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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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VINCENT A. SCERRI,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR & INDUSTRIES**

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## **I. INTRODUCTION**

Cindy Scerri is not entitled to a new trial when substantial evidence supports the jury's verdict. Ms. Scerri challenges the jury's finding that her husband, Vincent Scerri, remained in need of necessary and proper treatment at the time of his death. But the jury heard the unrefuted testimony of his attending medical provider, who opined that Mr. Scerri's mental conditions were not fixed and stable and that he still needed curative treatment for these conditions when he died. While the provider believed that Mr. Scerri's alcohol abuse would undermine the benefits of this treatment, he did not retract his opinion that Mr. Scerri's conditions had not reached maximum medical improvement.

This Court will not disturb a jury's verdict when there is substantial evidence to support it. Because the jury could reasonably believe the testimony of Mr. Scerri's medical provider, substantial evidence supports its finding that he still needed medical treatment at the time of his death. The trial court properly denied Ms. Scerri's motion for a new trial. This Court should affirm.

## **II. ISSUE**

Under CR 59(a)(7), the superior court may deny a motion for a new trial if there is "no evidence or reasonable inference from the evidence to justify verdict." An expert medical witness testified that

Mr. Scerri's mental health conditions were not fixed and stable and that he still needed medical treatment on the day he died. The jury found that Mr. Scerri's conditions were not fixed and stable and that he needed medical treatment. Did the trial court properly deny Ms. Scerri's motion for a new trial?

### **III. STATEMENT OF THE CASE**

#### **A. Vincent Scerri Injured His Low Back in the Course of Employment**

Vincent Scerri sustained an industrial injury to his low back in 2008, while carrying a bucket of paint up stairs. CP 3, 35. The Department of Labor and Industries allowed his workers' compensation claim and provided treatment, including several back surgeries. CP 551, 658, 667, 732, 784. Mr. Scerri developed depression, adjustment disorder, and a pain disorder, which the Department also accepted under his injury claim. CP 3, 35, 132.

In May 2013, Mr. Scerri's attending medical provider, physician's assistant John O'Brien, began treating him for his mental health conditions. CP 568-69. Ms. Scerri would sometimes accompany her husband to these visits. CP 575. O'Brien referred Mr. Scerri to a psychologist and began prescribing an antidepressant. CP 568-69, 732-33.

Mr. Scerri did not comply with O'Brien's treatment plans. CP 576-77. Eventually, O'Brien learned that Mr. Scerri had abused alcohol during the time O'Brien served as his attending medical provider. CP 574. Neither Mr. Scerri or Ms. Scerri informed O'Brien of Mr. Scerri's history of alcohol abuse. CP 575. But O'Brien eventually concluded that Mr. Scerri's alcohol abuse explained why he failed to comply with the treatment plans O'Brien proposed. CP 580.

In July 2015, Mr. Scerri died of causes unrelated to his industrial injury. CP 3, 35. The Department closed his workers' compensation claim, awarding him permanent partial disability for his low back and mental health conditions. CP 35, 796. In a second order, it denied Ms. Scerri's application for survivor's benefits, finding that Mr. Scerri was not permanently and totally disabled at the time of his death. CP 35, 57-58.

**B. The Board of Industrial Insurance Appeals Rejected Ms. Scerri's Claim for Survivor Benefits**

Ms. Scerri appealed the Department's orders to the Board of Industrial Insurance Appeals. CP 45, 57-61. There were two appeals. CP 45, 61. In her first appeal, she objected to the Department's impairment ratings. CP 54-55. But after she presented no evidence that the Department's ratings were in error, the Board dismissed her appeal. CP 3, 36.

In her second appeal, Ms. Scerri challenged the Department's decision to deny her application for survivor's benefits. CP 57. In an evidentiary hearing, Ms. Scerri called as expert witnesses Mr. Scerri's attending provider, O'Brien, a forensic examiner, H. Richard Johnson M.D., and a vocational counselor. CP 128, 549, 644-45. The Department called an endocrinologist, a neurologist, and an orthopedic surgeon. CP 313-14, 371, 701-02.

