Case #: 1038984

NO. 87074-2-I

COURT OF APPEALS,
DIVISION I

OF THE STATE OF WASHINGTON

LYUBOV ANDRYUSHINA, *PETITIONER*

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *RESPONDENT*

PETITION FOR REVIEW TO THE SUPREME COURT OF WASHINGTON

By Steven L. Busick, WSBA #1643
Law Office of Steven L. Busick, PLLC
PO Box 1385
Vancouver, WA 98666
Ph. (360)696-0228
Attorney for Petitioner

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A. IDENTITY OF PETITIONER

Lyubov Andryushina seeks review in the Supreme Court of the State of Washington of the Court of Appeals decision terminating review in part B.

B. COURT OF APPEALS DECISION

The unpublished opinion of the Court of Appeals, Division I, dated January 27, 2025, affirming a decision of the Superior Court of Clark County. A copy of the Unpublished Opinion is attached as Appendix A, pages 1 through 6.

C. ISSUES PRESENTED FOR REVIEW

Did the trial court error in giving the Department of Labor and Industries proposed Instruction No. 3 to the jury, copy attached as Appendix B, as opposed to Ms. Andryushina's proposed Instruction No. 3, attached as Appendix C.

The difference between the two instructions is that the Department included findings at the Board of Industrial Insurance Appeals as Findings 1 and 2 related to a prior work injury of Ms. Andryushina, which was not at issue in the case . The only issue before the Board and the trial court was whether Ms. Andryushina experienced an occupational disease arising naturally and proximately from the distinctive conditions at her employment after she returned to work pursuant to RCW 51.08.140 under the Industrial Insurance Act, Title 51.

D. STATEMENT OF THE CASE

Lyubov Andryushina is an immigrant from Russia who testified through an interpreter at the Board of Industrial Insurance Appeals. She had been working as a spinner for Pendleton Woolen Mills in Washougal, Washington, since 1998. She worked with large machines that spin wool into thread to make clothing and blankets. She had a stroke the previous year,

and was working light duty with assistance.

Then on August 15, 2018, she was stepping up onto the platform of one of her wool machines, called frames. The handrail to the machine was loose, she fell between two frames to her knees twisting her right arm and shoulder. She continued working to the end of her shift and for the next two days with some discomfort. CP 5, Certified Appeal Board Record, page 62, line 8; page 63, lines 21 and 25; page 64; lines 6, 12 and 18; page 65, lines 1, 11, 22 and 24; page 66, lines 5, 16 and 24; and page 67, lines 2, 7 and 11.

Ms. Andryushina did not go to a doctor right away, because she was hoping her shoulder would heal on its own. Her oldest daughter, Nellie Kovalev, had gone to all of her mother's doctor appointments with her for Ms. Andryushina's stroke in 2017. After August 15, 2018, her daughter asked her mother whether she wanted to go to emergency, but her mother already had a follow up appointment with her doctor, Dr. Pavlenko, on August 20, 2018. When they went to the appointment, Ms.

Andryushina told Dr. Pavlenko that she fell off the frame, but her blood pressure was skyrocketing that day, and Dr. Pavlenko paid more attention to her high blood pressure. Dr. Pavlenko did tell her mother to use a heating pad on her shoulder and give it rest, and gave her time off work, but no claim for a work injury was filed with the Department of Labor and Industries. CP 5, CABR, page 67, line 18; page 85, lines 13 and 18; page 87, lines 1 and 9.

Ms. Andryushina had another appointment with Dr. Pavlenko on September 7, 2018, which her daughter attended. Her mother had not been working for three weeks, was doing better with her right shoulder, and her mother asked Dr. Pavlenko to release her back to work. From September 10, 2018, Ms. Andryushina continued working at Pendleton Woolen Mills, and was not complaining to her daughter about her right shoulder. Ms. Andryushina had one more appointment with Dr. Pavlenko in November 2018 before she left the Vancouver Clinic. At the appointment, Ms. Andryushina told Dr. Pavlenko that she was

using her heating pad and continuing to work. She was not doing anything after work, and taking one day at a time depending on the workflow at work. CR 5, CABR, page 88, lines 10 and 19 and page 89, lines 1, 8, 12, 18.

After Ms. Andryushina returned to work on September 10, 2018, she was servicing two frames by herself. Pendleton Woolen Mills would not allow anybody near her at work. The more she used her right arm, the worse her right shoulder became. She used her sick leave and vacation for two to three days off work at a time. She was having to lift spools of thread weighing 35 to 40 pounds on and off the frames above her head, several times a day. She was not able to bathe herself at home due to her right shoulder, and her husband was having to hold vegetables for her to cut up for cooking with her left hand. Ms. Andryushina decided to follow up with Dr. Pavlenko at Providence in Portland, because she could speak Russian with her without an interpreter, but she had to wait from November 2018 to April 2019 to get in to see Dr. Pavlenko. CP 5, CABR,

page 70, line 1; page 71, lines 10 and 12; page 72, line 4; page 73, line 20; page 74, lines 2 and 14; page 89, line 23).

