IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NANCY JENKINS, Appellant, v. TARGET CORPORATION, Respondent.	No. 39961-0-II UNPUBLISHED OPINION

Worswick, J. — Nancy Jenkins appeals an order affirming a decision by the Board of Industrial Insurance Appeals (BIIA), denying her benefits. She asserts that she did not receive a fair trial because the trial court did not provide the jury with a video tape player, or instruct it that one could be made available if requested. We affirm.[1]

FACTS

Jenkins filed a claim for industrial insurance benefits in July 2007, based on a back injury sustained on June 18. She asserted that she had twisted her back while lifting a box of curtain rods. The Department of Labor and Industries allowed the claim, and the Target Corporation appealed to the BIIA. At the BIIA hearing, Jenkins testified that she had suffered some lower back pain before June 18, but the pain she experienced afterward was greater, and different, involving a stabbing, burning pain, instead of an ache, and pain that was not confined to her lower

[1] A commissioner of this court considered this matter pursuant to RAP 18.14 and referred the case to a panel of judges.

back but extended down her left leg to her knee.

The BIIA also considered testimony or depositions from three doctors who had treated or examined Jenkins. The chiropractor who had treated her for approximately two years before the incident found that she had suffered an injury on June 18 that had increased the severity of her symptoms. However, a second chiropractor believed that the lower back condition had not been aggravated by the June 18 incident. The third doctor, an orthopedic surgeon, found that Jenkins had a pre-existing lumbosacral strain with left leg pain and, except for pain medication, her treatment had not changed after the incident. He could not say on a more probable than not basis that she had sustained an injury on June 18.

In addition to this testimony, Target produced a surveillance video of Jenkins, made on July 21 without her knowledge. It depicted her at a grocery store and in a medical building parking lot. The tape was 8 minutes and 51 seconds long. Two of the medical experts reviewed the video and opined that Jenkins's actions and movements were inconsistent with her claims. The third expert was not asked to comment on the video.

The BIIA found that Jenkins had not sustained an industrial injury and reversed the Department's decision. Jenkins appealed to superior court and asked for a jury trial. The jury considered only the evidence before the BIIA. It viewed the video tape in court, and Jenkins's attorney encouraged the jury to look at the tape again during its deliberations. The video tape went with the jury; however, it did not request and was not provided a tape player.

The jury found that the BIIA's decision was correct. Jenkins filed a CR 59 motion for a new trial the same day, asserting that the failure to provide the jury with a tape player constituted

an irregularity in the proceedings that denied her a fair trial. The trial court denied that motion on October 30.

ANALYSIS

Decisions regarding what should go to the jury room for deliberations lie within the sound discretion of the trial court. *See State v. Castellanos*, 132 Wn.2d 94, 102, 935 P.2d 1353 (1997). The court does not abuse its discretion unless no reasonable person would adopt the same position. *Singleton v. Frost*, 108 Wn.2d 723, 730, 742 P.2d 1224 (1987).

There is a potential for undue emphasis when recorded evidence is replayed. *See State v. Frazier*, 99 Wn.2d 180, 190, 661 P.2d 126 (1983); *State v. Slater*, 36 Wn.2d 357, 365, 218 P.2d 329 (1950); *State v. Whalon*, 1 Wn. App. 785, 803, 464 P.2d 730 (1970). Thus, it is reasonable for the court to maintain control over the mechanism for playing back the recorded information. *See Castellanos*, 132 Wn.2d at 98-99; *Frazier*, 99 Wn.2d at 191; *State v. Smith*, 85 Wn.2d 840, 851, 540 P.2d 424 (1975); *State v. Oughton*, 26 Wn. App. 74, 82-83, 612 P.2d 812 (1980). The trial judge in this case said that he rarely allowed a playback machine in the jury room because of the concern about unduly emphasizing one piece of evidence. That was a reasonable position.

With regard to the need for an instruction, given the closing argument, there is no reason why the jury should have believed that it could not ask to watch the video again. Jenkins has not shown that an instruction was necessary. In any case, she did not request or propose one, and she has waived this argument. *See State v. Hultenschmidt*, 125 Wn. App. 259, 269, 102 P.3d 192 (2004).

Affirmed.

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.

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Worswick, A.C.J.

We concur:

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Armstrong, J.

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Van Deren, J.