IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL D. HENDERSON, Appellant, v. GLACIER NORTHWEST, INC. and DEPARTMENT OF LABOR AND INDUSTRIES, STATE OF WASHINGTON, Respondents,	No. 41205-5-II UNPUBLISHED OPINION

Van Deren, J. — Michael Henderson appeals from a jury verdict in favor of Glacier Northwest Inc., affirming a Board of Insurance Appeals order ending Henderson's workers' compensation benefits. He argues that (1) the trial court abused its discretion in admitting testimony from one of Glacier Northwest's witnesses, (2) the trial court abused its discretion in denying his motion for a new trial based on juror misconduct, and (3) substantial evidence does not support the jury's verdict. We affirm.

FACTS

On August 26, 2003, Henderson injured his right knee while working as a cement truck driver for Glacier Northwest. Henderson was walking when "[his] right leg twisted [his] ankle [and as he] stopped himself from falling [he] felt [his] knee pop." Administrative Record (AR)

(Henderson-direct)[1] at 21. The Department of Labor and Industries (L&I) allowed an industrial insurance claim for the right knee injury and Glacier Northwest, a self-insured employer, began paying benefits to Henderson. On April 8, 2005, L&I issued an order ending Henderson's time loss benefits effective December 30, 2003, and closing his claim without any permanent partial disability award. After reconsideration on August 24, 2005, L&I affirmed its April 8 order.

Henderson appealed the order to the Board. An industrial appeals judge (IAJ) issued an amended interlocutory order setting Glacier Northwest's witness confirmation deadline for May 15, 2006. On June 6, Glacier Northwest sent a letter to the IAJ requesting permission to amend its witness list to include Dr. Michael Barnard, an orthopedic surgeon. Glacier Northwest's letter stated that Barnard's examination had originally been scheduled for May 4 but, in order to accommodate Henderson, it had been rescheduled for May 22. As a result, Barnard's report was not yet available and Glacier Northwest had not been able to confirm him as a witness by the May 15 deadline.

Henderson submitted without objection to the examination by Barnard in connection with Henderson's application to reopen his August 26, 2003, claim based on a back injury he asserted was related to his earlier knee injury and both parties agreed that the back claim injury was not currently before the Board. Henderson unsuccessfully objected to the admission of Barnard's testimony in the hearing on his knee claim based on prejudice. The IAJ, however, ruled that the other Glacier Northwest expert witness, Dr. David Smith, could not testify if Barnard testified, and it offered Henderson a continuance to alleviate any potential prejudice.

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[1] The administrative record is partially composed of nonconsecutively numbered sections corresponding to the testimony of each witness. For these sections, we cite to the specific witness's last name, e.g., "AR (Johnson-direct)" for clarity.

Before the IAJ, Barnard testified about his review of Henderson's medical history. His testimony provided a chronology of Henderson's treatment of his knee injury. Barnard testified that on September 26, 2003, Dr. W. Frederick Thompson, an orthopedic surgeon, began treating Henderson. Thompson found nothing but "tenderness" when examining Henderson's knee, and a magnetic resonance imaging (MRI) scan of it read as "'normal' with no evidence of internal derangement." AR (Barnard-direct) at 9-10. Thompson recommended physical therapy and advised Henderson to lose weight because he felt Henderson's weight exacerbated the knee problem. Subsequently, Thompson performed an arthroscopic evaluation of Henderson's knee, which showed "some hypertrophy or swelling of the soft tissues," but no tearing of cartilage or the menisci. AR (Barnard-direct) at 11. In December, Thompson indicated that Henderson had "no major complaints," that he was walking well without assistance, and that he was "released to . . . sedentary or office-type work" at the time. AR (Barnard-direct) at 12-13. In March 2004, Thompson saw Henderson again, said there was no need for further treatment, and concluded that his claim was ready for closure.

In April 2004, Henderson sought a second opinion from Dr. Jerome Zechmann, also an orthopedic surgeon. Henderson did not begin a course of treatment for his knee following his first visit to Zechmann. Following a second visit in June, Zechmann made no findings of impairment in Henderson's knee and described it as "a normal knee for [Henderson's] age." AR (Barnard-direct) at 14. According to Barnard, there was nothing in Zechmann's findings indicating further treatment was necessary.

Henderson subsequently saw Dr. Roy Broman, who released him to perform "[l]ight to medium" work. AR (Barnard-direct) at 16. Barnard testified that this was consistent with

Thompson's and Zechmann's earlier findings.

On November 4, 2004, Henderson saw Smith, Glacier Northwest's original expert witness. Barnard testified, based on Smith's findings, that Henderson's knee condition was "fixed and stable" and that Henderson did not have "any permanent partial disability or impairment" at that time. AR (Barnard-direct) at 18.