These witnesses testified extensively about Mr. Scerri's low back condition, but only O'Brien offered an opinion about his mental health conditions. He testified that at the time of Mr. Scerri's death, the claim-related mental health conditions were not fixed and stable and required additional treatment:

Q: Do you have an opinion on a more-probable than not basis, sir, as to whether as of the date of Mr. Scerri's death, July 11, 2015, whether he was in need of further curative medical care?

A: Yes

Q: What is that opinion?

A: Yes, he is. He was in need of further medical care.

Q: Now, is that medical care curative or what is your opinion about whether the medical care that he was receiving at the time of his death was curative or not?

A: If – if allowed treatment for depression and other psychological pain disorders – that’s a difficult question to answer.

In my opinion, the treatment he received for adjustment disorder, depression, and other psychological pain disorders was suboptimal, in no small part, because of his active end-stage alcoholism. Not the sole cause but a cause of diminished ability to be compliant with treatment for adjustment disorder, depression, and other psychological pain disorders.

Therefore, I’d say that in my opinion those diagnoses never evolved to the point which could be considered fixed and stable or maximum medical improvement. So I can’t make an opinion – I can’t express an opinion as to if they’re curative because treatment was not successful in that those treatments require a compliance on the part of the patient.

CP 583-84.

After the hearing, the Board found these facts:

1. Vincent A. Scerri sustained an industrial injury on May 28, 2008, when he was walking up a flight of stairs while carrying a bucket of paint. (CP 35 (FF 2)).
2. The industrial injury proximately caused lumbosacral strain and displaced lumbar intervertebral disk without myelopathy. The industrial injury also proximately caused the following mental health conditions: depression, pain disorder, and adjustment disorder. (CP 35 (FF 3)).
3. Mr. Scerri died on July 11, 2015, due to causes unrelated to the industrial injury. (CP 35 (FF 4)).
4. As of July 11, 2015, Mr. Scerri’s conditions, proximately caused by the industrial injury, were not fixed and stable,

and he was in need of further and proper medical treatment.  
(CP 35 (FF 6)).

CP 35.<sup>1</sup>

The Board concluded that because Mr. Scerri remained in need of proper medical treatment, he was not permanently and totally disabled at the time of his death. CP 36 (CL 3). As a result, it affirmed the Department's order denying Ms. Scerri's application for survivor's benefits. CP 36 (CL 3).

**C. A Jury Found That Ms. Scerri Was Not Entitled to Survivor Benefits**

Ms. Scerri appealed to superior court, and the court empaneled a 12-person jury to hear the case. CP 1-3. She challenged the Board's finding that Mr. Scerri's claim related conditions were not fixed and stable. CP 12-22, 844.

The testimony of the witnesses at the Board was read to the jury. The jury heard O'Brien's testimony. He served as Mr. Scerri's attending provider from February 2013 through June 2015. CP 550, 577. In May 2013, O'Brien referred Mr. Scerri to a psychologist to address chronic pain and depression. CP 567-69. He prescribed an antidepressant

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<sup>1</sup> The Board's finding of fact 5 determined that there was insufficient evidence to support a higher award beyond the permanent partial impairments paid for Mr. Scerri's low back injury and his mental health conditions. The award of permanent partial disability is not part of this appeal. CP 35. In Court Instruction No. 5 the Board's finding concerning permanent partial disability was removed by agreement. Ins. No. 5.

and recommended Scerri receive trigger point injections to manage his pain. CP 568-71, 733. The jury heard O'Brien testify that Mr. Scerri's adjustment disorder, depression, other psychological pain disorder were related to his industrial injury. CP 582. And it heard him say that these conditions were not fixed and stable and that Mr. Scerri still needed treatment for them when he died. CP 583-84.

