder.

2. Lyubov Andryushina did not file an application for benefits within a year of her right shoulder injury on August 15, 2018.

3. Lyubov Andryushina worked as a spinner at a woolen mill for approximately 17 years before August 15, 2018. Her job consisted of monitoring machines that made wool line or thread to be made into fabric.

4. During the course of a workday, Lyubov Andryushina would lift spools of line weighing 35 to 40 pounds off a holder, which involved reaching above her shoulders. These spool changes occurred between 20 to 40 times in a shift on average and were distinctive conditions of her employment.

5. Lyubov Andryushina's right shoulder condition and/or right shoulder adhesive capsulitis did not arise naturally and proximately out of the distinctive conditions of her employment.

CP 51. Andryushina argued that Findings Nos. 1 and 2 in Instruction No. 3 were not material findings to the Board's decision, and she offered her own version of Instruction No. 3, which excluded Findings Nos. 1 and 2. CP 2-4, 31.

The superior court found the Department's proposed instruction to be appropriate. The superior court thought the jury would be confused without the inclusion of Findings Nos.

1 and 2 because of the testimony relating to industrial injury and occupational disease. Am. RP (Vol I.) 5, 7. And the superior court found that *Gaines v. Dep't. of Lab. & Indus.*, 1 Wn. App. 547, 463 P.2d 269 (1969), was distinguishable: the *Gaines* Court excluded a Board finding about the witness's credibility, whereas the findings at issue in Andryushina's case were "not that kind of finding of fact." Am. RP (Vol I.) 7.

The superior court used the Department's version of Instruction No. 3, which included Findings Nos. 1 through 5 and the instruction that "By informing you of these findings the court does not intend to express any opinion on the correctness or incorrectness of the Board's findings." CP 51.

After hearing the same testimony that was presented at the Board, the jury returned its verdict affirming the Board's decision. CP 66.

The Court of Appeals affirmed the verdict in an unpublished opinion. *Andryushina v. Dep't. of Lab. & Indus.* No. 87074-2-1, slip op. at 6 (Wash. Ct. App. Jan. 27, 2025)

(unpublished). The Court of Appeals held that the findings of fact were not impermissibly argumentative or harmful to Andryushina's credibility, so they were not to be excluded under *Gaines* or *Stratton v. Dep't. of Lab. & Indus.*, 7 Wn. App. 652, 501 P.2d 1072 (1972), cases upon which Andryushina relied. *Andryushina*, slip op. at 5. The court further held that the findings were material because they were the basis for the decision by the Board that Andryushina did not sustain an occupational disease. *Id.* The court concluded that the superior court properly instructed the jury about the findings. *Id.* at 5-6.

IV. ARGUMENT

The superior court properly instructed the jury about the Board's findings as required by RCW 51.52.115. Andryushina has stated no reason for this Court's review under the Rules of Appellate Procedure, and no such reason exists. *See* RAP 13.4(b). Andryushina argues that the Board's Findings Nos. 1 and 2 should not have been instructed to the jury because they involved an industrial injury, not an occupational disease. Pet.

2, 20. But the injury was a key event in the evidence that that the jury had to consider, and it would have confused the jury to not instruct them about it. Without the instruction, the jury might have believed that it could find for Andryushina based on the injury, even though it is undisputed that she did not file a timely claim for an industrial injury. As the Court of Appeals correctly determined, the superior court properly instructed the jury about the Board's findings, and this Court's review is not warranted.

A. Review Is Not Warranted Because RCW 51.52.115 Requires the Jury to Be Instructed on the Board's Material Findings

Under the plain language of RCW 51.52.115, when a decision of the Board has been appealed to superior court, and the case is tried before a jury, the court shall "advise the jury of the exact findings of the board on each material issue before the court." The sole issue is whether Findings Nos. 1 and 2 relate to material issues in Andryushina's case. Pet. 19-20. Andryushina argues that the findings about the industrial injury were

subordinate findings that were argumentative in nature and therefore should not have been offered to the jury. Pet. 19-20.

