

NO. 45653-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

DARLENE FLETCHER,

Appellant,

v.

GRAYS HARBOR COMMUNITY HOSPITAL

Respondent.

---

BRIEF OF APPELLANT

---

Wayne L. Williams , WSBA# 4145  
Attorney for Appellant

Williams, Wyckoff & Ostrander, PLLC  
P.O. Box 316  
Olympia, Washington 98507  
(360) 528-4800

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR .....	1
Issues Pertaining to Assignments of Error.. .....	1
B. STATEMENT OF THE CASE .....	3
C. SUMMARY OF ARGUMENT .....	7
D. ARGUMENT .....	8
E. ARGUMENT RE ATTORNEY'S FEES AND COSTS .....	21

## TABLE OF AUTHORITIES

	Page
<u>Boeing Co. v. Harker-Lott</u> , 93 Wn.App at 188 n. 14, 968 P.2d 14 (1998) .....	17
<u>Cox v. Charles Wright Academy, Inc.</u> , 70 Wn.2d 173, 176, 422 P.2d 515 (1967) .....	9
<u>Hamilton v. Department of Labor and Industries</u> , 111 Wn.2d 569, 761 P.2d 618 (1988) .....	17
<u>Hizey v. Carpenter</u> , 119 Wn.2d 251, 572, 830 P.2d 646 (1992) .....	9
<u>Kustura v. Department of Labor and Industries</u> , 142 Wn.App 655, 175 P.3d 1117 (2008) .....	21
<u>McClelland v. ITT Rayonier, Inc.</u> , 65 Wn.App 386, 394 n. 1, 828 P.2d 1138 (1992) .....	17
<u>State v. Hall</u> , 74 Wn.2d 726, 727, 446 P.2d 323 (1968) .....	9

## OTHER AUTHORITIES

Chapter RCW 4.84.010.....	22
Chapter RCW 51.52.115 .....	3
Chapter RCW 51.52.130 .....	22
WAC 296-20-01002 .....	11
WAC 296-20-220 .....	11
WAC 296-20-230 .....	12
WAC 296-20-240 .....	11
CR 50 .....	9
Washington Pattern Instruction 155.13.01 .....	17
<u><a href="http://umm.edu/programs/spine/health/guides/anterior-cervical-fusion">http://umm.edu/programs/spine/health/guides/anterior-cervical-fusion</a></u> .....	2

#### A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to grant Appellant's (hereinafter Ms. Fletcher) motion for a directed verdict at the conclusion of testimony.

2. The trial court erred in failing to grant Ms. Fletcher's Motion for Judgment as a Matter of Law, after the jury verdict and before Judgment was entered.

3. The trial court erred by failing to give Ms. Fletcher's Proposed Instruction No. 13.

4. The trial court erred by failing to give Ms. Fletcher's Proposed Instruction No. 14.

5. The trial court erred in entering its Judgment and Order affirming the Order of the Board of Industrial Insurance Appeals which was dated November 29, 2012.

#### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Ms. Fletcher entitled to a Directed Verdict where the Board of Industrial Insurance Appeals (hereinafter Board) based its decision on a Finding of Fact barred by res judicata? (Assignments of Error 1, 2 and 5)

2. Was Ms. Fletcher entitled to Judgment as a Matter of Law where the Board based its decision on a Finding of Fact barred by res judicata? (Assignments of Error 1, 2 and 5)

3. Should the court have instructed the jury that "It has been established that on August 8, 2011, when her claim was closed, Ms. Fletcher had objective findings of permanent cervico-dorsal impairment." (Assignments of Error 3)

4. Should the court have instructed the jury that: "Special consideration is to be given to the testimony of an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations." (Assignments of Error 4)

5. Did the trial court err in affirming an Order and Finding of the Board which was barred by res judicata? (Assignments of Error 1, 2 and 5)

## B. STATEMENT OF THE CASE

Finding of Fact 2 entered by the Board provides a starting point for this case. The Board found<sup>1</sup>:

