

NO. 34499-8-II

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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,

Respondent.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

This is a worker's compensation case governed by Washington's Industrial Insurance Act, Title 51 RCW. Marvin Poindexter appeals from a superior court judgment that affirmed an order of the Board of Industrial Insurance Appeals. Poindexter challenges the trial court's denial of his motions for a judgment as a matter of law and a new trial.

The Board found that Poindexter's shoulder and back conditions from his prior industrial injury became aggravated and ordered the Department of Labor and Industries to pay him time-loss benefits and allow medical treatments. But considering the totality of the testimony by three doctors, the Board rejected his hired orthopedist's opinion Poindexter also suffered the specific psychological condition of "chronic pain syndrome" as a proximate result of his industrial injury, and the jury concurred.

The trial court properly denied Poindexter's motions. To prevail on his motions, he had to establish as a matter of law both that he suffered chronic pain syndrome and that it was a proximate result of his industrial injury. The jury was free to reject, as it did, his expert's opinions in whole or in part, especially when two other experts who examined him, including his attending doctor, did not include chronic pain syndrome in their

diagnoses, and one of them instead described “factitious” symptoms and “illness conviction.” The Court should affirm the superior court judgment.

## II. COUNTERSTATEMENT OF THE ISSUES

At trial, none of the testifying doctors, except for Poindexter’s hired orthopedist who saw him once, diagnosed him with a psychological condition of chronic pain syndrome as a proximate result of his industrial injury, based on his pain behaviors. Another orthopedist, who examined him twice, testified that the same behaviors were due to his illness conviction. Poindexter had the burden of proving that he suffered chronic pain syndrome as a proximate result of his industrial injury, and the Board determined, and the jury concurred, that he failed to do so. Under these circumstances, and when Poindexter asserted *only* that there was insufficient evidence for the jury to reject his expert’s opinions:

A. Did the trial court correctly deny Poindexter’s motion for a judgment as a matter of law?

B. Did the trial court properly exercise its discretion in denying Poindexter’s motion for a new trial?

### III. COUNTERSTATEMENT OF THE CASE

#### A. The Department's Adjudications Of Poindexter's Claims

On September 16, 1997, Marvin Poindexter sustained an industrial injury to his left shoulder and back when he tripped and fell at work. Certified Appeals Board Record (CABR) at 20; Finding of Fact (FF) 2<sup>1</sup>; Poindexter<sup>2</sup> at 6-7. On October 3, 1997, he filed a workers' compensation claim with the Department, which allowed his claim and paid him time-loss benefits. CABR at 19, FF 1. After his physicians released him to work, the Department closed his claim on March 12, 1998, without a permanent partial disability award. CABR at 19, FF 1. Poindexter did not seek any treatment for his shoulder or back from March to November 1998. Poindexter at 37.

Poindexter returned to his physician for increased low-back pain after he raked leaves in his yard in November 1998. Poindexter at 38; Furrer at 24. On December 8, 1998, he applied to re-open his claim based on aggravation of his conditions from his 1997 industrial injury. CABR at 19, FF 1. On February 23, 1999, the Department issued an order denying Poindexter's application and, upon his protest and request for

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<sup>1</sup> Findings of Fact refer to those made by the Industrial Appeals Judge in the Proposed Decision and Order (CABR at 11-21), adopted by the Board in its Order Denying Petition for Review (CABR at 1), which was affirmed by the superior court.

<sup>2</sup> This brief refers to each witness's testimony by the witness's surname and the page number of the transcript of the hearing or perpetuation deposition where the testimony was given.

reconsideration, affirmed the order on April 2, 1999. CABR at 19-20, FF 1. Poindexter appealed the order to the Board. CABR at 23-24.

**B. Proceedings At The Board**

At the Board proceedings, three medical doctors presented their testimony: Dr. Furrer (who conducted two independent medical examinations of Poindexter); Dr. Wyman (Poindexter's treating physician); and Dr. Johnson (Poindexter's hired expert who saw him once). The following is their testimony relevant to this appeal:

**1. Dr. Furrer**

Dr. William Furrer was an orthopedic surgeon who conducted two independent medical examinations (IME) of Poindexter at the Department's request – one in 1999 and the other in 2002. Furrer at 6, 16, 44. The first IME took place on January 26, 1999. Furrer at 16. Poindexter complained of pain in the left shoulder and lower back. Furrer at 17. Dr. Furrer took a history from him, reviewed his past medical records, and conducted a physical examination. Furrer at 17, 28.

During the examination, Poindexter exhibited "pain behaviors," such as "clutching of his low back when he bent over in flexion." Furrer at 41. With a very light pressure to the top of his head, he would report pain in the shoulder. Furrer at 30. With a little rock sideways of his body, which should not cause anyone any pain in the shoulder, he would

nonetheless report pain in his left shoulder. Furrer at 30. According to Dr. Furrer, the reported pains could not physiologically be explained. Furrer at 30. After the examination, Dr. Furrer diagnosed Poindexter with contusion of the left shoulder with mild impingement and lumbosacral strain. Furrer at 40-41. While noting Poindexter's pain behaviors, Dr. Furrer did not include chronic pain syndrome in his diagnoses. Furrer at 41.

Dr. Furrer's second IME occurred on January 22, 2002. Furrer at 44. Dr. Furrer reviewed Poindexter's additional medical records after his 1999 IME, including Dr. Wyman's, and confirmed that Poindexter's complaints were "quite the same" as before – pain in the left shoulder, upper extremity, and the low back. Furrer at 45-46.