Ms. Andryushina was able to get in to see a nurse practitioner, Paula Mantei, at the Vancouver Clinic with her daughter before she saw Dr. Pavlenko again. Ms. Andryushina told Nurse Mantei about falling in August 2018, and she was hurting, but Nurse Mantei told her as she was typing on her computer, that if she wrote down everything that she said, she may not have a job at Pendleton Woolen Mills. Nurse Mantei was just going to keep her on light duty for now. No claim for a work injury on August 15, 2018, was filed with the Department of Labor and Industries. CP 5, CABR, page 89, line 23; page 90, line 7; and page 91, line 8.

When Ms. Andryushina saw Dr. Pavlenko in April 2019, she was complaining of pain in her right shoulder and Dr. Pavlenko gave her two weeks off work, but no claim was filed with the Department of Labor and Industries for an injury on August 15, 2018, at Pendleton Woolen Mills. Dr. Pavlenko went

on sick leave herself, and Ms. Andryushina could not see her again until August 2019. At that visit Dr. Pavlenko sent in the papers to Pendleton Woolen Mills, and they refused to accept them, stating that she needs to see a doctor in Washington. Dr. Pavlenko then went on maternity leave herself, and referred Ms. Andryushina to Dr. Upham at the Vancouver Clinic. CP5, CABR, page 92, line 19, and page 93, lines 1 and 10.

When Ms. Andryushina saw Dr. Upham in November 2019, she was guarding her right shoulder the way she was walking due to pain. Dr. Upham diagnosed Ms. Andryushina with frozen shoulder, gave her a cortisone injection in the shoulder, and released her back to work at Pendleton with no use of her right arm. Dr. Upham continued to treat Ms. Andryushina and sent her to physical therapy at the Vancouver Clinic. Physical therapy refused to work with Ms. Andryushina until she had magnetic resonance imaging, and the MRI was denied twice. CR 5, CABR, page 93, line 10, and page 94, lines 14 and 23.

Ms. Andryushina first saw Dr. Harold Lee with her

daughter on May 21, 2020. Dr. Lee is a medical doctor who specializes in physical medicine and rehabilitation and practices at Portland Adventist Medical Center. Ms. Andryushina had a stroke on September 1, 2017, that affected her right upper and lower extremities. She had completely recovered from the stroke, and had returned to work at Pendleton Woolen Mills in February with light duty restrictions. After the incident on August 15, 2018, she had returned to work on September 10, 2018, and Ms. Andryushina had to lift 5 to 6 spindles weighing up to 40 pounds above her head. The yarn on the spools would break and she would also have to change the spools. As time went by Ms. Andryushina had a lot heavier work to handle because she was assigned to the area where the yarn is thicker and the spindles filled up faster. CP5, CABR, page 110, lines 16 and 20; page 115, line 22; page 118, lines 8, 14, and 21; and page 119, line 21.

Dr. Upham had given her an injection in the right shoulder, which did not help much. She also had some physical therapy which did not help much. She had more pain when she tried to

exercise, and she had withdrawn from exercise even at home. Ms. Andryushina had pain, numbness, and stiffness in her right upper extremity, especially in her shoulder. She had been taking Tramadol for pain medication, and a muscle relaxer for her right shoulder. CP5, CABR, page 122, lines 1, 8, 10, 12, 18 and 21, and page 124, lines 17 and 19.

Dr. Lee conducted a physical examination of Ms. Andryushina on May 21, 2020. With range of motion at her upper extremities using a goniometer to measure angles. With Abduction, moving her arm away from her body, was 75 degrees on the right and 150 degrees on the left. Adduction, moving her arm towards the midline of the body, was 15 degrees on the right and 45 degrees on the left. Flexion, moving her arm forward was 80 degrees on the right and 170 degrees on the on the left. Extension, moving her arm backwards, was 30 degrees on the right and 45 degrees on the left. External rotation was 40 degrees on the right and 90 degrees on the left. Internal rotation was 55 degrees on the right and 80 degrees on the left. With motor

strength rating Ms. Andryushina had weakness on the right side as opposed to the left with flexion and internal rotation. CP5, CABR, page 125, line 13; page 126, line 21; page 127, lines 6, 10, 16 and 21 and page 128, line 6.