On May 3, 2001, Darlene H. Fletcher<sup>2</sup> sustained an industrial injury to her neck, while in the course of her employment for Grays Harbor Community Hospital, when she was transferring a patient and the patient fell on top of her.  
(CABR<sup>3</sup> 27)

As a result of the industrial injury, Dr. Clyde Carpenter performed cervical surgery on her at the C5-6 level. (CABR, Carpenter Deposition p. 6, l. 25 to p. 7, l. 2; p. 9, l. 4-6) The surgery was an anterior cervical discectomy and fusion at C5-6. (CABR, Carpenter Deposition p. 10, l. 19-22) The surgery was performed on September 10, 2001 and included "corpectomy, prosthetic device, and anterior cervical instrumentation."<sup>4</sup> (CABR, Goler Deposition p. 19, l. 15-18) X-rays taken after the surgery, in

---

<sup>1</sup> No appeal was taken from this Finding and it is binding on the parties. RCW 51.52.115.

<sup>2</sup> As she has been married, Ms. Fletcher is sometimes referred to as Ms. Kessell. (CABR, Fletcher Testimony p. 5, l. 6-17)

<sup>3</sup> Certified Appeal Board Record.

<sup>4</sup> This involves removing a herniated disc, filling the space with a bone graft and using metal plates, screws and rods to hold the vertebrae in place while the fusion heals. <http://umm.edu/programs/spine/health/guides/anterior-cervical-fusion>. University of Maryland Medical Center.

October of 2001, showed the hardware to be intact and in normal alignment. (CABR, Goler Deposition p. 19, l. 21-22)

Ms. Fletcher's claim was then closed on August 28, 2003, with the direction that her self-insured employer pay her a permanent partial disability award of category 2 permanent cervical and cervico-dorsal impairment. (CABR 44) The Board's Finding of Fact No. 3 said:

Darlene H. Fletcher's industrial injury claim was closed August 28, 2003, and she was given a Category 2 permanent partial disability award for cervical and cervico-dorsal impairments. (CABR 27)

On October 22, 2010, Ms. Fletcher filed an Application to Reopen her claim. (CABR 44) Ultimately, her Reopening Application was denied, on December 8, 2011. (CABR 45) Ms. Fletcher timely appealed the Department of Labor and Industries (hereinafter Department) decision denying reopening to the Board. (CABR 45)

The Board held hearings and on November 29, 2012, an Industrial Appeals Judge issued a Proposed Decision and Order. (CABR 19-27) On December 21, 2012, Ms. Fletcher filed a Petition for Review of the Proposed Decision and Order. (CABR 3-8)

In her Petition for Review, Ms. Fletcher specifically objected to proposed Findings of Fact 4 and 5. (CABR 4) Those proposed Findings read as follows:

4. On December 8, 2011, Darlene H. Fletcher had no objective findings proximately caused by industrial injury.
5. During the period between August 28, 2003, and December 8, 2011, Darlene H. Fletcher's industrial injury condition did not objectively worsen. (CABR 27)

The Board denied Ms. Fletcher's Petition for Review and adopted the Proposed Decision and Order, including Findings of Fact 4 and 5, as the Decision and Order of the Board. (CABR 1)

Ms. Fletcher timely appealed the Board's Decision and Order to the Grays Harbor Superior Court. (CP 1-4) The Respondent, Grays Harbor Community Hospital (hereinafter Hospital), entered its Notice of Appearance. (CP 7-8) The Board certified its Record to the Superior Court. (CP 9)

The matter was tried to a jury on October 1, 2013. (CP 53) At the close of the evidence, Ms. Fletcher made and argued a motion for a directed verdict. (Excerpt Verbatim Report of Proceedings before the Honorable Judge Gordon Godfrey 1-8, hereinafter RP) The Judge denied the motion. (RP 8) Ms.