Although Poindexter appeared to hold his left shoulder a little (one centimeter) lower than he did in 1999, Dr. Furrer explained that such a change was not necessarily significant as "some people are a little crooked and some people, if they're favoring something, may relax it or hold it lower in that fashion." Furrer at 54-55. Dr. Furrer measured Poindexter's arms and found them to be the same size as they were three years ago, which indicated his regular use. Furrer at 60. As Dr. Furrer explained, Poindexter was left-handed, and if "he had not been using his arm over the . . . three years which elapsed from [his] first exam to [his] second exam,

he should have had a less large arm, should have undergone atrophy if had been favoring it to a significant degree.” Furrer at 60. There was no measurable atrophy in Poindexter’s left arm. Furrer at 64.

Dr. Furrer found the same pain behaviors as found during the 1999 IME, due to which the doctor could not “home in” on the areas he needed to examine. Furrer at 62-64, 66. With just a superficial palpation on his shoulder (a very light touch without denting his skin), Poindexter would report pain and jerk quickly from the doctor’s examining fingers. Furrer at 55-56, 61-62. He reported shoulder pain when the doctor lightly pressed on his head and passively rotated his truck with his shoulders being at rest, which should not cause anyone any pain in the shoulders. Furrer at 54. He reported pain in his low back when the doctor moved his hips. Furrer at 62. These were pains the doctor could not explain on an organic basis and “would not expect,” because “even a person with a bad ruptured disc wouldn’t do that.” Furrer at 61-62.

Dr. Furrer noted that Poindexter’s bodily motions were limited “to a significant degree” – he grimaced and winced when performing cervical spine motions, allowed his left arm to flex only up to 90 degrees resisting further flexion, and abducted his left arm up to 45 degrees resisting further abduction. Furrer at 56, 58-59, 74. As Dr. Furrer stated, “it’s very difficult to assess an individual who has a physical examination with as

many non-physiologic findings as [Poindexter] manifests.” Furrer at 83. Dr. Furrer explained that physical examinations “depend totally upon the patients, and the patient does have an input on how much they will permit you to move.” Furrer at 75. The “patient controls the amount that he will move the shoulder and that’s what is put down.” Furrer at 77. Dr. Furrer pointed out a discrepancy between Poindexter’s limited motions of his left shoulder during his two IMEs and the full range of motion of his left shoulder reported by Dr. Wyman. Furrer at 76.

Dr. Furrer conducted a neurological examination and found Poindexter’s reflexes to be normal. Furrer at 63. But during the sensory examination, the doctor noted Poindexter’s “completely non-physiological distributions of altered sensation,” although his “shoulder condition should not cause that kind of a problem and this is kind of a non-physiologic or *factitious* kind of decreased sensation.” Furrer at 63 (emphasis added).

Asked to confirm the *actual* existence of Poindexter’s “intense pain,” Dr. Furrer carefully said, “I’m not inside the patient’s body and I don’t think about pain. They can only describe it to me and I can record it.” Furrer at 77. In fact, Dr. Furrer found that Poindexter’s pain behaviors and non-physiological findings were due to his “illness conviction.” Furrer at 77-78. Dr. Furrer testified, “[I]f he would continue to conduct himself outside of the examination room that [the doctor] was

in with him in the same way he conducted himself there, he doesn't think he can use his arm for just about anything." Furrer at 83.

After his second IME, Dr. Furrer made "essentially the same diagnoses" but added only chronic bursitis or tendonitis of the left shoulder, consistent with his review of the x-ray and MRI findings reported by Dr. Wyman. Furrer at 64. By January 2002 Dr. Furrer testified that he could no longer state on a more probable than not basis "that his left shoulder condition and his low back condition were secondary to the [industrial] injury simply because of the amount of time that had elapsed and the very flagrant pain behavior on physical examination which [he] observed, the patient's resistance to motion about the left shoulder." Furrer at 65. Dr. Furrer testified that his opinions would remain the same, even if another doctor diagnosed Poindexter with chronic pain in his left shoulder, left upper extremity, and left lower extremity and hypertension with non-organic findings. Furrer at 84.

## **2. Dr. Wyman**

Dr. James Wyman was an orthopedic surgeon who treated Poindexter's shoulder beginning August 16, 2000. Wyman at 6, 28. During his first examination, Dr. Wyman checked Poindexter's shoulder, reviewed x-rays, and noted mild glenohumeral joint degeneration – a little wear and tear in his shoulder joint. Wyman at 8. Dr. Wyman made a

diagnosis of a chronic left rotator cuff tendonopathy. Wyman at 7-8. Chronic tendonopathy is an inflammatory process, which may cause changes in the surrounding soft tissues and permanent changes in the muscle and tendon. Wyman at 11. Dr. Wyman gave Poindexter an injection with numbing medicine, from which he reported relief, consistent with the doctor's diagnosis. Wyman at 8-9.

Dr. Wyman continued to treat Poindexter. Wyman at 9-12. The doctor saw Poindexter on four different occasions between September 2001 and January 2002. Wyman at 9-12. During this time, Poindexter's complaints remained the same, and Dr. Wyman ordered an MRI to evaluate his rotator cuff. Wyman at 10-12. While reporting pain, Poindexter gave a full range of motion on his left shoulder. Wyman at 24. Dr. Wyman found the MRI and the examination results to be consistent with his diagnosis of chronic rotator cuff tendonopathy. Wyman at 10-12.

Although Dr. Wyman testified that chronic rotator cuff tendonopathy was probably related to his 1997 industrial injury, Wyman at 19, 21, the doctor testified that the condition could also be due to his repetitive use of the arms, Wyman at 11-12, 15-16. The doctor testified:

The fact that you have to use your arms every day on a daily basis, in some people cause them never to allow that swelling and inflammation to resolve. After a while, it

becomes chronic. And, basically, you get tissue changes that even if you do rest, tend not to resolve back to their normal size and structure. And then that just makes you prone to have a chronic problem.

Wyman at 15.