Based on reasonable medical probability, Dr. Lee diagnosed Ms. Andryushina with right shoulder adhesive capsulitis, or frozen shoulder, and rule out rotator cuff tear, arising naturally and proximately from the distinctive conditions of her employment as a yarn machine operator after she returned to work at Pendleton Woolen Mills on September 10, 2018. The diagnosed conditions originated with the incident on August 15, 2018, but were aggravated after Ms. Andryushina returned to work on September 10, 2018. Wendelin Schaefer, MD, and Sushil Sethi, MD, who performed medical evaluations at the request of the Department of Labor and Industries, and testified for the Department, minimized the incident that occurred at work on August 15, 2018. Dr. Schaefer testified that Ms. Andryushina's arm was pulled behind her, but she did not

actually fall and continued working, and she mainly went to the doctor on August 20, 2018, for high blood pressure rather than the incident that occurred on August 15, 2018. Dr. Suthi testified that if there was a significant incident on that date, Ms. Andryushina would have gone to a doctor, and she did not have a significant injury, CP 5, CABR, page 176, line 5; page 229, line 13 and page 236, line 18.

A claim for benefits while employed by Pendleton Woolen Mills was filed with the Department of Labor and Industries on October 18, 2019, but not until October 21, 2020, did the Department reject the claim as an industrial injury for not having been filed within one year of August 15, 2018, pursuant to RCW 51.28.050. In that order the Department also rejected the claim as an occupational disease not coming within the meaning of RCW 51.28.140.[1] A timely notice of appeal to the Board of Industrial Insurance Appeals was filed on behalf of Ms.

1. See trial courts instruction 11, WPI 155.21, Aggravation of preexisting condition can be an occupational disease. CP 39.

Andryushina appealing the denial of an occupational disease claim. Ms. Andryushina did not appeal the order denying the claim as an industrial injury on August 15, 2018, and there was no issue before the Board as to whether Ms. Andryushina suffered a work injury prior to returning to work on September 10, 2018. CP5, CABR.

Ms. Andryushina's appeal for the development of an occupational disease from her job as a wool spinner after September 10, 2018, proceeded to an evidentiary hearing before an Industrial Appeals Judge. Upon completion of the hearing, the Industrial Appeals Judge issued a Proposed Decision notice, Findings of Fact and Conclusions of Law, Finding No. 3 stated that Ms. Andryushina did injure her right shoulder and arm at work on August 15, 2018. Finding No. 2 stated that she failed to file her claim for injury within one year. Finding No. 5 stated that the work she performed after September 10, 2018, were distinctive conditions of her employment at Pendleton Woolen Mills. Finding No. 6 stated that her right shoulder condition,

adhesive capsulitis, did not arise naturally and proximally out of the distinctive conditions of her employment. RCW 51.04.140. CP 55, CABR, pages 30-31.

Ms. Andryushina petitioned for review to the three member Board, and two of the members denied the petition and adopted the Proposed Decision and Order. Ms. Andryushina timely filed an appeal in Superior Court for Clark County, and her appeal proceeded to a jury trial, at which the testimony before the Board at hearing and perpetuation depositions were read to the jury pursuant to RCW 51.52.115. Before the parties argued their cases to the jury, the trial judge gave the instructions on the law to the jury. A hearing was held outside the presence of the jury as to which proposed instructions should be given to the jury. The discussion centered on the trial court's Instruction No. 3. CP 39, Appendix B.

At the commencement of trial, Ms. Andryushina's counsel had filed a Legal Memorandum on Jury Instructions. RCW 51.52.115 provides that in worker compensation appeals to

Superior Court, the trial court shall advise the jury of the exact findings of the Board on each industrial issue before the court. Relying on *Gaines v. Department of Labor and Industries*, 1 Wn. App 547, 557, 463 P.2d 269 (1969), the word findings is construed to mean findings on ultimate fact on which the outcome of the litigation depends, not subordinate findings on which the outcome of the litigation does not depend. Ms. Andryushina's proposed instruction No. 3 which left out reference to a prior injury on August 15, 2018, number 1, and that Ms. Andryushina failed to file a claim for that injury within one year, number 2. Counsel for the Department of Labor and Industries argued that findings 1 and 2 were material findings made by the Board. The trial court decided that since there had been testimony regarding a previous injury in August 2018 that the jury might be confused without the Board's findings 1 and 2. RP 1-2, Appendix B.

