NO. 44508-5-II

COURT OF APPEALS,
DIVISION II

IN THE STATE OF WASHINGTON

CAROLYN A. GIGER, *APPELLANT/PLAINTIFF*

v.

DEPARTMENT OF LABOR AND INDUSTRIES, *RESPONDENT/DEFENDANT.*

BRIEF OF APPELLANT

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Assignment of Error

The trial court erred in entering the Order, Judgment and Decree dated, January 23, 2013, granting summary judgment in favor of the Department of Labor and Industries

Issues Pertaining to Assignment of Error

No. 1. Was the industrial injury of December 24, 1985, a proximate cause of Robert Giger's retirement from the Department of Corrections on April 1, 1988?

No. 2. Was it reasonable under the circumstances that Robert Giger not attempt to return to work between September 4, 1992, and February 14, 1994?

Statement of the Case

Robert Giger, born April 20, 1936, commenced working for the Department of Corrections, State of Washington, on August 17, 1957. In 1959, Mr. Giger was working as a correction office at the state penitentiary in Walla Walla, when he was assaulted by an inmate and suffered a low back injury. He filed a worker compensation claim, and in January 1960, underwent a laminectomy and fusion at L5-S1. He then returned to work for the Department of Corrections in January 1961. The first year or two after the injury his low back bothered him periodically, but as time went on his condition improved. (Certified Appeal Board Record, R. Giger - Direct, November 5, 2010, page 8, line 23; page 9, lines 14, 16, 20 and 26; page 10, lines 8, 10 and 18; and Cross, page 69, lines 3, 5 and 9).

Then on July 1, 1978, Mr. Giger was transferred to Larch Corrections Center, a minimum security facility in Clark County, Washington, as Superintendent. On Christmas Eve, 1985, Mr. Giger received a call at home that two inmates had escaped from the Correction Center. Mr. Giger drove to a remote location in Clark County, where the inmates were likely to head, to set up a post. As he stepped from his service vehicle, he slipped on compacted snow and ice, twisted his back, and fell to

the ground. Mr. Giger was off work for four to six weeks, went back to work full time, continued to have problems with his low back, and last worked in late April 1987. (CABR, R. Giger – Direct, page 9, lines 6, 8, 10 and 12; page 15, line 26; page 16, line 3; and page 18, line 14).

On March 1, 1988, Mr. Giger had a second low back surgery, consisting of a Steffee plate fusion at L4-5 with pedicle screws. Mr. Giger could not continue working at the Department of Corrections with his low back condition, and retired on April 1, 1988, with over 30 years of service. At the time of his retirement, Mr. Giger also suffered from high blood pressure, or hypertension, which had been first diagnosed in 1984. Prior to December 24, 1985, Mr. Giger's hypertension was controlled by medication, but, after the injury with the pain he was experiencing, his blood pressure skyrocketed. Mr. Giger had also been diagnosed with angina, and the stress of the industrial injury and managing his pain aggravated his angina. (CABR, R. Giger - Direct, page 17, lines 5, 8, 19, 23 and 25; page 18, lines 14, 17 and 24; page 19, line 14, page 21, line 7; page 22, lines 14, 16 and 18; page 23, lines 17 and 19; and page 24, line 5).

After Mr. Giger retired from the Department of Corrections, the Department of Labor and Industries assigned a vocational counselor, Connie Stewart, who at the time was employed by the Department, to determine

whether Mr. Giger was employable. Ms. Stewart knew that Mr. Giger had retired on April 1, 1988, and learned that there were no jobs available to Mr. Giger at the Department of Corrections. Ms. Stewart learned that Mr. Giger wanted to pursue a career in real estate to supplement his retirement income, which was $2,800 per month. Ms. Stewart was also aware that Mr. Giger's hypertension prevented him from returning to a high stress or pressure job. Ms. Stewart found that Mr. Giger had transferable skills to do other work and be gainfully employed should he choose to do that. (CABR, Stewart - Direct, January 10, 2011, page 4, line 24; page 6, line 20; page 8, line 14; page 16, line 25; page 17, line 21; page 20, line 12; and page 32, line 12).