Dr. Wyman did not have “a whole lot more to offer [Poindexter] than surgery,” which would allow him to move his arm without abrading or irritating his shoulder blade rotator cuff. Wyman at 12, 19. Dr. Wyman reviewed and concurred with Dr. Furrer’s 2002 IME. Wyman at 27-28. Like Dr. Furrer, Dr. Wyman did not make a diagnosis of chronic pain syndrome. Wyman at 7-8.

### **3. Dr. Johnson**

Dr. H. Richard Johnson was a retired orthopedic surgeon who saw Poindexter only once in October 2002 at his request at his attorney’s office. Johnson at 7, 13. Dr. Johnson testified that Poindexter suffered contusion of the left shoulder, lumbosacral strain or sprain, chronic left shoulder impingement syndrome with tendonitis and bursitis, and chronic pain syndrome with regard to his shoulder and low back. Johnson at 59, 75. Dr. Johnson testified that all of these conditions were causally related to Poindexter’s 1997 industrial injury. Johnson at 61, 76. Although Dr. Johnson described chronic pain syndrome as a psychological

condition, Johnson at 78, his stated specialty or background included neither psychology nor psychiatry, Johnson at 7-8.

Dr. Johnson gave a general description of chronic pain syndrome as seen among those who have pain for longer than six months and develop “certain behaviors” in an attempt to deal with it. Johnson at 77. Dr. Johnson testified that patients with chronic pain syndrome were often discredited due to their “functional overlay,” which, according to the doctor, was synonymous with “pain behaviors.” Johnson at 78. The doctor indicated that there were 11 subcategories of functional overlay. Johnson at 78-79. The doctor testified that Poindexter could be treated with a chronic pain management program. Johnson at 79.

### **C. The Board Decision**

An Industrial Appeals Judge (IAJ) of the Board issued a Proposed Decision and Order reversing the Department’s closing order. CABR at 11-21. The IAJ found that Poindexter’s conditions from his 1997 industrial injury became aggravated between April 2, 1999 and February 6, 2002. CABR at 20, FF 5; CABR at 21, CL 2. The IAJ directed the Department to re-open Poindexter’s claim, to allow him to receive necessary and proper medical treatments for the conditions including the surgery recommended by Dr. Wyman, and to pay him time-loss benefits. CABR at 18, 21; CL 5.

But the IAJ found that Poindexter did not suffer chronic pain syndrome as a proximate result of his industrial injury:

As a proximate cause of his September 16, 1997 industrial injury, the claimant sustained a lumbosacral strain/sprain and a contusion to his left shoulder that left him with an impingement syndrome, tendonitis and bursitis. *He did not develop a chronic pain syndrome as a proximate cause of his industrial injury.*

CABR at 20, FF 3 (emphasis added). The IAJ reasoned that in light of the totality of the medical evidence, including Dr. Furrer's testimony about illness conviction, Poindexter failed to establish that he suffered chronic pain syndrome as a proximate result of his industrial injury:

Dr. Johnson also diagnosed a chronic pain syndrome that he said was related to the industrial injury. He thought that it was due to the extended difficulties the claimant experienced following his industrial injuries. But Mr. Poindexter also displayed pain behavior and functional overlay during his exams as indicated by Dr. Furrer, who stated the claimant had a "significant illness conviction." Taking the record as a whole, it is not evident on a more-probable-than-not basis that Mr. Poindexter has a chronic pain syndrome proximately caused by his industrial injury.

CABR at 17 ll. 25-35.

Poindexter petitioned the Board to review the Proposed Decision and Order, challenging the finding that he did not suffer chronic pain syndrome proximately caused by his industrial injury. CABR at 2-6. The Board denied his petition and adopted the Proposed Decision and Order as its final order. CABR at 1.

**D. Proceedings At Superior Court**

Poindexter appealed the Board's order to Pierce County Superior Court. CP at 1-3. After the testimony taken at the Board was read to a jury, Poindexter moved for a directed verdict. CP at 77-85; RP at 69. He argued that Dr. Johnson's opinions established his chronic pain syndrome as a proximate result of his industrial injury, and Dr. Furrer's opinions were insufficient to refute Dr. Johnson's opinions as a matter of law:

[C]hronic pain syndrome is a recognized condition. And DSM-IV even lists it as a condition. It's recognized.

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Despite the fact that Dr. Furrer goes on and on mentioning all these pain behaviors from 1999 through 2002 and even admits in my cross that he has these chronic pain behaviors, *he still doesn't make the diagnosis, because in his opinion, as Dr. Johnson said, it's just not a legitimate complaint.*

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The issue itself is that we have to decide whether or not the chronic pain syndrome which exists was caused by the industrial injury. And the only doctor who speaks to that is Dr. Johnson. And it's unrefuted. And *the only evidence you could possibly say that would refute his opinion is Dr. Furrer, who on cross admits that he had these illness behaviors and this illness conviction.* So I don't know what the jury could possibly – where they could even get some contrary evidence to make a decision contrary to that given by Dr. Johnson.

RP at 74-75 (emphasis added).

The trial court denied Poindexter's motion, concluding that there was sufficient evidence for the jury to conclude that he did not have chronic pain syndrome as a proximate result of his industrial injury:

I've sat through and read along with counsel all the testimony, and being this is a motion for a directed verdict, and having to view all of the evidence in favor of the nonmoving party, which is the defendant in this part, I am going to deny that – I reject that argument, basically.

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Although no other doctor diagnosed [Poindexter] with chronic pain syndrome, I think that *the evidence could lead a reasonable jury to conclude, one, that maybe [he] did not have chronic pain syndrome.* And so if he doesn't have it, how could be proximately caused by his industrial injury? *Or through the testimony of Dr. Wyman, a reasonable jury could reach the conclusion that this pain he is suffering is not proximately caused by the industrial accident but possibly by his repetitive use of his arms in his occupation.*

RP at 76-77 (emphasis added).