The three member panel of judges in the Court of Appeals, Division One, held at page 5 of the Unpublished Opinion that

findings 1 and 2 were material to resolving the ultimate issue because they were the basis for the Board's decision that Ms. Andryushina did not suffer from an occupational disease. These findings were material to resolving the ultimate issue of whether Ms. Andryushina suffered an occupational disease. And lastly, the findings were not argumentative or comments on the evidence. Ms. Andryushina contends that findings one and two were subordinate findings and should not have been the basis for the Board or jury's decision to deny her claim for occupational disease and had nothing to do with whether the claim should have been accepted as an occupational disease, and were argumentative and comments on the evidence in the context of an occupational disease claim. See *In re Donald Plemmons*, BIIA Dec., 04 12018, (2005), a significant decision of the Board of Industrial Insurance Appeals attached as Appendix D.

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E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

An appellate court reviews jury instructions de novo and reverses the trial court only when an instruction contains an error of law that prejudices a party. Jury instructions are sufficient if they allow the parties 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 in the case. *Felipe v. Dep't of L. and Indus.*, 195 Wn. App, 913-914, 381 P.3d 205 (2016). The issue here is whether the trial court in giving of Instruction No. 3 to the jury committed an error of law which prejudiced Lyubov Andryushina.

Because the trial court is also required by RCW 51.52.115 to advise the jury that it shall presume the findings and decision of the Board are prima facie correct, it is necessary to direct the jury's consideration to the Board's findings only on material issues. If the presumption of correctness applied to all of the

Board's findings, both material and immaterial to the issue involved, confusion would reign in the jury's consideration. *Stratton v. Dep't of L. and Indus*, 1 Wn. App. 77, 81, 459 P.2d 651 (1969).

Worker compensation appeals in Superior Court pursuant to RCW 51.52.115 are unique as compared to other civil jury trials in that the testimony before the Board of Industrial Insurance Appeals is read to the jury, and the jury decides the issues in the case on a special verdict form. The questions are phrased in the special verdict form was the Board correct in making those findings. WPI 155.14.

Gaines v. Department of Labor and Industries, 1 Wn App. 547, 551, 463 P. 2d 269 (1969), held that the legislature rejected the appellate review rule on appeal from the board to superior court, and substituted de novo review as the method of review under the Industrial Insurance Act, Title 51. The trial court should construe the word findings in a manner that will best fulfill the expressed legislative preferences. If the board findings

are to be given prima facie effect by the jury are evidentiary or argumentative, characterized as subordinate findings, their detailed or argumentative nature may substantially impede or derogate from the ability of the worker to obtain de novo review of the evidence before the board. The practical effect of permitting evidentiary or argumentative findings, subordinate findings may well go far toward substituting appellate review for the rule of de novo review.

A subordinate finding on the credibility of a witness testifying before the board could effectively and adversely deprive a worker of the opportunity to reexamine the evidence in a meaningful way, and could have the effect of destroying the plaintiff's credibility, making recovery improbable. The board must determine whom to believe, but on appeal to Superior Court the credibility of the witnesses testifying is still an issue of fact for the jury to determine. The potential interference of evidentiary and argumentative findings can be obviated if the word findings is construed to mean findings of

ultimate fact. Specific statements by the board, in addition to ultimate findings of the board's view as to the evidence supporting the ultimate findings, recitals or summaries of the evidence, statements that contain evidence or arguments that support the board's ultimate findings, or statements that a witness is not to be believed are subordinate findings and should not be given. *Gaines v. Dep't of L. and Indus.*, 1 Wn App. at 552.

To the foregoing considerations, there should be added certain canons of statutory construction, that the entire statute should be liberally construed to advance the remedy provided by the Industrial Insurance Act, to conform to the spirit as well as the letter of the Act, that any doubt as to the meaning of the statute should be resolved in favor of the worker, for whose benefit the Act was passed. *Gaines v. Dep't of L. and Indus.*, 1 Wn App. at 552.

Findings No. 1 and 2 of Instruction No. 3 are evidentiary and argumentative findings. They are subordinate findings

detailing evidence and argumentative in nature. Whether Ms. Andryushina suffered a prior injury or failed to file a claim for that injury had nothing to do with whether she had met her burden of proof to establish by a preponderance that she suffered an occupational disease after she returned to work on September 10, 2018.

Jury Instruction No. 3 with Findings Nos. 1 and 2 does not permit Ms. Andryushina to effectively argue her case to the jury of occupational disease, in that the jury could not get over the subordinate finding that she did not file a claim of injury within one year for the event of August 15, 2018. The instruction is misleading the jury in that Findings Nos. 1 and 2 allow the jury to focus on the fact of a previous event, rather than what happened to Ms. Andryushina after she returned to work on September 10, 2018. When read as a whole, they do not properly inform the trier of fact of the applicable law. Stating that Ms. Andryushina did not file a claim for a work injury within one year is not applicable law. A claim for occupational

disease need only be filed within two years, RCW 51.28.055, and the timely filing of an injury claim was not an issue to be considered by the jury, nor the board, as Ms. Andryushina was not contending that she had a work injury. Introducing testimony of the event on August 15, 2018, was only offered by Ms. Andryushina in the context of which her occupational disease arose after September 10, 2018. See *Bowers v. Fibreboard Corp.*, 66 Wn. App. 454, 458, 832 P.2d 523 (1992).