Though the Department of Labor and Industries knew that Mr. Giger had retired on April 1, 1988, they continued to pay him time loss benefits as a temporarily totally disabled worker through October 15, 1990. When the Department of Labor and Industries then closed his claim on November 8, 1990, and found Mr. Giger able to work, Mr. Giger appealed to the Board of Industrial Insurance Appeals, and then to Superior Court for Clark County. The appeal to Superior Court was decided by jury verdict against Mr. Giger, and on September 4, 1992, the Court affirmed the decision of the Board. (CABR, Page 90).

Then on November 12, 1992, Mr. Giger was involved in a motor vehicle accident, when his car was struck from the rear while stopped for a traffic light by a drunk driver. Mr. Giger received a compression fracture to his neck and treated with Dr. Bruce Bell, a neurologist, in Vancouver, Washington. Again on February 9, 1993, Mr. Giger's vehicle was struck from the rear by another vehicle when traffic slowed on a freeway on-ramp. The impact aggravated Mr. Giger's compression fracture and he continued treatment with Dr. Bell. (CABR, pages 89-90; R. Giger - Direct, page 28, line 15; page 29, lines 3, 7 and 14; and page 30, line 12).

On December 8, 1993, Dr. Bell saw Mr. Giger back. He had been improving from the injuries he received in the motor vehicle accidents, and, about a week prior to the visit, he had an aggravation of his low back condition from the industrial injury of December 24, 1985. His low back had locked up, and he had hardly any movement in his back. He had pain running down both legs. On physical examination, Dr. Bell found a significant amount of spasm in his low back, severe scoliosis bending to the left, and a positive straight by raise of 10 degrees bilaterally. Dr. Bell saw him back on December 29, 1993, and January 12, 1994, and Mr. Giger's low back symptoms were getting worse. On February 9, 1994, when Dr. Bell saw Mr. Giger again, an application to reopen claim for aggravation was

completed, and the reopening application was received by the Department of Labor and Industries on February 14, 1994. (CABR, Dr. Bell – Direct, November 30, 2010, page 63, lines 10, 12, 16, 23 and 25; page 64, lines 14 and 16; page 65, lines 21 and 23; and page 67, lines 12 and 17).

On January 25, 1995, Mr. Giger's claim was reopened by the Department of Labor and Industries for medical treatment only on the basis that the aggravation application was not received within seven years of initial claim closure. That issue was eventually decided in Superior Court for Clark County by summary judgment on June 26, 2009, favorable to Mr. Giger, after a long and protracted series of protests and appeals, and he could receive benefits other than treatment effective February 14, 1994. (CABR, pages 90-94).

While the claim was reopened for treatment, Mr. Giger had the Steffee plates and pedicle screws removed by Dr. Michael Markham, a neurosurgeon, on March 17, 1995. The Steffee plates that had been used in the fusion at L4-5 on March 1, 1988, had come apart, and x-rays showed that a nut on one of the pedicle screws did not have a lock nut on it. The nut had come off the pedicle screw causing the Steffee plate to move up and down. Mr. Giger then had improvement for six months before his condition worsened again, and Dr. Markham had x-rays taken that determined that the

fusion itself had come apart. Mr. Giger then saw Dr. Timothy Keenan, a spine surgeon, who on November 5, 1997, re-fused the L4-5 level and extended the rods to L3-4, resulting now in a three level fusion. Following the third fusion, Mr. Giger has had a slow and difficult recovery, and has had 40-50 epidural steroid injections over the years. (CABR, R. Giger - Direct, page 32, line 1; page 34, lines 8, 10, 12 and 18; page 36, lines 7 and 21; page 37, line 1; and page 38, line 2).

Timothy Keenan, MD, a Board certified orthopedist, with a fellowship in spine surgery, reviewed the operative report of Michael Markham, MD, dated March 17, 1995. Dr. Markham was now deceased. One of the lock screws had come off and was located in the soft tissue. Reviewing the CT scan of November 20, 1996, Dr. Keenan found that the facet joints were over grown and not completely fused. The condition is called psuedoarthritis, and was related to the 1988 surgery not healing. (CABR, Dr. Keenan - Direct, November 16, 2010, page 5, line 17; page 7, line 10; page 11, line 10; page 13, lines 4, 9, 13 and 15; page 14, line 9; page 15, line 3; and page 16, line 6).