The jury answered in the affirmative the sole question presented: “Was the [Board] correct when it decided that chronic pain syndrome was not proximately caused by [Poindexter's] September 16, 1997 industrial injury?” CP at 144. Accordingly, the trial court issued a judgment affirming the Board's order. CP at 143-45. The trial court later denied Poindexter's motion for judgment notwithstanding the verdict or for a new trial. CP at 146-69, 174. Poindexter now appeals from the trial court's denial of these motions. CP at 175-79.

#### IV. STANDARD OF REVIEW

This case turns on the standard of review and the locus of the burden of proof, which will be discussed in the argument sections below.

#### V. SUMMARY OF ARGUMENT

Assigning errors to the trial court's denials of his motions for a judgment as a matter of law and new trial, Poindexter argues *only* that the evidence was insufficient as a matter of law to support the jury's finding that he did not suffer chronic pain syndrome proximately caused by his industrial injury. Appellant's Br. at 12-22. Although he challenges the denial of his motion for a new trial under CR 59(a)(9), claiming that substantial justice was not done, the *only* basis for this argument is the same, claimed insufficiency of the evidence. Appellant's Br. at 22:

Accordingly, Poindexter's challenges to the trial court's denial of a judgment as a matter of law and a new trial fail for the same reason – the evidence viewed in the light most favorable to the Department does not compel a conclusion as a matter of law that he suffered chronic pain syndrome as a proximate result of his industrial injury. While describing chronic pain syndrome as psychologically-based behaviors seen in people with pain for longer than six months, Dr. Johnson did not specifically define what types of behaviors are generally considered to indicate the

condition. Johnson at 77-78. Nor did Dr. Johnson testify that the *only* explanation for Poindexter's pain behaviors was chronic pain syndrome.

On the other hand, Dr. Furrer's opinion of Poindexter's illness conviction based on inconsistent medical results and his "factitious" symptoms and physiologically unexplainable pain behaviors, along with Dr. Furrer's and Dr. Wyman's diagnoses that did not include chronic pain syndrome refuted Dr. Johnson's opinions. In any event, the jury was free to reject, as it did, Dr. Johnson's opinions in whole or in part. Poindexter had the burden of proving that he suffered chronic pain syndrome proximately caused by his industrial injury. He failed to do so in the eye of the Board and the jury.

## VI. ARGUMENT

### A. **Poindexter Had The Very Heavy Burden Of Affirmatively Proving As A Matter Of Law That He Suffered Chronic Pain Syndrome As A Proximate Result Of His Industrial Injury**

Throughout his brief, Poindexter asserts that besides Dr. Johnson, none of the testifying doctors was *asked* whether he had chronic pain syndrome as a proximate result of his industrial injury. Appellant's Br. at 1, 11, 14, 15, 16, 17, 20-21. But, to prevail on his motion for a judgment as a matter of law, Poindexter had the very difficult burden of *affirmatively establishing, as a matter of law*, that he suffered chronic pain

syndrome as a proximate result of his industrial injury. It was not the Department's burden to disprove his theory.

An appellate court reviews the trial court's denial of a motion for a judgment as a matter of law de novo. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). A judgment as a matter of law is appropriate only if "viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Sing*, 134 Wn.2d at 29. No discretion is involved. *Colville v. Cobarc Servs.*, 73 Wn. App. 433, 437, 869 P.2d 1103 (1994). "Substantial evidence is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560-561, 897 P.2d 431 (1995).

Although not binding on the trial court, the "findings and decisions of the Board are prima facie correct and the burden of proof is on the party attacking them." *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987); RCW 51.52.115. Poindexter had the burden of proving that the Board's challenged finding was "incorrect by a preponderance of the evidence." *Ravsten*, 108 Wn.2d at 146. "The jury's verdict upholding the Board's findings and decision must also be

presumed correct.” *Intalco Aluminum v. Dep’t of Labor & Indus.*, 66 Wn. App. 644, 653, 833 P.2d 390 (1992).

A workers’ compensation claim, once closed, may be re-opened, if a condition proximately caused by an industrial injury becomes aggravated after the claim closure. RCW 51.32.160; *Moses v. Dep’t of Labor & Indus.*, 44 Wn.2d 511, 517, 268 P.2d 665 (1954). The “burden is on the claimant to produce medical evidence, some of it based on objective findings, to prove that there has been an aggravation of the injury which resulted in increased disability.” *Moses*, 44 Wn.2d at 517.

Poindexter thus had the burden of proving by competent medical evidence that he suffered chronic pain syndrome and that “there [was] a [p]robable (as distinguished from a possible) causal relationship between [his] industrial injury and [chronic pain syndrome].” *Sayler v. Dep’t of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966); *see also Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949) (“[T]hose who claim benefits . . . must, by competent evidence, prove the facts upon which they rely.”); *Ruse v. Dep’t of Labor & Indus.*, 90 Wn. App. 448, 453, 966 P.2d 909 (1998) (it is the claimant who has the burden of producing evidence which supports his claim), *aff’d*, 138 Wn.2d

1, 977 P.2d 570 (1999); *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996) (“workers who claim rights under the act should be held to strict proof of their right to receive benefits”).

As one having the burden of proof at trial, Poindexter’s burden of proof on his motion for a judgment as a matter of law is an extremely difficult, if not an impossible, one. *See Sauer v. Scott*, 176 N.W.2d 140, 145 (Iowa 1970) (only in rare cases can it be said one having the burden of proof on an issue has proved the affirmative of the issue as a matter of law); *Forth v. Forth*, 409 N.E. 2d 1107, 1111 (Ind. Ct. App. 1980) (a verdict or finding against one having the burden of proof is a negative decision and may not be attacked on the ground that there was a lack of evidence); *Crescent Bed Co. v. Comm’r of Internal Revenue*, 133 F.2d 424, 425 (5th Cir. 1943) (verdicts and other fact findings often rest on the failure of one having the burden of proof to carry it successfully).