Ms. Andryushina did not rely on the existence of an injury on August 15, 2018, or at any other date, in support of her argument that an occupational disease developed after she returned to work on September 10, 2018. Whether an injury had even occurred prior to the occupational disease was in contention by the medical experts in the case. Wendelin Schaefer, MD, for the Department testified that Ms. Andryushina went to the doctor after August 15, 2018, mainly for her high blood pressure, and she was out of work for three weeks because of high blood pressure, not a work injury. CP 5,

CABR, page 236, line 18. Sushil Sethi, MD, the other medical witness for the Department testified that if Ms. Andryushina had a significant injury (on August 15, 2018) she would have gone to a medical facility. Not going to the doctor means it was a minor twist. The findings that an injury occurred on August 15, 2018, and that Ms. Andryushina did not file a claim for injury are subordinate findings and can be construed as comments on the evidence. *Gaines v. Dep't of L. and Indus.*, 1 Wn App. at 552.

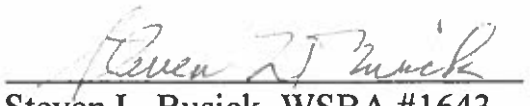
F. CONCLUSION

The Supreme Court should reverse the judgment on the verdict of the trial court based on an error of law in giving Instruction No. 3 to the jury, rather than Ms. Andryushina's proposed Instruction No. 3, and order a new trial.

This document contains 3,862 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 26th day of February.

Respectfully submitted,



Steven L. Busick, WSBA #1643
Attorney for Petitioner,
Lyubov Andryushina
1915 Washington Street
PO Box 1385
Vancouver, WA 98666

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LYUBOV ANDRYUSHINA, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	No. 87074-2-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — Lyubov Andryushina appeals a jury verdict affirming the Board of Industrial Insurance Appeals' (Board) order finding that she did not suffer an occupational disease. She contends that the superior court erred by instructing the jury on two of the Board's findings of fact because those findings were immaterial. We affirm.

I

In 1998, Andryushina began working as a spinner for Pendleton Woolen Mills. On August 15, 2018, Andryushina injured her shoulder at work when she was reaching for a loose handrail and fell between the metal frames onto her knees twisting her right

arm and shoulder. Andryushina reported her injury to her supervisor but continued to work on light duty.

On August 20, 2018, Andryushina attended an existing appointment with her primary care physician who was predominantly concerned about her high blood pressure but told Andryushina to rest her shoulder. Andryushina took three weeks off of work and returned to light duty on September 10, 2018.[1]

On October 18, 2019, Andryushina applied for workers' compensation benefits, about 14 months from her injury on August 15, 2018. The Department rejected the claim reasoning that it was over a year since the industrial injury and the condition did not qualify as an occupational disease under RCW 51.08.140.

Andryushina appealed the denial of the occupational disease claim to the Board. After a hearing, the Board concluded that Andryushina's injury did not qualify as an occupational disease.

Andryushina then appealed the Board's decision to Clark County Superior Court. The superior court instructed the jury on the Board's findings. The Board made six findings of fact, and the superior court instructed the jury on all of the Board's findings, excluding the first finding, which was procedural only. Accordingly, the court instructed the jury:

> This is an appeal from the findings and decision of the Board of Industrial Insurance Appeals. The Board made the following material findings of fact:
>
> 1. On August 15, 2018, Lyubov Andryushina injured her right shoulder and arm during the course of her employment when she lost her balance

[1] In May 2020, Andryushina met with a different doctor about her shoulder. That doctor believed that Andryushina had adhesive capsulitis from her injury on August 15, 2018. Other independent medical examiners disagreed finding that Andryushina did not suffer from adhesive capsulitis.

> while reaching for a loose handrail and fell between the metal frames onto her knees 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.
>
> 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.

Andryushina objected to that instruction and proposed an instruction that omitted the first two findings of fact—that she injured her shoulder when she fell and that she did not file an application for benefits within a year. Andryushina argued those findings of fact were not material.

The superior court ultimately declined and included those findings in the jury instructions. The superior court reasoned that it would be confusing for the jury to understand the context of the issue without including the findings.

Andryushina appeals.

II

Andryushina argues the superior court erred in declining to give her proposed jury instruction. We disagree.

