

FILED

FEB 17 2012

No. 304680

STATE OF WASHINGTON COURT OF APPEALS
DIVISION THREE

Sacred Heart Medical Center

Respondent,

v.

Jean Knapp

Appellant.

APPELLANT'S OPENING BRIEF

Christopher S. Carlisle,
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I. ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR: The trial court misapplied the law with regard to RCW 51.52.130, and statutory attorney fees.

II. STATEMENT OF ISSUES

Was the denial of statutory attorney fees by the trial court improper under RCW 51.52.130 given that Ms. Knapp sustained her right to relief when the trial court upheld the Board of Industrial Insurance Appeals decision which reversed the Department of Labor and Industries Order dated September 29th, 2009? *Yes.*

III. FACTS

This matter came on regularly for trial on June 17th, 2011, before the Honorable Judge Salvatore F. Cozza, Judge of the Superior Court of Spokane County. Clerk's Papers (CP) 14. Jean Knapp appeared by and through her attorney of record, Stiley & Cikutovich, PLLC, per CHRISTOPHER S. CARLISLE. *Id.* Sacred Heart Medical Center and the Department of Labor and Industries, appeared by and through their attorneys; James L. Gress, and Molly M. Parish, Associate Attorney General, respectively. *Id.*

On November 18, 2011, Ms. Knapp's motion for statutory attorney fees was heard and ruled upon by the Honorable Judge Cozza. Report of Proceedings (RP), 2, November 18th, 2011. The hearing resulted in a denial of attorney fees. RP, 8, November 18th, 2011. The trial court judge summarily dismissed an award of fees, and did not state a basis for the denial. *Id.*

IV. ARGUMENT

“This court reviews the reasonableness of attorney fees awards under an abuse of discretion standard.” *Brand v. Dept. of Labor and Indust.*, 139 Wn.2d 659, 989 P.2d 1111, 1114 (1999). “A trial court does not abuse its discretion unless the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *Brand* (quoting *Progressive Animal Welfare Soc’y v. University of Wash.* 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990)). However, “[the] court has overturned attorney fees awards when it has disapproved of the basis or method used by the trial court, or when the record fails to state a basis supporting the award.” *Id.* The trial court judge summarily dismissed an award of fees, and did not state a basis for the denial.

More pertinent is the fact that the trial court *misapplied the law.*

It seems to me that when you look at the relief granted here, I think that it was more in the nature of – how can I put it – a technical correction of a flaw that occurred in the Tribunal before it got to this Court. I don't think I would characterize it as a situation where the worker here prevails for purposes of the triggering of attorney's fees here.

RP 8, November 18, 2011.

RCW 51.52.130 clearly establishes that attorney fees *shall* be fixed by the court in favor of a non-appealing worker if that worker's right to relief is sustained. There is no requirement that a prevailing party even be recognized in order to "trigger" RCW 51.52.130, rather, it is automatic. In fact, the Washington Supreme Court in *Brand* declared that the degree of success on appeal is irrelevant, provided that the worker sustains her right to relief. *See Brand* at 1116.

The trial court classified the decision as a "technical correction of a flaw" which has no bearing whatsoever on the fact that Ms. Knapp sustained her right to relief.

If the trial judge had ruled that the requested fee was *unreasonable*, the standard of review at this court would be abuse of discretion. However, by inferring that the statute must be triggered by the declaration of a prevailing party, which in practice would leave the relevance of the statute completely at the discretion of the trial judge, the trial court misapplied the law. Because this

matter rests on a question of law rather than a question of the reasonableness of a fee award, the standard of review is de novo.

Ms. Knapp is entitled to attorney fees under RCW 51.52.130 which requires the court to fix a reasonable fee for the services of the beneficiary's attorney. This statute states, in part:

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. (*emphasis added*)

RCW 51.52.130.

Looking at the adopted Findings of Facts and Conclusions of Law (FFCL) presented, this Court may examine the history of judicial proceedings in this case, and note that Ms. Knapp was successful in sustaining her right to relief on appeal. *See* CP 49-52.

Ms. Knapp appealed the premature closure of her claim to the Board of Industrial Insurance Appeals. She was successful. The Self Insured Employer appealed the decision to the superior court, where the findings of fact and conclusions of law state "As a change of circumstances had occurred, the Director of the Department of Labor and

Industries is authorized to reconsider *prior to claim closure*, whether or not vocational services are still required in order to restore an injured worker's employability." CP 51 (*emphasis added*).

By upholding the BIIA's decision to reverse the closure of her claim, Ms. Knapp has *sustained her right to relief in this appeal*. In fact, Ms. Parrish, the Assistant Attorney General stated on the record on November 18, 2011, that "there was not really a prevailing party." RP 6, November 18th, 2011. It is the only reasonable, logical, conclusion that if the Self Insured Employer was not the prevailing party on appeal, than the BIIA's ruling was sustained and, as a matter of course, Ms. Knapp thereby *sustained her right to relief that the closure of the claim in the Department Order dated September 29th, 2009 was reversed*.

Ms. Knapp is entitled to attorney fees under RCW 51.52.130 because although the superior court's ruling clarified the Board's Order, Ms. Knapp's right to relief has been sustained, and not overturned or diminished. The court's ruling that the Board Order be clarified does not operate to change the fact that the closure of the claim in the Department Order dated September 29th, 2009 was reversed at the Board.