The issue is not whether the *Department* produced sufficient evidence to *disprove* Poindexter’s theory but whether *Poindexter* affirmatively established as a matter of law he suffered chronic pain syndrome proximately caused by his industrial injury. This is not a situation where the Department claims that the trial court should have granted a directed verdict *against Poindexter* who had the burden of proof, “but one where the claim was that the verdict should have been directed,

as a matter of law, *in favor of the one having the burden of proof*, after a jury had found that that burden had not been sustained.” *Imbrey v. Prudential Ins. Co. of Am.*, 286 N.Y. 434, 439 (1941) (emphasis added).

“It is not the weakness of a defense but the strength of the issue that sustains an affirmative finding for one having the burden of proof.” *Hardwick v. Kansas City Gas Co.*, 180 S.W.2d 670, 673 (Mo. 1944); *see also Ivey v. Dep’t of Labor & Indus.*, 4 Wn.2d 162, 164, 102 P.2d 683 (1940) (“[T]he evidence in the record, as it stood, being to the court’s mind so conflicting that it could not decide the question presented. That, of course, must necessarily mean that the claimant had not sustained the burden of proof required of him by the statute.”). As shown below, Poindexter failed to carry his heavy burden of proof.

**B. The Jury Was Entitled To, And Did, Reject Dr. Johnson’s Opinions That Poindexter Suffered Chronic Pain Syndrome As A Proximate Result Of His Industrial Injury**

Poindexter argues that Dr. Johnson’s opinions established as a matter of law that he suffered chronic pain syndrome as a proximate result of his industrial injury. He argues that to the extent the jury rejected Dr. Johnson’s opinions, its verdict is based on “pure speculation and cannot stand.” Appellant’s Br. at 21. But Dr. Johnson’s opinions were not conclusive, and the jury was not *required* to accept them.

The existence of a disability and its causal relationship with an industrial injury are generally questions of fact for the jury. *See Collins v. Dep't of Labor & Indus.*, 50 Wn.2d 194, 195, 310 P.2d 232 (1957) (the extent of a disability is “purely a question of fact”); *Mathers v. Stephens*, 22 Wn.2d 364, 370, 156 P.2d 227 (1945) (“[U]sually the question of proximate cause is for the jury[.]”).

“The jury is the sole judge of the credibility and weight of the evidence.” *Arthurs v. Nat'l Postal Transp. Ass'n*, 49 Wn.2d 570, 577, 304 P.2d 685 (1956). “The fact finder is given wide latitude in the weight to give expert opinion.” *In re Sedlock*, 69 Wn. App. 484, 491, 849 P.2d 1243 (1993) (trier of fact may assess the value of an asset by adopting a “compromise” figure between the values testified to by two experts); *see also Reese v. Stroh*, 74 Wn. App. 550, 565, 874 P.2d 200 (1994) (jurors are perfectly capable of determining what weight to give this kind of expert testimony); *State v. Moon*, 45 Wn. App. 692, 698, 726 P.2d 1263 (1986), *review denied*, 108 Wn.2d 1029 (1987) (an expert cannot usurp the jury’s duty of deciding facts because the jury may always accept or reject the expert’s evidence or opinion, in whole or in part); Washington Pattern Instruction (WPIC) 6.51 (“You are not bound, however, by [an expert] opinion.”); *State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843 (1998)

(referring to WPIC 6.51 as a “proper instruction”); CP at 121 (the jury instruction given was virtually identical to WPIC 6.51).

The trier of fact “is not required to accept the opinion testimony of experts solely because of their special knowledge; rather, [it] decides an issue upon its own fair judgment, assisted by the testimony of experts.” *In re Pilant*, 42 Wn. App. 173, 178, 709 P.2d 1241 (1985). “A trial court has the right to reject expert testimony in whole or in part in accordance with its views as to the persuasive character of that evidence.” *Brewer v. Copeland*, 86 Wn.2d 58, 74, 542 P.2d 445 (1975).

The trier of fact may even “refuse to accept uncontradicted expert testimony as long as it does not act in an arbitrary or capricious manner.” *State ex rel. Flieger v. Hendrickson*, 46 Wn. App. 184, 190, 730 P.2d 88 (1986) (trial court properly rejected unrefuted testimony of two experts on paternity, especially when the experts used a formula without meeting preliminary statistical tests); *Brewer v. Copeland*, 86 Wn.2d at 74 (trial court properly rejected a trooper’s unrefuted expert opinion on the maximum safe speed at which curve might be negotiated); *In re Watson*, 25 Wn. App. 508, 512, 610 P.2d 367 (1979) (trial court properly refused to give any weight to the unrefuted expert opinions of two psychiatrists that twins were suffering from maternal deprivation). This is because even an unrefuted expert opinion is not *binding* on the jury:

There is generally speaking, no rule of law which requires controlling effect or influence to be given to, and the court and jury are not required to accept in the place of their own judgments, the opinion testimony of the witnesses concerning the matters upon which they give their testimony. *Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are generally regarded as purely advisory in character; the jury may place whatever weight they choose upon such testimony and may reject it, if they find that it is inconsistent with the facts in the case or otherwise unreasonable.* Generally speaking, no distinction is made in this regard between expert testimony and evidence of other character. Opinions of experts are to be considered, however, and to receive such weight as, in view of all the circumstances, reasonably attaches to them. *Even if those instances where several competent experts concur in their opinion and no opposing expert evidence is offered, the jury are [sic] still bound to decide the issue upon their own fair judgment, assisted by the statements of the experts.*

*Richey & Gilbert Co. v. Nw. Natural Gas Corp.*, 16 Wn.2d 631, 649-50, 134 P.2d 444 (1943).