We review alleged instructional errors de novo. State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). "An instruction is sufficient if it correctly states the law, is not misleading, and permits counsel to argue his theory of the case." State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

RCW 51.52.115 states:

> The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court. . . . 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.) Accordingly, a superior court is not required to advise the jury of a Board finding unless the finding is on a material issue. Gaines v. Dep't of Lab. & Indus., 1 Wn. App. 547, 551, 463 P.2d 269 (1969). The term "findings" means "finding of ultimate fact" which include:

> a finding on the identity of the claimant and his employer, the claimant's status as an employee or dependent under the act, the nature of the accident, the nature of the injury or occupational disease, the nature and extent of disability, the causal relationship between the injury or the disease and the disability, and other ultimate facts upon the existence or nonexistence of which the outcome of the litigation depends.

Gaines, 1 Wn. App. at 552. In comparison, "subordinate findings" are evidentiary or argumentative findings, which may "substantially impede or derogate from the ability of a claimant to obtain a de novo review of the evidence received by the board." Gaines, 1 Wn. App. at 551.

Andryushina argues that the findings that she was injured on August 15, 2018, and that she did not timely file a claim should not have been given to the jury because

they were subordinate findings and constituted a comment on the evidence. Andryushina relies on Gaines and Stratton v. Department of Labor and Industries, 7 Wn. App. 652, 501 P.2d 1072 (1972), to support her argument. In both of those cases, the court found that the jury should not have been instructed on certain findings because they were improperly argumentative and harmed the credibility of the claimant.

For example, in Gaines, the court found the Board's finding that the plaintiff purposely misrepresented his condition was properly excluded because it had the effect of "destroying the plaintiff's credibility, making recovery improbable." Gaines, 1 Wn. App. at 551. Similarly, in Stratton, the finding read in part, "[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." Stratton, 7 Wn. App. at 654. The court ruled that the finding was not based on medical evidence, but rather on the opinion of the Board, so the finding was highly prejudicial and improper. Stratton, 7 Wn. App. at 654.

Here, unlike Gaines and Stratton, the findings of fact that Andryushina was injured on August 15, 2018, and did not file a claim within a year were not argumentative or harmful to her credibility. The findings did not suggest she was dishonest about the injury, as in Gaines, nor did the findings suggest that Andryushina lacked motivation or had ulterior motives, as in Stratton.

The findings were material because they were the basis for the Board's decision that Andryushina did not suffer from an occupational disease. These findings were material to resolving the ultimate issue of whether Andryushina suffered an occupational disease. Lastly, these findings were not argumentative or comments on the evidence,

so the superior court properly declined to remove those findings. Since the findings were material to the ultimate issue, the superior court properly instructed the jury under RCW 51.52.115.

We affirm.[2]

Mann, J.

WE CONCUR:

Birk, J.

Chung, J.

[2] Andryushina requests attorney fees under RCW 51.52.130, which provides a fixed fee for workers who receive additional relief on appeal. Because Andryushina does not receive additional relief on appeal, she is not entitled to attorney fees.

INSTRUCTION NO. 3

This is an appeal from the findings and decision of the Board of Industrial Insurance Appeals. The Board made the following material findings of fact:

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.

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.

Instruction No. 3

This is an appeal from the findings and decision of the Board of Industrial Insurance Appeals. The Board made the following material findings of fact:

1. 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.

2. 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.

3. 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.

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.

Plemmons, Donald

OCCUPATIONAL DISEASE (RCW 51.08.140)

Aggravation of preexisting condition

Aggravation of a pre-existing condition by distinctive conditions of work can be the basis for an occupational disease claim allowance without a showing that the pre-existing condition has objectively worsened. ....***In re Donald Plemmons***, **BIIA Dec., 04 12018 (2005)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DONALD L. PLEMMONS	**DOCKET NO. 04 12018**
CLAIM NO. Y-677854	**DECISION AND ORDER**

APPEARANCES:

Claimant, Donald L. Plemmons, by
Law Office of Mark C. Wagner, per
Mark C. Wagner

Employer, BMC West Corporation,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Lynette Weatherby-Teague, Assistant

The claimant, Donald L. Plemmons, filed an appeal with the Board of Industrial Insurance Appeals on May 4, 2004, from an order of the Department of Labor and Industries dated April 26, 2004. In this order, the Department affirmed an April 13, 2004 order in which it rejected the claim. The Department order is **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review, filed by the Department, to a Proposed Decision and Order issued on November 9, 2004, in which the industrial appeals judge reversed the April 26, 2004 order. Our industrial appeals judge ordered the Department to allow the claim as an occupational disease.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. These rulings are affirmed.