All of the doctors who testified on behalf of Mr. Giger: Bruce Bell, MD, John Kauser, MD, Timothy Keenan, MD, and Maury Hafermann, MD, established that Mr. Giger was temporarily totally disabled

as proximately caused by the industrial injury of December 24, 1985, from February 14, 1994, through June 9, 2010. Their testimony also established that at least by June 9, 2010, Mr. Giger was permanently totally disabled. (CABR, Dr. Bell - Direct, November 30, 2010, page 77, lines 12 and 16; and page 78, line 7; Dr. Kaiser - Direct, November 30, 2010, page 35, line 16; and page 36, line 23; Dr. Keenan - Direct, November 16, 2010, page 29, line 9; and Dr. Hafermann - Direct, November 5, 2010, page 122, lines 15 and 19; and page 123, line 8). What is in dispute is since Mr. Giger did not attempt to return to work after he was found employable as of November 8, 1990, whether he should be denied time loss and pension benefits on his reopening application.

Mr. Giger had appealed to the Board of Industrial Insurance Appeals the order of the Department of Labor and Industries dated June 25, 2010, affirming the orders dated June 8, 2010, and June 9, 2010. The June 8, 2010, Department order denied time loss benefits from February 14, 1994, through June 4, 2010, on the basis that he voluntarily retired from employment on April 1, 1988. The June 9, 2010, Department order closed the claim for treatment without awarding pension benefits. (CABR, pages 77-79 and page 95).

Mr. Giger's appeal to the Board proceeded to a full evidentiary hearing before an Industrial Appeals Judge. The issue presented for hearing was whether the December 24, 1985, industrial injury was a proximate cause of Mr. Giger's retirement from the Department of Corrections on April 1, 1988. On September 19, 2011, the Industrial Appeals Judge issued his 34 page Proposed Decision and Order deciding the issue favorable to Mr. Giger. The Proposed Decision and Order awarded temporary total disability from February 14, 1994, and permanent total disability as of June 25, 2010. (CABR, pages 41-74).

The Department of Labor and Industries then petitioned for review to the Board and Mr. Giger responded. (CABR, pages 41-74). On January 25, 2010, two of the three Board members, the third not participating, reversed the Industrial Appeals Judge. The Decision and Order determined that since Mr. Giger had not attempted to return to work following the order of November 8, 1990, that he could not recover further time loss or pension benefits. Since he had not attempted to return to work before filing his reopening application on February 14, 1994, he was foreclosed from further benefits. (CABR, pages 2-35).

Mr. Giger then appealed the Board's Decision and Order to Superior Court for Clark County. The Department filed a Motion for Summary Judgment to which Mr. Giger responded. The motion was argued to the Court on September 14, 2012. Robert Giger died on December 4, 2012, and on January 15, 2013, an order was entered substituting Carolyn Giger as the plaintiff in the action. On January 23, 2013, an Order, Judgment and Decree was entered granting summary judgment for the Department affirming the Board's decision. On February 7, 2013, Mrs. Giger filed her appeal to the Court of Appeals, Division II, in Superior Court. (Clerk's Papers Nos. 2, 20, 38 and 61).

Argument

A. Summary Judgment

The appellate court reviews a summary judgment order *de novo*, engaging in the same inquiry as the trial court. *Elcon Constr., Inc., v. E. Wash. Univ.,* 174 Wn.2d 157, 164, 273 P.3d 965 (2012)., Summary judgment is appropriate where, viewing all facts and resulting inferences

most favorable to the nonmoving party, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Briggs v. Nova Servs.,* 166 Wn. App. 20 794, 801, 213 P.3d 910 (2009).

A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of litigation, *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). The moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Fitzpatrick v. Okonogan County*, 169 Wn.2d 598, 605, 283 P.3d 1129 (2010). See *Orris v. Lingley,* 172 Wn. App. 61, 65, P. 3d (2012).