A decision is “arbitrary and capricious” if it is “willful and unreasoning” and “without consideration and in disregard of facts and circumstances.” *Saldin Sec., Inc. v. Snohomish Cy.*, 134 Wn.2d 288, 296, 949 P.2d 370 (1998). “Where there is room for two opinions,” a decision is “not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.” *Saldin*, 134 Wn.2d at 296.

Here, Poindexter had the burden of affirmatively proving that he suffered chronic pain syndrome proximately caused by his industrial

injury. He relied exclusively on Dr. Johnson's opinions to carry his burden of proof. To the extent the jury was free to reject Dr. Johnson's opinions in whole or in part, as it did, Poindexter's argument must necessarily fail. Further, there is nothing to suggest that the jury acted in an arbitrary or capricious manner in rejecting Dr. Johnson's opinions.

**C. The Evidence Did Not Compel A Conclusion That Poindexter Suffered Chronic Pain Syndrome As A Proximate Result Of His Industrial Injury**

Poindexter argues that the "only way a jury could conclude Poindexter did not suffer chronic pain syndrome is if it entirely *ignored* Dr. Johnson's testimony and relied instead upon the absence of testimony on the issue." Appellant's Br. at 17-18 (emphasis added). But the evidence, viewed in the light most favorable to the Department, did not compel a conclusion that Poindexter suffered chronic pain syndrome as a proximate result of his industrial injury.

First, Dr. Johnson's opinions, viewed in the light most favorable to the Department, are incomplete at best and questionable. The doctor's opinions were questionable particularly when he was a retired orthopedic surgeon without a specialty or background in psychology or psychiatry, Johnson at 7-8, and chronic pain syndrome is a psychological condition, Johnson at 78. Also, Dr. Johnson saw Poindexter only once at Poindexter's request at his attorney's office, Johnson at 13, and was thus

“an expert hired to give a particular opinion consistent with one party’s view of the case,” whose opinion is not entitled to the special consideration given to an attending doctor. *Intalco*, 66 Wn. App. at 654.

Dr. Johnson’s opinions of chronic pain syndrome were also incomplete. While very generally describing it as found among patients having pain for more than six months who develop “certain behaviors” in order to cope with their pain, Dr. Johnson did not give any specific definition of chronic pain syndrome nor explain what behaviors were generally considered as indicating it. Johnson at 78-79. It is perhaps for this reason the jury, during their deliberation, requested a written definition of “chronic pain syndrome,” a request the trial court properly denied without objection by either party, as the evidence for the jury was limited to the record already read to them. RP at 105-07; RCW 51.52.115 (evidence is confined to that presented to the Board).

Dr. Johnson did not testify that the *only* explanation for Poindexter’s pain behaviors was chronic pain syndrome. Nor did he explain why his pain behaviors were not “illness conviction” as found by Dr. Furrer. In fact, Dr. Johnson suggested that pain behaviors do not necessarily mean chronic pain syndrome by testifying that pain behaviors were used synonymously with “functional overlay,” Johnson at 75-76, 78, and there were 11 subcategories of “functional overlay,” Johnson at 78-79.

Dr. Johnson suggested that chronic pain syndrome is distinguished from “malinger,” without explaining why Poindexter’s pain behaviors were *not* malingering. Johnson at 78. The “thoroughness of an expert’s examination of the real evidence is a matter of weight for the jury.” *Tokarz v. Ford Motor Co.*, 8 Wn. App. 645, 653, 508 P.2d 1370 (1973) (citing *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969)).

Second, reasonable inferences from Dr. Furrer’s and Dr. Wyman’s testimony, viewed in the light most favorable to the Department, refuted Dr. Johnson’s opinions. An inference in law is a “process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.” *Shelby v. Keck*, 85 Wn.2d 911, 914-15, 541 P.2d 365 (1975). Dr. Furrer, while finding Poindexter’s pain behaviors on two separate IMEs, did not include chronic pain syndrome in his specific diagnoses of Poindexter pertaining to his 1997 industrial injury. Furrer at 64. Given Dr. Johnson’s reliance on Poindexter’s pain behaviors for his opinions on chronic pain syndrome, the absence of the condition in Dr. Furrer’s diagnoses gives rise to a reasonable inference that the doctor implicitly excluded it from his diagnoses.

Poindexter asserts that there is “absolutely no evidence in the record, direct or inferential, that [he] was faking his pain.” Appellant’s Br.

at 18 n.78. But Dr. Furrer's testimony, viewed in the light most favorable to the Department, did raise a reasonable inference that Poindexter's pain was factitious. For example, Dr. Furrer pointed out that Poindexter would report pain with a superficial palpation on his shoulder (a very light touch without denting his skin), or a little rock sideways of his body, which would not cause anyone any pain at all. Furrer at 30, 55-56, 61-62. As the doctor explained, "even a person with a bad ruptured disc wouldn't do that." Furrer at 61-62. Dr. Furrer testified, "[I]f he would continue to conduct himself outside of the examination room that [the doctor] was in with him in the same way he conducted himself there, he doesn't think he can use his arm for just about anything." Furrer at 83.

Dr. Furrer pointed out his difficulties in conducting physical examinations of Poindexter due to his pain behaviors and claimed limitations of movement (Furrer at 62, 83), while noting the full range of motion of his left shoulder reported by Dr. Wyman, (Furrer at 76). Dr. Furrer explained that his examinations depended on how much Poindexter would allow the doctor to move his body. Furrer at 75, 77. Dr. Furrer also noted Poindexter's claimed altered sensation as "kind of a nonphysiologic or *factitious* kind of decreased sensation." Furrer at 63 (emphasis added). Dr. Furrer described Poindexter's claimed pain as not physiologically explainable and his pain behaviors as due to his "illness

conviction.” Furrer at 61-62, 77-78, 83. When asked to confirm the actual existence of Poindexter’s “intense pain,” Dr. Furrer carefully said, “I’m not inside the patient’s body and I don’t think about pain. They can only describe it to me and I can record it.” Furrer at 77.