We granted the Petition for Review to correct findings and conclusions in the Proposed Decision and Order. In the body of the proposed decision, our industrial appeals judge indicated the evidence supported allowing the claim as an aggravation of a pre-existing condition. Nonetheless, the findings and conclusions in the Proposed Decision and Order simply allow the claim as an occupational disease, without that limitation. We have granted review primarily to correct this error.

Mr. Plemmons, a boom truck driver, had an injury at work during October 2001. While unloading his truck in Renton, Washington, a ladder fell out from under him and he caught himself

with his right arm. This injured his right shoulder. However, he did not obtain any medical treatment for his shoulder until November 2002. At that point, he filed an application for benefits with the Department for his October 2001 injury. His claim was rejected as untimely, because it was filed more than a year after his injury.

He obtained treatment from Julian S. Arroyo, M.D., an orthopedic surgeon specializing in shoulder disorders. He was first seen in Dr. Arroyo's office in December 2002. An MRI taken that same month disclosed tendonitis in the right rotator cuff, and a rotator cuff tendon tear. Based on that MRI, a subsequent March 2003 x-ray, and his clinical findings, Dr. Arroyo diagnosed Mr. Plemmons' right shoulder condition as a right rotator cuff tear, with impingement. He recommended surgical intervention. This diagnosis, and the resulting need for treatment, has not been disputed.

The Department maintains that Mr. Plemmons' rotator cuff tear was caused by his October 2001 injury. It maintains there is no objective evidence that his condition has worsened since this injury. It argues this claim should be rejected.

The Department's fundamental premise, that objective proof of worsening is a prerequisite to allowing the claim as an occupational disease, is incorrect. It is undisputed that Mr. Plemmons injured his shoulder in the October 2001 accident. Dr. Arroyo described this fall as the original insult to the right shoulder. However, he stated that Mr. Plemmons' continued job duties as a boom truck driver, since that incident, aggravated his right shoulder condition. Mr. Plemmons' work, described in Exhibit No. 1, involves frequently lifting 35 to 50 pounds above the shoulders and frequently using his arms from waist to above shoulder height. Dr. Arroyo noted that Mr. Plemmons did not seek medical treatment for 13 months after the 2001 incident, and that he continued to work full-time in a strenuous job for two years before filing this claim. He stated that Mr. Plemmons' work as a truck driver following the 2001 injury aggravated his shoulder condition, resulting in a need for treatment. Dr. Arroyo testified that Mr. Plemmons' continuous work duties were the proximate cause of his need for surgery. This is a reasonable conclusion because his work was more strenuous than limitations that the Department's expert witness, Alan G. Brobeck, M.D., thought were appropriate following the October 2001 injury. Dr. Brobeck thought lifting with the right arm should have been limited to 10 to 15 pounds, and repetitive use of the right arm should have been limited since that accident. Mr. Plemmons' job as a boom truck driver required him to regularly exceed these limitations. Our determination that Mr. Plemmons' work duties for two years following his 2001 accident aggravated his shoulder injury is, therefore, quite reasonable.

The medical testimony is legally sufficient to allow this claim as an occupational disease for an aggravation of a pre-existing condition. Since Mr. Plemmons delayed getting treatment after his 2001 accident, the exact diagnosis for his pre-existing shoulder condition is unclear. While there are no objective findings indicating his shoulder condition has worsened, such proof is unnecessary. Objective medical findings of worsening are only required to reopen a claim, or to pay a permanent partial disability award to a worker with a pre-existing impairment. Based on a long line of appellate decisions, occupational disease claims can be allowed if medical testimony establishes distinctive work conditions aggravated a worker's pre-existing condition. *See Dennis v. Department of Labor & Indus.*, 109 Wn.2d. 467 (1987). If medical testimony establishes a worker's job duties accelerated his need for treatment or aggravated his underlying condition, his claim can be allowed. *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731 (1999). Mr. Plemmons has met this requirement, because he established his work duties after October 2001 aggravated his shoulder condition, resulting in his need for surgery.

We have, therefore, corrected Findings of Fact Nos. 3 through 5, and Conclusions of Law Nos. 2 and 3 in the Proposed Decision and Order, to make them consistent with this decision.

FINDINGS OF FACT

1. On November 21, 2003, the claimant, Donald L. Plemmons, filed an application for benefits with the Department of Labor and Industries, alleging that he sustained an occupational disease on or about November 17, 2003, while in the course of his employment with BMC West Corporation.

   On April 13, 2004, the Department issued an order in which it rejected the claim for benefits for the following reasons: there was no proof of a specific injury at a definite time and place in the course of employment; the claimant's condition was not the result of an industrial injury; and the claimant's condition was not an occupational disease.