Fletcher then excepted to the court's failure to give her Proposed Instructions No. 13 and 14. (RP 9) Ms. Fletcher's Proposed Instructions No. 13 and 14 read as follows:

Plaintiff's Proposed Instruction No. 13

It has been established that on August 8, 2011, when her claim was closed, Ms. Fletcher had objective findings of permanent cervico-dorsal impairment. (CP 25)

Plaintiff's Proposed Instruction No. 14

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations. (CP 26)

The Judge instructed the jury. (CP 30-39) The jury returned its verdict, as follows:

We, the jury, make the following answer to the questions submitted by the court:

Question No. 1

Was the Board of Industrial Insurance Appeals correct when it found that on December 8, 2011, Darlene H. Fletcher had no objective findings proximately caused by her industrial injury?

Answer: Yes XXX No \_\_\_\_\_

Question No. 2

Was the Board of Industrial Insurance Appeals correct when it found that between August 28, 2003 and

December 8, 2011, Darlene H. Fletcher's condition, proximately caused by the industrial injury, did not objectively worsen?

Answer: Yes XXX No \_\_\_\_\_  
(CP 40)

Ms. Fletcher then filed her Motion for Judgment as a Matter of Law and Memorandum of Authorities. (CP 41-47) Ms. Fletcher filed a Reply Brief. (CP 49-51) The Motion was argued and denied on November 4, 2013. (CP 48) The Judgment was signed by Judge Godfrey on that date. (CP 48; CP 52-53)

Ms. Fletcher filed a timely appeal of the Judgment and Order on November 19, 2013. (CP 54-55) That is the way the matter reached this court.

### C. SUMMARY OF ARGUMENT

On August 28, 2003, Ms. Fletcher was given a category 2 permanent partial disability award for cervical and cervical-dorsal impairments. (CABR 44) As a result of an industrial injury, she had extensive cervical surgery, including a bone graft and instrumentation both of which were visible on x-ray. (CABR, Goler Deposition p. 19, l. 15-18 and 21-22) There is no evidence her spine had totally healed or that the metal had dissolved.

Therefore she still had objective findings from the surgery on December 8, 2011.

Three doctors testified and not one of them testified Ms. Fletcher did not have objective findings on December 8, 2011.

There is no support legally or factually for the finding that Ms. Fletcher had no objective findings from the industrial injury on December 8, 2011. In fact, it is res judicata that she had permanent objective findings when her claim was closed in 2003.

Ms. Fletcher proposed Instruction No. 13 to alert the jury that Ms. Fletcher had permanent objective findings on August 28, 2003. Ms. Fletcher proposed Instruction No. 14, because her attending physician testified her condition had objectively worsened.

The court rejected those instructions.

#### D. ARGUMENT

At the trial held on October 1, 2013, Ms. Fletcher made a Motion for Judgment as a Matter of Law at the close of all the evidence. The Court did not grant the Motion, and after the jury returned its verdict, Ms. Fletcher renewed her request for Judgment as a Matter of Law.

Pursuant to CR 50(b), the trial court had three choices:

- a) To allow the judgment to stand,
- b) To order a new trial, or
- c) Direct entry of judgment as a matter of law.

A Motion for Judgment as a Matter of Law cannot be denied unless there is competent and substantial evidence on which the verdict can rest. State v. Hall, 74 Wn.2d 726, 727, 446 P.2d 323 (1968). If it is clear the evidence and reasonable inferences are insufficient to support the jury's verdict, then the motion must be granted as a matter of law. Hizey v. Carpenter, 119 Wn.2d 251, 572, 830 P.2d 646 (1992). The motion should have been granted in this case.

The mental processes by which individual jurors reach their respective conclusions; their motives; the effect the evidence may have had upon them; the weight they may have given particular evidence and their intentions and beliefs are all factors which inhere in the verdict, and cannot be used to attack the verdict. Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 176, 422 P.2d 515 (1967). Therefore, we must rely upon the verdict given.