As the trial court stated, through Dr. Furrer’s testimony, “a reasonable jury [could] conclude, one, that maybe [he] did not have chronic pain syndrome.” RP at 77.

Poindexter emphasizes the finding by Dr. Furrer that Poindexter appeared to hold his left shoulder a little lower in 2002 than he did in 1999. Appellant’s Br. at 15. Dr. Johnson testified that patients with chronic shoulder problem often favor the affected shoulder by carrying it lower than the other. Johnson at 49. But Dr. Furrer’s testimony suggested that Poindexter was not favoring his left shoulder to a significant degree. Dr. Furrer pointed out the unchanged size of Poindexter’s arms as suggesting his regular use and testified that if he had been favoring his left arm to a significant degree, he should have had a less large arm and atrophy. Furrer at 60. The doctor noted the absence of any measurable atrophy in Poindexter’s left arm. Furrer at 64.

Like Dr. Furrer, Dr. Wyman, Poindexter’s treating physician, who examined him on five different occasions between August 2000 and January 2002, did not include chronic pain syndrome in his diagnoses of

Poindexter, while specifically diagnosing him with chronic left rotator cuff tendonopathy. Wyman at 7-8. Although Dr. Johnson recommended chronic pain management program for chronic pain syndrome, Johnson at 79, Dr. Wyman testified that there was not “a whole lot more to offer [Poindexter] than surgery,” which would allow him to move his arm without abrading or irritating the rotator cuff on the shoulder blade, (Wyman at 12, 19). The court must give special consideration to the opinion of an attending physician, because an “attending physician who has cared for and treated a patient over a period of time is better qualified to give an opinion as to the patient’s disability than a doctor who has seen and examined the patient once.” *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 6, 977 P.2d 570 (1999).

Dr. Wyman’s opinions also cast doubts on the causal relationship between Poindexter’s conditions and his industrial injury. Although Dr. Wyman testified that his chronic rotator cuff tendonopathy was more probably than not related to his industrial injury, Wyman at 19, 21, the doctor also testified that *it could also be due to his repetitive use of his arms*, Wyman at 11-12, 15-16. As the trial court stated, through Dr. Wyman’s testimony, “a reasonable jury could reach the conclusion that [Poindexter’s pain] is not proximately caused by the industrial

accident but possibly by his repetitive use of his arms in his occupation.”

RP at 77.

The medical evidence, viewed in the light most favorable to the Department, thus refuted Dr. Johnson’s opinions.

Poindexter improperly cites to the discussion of “pain disorder” in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) as well as a website entitled “The Merck Manual of Diagnosis and Therapy,” neither of which was in the record nor even referred to by Dr. Johnson. Appellant’s Br. at 8. Judicial review of a Board decision is “limited to the testimony and evidence presented to the Board.” *Harman v. Dep’t of Labor & Indus.*, 111 Wn. App. 920, 923, 47 P.3d 169 (2002); RCW 51.52.115. An appellate court “cannot consider matters outside the record or presented for the first time on appeal.” *Sepich v. Dep’t of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969). The Court should reject Poindexter’s attempt to bring new evidence on appeal.

In any event, the cited materials only reveal the incompleteness of Dr. Johnson’s diagnosis and the inconsistency between Dr. Johnson’s and Dr. Furrer’s opinions on Poindexter’s pain behaviors. DSM-IV states that the “essential feature of Pain Disorder is pain that is the predominant focus of the clinical presentation and is of sufficient severity to warrant clinical

attention.” DSM-IV at 458. It states that “Pain Disorder is not diagnosed if the pain is better accounted for by a mood, anxiety, or psychotic disorder, or if the pain presentation meets criteria for Dyspareunia.” DSM-IV at 458. It distinguishes pain disorder from “factitious disorder” or “malingering,” stating that pain symptoms may be due to the latter:

Pain symptoms may be intentionally produced or feigned in Factitious Disorder or Malingering. In Factitious Disorder, the motivation is to assume the sick role and to obtain medical evaluation and treatment, whereas *more obvious goals such as financial compensation . . .* are apparent in Malingering.

DSM-IV at 461 (emphasis added).

The DSM-IV discussion thus reveals that Poindexter’s pain behaviors may be explained by a condition *other than chronic pain syndrome* – mood, anxiety, psychotic disorder, Dyspareunia, factitious disorder, or malingering. It reveals that Dr. Johnson’s analysis is incomplete, and Dr. Furrer’s opinions of Poindexter’s “factitious” symptoms and “illness conviction” tended to contradict Dr. Johnson’s finding of chronic pain syndrome.

In sum, Poindexter failed to carry his heavy burden of proving, as a matter of law, that he suffered chronic pain syndrome proximately caused by his industrial injury. The trial court correctly denied his motion for a judgment as a matter of law.

**D. The Trial Court Properly Exercised Its Discretion In Denying Poindexter's Motion For A New Trial**

Citing to CR 59(a)(7) and (a)(9), Poindexter argues that the trial court abused its discretion in denying his motion for a new trial. Appellant's Br. at 19-23. The trial court may vacate a verdict and order a new trial "if there is no evidence or reasonable inference to justify the verdict, or if the jury did not do substantial justice." *Ma'ele v. Arrington*, 111 Wn. App. 557, 559, 45 P.3d 557 (2003); CR 59(a)(7), (a)(9). The trial court properly exercised its discretion in denying Poindexter's motion for a new trial, when he asserted only insufficiency of the evidence to support the jury's verdict.