The jury also heard the testimony of several other medical witnesses. But none of them opined about Mr. Scerri's mental health conditions. Dr. Johnson testified "there was no further curative treatment with regards to the issue of his low back or lower extremity functional impairment," CP 695, but offered no opinion about Mr. Scerri's mental health conditions. None of the Department's medical witnesses testified about these psychological conditions. So the jury had only O'Brien's unrefuted testimony that Mr. Scerri's claim related mental health conditions were not fixed and stable and that he still need treatment for them when he died.

At the end of the testimony, the court instructed the jury on the law. The court instructed the jury that "Mr. Scerri was not permanently and totally disabled if he was in need of further curative or rehabilitative medical care for his industrial conditions on the date of his death, July 11,

2015.” Ins. No. 13.<sup>2</sup> Curative treatment is treatment “intended to produce permanent changes which eliminate or lessen the clinical effects of the condition.” Ins. No. 18. Rehabilitative treatment is “treatment intended to allow an injured or ill worker to regain functional activity on a long-term basis.” Ins. No. 18.

The jury was asked:

Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Scerri’s conditions due to his industrial injury were not fixed and stable, and he was in need of further necessary and proper medical treatment?

CP 844.

The jury answered “yes.” CP 844.

Ms. Scerri moved to set aside the jury’s verdict and grant her a new trial. CP 849-56. The court denied the motion. CP 879. This appeal followed.

#### IV. STANDARD OF REVIEW

The ordinary standard of civil review applies to the review of the trial court’s decision in a workers’ compensation appeal. RCW 51.52.140 (“Appeal shall lie from the judgment of the superior court as in other civil cases.”); *see Rogers v. Dep’t of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). This Court limits its review to “examination of

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<sup>2</sup> The jury instructions are in the supplemental clerk’s papers.

the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions flow from the findings." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

When undertaking substantial evidence review, the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the factfinder. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Rather, the appellate court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006); *Gagnon*, 110 Wn. App. at 485. "Where there is substantial evidence, we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently." *Korst*, 136 Wn. App. at 206.

Under Civil Rule 59, the superior court may grant a new trial when there is "no evidence or reasonable inference from the evidence to justify

the verdict or the decision, or that it is contrary to law.” CR 59(a)(7). The decision to grant a motion for a new trial based on insufficient evidence falls within the discretion of the trial court. *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012) (citing *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812, 440 P.2d 834 (1968)). If the motion under CR 59 would require any weighing of conflicting evidence, the trial court must deny the motion. *Johnson v. Dep’t of Labor & Indus.*, 46 Wn.2d 463, 466, 281 P.2d 994 (1955). “We are not to reweigh or rebalance the competing testimony and inferences, or to apply anew the burden of persuasion, for doing that would abridge the right to trial by jury.” *City of Bellevue v. Raum*, 171 Wn. App. 124, 152, 286 P.3d 695 (2012) (quoting *Gagnon*, 110 Wn. App. at 485).

## V. ARGUMENT

### A. **Substantial Evidence Supports the Jury’s Finding that Mr. Scerri’s Claim-Related Mental Health Conditions Were Not Fixed and Stable and That He Still Needed Necessary and Proper Medical Treatment at the Time of His Death**

O’Brien’s testimony constitutes substantial evidence to support the jury’s determination that Mr. Scerri’s claim-related mental health conditions were not fixed and stable and that he remained in need of proper and necessary medical treatment when he died. The jury was instructed that proper and necessary medical treatment may be “either

curative or rehabilitative.” Ins. No. 18. “Curative treatment is treatment intended to produce permanent changes which eliminate or lessen the clinical effects of the condition.” Ins. No. 18. “Rehabilitative treatment is treatment intended to allow an injured or ill worker to regain functional activity on a long-term basis.” Ins. No. 18. And a worker’s condition is “fixed and stable” when “no fundamental or marked change in the condition can be expected, with or without treatment.” Ins. No. 18. Ms. Scerri did not object to this instruction and assigns no error to it on appeal. (AB 5.)