Obviously the jury determined Ms. Fletcher's condition, proximately caused by the industrial injury, had not objectively worsened, because on December 8, 2011 she "had no objective findings proximately caused by her industrial injury." The only theory which would support the answer to Question No. 1 is that the permanent objective findings, present when the claim closed in 2003, had disappeared. There is no support for that theory in the record. The trial court should have entered a verdict for Ms. Fletcher, as the verdict entered is not supported by the evidence in the record.

In this case, no challenge was made to Findings of Fact 1, 2 and 3 of the Board. Those Findings were as follows:

1. On March 2, 2012, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. On May 3, 2001, Darlene H. Fletcher sustained an industrial injury to her neck, while in the course of her employment for Grays Harbor Community Hospital, when she was transferring a patient and the patient fell on top of her.
3. Darlene H. Fletcher's industrial injury claim was closed August 28, 2003, and she was given a Category 2 permanent partial disability award for cervical and cervico-dorsal impairments.  
(CP 34)

The Department has adopted special rules for the establishment of permanent bodily impairment.<sup>5</sup>

WAC 296-20-220(1)(b) and (c) define permanent and impairment as follows:

(b) "Permanent" describes those conditions which are fixed, lasting and stable, and from which within the limits of medical probability, further recovery is not expected.

(c) "Impairment" means a loss of physical or mental function.

In assigning a category of disability, WAC 296-20-220(1)(g) provides, in relevant part, that:

The categories include appropriate subjective complaints in an ascending scale in keeping with the severity of objective findings, thus a higher or lower category is not to be selected purely on the basis of unusually great or minor complaints.  
(Emphasis supplied)

WAC 296-20-220(1)(i) provides that:

Objective physical or clinical findings are those findings on examination which are independent of voluntary action and can be seen, felt, or consistently measured by examiners.  
(Emphasis supplied)

WAC 296-20-240(2) defines Category 2 of cervical and cervico-dorsal impairments as:

---

<sup>5</sup> Permanent partial impairment is also called permanent partial disability. WAC 296-20-01002.

Mild cervico-dorsal impairment, with objective clinical findings of such impairment with neck rigidity substantiated by X-ray findings of loss of anterior curve, without significant objective neurological findings.

This and subsequent categories include the presence or absence of pain locally and/or radiating into an extremity or extremities. This and subsequent categories also include the presence or absence of reflex and/or sensory losses. This and subsequent categories also include objectively demonstrable herniation of a cervical intervertebral disc with or without discectomy and/or fusion, if present. (Emphasis supplied)

WAC 296-20-230(1)(a) provides as follows:

Muscle spasm or involuntary guarding, bony or fibrous fusion, any arthritic condition, internal fixation devices or other physical finding shall be considered, in selecting the appropriate category, only insofar as productive of cervical or cervico-dorsal impairment. (Emphasis supplied)

Since Ms. Fletcher was awarded a category 2 disability, it is established that when her claim was closed, she had objective clinical findings, as well as neck rigidity substantiated by X-ray findings.

In this case, the court gave Instruction No. 10, as follows:

The extent of Darlene Fletcher's aggravation of her industrially related condition on December 8, 2011 must be supported by medical testimony based at least in part upon one or more objective findings.

Statements of complaints by the worker made to a physician are called subjective complaints. Findings of disability that can be seen, felt, or measured by an examining physician are called objective findings.

In determining whether aggravation has occurred and the extent of any resulting increased disability, a physician cannot rely solely upon complaints, but must have some objective basis for his or her opinion. On the other hand, a physician need not rely solely upon objective findings. If there are objective findings, then the physician may also consider subjective complaints.

(CP 22) (Emphasis supplied)

The court also gave Instruction No. 11, which read as follows:

To establish that there is a need for treatment because of aggravation, Darlene Fletcher has the burden of proving each of the following propositions (by medical testimony based at least in part upon a comparison of objective findings):

(1) That the aggravation resulted in a need for treatment:

(2) That the need for treatment was proximately caused by the industrial injury;

(3) That the aggravation occurred between August 28, 2003 and December 8, 2011.