   On April 22, 2004, the claimant filed a protest to the Department's April 13, 2004 order. On April 26, 2004, the Department issued an order in which it affirmed its April 13, 2004 order.

   On May 4, 2004, the claimant filed a Notice of Appeal with the Board of Industrial Appeals from the Department's April 26, 2004 order. On May 25, 2004, the Board issued an order in which it granted the appeal under Docket No. 04 12018.

2. Between 1985 and April 26, 2004, the claimant worked as a boom truck driver, delivering trusses and other materials to construction sites. In addition to other heavy work duties, his conditions of employment

included repetitive lifting to varying degrees: floor to waist, 35 to 50 pounds frequently; waist to shoulder, 35 to 50 pounds frequently; and shoulder and above, 35 to 50 pounds frequently. His job duties required frequent reaching while securing loads and throwing straps over trusses. Those conditions are unique to his employment, and are not merely coincidentally occurring in his workplace.

3. Mr. Plemmons had a work-related right shoulder injury in 1989, but he fully recovered following this accident. He reinjured his right shoulder again in October 2001, while unloading his truck in Renton. A ladder fell out from under him, and he caught himself with his right arm. He did not seek treatment for his right shoulder until November 2002.

4. Mr. Plemmons filed an application for benefits with the Department for his October 2001 injury in November 2002. This claim was denied on the grounds his application for benefits was filed more than one year after his injury, and was, therefore, untimely.

5. Following the October 2001 right shoulder injury, and despite associated pain, the claimant continued to perform his heavy repetitive job duties, preventing the right shoulder from healing. In December 2002, an MRI revealed a right rotator cuff tear. A March 2003 x-ray revealed a right shoulder bone spur. As of April 26, 2004, Mr. Plemmons' right shoulder condition is best described as a rotator cuff tear with impingement.

6. There is no specific diagnosis for the right shoulder condition proximately caused by Mr. Plemmons' October 2001 injury. As of April 26, 2004, Mr. Plemmons' right rotator cuff tear with impingement was either the natural and proximate result of distinctive conditions of his employment with BMC West Corporation following his October 2001 injury, or was an aggravation of a condition caused by his October 2001 injury.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. As of April 26, 2004, the claimant had developed an occupational disease within the meaning of RCW 51.08.140.

3. The order of the Department of Labor and Industries dated April 26, 2004, is incorrect and is reversed. This matter is remanded to the Department with instructions to issue an order in which it allowed this

claim as an occupational disease for an aggravation of his pre-existing right shoulder condition and to take such further action as required by the law and the facts.

It is so **ORDERED**.

Dated this 7th day of February, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
CALHOUN DICKINSON Member

SUPREME COURT
OF THE STATE OF WASHINGTON

LYUBOV ANDRYUSHINA, Appellant, THE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 87074-2-I PROOF OF SERVICE

The undersigned states that on Wednesday, February 26, 2025, I filed via Washington State Appellate Courts' Secure Portal, Petition for Review, by the method indicated below:

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Caitlyn M. Bookman, AAG
Attorney General of Washington
Labor and Industries Division
PO Box 40121
Olympia, WA 98504-0121
caitlyn.bookman@atg.wa.gov

( ) U.S. Mail
(x) Via E-Mail

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

Dated this 26th day of February, 2025.

Star C. Towne

Star Towne, Legal Assistant
To Steven L. Busick, WSBA No. 1643

Attorneys
Steven L. Busick
Irma Ozegovic

Law Office of Steven L. Busick, PLLC
1915 Washington Street
PO Box 1385
Vancouver, WA 98666-1385
Telephone (360) 696-0228
Fax (360) 696-4453

Office Manager
Ashley Sturgis

Legal Assistant
Star Towne

February 26, 2025

Submitted Electronically

Lea Ennis, Court Administrator/Clerk
Washington State Court of Appeals, Division I
One Union Square
600 University St
Seattle, WA 98101-1176

Re: Lyubov Andryushina v. Department of Labor and Industries
Clark County Superior Court Cause No. 22-2-00551-06
Court of Appeals No. 87074-2

Dear Ms. Ennis:

Enclosed please find appellant's Petition for Review to the Supreme Court and Proof of Service for filing and processing. A check in the sum of $200.00 to cover the filing fee is being mailed on this date.

Sincerely,

Steven L. Busick

SLB:st
Encl.
cc: Caitlyn M. Brookman (w/ encl.) – *via e-mail (caitlyn.brookman@atg.wa.gov)*
Lyubov Andryushina (w/ encl.)

February 26, 2025 - 11:36 AM

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Superior Court Case Number:	22-2-00551-7

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