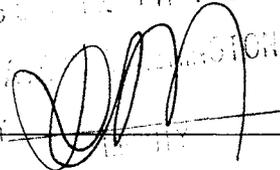


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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MARVIN POINDEXTER,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

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REPLY BRIEF OF APPELLANT

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I. REPLY TO RESPONDENT'S COUNTERSTATEMENT OF THE CASE

In discussing the testimony of Dr. William Furrer, who examined Marvin Poindexter at the behest of the Department of Labor and Industries,<sup>1</sup> the Department acknowledges Dr. Furrer's observation that Poindexter exhibited pain behaviors during his January 1999 independent medical examination (IME) of Poindexter. Br. of Resp't at 4; Furrer at 41 (Poindexter exhibited pain behavior such as clutching his low back when he bent over in flexion). Dr. Furrer found that Poindexter exhibited the same manifestations of pain behavior during the January 2002 IME he exhibited during the January 1999 IME. *Id.* at 64. In fact, Dr. Furrer characterized Poindexter's manifestations of pain behavior as "flagrant." *Id.* at 77. In its counterstatement of the case, the Department fails to discuss the significant fact that pain behaviors such as those Poindexter exhibited during both IMEs are indicators of chronic pain syndrome. Johnson, Oct. 18, 2002, at 76.

In discussing the testimony of Dr. Johnson, the Department attempts to discredit Dr. Johnson's qualifications and medical competence

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<sup>1</sup> While assigning the derogatory label of "hired expert" to Dr. H. Richard Johnson, the Department describes Dr. Furrer as a physician "who conducted two independent medical examinations of Poindexter." Br. of Resp't at 4. The Department's label of "hired expert" applies equally to Dr. Furrer, as Dr. Furrer was hired by the Department to examine Poindexter.

to diagnose chronic pain syndrome. In fact, Dr. Johnson, an orthopedic surgeon, was “well familiar” with patients with chronic pain syndrome and with the necessary treatment of the condition. *Id.* at 77. Dr. Johnson diagnosed many patients with chronic pain syndrome during his career. *Id.* After not only personally examining Poindexter, but also reviewing numerous records and reports prepared by a number of other treating medical professionals, *see id.* at 13-14, Dr. Johnson diagnosed Poindexter as suffering chronic pain syndrome. *Id.* at 75. He further opined that Poindexter’s chronic pain syndrome is, on a medically more probable than not basis, directly related to his industrial injury. *Id.* at 76. Dr. Johnson was fully qualified and unquestionably competent to diagnose Poindexter’s chronic pain syndrome.

The Department also mischaracterizes Poindexter’s argument before the superior court. In its brief, the Department quotes portions of Poindexter’s counsel’s argument in support of Poindexter’s motion for a directed verdict. *See Br. of Resp’t* at 13. The excerpt the Department quotes implies that Dr. Johnson acknowledged that chronic pain syndrome is not a legitimate complaint. That is not, by any stretch, what counsel argued. In fact, if the portion of the transcript cited, RP 74-75, is read in its entirety, it is plainly evident that counsel was summarizing Dr. Johnson’s testimony that physicians who are not knowledgeable about

chronic pain syndrome often dismiss a patient's complaints of chronic pain as nothing but the phony complaints of a malingerer, when in fact the patient is suffering chronic pain syndrome, a recognized condition. In the portion of argument the Department quotes, Poindexter's counsel argued that Dr. Furrer, although recognizing that Poindexter exhibited flagrant pain behaviors, did not diagnose chronic pain syndrome because he fell into the category of physicians who do not understand that chronic pain syndrome is a legitimate condition and that a patient's complaints about chronic pain and a patient's pain behaviors are legitimate complaints and indicators of chronic pain syndrome.