(CP 37) (Emphasis supplied)

The court's Instruction No. 4 advised the jury that the Board had found that "On December 8, 2011, Darlene Fletcher had no objective findings proximately caused by the industrial injury."

(CP 34) With its Instruction No. 3, the court instructed the jury that this finding was presumed correct. (CP 33-34)

Once the jury had found the Board was correct in determining Ms. Fletcher had no objective findings on December 8, 2011, it could not answer Question No. 2, no. Reading Instruction No. 11 with Instruction No. 10, it is clear the jury could not have found that an aggravation occurred between August 28, 2003 and December 8, 2011, because a physician giving that opinion "must have some objective basis for his or her opinion." The doctor could not base an opinion on subjective findings because, to do so, there must first be objective findings. The jury had already determined there were no objective findings.

The court's Instruction No. 11 advised the jury that objective worsening had to occur between August 28, 2003 and December 8, 2011 before they could find aggravation. (CP 36-37) If Ms. Fletcher had no objective findings on December 8, 2011, her condition could not have objectively worsened since August 28, 2003.

Dr. Carpenter, the attending physician, testified that he agreed with the assignment of a category 2 level of permanent cervical and cervico-dorsal impairment, when the claim was closed.

(CABR, Carpenter Deposition p. 10, l. 24 to p. 11, l. 6) Dr. Bauer testified that Ms. Fletcher had not sustained an increased permanent impairment beyond the category 2 cervical, cervico-dorsal impairment awarded on August 28, 2003. (CABR, Bauer Deposition p. 30, l. 5-10) There is ample evidence Ms. Fletcher continued to have objective findings, including X-ray findings and a scar.

Dr. Bauer described Dr. Goler's review of the February 21, 2010 cervical MRIs as follows:

. . . The diagnoses generated by that neurosurgeon consisted of cervical radiculopathy status post anterior cervical discectomy and fusion C5-6 due to industrial injury of May 3, 2001, . . .  
(CABR, Bauer Deposition p. 19, l. 17-21)

Dr. Goler noted that the December 21, 2010 MRI scan showed prior surgery at C5-6 and that there was an artifact present, and at C5-6 postsurgical change was present. (CABR, Goler Deposition p. 27, l. 17 to p. 28, l. 9) Dr. Bauer described a "well-healed cervical scar which was consistent with the surgery she'd had." (CABR, Bauer Deposition p. 26, l. 7-8)

Dr. Bauer also testified that "after reviewing the medical records, after reviewing the imaging studies, after performing a physical examination, we did not feel that there was

any change in her condition, in any objective fashion, between the time of closure and the time of the Department's order." (CABR, Bauer Deposition p. 30, l. 20-24) This would mean that category 2 still described her condition when he examined her on November 17, 2011. (CABR, Bauer deposition p. 11, l. 3-5)

Yet, somehow the Board and jury found she had no objective findings, on December 8, 2011, less than a month after Dr. Bauer's examination.

In effect, the jury found that between August 28, 2003 and December 8, 2011, the objective findings which had existed on August 28, 2003, had disappeared.

The jury's answer to Question No. 2 merely reiterates the finding implicit in Question No. 1; i.e., objective findings have not worsened, they have disappeared. The Board's Findings of Fact 4 and 5 were obviously premised on the same reasoning.

The verdict is not supported, in any way, by the evidence in the record, and in fact, flies directly in its face. The jury verdict must be rejected. This court should reverse the trial court's denial of a directed verdict for Ms. Fletcher.

If the jury believed, as they did here, that there were no objective findings on the second terminal date, then they could

not, pursuant to the court's Instruction No. 10, find objective worsening, since there were no objective findings at all.

Ms. Fletcher's Proposed Instruction No. 13, would have emphasized to the jury that Ms. Fletcher had objective findings of permanent cervico-dorsal impairment on August 28, 2001.