On May 22, 2006, Barnard examined Henderson's knee and found "some tenderness," but found no fluid within it, no signs of instability, and no signs of "significant degenerative disease." AR (Barnard-direct) at 30. He diagnosed Henderson with "severe exogenous obesity," which he felt was "the primary cause of [Henderson']s ongoing complaints"; "history of a right knee strain with no evidence of internal derangement"; and "degenerative arthritis of the right knee unrelated to the industrial claim." AR (Barnard-direct) at 31. Based on his review of Henderson's treatment history, Barnard opined that Henderson's knee condition had remained "fixed and stable" since being treated by Thompson in December 2003, and that Henderson had not needed treatment and had been without "[any] ratable impairment of the lower extremity" since then. AR (Barnard-direct) at 32-33.

Barnard also opined that Henderson could no longer work as a cement truck driver but that after his treatment by Thompson ended in December 2003, Henderson was able work light duty jobs such as an observer, a porter, a clerk, or a shuttle driver. He also testified that, when leaving the examination, Henderson took "a large step up" into his truck without any difficulty. AR (Barnard-direct) at 23.

Dr. Romeo Puzon, a family physician who performs Washington State Department of Transportation commercial driver fitness evaluations, testified that he evaluated Henderson on

May 11, 2005. Henderson passed his physical examination, and Puzon found no limp, atrophy, lack of mobility or strength, or other impairment to Henderson's leg.

Ronnie Stabler, a Glacier Northwest employee, testified that she observed Henderson operating a dump truck on August 17, 2005, during the period he claimed he could not drive a cement truck for Glacier Northwest due to his knee injury. Merrill Cohen, a vocational counselor, testified that Henderson was capable of "light-duty" work between December 12, 2003, and May 22, 2006. AR (Cohen-direct) at 18-19.

The IAJ issued a proposed decision and order concluding (1) between December 31, 2003, and August 24, 2005, Henderson was not "temporarily totally disabled"; (2) as of August 24, 2005, Henderson's condition was not in need of further treatment; and (3) as of August 24, 2005, Henderson's condition did not result in any permanent impairment. AR at 34. Henderson petitioned the Board for review, which the Board denied, adopting the IAJ's proposed decision and order.

Henderson appealed to superior court. He moved to strike Barnard's testimony, arguing that (1) Glacier Northwest obtained Bernard's examination of Henderson only by agreeing that his results would not be used against Henderson in the case involving his knee injury; (2) Barnard's testimony was not necessary to rebut testimony related to Henderson's back injury claim because no such evidence was offered at the hearing; (3) Barnard's testimony had no probative value because he examined Henderson in relation to his back claim; and (4) Barnard's testimony was prejudicial, cumulative, and confusing. At the trial court, Henderson briefly mentioned that Barnard's examination was "almost like a compel exam . . . subject to a CR 35 motion," but his arguments focused on the relevancy of and alleged prejudice arising from admission of Barnard's

testimony. Report of Proceedings (RP) at 12. The trial court concluded that Barnard's testimony was relevant and denied Henderson's motion to exclude it.

On the second day of trial, the trial court and the parties learned that juror 2 was juror 6's mother. In response to individual questioning by the trial court, jurors 2 and 6 stated that they did not reside together, juror 6 worked at night, they rode together to the trial, they had not discussed the case with each other, and they would not have difficulty discussing the case openly and honestly during jury deliberations even if their opinions differed. After the questioning, the parties agreed to proceed without objection to jurors 2 and 6 remaining on the jury.

After originally returning a verdict and encountering a "problem," the jury deliberated an extra day. RP at 97. The jury returned a verdict affirming the Board's findings and decision. Henderson unsuccessfully moved for a new trial, arguing that juror 2 improperly influenced juror 6 to change her vote when the jury was polled after returning its original verdict and, during subsequent deliberations, influenced the rest of the jury to change their votes to return its second verdict affirming the Board's decision. He appeals.

ANALYSIS

I. Scope Of Review

We observe from the outset that Henderson asks us to review rulings by the IAJ and the Board. But under RCW 51.52.115, the superior court reviews the Board's determinations de novo. RCW 51.52.140 provides that "the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court *as in other civil cases*." (Emphasis added.) Thus, we do not directly review the Board's determinations but focus on the trial court proceeding.

II. Admission of Barnard's Testimony

Henderson argues that the trial court abused its discretion in admitting Barnard's testimony because it was "akin to allowing a CR 35 examination to have taken place without the appropriate motion and without the appropriate evidentiary showing" of good cause.[2] Br. of Appellant at 23. We disagree.

We review a trial court's admission of evidence for abuse of discretion. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).

CR 35(a)(1) provides:

> Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties.

(Emphasis omitted.) Here, neither the Board nor the trial court compelled Henderson to submit to an examination by Bernard. Instead, Henderson privately agreed to the examination. Thus, CR 35 is inapplicable in this case and Henderson's claim based on an argument that the trial court abused its discretion in denying his motion to strike Bernard's testimony without an order that required the examination fails.

III. Juror Misconduct

Henderson next argues that the trial court abused its discretion in denying his motion for

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[2] The record before us does not reflect an agreement between the parties that Barnard's findings would not be used in the hearing on Henderson's knee claim.

a new trial because (1) juror 2 committed misconduct by improperly influencing her daughter, juror 6, and (2) jurors 2 and 6 committed misconduct by improperly influencing the rest of the jury. We disagree.