Mrs. Giger maintains that there is a genuine issue of material fact as to whether her husband retired as a proximate cause of the industrial injury, and whether a reasonable person in the position of Mr. Giger would have attempted to return to work after his claim was closed.

In 1986, RCW 51.32.060, Permanent Total Disability, was amended to add a new paragraph (6), which provides:

> In the case of new or reopened claims, if the supervisor of industrial insurance determines that, at the time of filing or reopening, the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section.

At the same time RCW 51.32.090, Temporary Total Disability, was amended to add a new paragraph (8), which provides:

> If the supervisor of industrial insurance determines the worker is voluntarily retired and no longer attached to the workforce, benefits will not be paid under this section.

In the same year, Washington Administration Code 296-14-100 was enacted to define what voluntary retirement means under RCW 51.32.060 and 51.32.090. Paragraph (3) provides:

> The claimants of new or reopened claims will not be deemed voluntarily retired if the injury or occupational disease was a proximate cause of the decision to retire and sever the attachment to the workforce.

Here, the reopening application was filed on February 14, 1994, after the effective date of the statutory amendments and regulation, and they would apply to govern the issues on this appeal.

Kaiser Aluminum v. Overdorf, 57 Wn. App. 291, 295, 789 P.2d 8 (1990), and *Weyerhaeuser Co. v. Farr,* 70 Wn. App. 759, 763, 885 P.2d 711 (1993), establish that the law of voluntary retirement was essentially the same prior to the enactment of RCW 51.32.060 (6) and RCW 51.32.090 (8). If an injured worker has previously voluntarily retired from the workforce prior to the aggravation of an industrial injury or occupational disease, he or she is not entitled to temporary total disability or permanent total disability. Mrs. Giger does not disagree, but the issue remains whether Mr. Giger

voluntarily retired from the workforce, or did he retire as a proximate cause of the industrial injury, which is a question of fact.

In *Energy NW. v. Hartje*, 148 Wn. App. 454, 468, 199 P.3d 1043 (2009), Ms. Hartje argued that she was not voluntarily retired because she was not able to return to the workforce due to her industrial injury. Division III at page 469 held that Ms. Hartje must show that her retirement would not have resulted if her industrial injury had not occurred, and she failed to do so. But then in the next paragraph, Division III states that because it was previously determined that Ms. Hartje was capable of gainful employment when her case was previously closed, her industrial injury was not a proximate cause of her failure to return to the workforce. This is what Division III calls the law of the case doctrine, that is somehow different than *res judicata*, which they earlier denied application.

Essentially, the law of the case doctrine is the same as *res judicata*. *White v. Department of Labor & Indus.*, 48 Wn.2d 413, 414, 293 P.2d 764 (1956), known as the *Jesse White* decision, holds that an order of the Department of Labor and Industries closing the claim of an injured worker is *res judicata* as to the extent of the injury at that time, but is not *res judicata* as to a subsequent period of aggravation. *Jesse White* has been applied to significant decisions of the Board of Industrial Insurance Appeals.

In re Leona McClenaghan, BIIA Dec., 24, 922 (1967). *In re Mary Burbank*, BIIA Dec., 30, 673 (1969), and *In re Lisa Smith*, BIIA Dec., 86, 1152 (1988). Here, the order of the Department of Labor and Industries dated November 8, 1990, that awarded permanent partial disability, time loss as paid, and closed the claim, was not *res judicata* as to the period of aggravation commencing February 14, 1994.

Since RCW 51.32.060 (6) references new or reopened claims at the time of filing or reopening the claim, the determination would be made here as of February 14, 1994, when the reopening application was filed. If Mr. Giger had retired as a proximate cause of the industrial injury on December 24, 1985, his retirement would not be voluntary, and he would be able to recover time loss benefits and a pension. The question of fact remains, was the industrial injury a proximate cause of his retirement. RCW 51.32.060 (6) and RCW 51.32.090 (8) do not state any retirement, only voluntary retirement disqualifies an injured worker from those benefits on a claim reopening for aggravation.