Ms. Fletcher's Proposed Instruction No. 14 read as follows:

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.

Proposed Instruction No. 14 uses the wording of Washington Pattern Instruction 155.13.01. In Hamilton v. Department of Labor and Industries, 111 Wn.2d 569, 761 P.2d 618 (1988), the Washington Supreme Court held this instruction incorporated a long-standing rule of law in workers' compensation cases.<sup>6</sup>

---

<sup>6</sup> Two later Court of Appeal cases seem to back away from the Supreme Court's holding. See McClelland v. ITT Rayonier, Inc., 65 Wn.App 386, 394 n. 1, 828 P.2d 1138 (1992); Boeing Co. v. Harker-Lott, 93 Wn.App at 188 n. 14, 968 P.2d 14 (1998).

This instruction might have helped counter the character assassination of Ms. Fletcher by Drs. Goler and Bauer. However, in this case, there is no real cure for the error in the Board's order and the jury's verdict.

The Hospital's case was designed to depict Ms. Fletcher as a dishonest person with a criminal record who did not really suffer an industrial injury. (CABR, Fletcher Testimony p. 14, l. 16-23) First, the Hospital introduced evidence Ms. Fletcher had a criminal record for Burglary 1, with a deadly weapon. (CABR, Fletcher Testimony p. 14, l. 16-23)<sup>7</sup>

Then the Hospital introduced medical evidence which depicted Ms. Fletcher as dishonest and unreliable. Dr. Goler testified that Ms. Fletcher tried to make her range of motion look worse than it really was. (CABR, Goler Deposition p. 24, l. 20-22) Dr. Goler testified as follows:

Q. All right. Overall, how do you characterize her physical examination? Normal? Abnormal? Is it possible to categorize what she looked like on exam?

A. It's an abnormal physical examination. She's trying to suggest to me she has significant problems with her left arm. But it's hard to tell exactly what they would be from this physical examination because the

---

<sup>7</sup> The Board struck the next four pages of criminal records offered by the Hospital. The text from p. 14, l. 24 through p. 18, l. 26 was stricken. (CABR 20, l. 3-16)

physical examination is not the typical physical examination of a radiculopathy or a spinal cord injury. It's a bizarre physical examination showing nonphysiologic numbness and weakness. (CABR, Goler Deposition p. 27, l. 6-16)

Dr. Goler testified that she had symptom magnification and pain behavior. (CABR, Goler Deposition p. 28, l. 16-19)

Dr. Goler also testified that he didn't think the case was really a proper Labor and Industry case in the first place, and that he thought it was important to know that she didn't have any inciting event and there was actually no injury to give rise to her industrial condition. (CABR, Goler Deposition p. 30, l. 2-10) He testified that her response to range of motion and rotation and strength testing was "inconsistent and not believable. I felt she was obviously capable of doing more than she showed me. And that all suggested symptom magnification and pain behavior." (CABR, Goler Deposition p. 30, l. 22 to p. 31, l. 1)

Dr. Bauer testified that "Dr. Goler further noted that the initial reports of her injury in 2001 did not note any inciting event, although the claim was accepted." (CABR, Bauer Deposition p. 20, l. 10-13) Dr. Bauer testified that the loss of sensation Ms. Fletcher reported in her arm was a form of symptom

magnification. (CABR, Bauer Deposition p. 24, l. 3-8) He testified that the numbness she felt in her chest was "a nonphysiologic non-anatomic finding, basically, made up by the patient." (CABR, Bauer Deposition p. 24, l. 16-18) When he talked about her muscle strength, he said "when somebody is feigning weakness, they'll fire it, then let it go suddenly. And that's what she did." (CABR, Bauer Deposition p. 27, l. 17-19)

Dr. Bauer testified that he felt she only had a cervical sprain that was related to the injury. (CABR, Bauer Deposition p. 28, l. 19-20) He testified that her cervical discectomy and fusion were unrelated to the injury although it had been administratively accepted. (CABR, Bauer Deposition p. 28, l. 24 to p. 29, l. 1) Dr. Bauer cast substantial doubt on whether the surgery had anything to do with her industrial injury. He testified:

Q. Since she only had a sprain, I assume the cervical discectomy and fusion, in your judgment, was due to the preexisting degenerative condition?