## II. ARGUMENT IN REPLY

Poindexter is not, as the Department contends, asking the Department to disprove his argument. Rather, as explained fully in Poindexter's opening brief, the finding of the Board of Industrial Insurance Appeals (BIIA), and the jury's determination that the BIIA was correct in finding, that Poindexter did not suffer chronic pain syndrome is not supported by substantial evidence because the *only* evidence of chronic pain syndrome in the record is Dr. Johnson's unequivocal testimony that Poindexter suffers this condition as a proximate result of his industrial injury. Assuming the Department is correct that the trier of fact is free to reject the testimony of one expert witness in favor of

another, that is not what happened here. Here, the trier of fact rejected Dr. Johnson's testimony that Poindexter suffers chronic pain syndrome, where there was no other evidence whatsoever on this issue the trier of fact could have accepted over Dr. Johnson's testimony. The BIIA's finding and the jury's verdict as to chronic pain syndrome, far from being supported by substantial evidence, are supported by no evidence.

Dr. Johnson's opinion as to chronic pain syndrome was not, as the Department contends, incomplete or questionable. Although Dr. Johnson examined Poindexter only once, the Department's hired expert, Dr. Furrer, examined Poindexter only twice, yet the Department hails Dr. Furrer's testimony as worthy of unconditional acceptance. And, Dr. Furrer, the Department's expert, is an orthopedic surgeon with no specialty or background in psychology or psychiatry, *see Furrer at 6-7*, the very reason the Department gives for discounting Dr. Johnson's opinions. *See Br. of Resp't at 24.*

The Department is entirely incorrect in arguing that Dr. Johnson's testimony as to chronic pain syndrome was incomplete. On the contrary, Dr. Johnson explained chronic pain syndrome and the tendency of physicians who lack sufficient knowledge of the condition to dismiss patients' complaints of chronic pain, when in fact the patients are suffering from chronic pain syndrome. Johnson, Oct. 18, 2002 at 75-80. Dr.

Johnson explained the basis for his diagnosing Poindexter with chronic pain syndrome secondary to his ongoing problems with his shoulder and low back. *Id.* at 75. He noted that both Drs. Kimpel and Furrer observed Poindexter's pain behaviors that are indicators of chronic pain syndrome.

*Id.* at 76. Dr. Johnson testified:

I believe that these pain behaviors are a direct result of the patient's reaction to his ongoing chronic pain – in other words, pain greater than six months in duration – that he clearly shows these pain behaviors but these pain behaviors, once understood, can be addressed and treated appropriately.

*Id.* Dr. Johnson also opined, on a medically more probable than not basis, that Poindexter's chronic pain syndrome is directly related to the residuals of his industrial injury. *Id.* Dr. Johnson's testimony was far from incomplete.

The Department asserts that reasonable inferences from the testimony of Drs. Furrer and Wyman refutes Dr. Johnson's testimony. Br. of Resp't at 26. On the contrary, the reasonable inference from Dr. Furrer's testimony is that Poindexter does in fact suffer from chronic pain syndrome. As discussed, Dr. Furrer observed Poindexter's flagrant pain behaviors. Furrer at 77. Pain behaviors are indicators of chronic pain syndrome. Johnson, Oct. 18, 2002, at 76. And, as discussed in Poindexter's opening brief, Dr. Wyman concurred with Dr. Furrer's

conclusions, including his conclusion that Poindexter exhibited flagrant pain behaviors. Wyman at 27-28. Dr. Wyman's testimony that Poindexter's shoulder pain "could have been" attributable to Poindexter's repetitive use of his arms, *id.* at 11-12, is mere speculation and, moreover, appears to be in reference to Poindexter's tendonopathy, not his chronic pain syndrome. *See* Br. of Appellant at 21. The Department fails to address this reasonable construction of Dr. Wyman's testimony.