In light of *Energy NW. v. Hartje*, 148 Wn. App. at page 469, there is a second issue of fact presented by this case. Since Mr. Giger did not attempt to return to work following November 8, 1990, when his claim was closed, was it reasonable that he not attempt to do so. Mr. Giger appealed

the determination that he was able to work as of November 8, 1990, to the Board of Industrial Insurance Appeals and to Superior Court. Since the issue was not resolved until September 4, 1992, when the Judgment and Decree was entered in Superior Court, Mr. Giger would have negated his appeal had he attempted to return to work during the interim. He would have disqualified himself as a temporarily totally disabled worker pursuant to RCW 51.32.090, and could not receive time loss benefits. Since Mr. Giger was pursuing his right to appeal pursuant to RCW 51.52.060 and RCW 51.52.110, he could not jeopardize that right.

A question of fact remains as to whether it was reasonable that Mr. Giger not attempt to return to work between September 4, 1992, and February 14, 1994. Mr. Giger was involved in the motor vehicle accident of November 12, 1992, in which he received a compression fracture of the neck, which was aggravated by the second motor vehicle accident on February 9, 1993. Then two weeks before December 8, 1993, when he again saw Dr. Bell, he had aggravated his low back condition from the industrial injury of December 24, 1985, when his back locked up and he could hardly move. His accepted low back condition declined from there. On March 17, 1995, Dr. Michael Markham removed the Steffee plates and pedicle screws from the March 1, 1988, fusion at L4-5. At that time it was discovered that

one of the pedicle screws did not have a lock nut on it, allowing the nut to come off the pedicle screw and the Steffee plate to move up and down. Then the CT scan of November 20, 1996, revealed that the fusion itself had failed, and on November 5, 1997, Dr. Timothy Keenan re-fused L4-5 along with L3-4.

Since the fusion for the industrial injury had failed, there is a completely different light cast on this case. The Board of Industrial Insurance Appeals determines which of their Decisions are significant and makes them available to the public pursuant to RCW 51.52.160. Those decisions are nonbinding, but persuasive authority on appeals. While the Board interpretation of the Industrial Insurance Act is not binding on the appellate court, they are entitled to great difference. *Dept. of Labor & Indus., v. Shirley,* 171 Wn. App. 870, 887, P.3d (2012), *O'Keefe v. Dept. of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005).

Well recognized in Washington is the Consequential Conditions Doctrine. Any conditions that develop from the industrial injury are covered as part of the claim. *In re Arvid Anderson*, BIIA Dec., 65, 170 (1986) held that conditions resulting from the industrial injury are considered part and parcel of the industrial injury itself. Where a cardiac arrhythmia was caused by the stress of surgery as part of the claim, therefore the heart arrhythmia

was attributable to the industrial injury. *In re Iris Vandorn*, BIIA Dec., 02 11466 (2003) held that a new injury suffered when the worker was involved in an auto accident on the way back from a required appointment with a vocational counselor as part of the claim is covered. The new injury is related to the original injury, and is a compensable consequence of the original industrial injury.

The Industrial Insurance Act is intended to grant the employee a sure and certain relief regardless of the fault or due care of either the employer or the employee. To this end, the Act is remedial in nature, and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Dept. of Labor & Indus., v. Shirley,* 171 Wn. App. at page 879, *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). Liberally construing the Act in favor of the worker, it is at least a question of fact as to whether it was reasonable that Mr. Giger not have attempted to return to work between September 4, 1992, and February 14, 1994, less than an 18 month period of time.

In this case Mr. Giger was receiving retirement benefits following his retirement from the Department of Corrections as of April 1, 1988, in the sum of $2,800 a month. Had the legislature intended to preclude time loss

and pension benefits from injured workers receiving retirement benefits, or reduce those benefits by the amount of retirement, they could have done so. Pursuant to RCW 51.32.220, injured workers receiving Social Security retirement or disability payments have their time loss and pension benefits reduced accordingly. Since the legislature has not reduced benefits in the instance of retirement, the legal presumption is that they did not intend to do so. *Dept. of Labor & Indus., v. Shirley*, 171 Wn. App. at Page 883. *Harris v. Dept of Labor & Indus.*, 120 Wn.2d 461, 472, 843 P.2d 1056 (1993) declined to read into the Act that which was absent.