A. I have no opinion as to that.  
(CABR, Bauer Deposition p. 34, l. 14-17)

Apparently, this line of attack worked. The Board's finding that she had no objective findings in December of 2011, impliedly finds that the cervical surgery she had undergone was not

caused by the industrial injury. Had it been, the X-ray findings that all the doctors agreed existed on December 8, 2011 would have been objective findings related to the industrial injury. By attacking the fact that the surgery was necessitated by the industrial injury, the Hospital apparently convinced both the Board and the jury that the surgery was not caused by the industrial injury.

However, this was an attempt to re-litigate the administrative acceptance of the surgery, which everyone agrees occurred and which was the basis for the permanent partial disability award. Clearly, no award would have been made for a sprain, which had resolved. The closing order is res judicata. Kustura v. Department of Labor and Industries, 142 Wn.App 655, 175 P.3d 1117 (2008).

The decisions of the Board and the trial court must be reversed and this matter remanded to the Department with the direction to enter an Order granting Ms. Fletcher's reopening application.

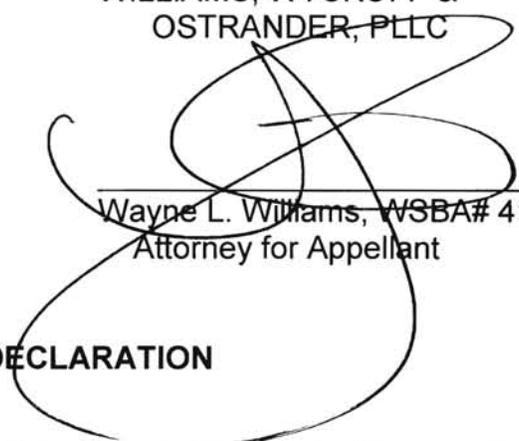
#### E. ARGUMENT RE ATTORNEY'S FEES AND COSTS

When the Superior Court judgment is overturned, as it must be, Ms. Fletcher will be entitled to her attorney's fees and

(Appendix B). This matter should be remanded to the Superior Court with direction to award attorney's fees and costs before the Superior Court.

DATED this 26<sup>th</sup> day of March, 2014.

WILLIAMS, WYCKOFF &  
OSTRANDER, PLLC

  
Wayne L. Williams, WSBA# 4145  
Attorney for Appellant

**DECLARATION**

I, Heather Wulf, hereby declare, under the penalties of perjury of the State of Washington, that a true and correct copy of Brief of Appellant was mailed on this 25<sup>th</sup> day of March, 2014, to each of the following.

Jannine Myers & Deborah Flynn  
Flynn Law Group, LLC  
600 University, Suite 2100  
Seattle, Washington 98101

Penny Allen, Assistant Attorney General  
Office of the Attorney General  
PO Box 40121  
Olympia, Washington 98504-0121

  
Heather Wulf

## **RCW 4.84.010**

### **Costs allowed to prevailing party — Defined — Compensation of attorneys.**

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

(1) Filing fees;

(2) Fees for the service of process by a public officer, registered process server, or other means, as follows:

(a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.

(b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;

(3) Fees for service by publication;

(4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;

(5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;

(6) Statutory attorney and witness fees; and

(7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

## **RCW 51.52.130**

### **Attorney and witness fees in court appeal.**

(1) 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 or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary 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, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, 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. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

(2) In an appeal to the superior or appellate court involving the presumption established under RCW 51.32.185, the attorney's fee shall be payable as set forth under RCW 51.32.185.