"Nothing in the language of RCW 51.52.130 suggests that the award of attorney fees is dependent upon the worker's overall success on appeal. Nor is there any evidence that the Legislature intended to limit

attorney fees to those attributable to successful claims...” *Brand v. Dept. of Labor and Indus.*, 989 P.2d 1111, 1116 (1999).

In *Brand*, the claimant was successful in her effort at the trial court to increase the category rating of her permanent partial disability, but unsuccessful in overturning the BIIA’s decision that she was totally permanently disabled. Although the claimant was not successful on the entirety of her claim, the trial court awarded her attorney fees under RCW 51.52.130. The Department appealed the award of attorney fees and ultimately the matter was brought to the Washington State Supreme Court, which found that:

In light of the plain language of RCW 51.52.130, we hold that reducing attorney fees awards to account for a worker’s limited success is inappropriate in this context. Under the statute, the worker’s degree of overall recovery is inconsequential. This holding is consistent with the purposes behind RCW 51.52.130. Awarding full attorney fees to workers who succeed on appeal before the superior or appellate court will ensure adequate representation for injured workers.

Brand at 1116.

The court in *Brand* further elucidates its holding that overall success on appeal does not eliminate the right to, or justify a reduction in the amount of, attorney fees under RCW 51.52.130. If this court were to find that the ruling made by Judge Cozza was a split-decision, *Brand*

would still apply, and Ms. Knapp will still be entitled to attorney fees.

“This court has followed *Hensley* and recognized that an award of attorney fees may be limited to fees attributable to successful claims if the claims brought are unrelated and separable.” *Brand* at 1117 (citing *Kastanis v. Educational Employees Credit Union*, 122 Wash.2d 483, 859 P.2d 26, 865 P.2d 507 (1994)) (and see *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). However, the court distinguishes *Hensley* from *Brand* by continuing that:

Workers' compensation claims are statutorily based, and deal with one set of facts and related legal issues...[and] [g]iven the unitary nature of claims brought under the Industrial Insurance Act, we hold that *workers' compensation claims are not unrelated, and should not be segregated in terms of successful and unsuccessful claims for the purpose of calculating attorney fees under RCW 51.52.130*. This conclusion is in accordance with the purpose of RCW 51.52.130 and the Industrial Insurance Act as a whole.

Brand at 1118 (*emphasis added*).

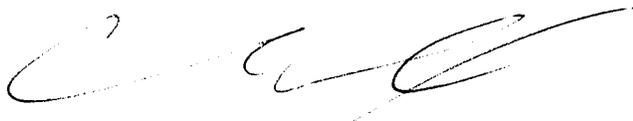
Given RCW 51.52.130, and precedential case law, Ms. Knapp is entitled to reasonable attorney fees because she sustained her right to relief upon appeal.

V. CONCLUSION

Ms. Knapp right to relief was sustained, as the Board Order reversing the Department's Order was upheld, thereby setting aside the closure of her claim, and entitling her to Temporary Total Disability payments. *Brand* shows us that the worker need not be the sole prevailing party on an appeal in order to be awarded attorney fees, nor should the award be limited to time spent on only those claims that were successful on appeal.

Ms. Knapp successfully sustained her right to relief, and she is entitled to costs and reasonable attorney fees under RCW 52.52.130.

Submitted this 17th day of February, 2012.



Christopher S. Carlisle, WSBA #48293

Attorney for Ms. Jean Knapp

APPENDICES



Inside the Legislature

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[RCWs](#) > [Title 51](#) > [Chapter 51.52](#) > [Section 51.52.130](#)

[51.52.120](#) << [51.52.130](#) >> [51.52.132](#)

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](#).

[2007 c 490 § 4; 1993 c 122 § 1; 1982 c 63 § 23; 1977 ex.s. c 350 § 82; 1961 c 23 § [51.52.130](#). Prior: 1957 c 70 § 63; 1951 c 225 § 17; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

Notes:

Effective dates – Implementation – 1982 c 63: See note following RCW [51.32.095](#).

FEB 21 2012
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SPOKANE COUNTY
B...

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION III

Sacred Heart Medical Center,

Plaintiff/Respondent,

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Jean Knapp,

Defendant/Appellant.

COA No. 304680

Spokane Cty. Sup. Ct. No. 102052491

Declaration of Service

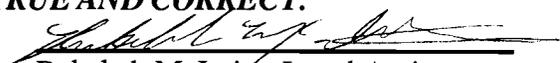
I DECLARE, that my name is Rebekah McIntire, I am a legal assistant for Stiley and Cikutovich, PLLC, I am and at all times hereinafter mentioned, a citizen of the United States and a resident of Spokane County, Washington, over the age of eighteen years, and that on the 17th day of February, 2012, I mailed a copy of Appellant's Opening Brief, relevant to the above-entitled matter, to the following parties:

Molly Parish, AAG
Office of the Attorney General
Attorney for the Department
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Spokane, WA 99201-1194

James Gress
Law Office of Gress and Clark, LLC
Attorney for Sacred Heart
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Portland, OR 97223

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 21st day of February, 2012


Rebekah McIntire, Legal Assistant

DECLARATION OF SERVICE

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