The Department of Labor and Industries argues here that the decision of the Department on November 8, 1990, that was upheld before the Board and in Superior Court, that Mr. Giger was able to work, breaks the chain of his retirement on April 1, 1988, and he cannot now contend that his retirement was caused by the industrial injury. Knowing that Mr. Giger had retired when he did and was receiving retirement benefits, the Department continued to pay him time loss benefits through October 15, 1990. If anyone should be estopped to assert that claimant voluntarily retired from the Department of Corrections, or waived their right, it should be the Department of Labor and Industries.

In *Dept. of Labor & Indus. v. Shirley,* 171 Wn. App. at page 873, the Department argued that Mr. Shirley's simultaneous ingestion of alcohol and prescription medication constituted an intervening activity that broke the chain of causation between the industrial injury and his death, thereby precluding survivor benefits to his spouse. As provided in Washington Pattern Jury Instructions: Civil 155.06, the Washington Industrial Insurance Act permits multiple proximate cause. The industrial injury need only be a proximate cause of death, not the proximate cause. *Dept. of Labor & Indus., v. Shirley*, 171 Wn. App., at page 885, *Wendt v. Dept. of Labor & Indus.*, 18 Wn. App. 674, 676, 571 P.2d 229 (1977). In light of the Act's no fault policy and its mandate that worker compensation law be construed in the worker's favor, the consumption of alcohol with medication was not a supervening cause, and did not break the chain of causation between the industrial injury and Mr. Shirley's death. *Dept. of Labor & Indus. v. Shirley*, 171 Wn. App. at page 892.

To hold that the later determination that Mr. Giger was able to work breaks the chain of causation between the industrial injury and his retirement, would refute *White v. Dept. of Labor & Indus.*, 48 Wn.2d at page 414. The determination that Mr. Giger was able to work as of November 8, 1990, is only *res judicata* as to his condition at that time, and is not

res judicata as to any subsequent period of aggravation. To hold otherwise would deny an injured worker their right to ever reopen his claim for aggravation and receive time loss and pension benefits regardless of the circumstances. In this case the treatment that Mr. Giger had for the industrial injury, namely the failed fusion, rendered him unable to work, or attempt to return to work, after his claim was closed, and caused him to be temporarily and permanently totally disabled. *In re Arvid Anderson*, BIIA Dec., 65, 170 (1986), *In re Iris Vandorn*, BIIA Dec., 02 11466 (2003).

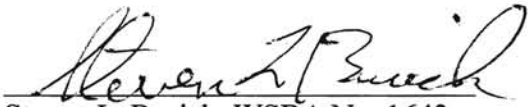
The moving party, the Department of Labor and Industries, failed to demonstrate that there is no genuine issue of material fact, and that reasonable minds could differ as to whether the industrial injury of December 24, 1985, was a proximate cause of Mr. Giger's retirement from the Department of Corrections on April 1, 1988, and whether it was reasonable under the circumstances that Mr. Giger not attempt to return to work between September 4, 1992, and February 14, 1994, *Fitzpatrick v. Okonogan Country*, 169 Wn.2d at page 605, and *Ranger Ins. Co.,* 164 Wn.2d at page 552.

B. Reasonable Attorney Fees

If the Court of Appeals were to grant judgment as a matter of law to Mrs. Giger, the respondent, she would be entitled to reasonable attorney fees pursuant to RCW 51.52.130. But, if the Appellate Court reverses and remands the case to Superior Court for trial on the issues remaining, the accident fund would not be affected, and she would have to prevail in Superior Court to be awarded reasonable attorney fees in Superior Court and the Court of Appeals.

Conclusion

The Order, Judgment and Decree dated January 23, 2013, granting summary judgment in favor of Department of Labor and Industries should be reversed and remanded to Superior Court for trial on the issues of fact remaining.



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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

CAROLYN A. GIGER, Appellant/Plaintiff, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent/Defendant(s).	No. 44508-5-II PROOF OF SERVICE BRIEF OF APPELLANT

The undersigned states that on May 17, 2013, I served by United States Mail, with proper postage prepaid, Brief of Appellant, addressed as follows:

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

Dated: May 17, 2013.

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