O’Brien was the only medical witness to address Mr. Scerri’s mental health conditions, and he explicitly testified that Mr. Scerri still needed medical treatment for those conditions when he died:

Q: Do you have an opinion on a more-probable-than-not basis, sir, as to whether as of the date of Mr. Scerri’s death, July 11, 2015, whether he was in need of further curative medical care?

A: Yes

Q: What is that opinion?

A: Yes, he is. He was in need of further medical care.

CP 583.

O'Brien explained that Mr. Scerri's alcoholism had interfered with his mental health treatment and that, as a result, these conditions had never reached a "fixed and stable" state:

In my opinion, the treatment he received for adjustment disorder, depression, and other psychological pain disorders was suboptimal, in no small part, because of his active end-stage alcoholism. Not the sole cause but a cause of diminished ability to be compliant with treatment for adjustment disorder, depression, and other psychological pain disorders.

Therefore, I'd say that in my opinion those diagnoses never evolved to the point which could be considered fixed and stable or maximum medical improvement.

CP 583-84.

O'Brien demurred about whether the treatment he had provided was curative, explaining "those treatments require a compliance on the part of the patient." CP 583-84. But while O'Brien testified that Mr. Scerri's alcoholism would likely prevent him from benefitting from further treatment, CP 584, substantial evidence shows that this was O'Brien's intent. As the jury was instructed, treatment is curative when "*intended* to produce permanent changes which eliminate or lessen the clinical effects of the condition." Ins. No. 18. Similarly, "[r]ehabilitative treatment is treatment *intended* to allow an injured or ill worker to regain functional activity on a long-term basis." Ins. No. 18.

Here, the jury could reasonably determine that O'Brien intended his treatment to eliminate or lessen the effects of Mr. Scerri's mental health conditions. He specifically stated that Mr. Scerri needed more curative medical care at the time of his death. CP 583. He explained that Scerri's conditions had never reached maximum medical improvement. CP 583; Ins. No. 18. And just one month before Mr. Scerri died, O'Brien was actively working to treat his chronic pain and elicit cooperation in the treatment program:

This period was studded with attempts at establishing allowable diagnoses and attempts at getting a handle on treatment of Mr. Scerri's chronic pain problem. My notes in April of 2015 I documented attempts to enlist Mr. Scerri's cooperation and compliance with plan of care for addressing his chronic pain syndrome and furthermore document my frustration with his noncompliance with that.

.....  
I also documented on the last visit, June 5, 2015, an attempt to start him on gabapentin, which is rarely – it's not considered to be an abusable drug – in an attempt to get some handle on his chronic pain.

CP 576-77.

The jury had a right to rely on this evidence and the inferences from it. *Korst*, 136 Wn. App. at 206. O'Brien opined that Mr. Scerri's mental health conditions were not fixed and stable and that he still needed more medical treatment when he died. And when viewed in light most favorable to the Department, who prevailed in superior court, the evidence

supports a reasonable inference that O'Brien intended this treatment plan to be curative or rehabilitative.

The jury correctly found that Mr. Scerri's claim related conditions were not fixed and stable and that he remained in need of further proper and necessary medical treatment. Because there is sufficient evidence to sustain the jury's verdict, the superior court did not abuse its discretion when it denied Ms. Scerri's motion to grant her a new trial.

**B. Inconsistencies in a Witness's Testimony Go to the Weight of that Testimony, not the Sufficiency of the Evidence**

Potential inconsistencies in O'Brien's testimony do not negate his initial opinion that Scerri needed further curative treatment. A witness's inconsistent statements do not preclude the jury relying on those statements. *Venezelos v. Dep't of Labor & Indus.*, 67 Wn.2d 71, 73, 406 P.2d 603 (1965); *Henry Indus., Inc. v. Dep't of Labor & Indus.*, 195 Wn. App. 593, 615, 381 P.3d 172 (2016). In *Venezelos*, the Supreme Court reversed the trial court's decision to grant the Department's motion to dismiss and take the case from the jury on a sufficiency of the evidence standard. *Venezelos*, 67 Wn.2d at 72-73, 77. The Court explained that "inconsistencies not amounting to a complete retraction should not vitiate the doctor's testimony as a matter of law." *Venezelos*, 67 Wn.2d at 73. While such statements may be somewhat impeaching, "their weight is for the jury, not the court." *Id.* Likewise, in *Henry Industries*, the court held that fact-finder resolves