Subordinate findings that are argumentative and go to the claimant's credibility should not be submitted to the jury.

Gaines, 1 Wn. App. at 548, 551-52 (rejecting instruction as attacking the claimant's credibility where the finding stated that the claimant had "purposely misrepresented his physical condition, his physical limitations, and the extent of his pain, to such an extent as to discredit his subjective complaints, except as the same were born out by objective findings of the doctors"); *see also Stratton*, 7 Wn. App. at 654 (rejecting instruction as attacking the claimant's credibility where the finding stated that "[a]ssociated with this psychiatric disorder is a demonstrated lack of motivation in the claimant to seek out and maintain gainful employment, coupled with a strong tendency and desire to realize a monetary gain from his injury").

Unlike the findings at issue in *Gaines* and *Stratton*, and contrary to Andryushina's characterization, *see* Pet. 18, nothing about Findings Nos. 1 or 2 was an attack on Andryushina's credibility. Instead, they objectively stated findings of fact on material issues to the case without any shading: namely, that Andryushina injured her right shoulder and arm on August 15, 2018, and that she did not file a claim within one year of that injury. CP 51. Both findings related to material issues before the court. Specifically, they related to whether Andryushina's symptoms were caused by the claimed occupational disease or whether they were caused by the previous injury, and if the symptoms were caused by the injury, whether the claim was timely. Therefore, as the Court of Appeals concluded, the superior court correctly instructed the jury on these findings, and this Court's review is not warranted.

B. Review Is Not Warranted Because the Instructions Allowed Each Party to Argue Their Theory of the Case

Andryushina argues that the question of whether there was an industrial injury had nothing to do with her claim that she had an occupational disease. Pet. 20. She is incorrect. The jury instructions, as given, allowed each party to argue their theory of the case.

After Andryushina failed to timely file a claim relating to her industrial injury, she sought coverage of the same symptoms and conditions by labeling them as an occupational disease. This was the Department's theory of the case:

Andryushina's claim could not be properly allowed as an occupational disease claim because her condition was entirely due to her injury and was not the product of an occupational disease. Explaining that there was not a timely industrial injury claim would inform the jury that they could not find for Andryushina on any claim arising from an asserted industrial

injury. It prevented the jury from making an error of law based on an incorrect understanding of the issues.

Conversely, under Andryushina's theory of the case, the industrial injury to her shoulder in August 2018 created a pre-existing condition. Her theory was that continuing to work after September 2018 aggravated that condition, which made her situation appropriate for acceptance as an occupational disease claim. She was able to argue this theory from the jury instructions. CP 59. Jury Instruction No. 11 instructed the jury that if, at the time of the occupational disease, Andryushina had a symptomatic condition that was made worse by the occupational disease, she may be eligible for treatment. CP 59.

Besides allowing both parties to argue their theories of the case, Instruction No. 3 assisted the jury by preventing confusion. Upon hearing testimony that Andryushina had an injury on August 15, 2018, the jury would understandably wonder why Andryushina could not simply receive benefits for her injury. Finding No. 2 provided context for this, and helped

explain why the focus was on whether Andryushina sustained an occupational disease as result of her employment. *See* CP 51.

V. CONCLUSION

The Department asks that this Court deny review.

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RESPECTFULLY SUBMITTED this 28th day of March, 2025.

NICHOLAS W. BROWN
Attorney General



ANASTASIA SANDSTROM
Senior Counsel
WSBA No. 24163
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

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DECLARATION OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, they caused to be served the Answer to Petition for Review Department of Labor and Industries and this Certificate of Service in the below described manner:

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Sarah R. Pendleton, Supreme Court Clerk
Supreme Court of the State of Washington

E-Mail via Washington State Appellate Courts Portal:

Steven L. Busick

sbusick@busicklaw.com
ashleys@busicklaw.com

DATED this 28th day of March, 2025.



HALCY VALERIO

Paralegal

Office of the Attorney General

800 Fifth Avenue, Suite 2000

Seattle, WA 98104-3188

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

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