Contrary to the Department's assertions, there is nothing improper about citing medical dictionaries and encyclopedias, including the DSM-IV and the Merck Manual of Diagnosis and Therapy. It is well settled that a court may resort to encyclopedias, authoritative works upon a subject, and "any source of information that is generally considered accurate and reliable." *Wash. Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 891-92, 665 P.2d 1337 (1983). A court may take judicial notice of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty. *CLEAN v. State*, 130 Wn.2d 782, 809, 928 P.2d 1054 (1996); *see also* ER 201. Courts in a number of opinions have cited, discussed, and relied on information in various encyclopedias. *See, e.g., Sahalee Country Club, Inc. v. State Board of Tax Appeals*, 108 Wn.2d 26, 35, 735 P.2d 1320 (1987) (encyclopedia of real estate appraising); *City of Seattle*

*v. Buchanan*, 90 Wn.2d 584, 596, 584 P.2d 918 (1978) (legal encyclopedia); *State v. Allen*, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978) (legal encyclopedia); *Gaylord v. Tacoma Sch. Dist. No. 10*, 88 Wn.2d 286, 292, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977) (New Catholic Encyclopedia, encyclopedias of psychology, Encyclopedia Britannica, Encyclopedia Americana, social science encyclopedia).

After complaining vehemently about Poindexter's citation to the DSM-IV, the Department then proceeds to quote a passage from the manual that discusses malingering. In so doing, the Department attempts to inject into this appeal, for the first time, the issue of whether Poindexter was faking his pain behaviors. This is improper. The genuineness of Poindexter's complaints has not been an issue in this case, despite the Department's attempts to extract unfounded inferences from Dr. Furrer's testimony to that effect. Dr. Furrer never, at any time, testified that in his opinion Poindexter's pain behaviors were phony. The Department repeatedly quotes Dr. Furrer's statement that he is "not inside the patient's body" and does not "think about pain." Furrer at 77 (stating further: "They can only describe it to me and I can record it."). It is a far stretch to infer from this testimony an opinion on the part of Dr. Furrer that Poindexter was faking his pain. Neither the evidence nor any reasonable

inference that can be drawn from the evidence supports the argument that Poindexter's complaints of pain were bogus or anything but genuine.

In sum, the BIIA's finding that Poindexter did not suffer chronic pain syndrome as a proximate result of his industrial injury is not supported by substantial evidence. Nor is the jury's finding that the BIIA was correct in so finding. Accordingly, the trial court erred by denying Poindexter's motion for judgment as a matter of law.

With regard to the denial of Poindexter's motion for a new trial, contrary to the Department's argument, the entry of a judgment against a party where there is a lack of evidence or reasonable inference to support the judgment does indeed constitute a denial of substantial justice to that party, justifying the grant of a new trial. *Barefield v. Barefield*, 69 Wn.2d 158, 417 P.2d 608 (1966). Indeed, it is difficult to conceive of a situation that more clearly illustrates a denial of substantial justice. Here, Dr. Johnson's testimony established that Poindexter suffers chronic pain syndrome as a proximate result of his industrial injury. A reasonable inference from Dr. Furrer's observation of Poindexter's flagrant pain behavior is that he suffers chronic pain syndrome. The evidence that Poindexter does *not* suffer chronic pain syndrome as a proximate result of his industrial injury consists of nothing more than the complete absence of

evidence. The trial court erred in denying Poindexter's motion for a new trial.

### III. CONCLUSION

For the reasons stated here and in Poindexter's opening brief, this Court should reverse the order denying Poindexter's motion for judgment as a matter of law and the judgment in favor of the Department and remand with directions to enter judgment in favor of Poindexter. Alternatively, this Court should reverse the order denying Poindexter's motion for a new trial and the judgment in favor of the Department and remand for a new trial. Poindexter is entitled to an award of attorney fees at trial. Further, costs on appeal, including reasonable attorney fees, should be awarded Poindexter.

DATED this 11<sup>th</sup> day of September, 2006.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I deposited in the U.S. mail a true and accurate copy of the following document: Reply Brief of Appellant, Court of Appeals, Division II, Cause No. 34499-8-II, to the following:

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

DATED: September 12, 2006, at Tukwila, Washington.

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