"Abuse of discretion is the standard of review for an order denying a motion for a new trial." *Aluminum Co. of Am. v. Aetna Gas & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). The criterion is, "Has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?" *Aluminum Co.*, 140 Wn.2d at 537. This rule "specific to motions for a new trial stands in juxtaposition to the general test for abuse of discretion," that is, "discretion manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *Aluminum Co.*, 140 Wn.2d at 537. While an appellate court "may order a new trial, appellate review is narrow and [the

court] rarely exercise the power.” *Ma’ele v. Arrington*, 111 Wn. App. 557, 559, 45 P.3d 557 (2003).

The *sole* basis of Poindexter’s argument for a motion for a new trial under CR 59(a)(7) and (a)(9) is insufficiency of the evidence. Appellant’s Br. at 19-23. “When the proponent of a new trial argues that the verdict was not based on the evidence, the appellate court reviews the record to determine whether there was sufficient evidence to support the verdict.” *Sommer v. Dep’t of Soc. & Health Servs.*, 104 Wn. App 160, 172, 15 P.3d 664 (2001). “All evidence must be viewed in the light most favorable to the party against whom the motion is made.” *Sommer*, 104 Wn. App. at 172. The verdict must be upheld if supported by substantial evidence. *Sommer*, 104 Wn. App. at 172.

As discussed above, the jury’s verdict – that the Board was correct in finding that Poindexter did not suffer chronic pain syndrome proximately caused by his industrial injury – was supported by the evidence, viewed in the light most favorable to the Department, especially when Poindexter had the burden of proving that he suffered chronic pain syndrome proximately caused by his industrial injury.

Poindexter cites to *Barfield v. Barfield*, 69 Wn.2d 158, 417 P.2d 608 (1966), for the proposition an entry of a judgment for a party without substantial evidence or reasonable inference to support it denies the other

party substantial injustice under CR 59(a)(9). Appellant's Br. at 22-23. But *Barfield* does not stand for the proposition nor support Poindexter.

*Barfield* is a divorce case with each party seeking a decree and custody of their two children involving three separate grounds warranting a new trial: (1) "an irregularity in the proceedings of the [trial] court by which [the mother] was prevented from having a fair trial"; (2) insufficiency of the evidence to justify the trial court's decision on the issue of custody; and (3) "substantial justice was not done when [the mother] was deprived of her children and when they were awarded to [the father] without any showing of fitness or ability on his part." *Barfield*, 69 Wn.2d at 163. It is also a case where the court upheld the trial court's grant of a new trial as *within its discretion*.

In *Barfield*, the trial judge "summarily awarded custody to [the father] at the conclusion of the [mother's] case without waiting to hear the latter's testimony and *without requiring any showing whatsoever as to [the father's] fitness and his ability to care for the two boys*, one of whom was not yet of school age." *Barfield*, 69 Wn.2d at 163 (emphasis added). The trial court did so despite the fact there is "*no presumption* that a father is a fit and proper person to have custody of children," and custody "may not be awarded unless and until there is a finding that the person being

given the children is a fit and proper person to be entrusted with their upbringing.” *Barfield*, 69 Wn.2d at 165 (emphasis added).

The trial judge “frankly conceded that he had ruled prematurely and without being fully advised and that, in so doing, he had done [the mother] an injustice.” *Barfield*, 69 Wn.2d at 163. Under these circumstances, the *Barfield* court determined that the trial court did not abuse its discretion in granting a new trial. *Barfield*, 69 Wn.2d at 165.

*Barfield* thus does not stand for the proposition that insufficiency of the evidence is a per se denial of substantial justice. Unlike *Barfield*, there is no suggestion or claim of procedural irregularity in this case. Further, unlike the situation in *Barfield*, in which the trial court gave custody to the father without requiring any evidence of his fitness to care for the children, a requirement for custody, when there was *no presumption of his fitness*, in this case, the Board’s finding was presumed to be correct, and Poindexter had the burden of proving that he suffered chronic pain syndrome proximately caused by his industrial injury. After having been given a full opportunity to present evidence and failed to persuade the Board and the jury, Poindexter is not entitled to yet another trial in which to again try his case.

In sum, the trial court properly exercised its discretion in denying Poindexter’s motion for a new trial.

### E. Attorney's Fee

Poindexter seeks attorney fees for his counsel's court work in the event he prevails. He cites RCW 51.52.130, paraphrasing the *first* sentence of the statute that provides for the court's fee-fixing role.<sup>3</sup> Appellant's Br. at 23. It is the *fourth* sentence of RCW 51.52.130 that would *authorize* an award of attorney's fees *payable out of the Department's fund* in case Poindexter prevails on his appeal.<sup>4</sup> *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889-90, 86 P.3d 1231 (2004), *review denied*, 152 Wn.2d 1032 (2004).

## VII. CONCLUSION

For the foregoing reasons, Poindexter failed to establish as a matter of law that he suffered chronic pain syndrome as a proximate result of his industrial injury and failed to demonstrate an abuse of discretion in the trial court's denial of a new trial. The trial court correctly denied

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<sup>3</sup> The first sentence of RCW 51.52.130 provides:

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker . . . a reasonable fee for the services of the worker's . . . attorney shall be fixed by the court.

<sup>4</sup> The fourth sentence of RCW 51.52.130 provides:

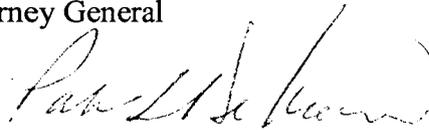
If in a worker . . . appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation . . . the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

Poindexter's motions for a judgment as a matter of law and a new trial.

The Department requests that the Court affirm the trial court's judgment.

SUBMITTED this 21<sup>st</sup> day of August, 2006.

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