conflicts in a witness's testimony where a driver testified inconsistently about employing others. *Henry Indus., Inc.*, 195 Wn. App. at 615.

O'Brien's testimony might be seen as inconsistent. As discussed above, he first opined that Mr. Scerri's mental health conditions were not fixed and stable, explaining that "those diagnoses never evolved to the point which could be considered fixed and stable or maximum medical improvement." CP 583-84. But after coaxing by Scerri's counsel, O'Brien stated that further treatment would not have made any improvement because, for the treatment to be effective, Scerri would have to cooperate, which O'Brien doubted because of Scerri's dependence on alcohol. CP 584-85.

But it was for the jury to weigh O'Brien's statements in determining the credibility and weight to assign the various aspects of his testimony. *See Venezelos*, 67 Wn.2d at 73. In response to questions about Mr. Scerri's need for treatment, the jury heard O'Brien testify that these mental health conditions never reached a fixed and stable state. CP 583-84. When asked if Mr. Scerri needed more curative medical care at time of his death, O'Brien testified that he did. CP 583. O'Brien told the jury that Mr. Scerri's mental health diagnoses "never evolved to the point which could be considered fixed and stable or maximum medical improvement." CP 583-84. And while he demurred about whether the treatment he had provided was curative, noting that successful treatment would require Mr. Scerri's compliance, CP 584, the jury could reasonably find that

O'Brien *intended* his treatment to permanently "lessen the clinical effects of the condition." Ins. No. 18.

O'Brien did not retract those opinions. While he eventually resigned himself to stating "[o]n a more-probable-than-not basis I would have to say that further treatment would not result in any improvement," this was because of Mr. Scerri's noncompliance with O'Brien's treatment plan, not because properly administered treatment would not cause improvement. CP 584. The jury had a right to view this statement for what it was: O'Brien's understandable frustration with his patient's unwillingness to participate in treatment. O'Brien did not withdraw his opinion that Mr. Scerri's conditions were not fixed and stable and that he continued to need necessary and proper medical treatment at the time of his death.

No other expert medical witnesses offered any opinion about Mr. Scerri's mental health conditions; each medical expert testified about medical fixity within their respective areas of specialty. And because no mental health specialists testified, the only testimony about depressive disorder, adjustment disorder, and pain disorder the jury had to consider was the treating provider, O'Brien. Based solely on the testimony offered by Mr. Scerri's attending provider, the jury could and did have sufficient evidence from which it could affirm the Board's finding that at the time of

his death, Mr. Scerri's claim-related mental health conditions were not fixed and stable.

The jury had a right to rely on O'Brien's testimony to find that Mr. Scerri's claim-related mental health conditions were not fixed and stable or at maximum medical improvement at the time of his death. Scerri offers no basis to justify this court disturbing the jury's verdict.

## VI. CONCLUSION

Ms. Scerri offers no basis to justify disturbing the jury's verdict. Substantial evidence supports the jury's determination that Mr. Scerri's claim related mental health conditions were not fixed and stable and remained in need of further necessary and proper medical treatment at the time of his death. This Court should affirm.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of July, 2019.

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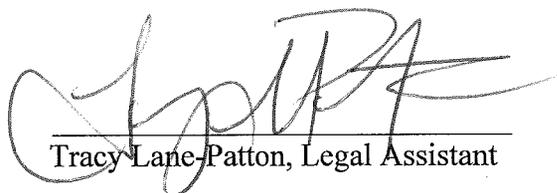
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