We review the trial court's ruling on a motion for a new trial based on juror misconduct for abuse of discretion. *Robinson v. Safeway Stores*, *Inc.*, 113 Wn.2d 154, 158, 776 P.2d 676 (1989). But an appellant bears the burden of perfecting the record so that we have before us all the relevant evidence. RAP 9.2(b); *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994). An insufficient appellate record precludes review of the alleged errors. *Bulzomi*, 72 Wn. App. at 525.

Henderson's argument relies on events occurring when the trial court polled the jury after returning its first verdict, apparently during which polling juror 6 disputed her vote, causing the jury to return for further deliberations. But the transcripts of this portion of the trial are not part of the record on appeal. Moreover, other than Henderson's speculation in his briefing, he offers no evidence of conduct by jurors 2 and 6 supporting his claim that they improperly influenced other jurors.

Finally, RAP 10.3(a)(6) requires parties to support their arguments with citation to legal authority. Other than citing the general standards for reviewing juror misconduct, Henderson offers no legal authority supporting his argument that juror misconduct occurred in this case. For all these reasons, we decline to review this issue.

IV. Verdict Supported By Substantial Evidence

Henderson also argues that the evidence does not support the jury's verdict affirming the Board's conclusions. We review the record for whether substantial evidence supports the

verdict, viewing the record in the light most favorable to the party prevailing in superior court. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009). "[S]ubstantial evidence" is "a quantum of evidence sufficient to persuade a fair-minded person that the premise is true." *Rainier View Ct. Homeowners Ass'n, Inc. v. Zenker*, 157 Wn. App. 710, 719, 238 P.3d 1217 (2010), *review denied*, 170 Wn.2d 1030 (2011). Such a challenge to the verdict "'admits the truth of the opponent's evidence and all inferences which can reasonably be drawn [from it].'" *Faust v. Albertson*, 167 Wn.2d 531, 537, 222 P.3d 1208 (2009) (alteration in original) (quoting *Davis v. Early Constr. Co.*, 63 Wn.2d 252, 254, 386 P.2d 958 (1963)). We defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence. *Rogers*, 151 Wn. App. at 180-81.

The jury's verdict provided that (1) between December 31, 2003, and August 24, 2005, Henderson was not "temporarily totally disabled"; (2) as of August 24, 2005, Henderson's condition was not in need of further treatment; and (3) as of August 24, 2005, Henderson's condition did not result in any permanent impairment. Jury instruction 9, the total disability instruction, provided in part:

> A worker is totally disabled if unable to perform or obtain regular gainful employment within the range of the worker's capabilities, training, education and experience. A worker is not totally disabled solely because of inability to return to the worker's former occupation. However, total disability does not mean that the worker must have become physically or mentally helpless.

Clerk's Papers (CP) at 74.

Jury instruction 10, the permanent partial disability instruction, provided:

> Permanent partial disability is a loss of bodily function to a part or parts of the body, proximately caused by the industrial injury . . . . [i]f the part of the body involved is a part that could be amputated but no amputation has occurred, then the disability is measured in terms of percentage of loss of function of that

> particular part or parts of the body.
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> Permanent partial disability is a measure of loss of bodily function only. In evaluating permanent partial disability, the ability or inability to carry on the worker's usual occupation as well as other limitations may be considered insofar as they reflect loss of bodily function.

CP at 75.

Here, Barnard's testimony about Henderson's treatment history, including his treatment and examinations by Thompson, Zechmann, and Broman, established that (1) in December 2003, Henderson was released to "sedentary or office-type work" and was capable of working as a clerk, porter, or rental car shuttle driver and (2) as of March 2004, he had "no permanent partial disability or impairment." AR (Barnard-direct) at 12-13, 17-19. Likewise, Cohen testified that Henderson was capable of "light-duty" work between December 12, 2003, and May 12, 2006. AR (Cohen-direct) at 18-19. Because the evidence shows that Henderson was capable of gainful employment as of December 2003, substantial evidence supports the jury's verdict that between December 31, 2003, and August 24, 2005, Henderson was not "temporarily totally disabled." CP at 85.

Similarly, Barnard's testimony summarizing Henderson's treatment history established that Henderson did not require further treatment after March 2004. Thus, substantial evidence supports the jury's verdict that as of August 24, 2005, Henderson's condition was not in need of further treatment.

Finally, Barnard's testimony about his review of Henderson's treatment history and his examination of Henderson's knee established that (1) Henderson's complaints stemmed from his obesity; (2) Henderson suffered from degenerative arthritis of the right knee unrelated to his knee injury; and (3) as of December 2003, Henderson did not suffer from "[any] ratable impairment of

the lower extremity." AR (Barnard-direct) at 32-33. Thus, substantial evidence supports the jury's verdict that as of August 24, 2005, Henderson's condition did not result in any permanent

impairment. Henderson's sufficiency claim fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Worswick, A.C.J.

Quinn-Brintnall, J.