

FILED

MAR 20 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30468-0-III

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

SACRED HEART MEDICAL CENTER

Respondent,

v.

JEAN KNAPP,

Appellant

**BRIEF OF RESPONDENT
SACRED HEART MEDICAL CENTER**

James L. Gress
Attorney for Respondent

James L. Gress, WSBA #25731
The Law Office of Gress & Clark
9020 SW Washington Square Road, Suite 560
(971) 285-3525

FILED

MAR 20 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30468-0-III

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

SACRED HEART MEDICAL CENTER

Respondent,

v.

JEAN KNAPP,

Appellant

**BRIEF OF RESPONDENT
SACRED HEART MEDICAL CENTER**

James L. Gress
Attorney for Respondent

James L. Gress, WSBA #25731
The Law Office of Gress & Clark
9020 SW Washington Square Road, Suite 560
(971) 285-3525

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE ISSUES.....1

III. STATEMENT OF THE CASE.....1

IV. ARGUMENT.....2

1. Appellant is not entitled to assessed attorney fees
and costs pursuant to RCW 51.52.130.

V. CONCLUSION.....9

TABLE OF AUTHORITIES

Washington Cases

Fred Meyer, Inc. v. Shearer,
102 Wash.App. 336, 8 P.3d 310 (2000).....4, 5

Brand v. Department of Labor and Industries,
139 Wash.2d 659, 989 P.2d 1111 (1999).....6, 7, 8

Statutes

RCW 51.52.130.....2, 3, 4, 5, 7, 8, 9

RCW 4.84.010.....3

I. INTRODUCTION

The respondent, Sacred Heart Medical Center, filed an appeal to Spokane County Superior Court from a determination issued by the Board of Industrial Insurance Appeals that concluded the appellant, Jean Knapp, was entitled to vocational rehabilitation plan development services. The respondent prevailed in its appeal to Superior Court and managed to have the Board's vocational determination remanded. The appellant failed to have the Board's determination sustained and to be awarded attorney fees and costs under these circumstances would be contrary to the law.

II. STATEMENT OF THE ISSUES

Whether the Superior Court was correct in concluding that all parties were responsible for their own fees and costs.

III. STATEMENT OF THE CASE

In this industrial insurance claim the Department of Labor and Industries determined on March 18, 2009 that the appellant was able to work and was not in need of vocational services. Clerk's Papers (CP) 49-50. A dispute to this Department determination was filed with the Department Director who found vocational services were necessary. CP 50. Following the Director's finding, the medical evidence showed that

the appellant was capable of returning to her regular job at the time of injury. *Id.* As a result, the Department entered an order dated September 29, 2009 that closed the claim. *Id.*

The appellant filed an appeal to the Board from the Department order closing the claim. *Id.* The appellant succeeded before the Board, which found that vocational rehabilitation plan development services were required. *Id.* The respondent appealed the Board's determination to Superior Court. *Id.* The respondent prevailed in Superior Court as the matter was remanded back to the Department for the Director to consider additional information before rendering a subsequent vocational determination. *Id.* at 51. The judge ordered that all parties were to bear their own fees and costs because the appellant had not prevailed thereby triggering an award for attorney fees. *Id.* at 51; Report of Proceedings (RP) November 18, 2011 at 8.

IV. ARGUMENT

The Spokane County Superior Court was correct in ordering that all parties were responsible for their own fees and costs. The requirements of RCW 51.52.130 had not been satisfied and the appellant was not justified in seeking an award of attorney fees and costs against respondent. Alleging that the appellant's right to relief under the statute had been

sustained by the Superior Court is patently absurd. The appellant's relief would have been sustained in the event the Superior Court entered an order affirming the Board's order on appeal that entitled her to vocational services. Instead, the respondent prevailed before Superior Court and Board's determination as to vocational services was remanded back to the Department. Consequently, an award for attorney fees and costs pursuant to RCW 51.52.130 would be improper.

1. Appellant is not entitled to assessed attorney fees and costs pursuant to RCW 51.52.130.

Assessed attorney fees and costs are authorized only when a party prevails on appeal. RCW 51.52.130; see also RCW 4.84.010. The pertinent portion of RCW 51.52.130 reads as follows:

“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 the case 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.” RCW 51.52.130.

The statute is very clear in delineating when it is attorney fees are to be awarded following an appeal to Superior or Appellate Court. In the case of an appeal filed by the worker, the award of attorney fees would be

proper if the worker were to prove a right to additional relief. RCW 51.52.130. This effectively means that the worker prevails in demonstrating an entitlement to additional benefits than had been awarded within the order under appeal. Where the worker is not the appealing party, the statute mandates fees and costs be paid in the event the worker sustains his or her right to relief. RCW 51.52.130. This provision translates to the worker being able to retain the benefits that had been awarded within the order under appeal. Regardless as to whether the worker is the appealing party or not, the basic principle recognized by the statute and case law that must be satisfied in order to justify an award for attorney fees is a successful outcome. Said another way, the worker must prevail in some aspect of the appeal.

This concept of prevailing in an appeal as is contemplated in RCW 51.52.130 is illustrated by the Appellate Court in *Fred Meyer, Inc. v. Shearer*. In this case, Fred Meyer appealed a decision made by the trial court that affirmed a Board determination. *Fred Meyer, Inc. v. Shearer*, 102 Wash.App. 336, 8 P.3d 310 (2000). The Board had found that the worker was entitled to time loss compensation benefits at a higher rate. *Id.* at 310. Following affirmation of the Board's reasoning and ruling, the worker's attorney made a request for fees and costs. *Id.* at 312. The Appellate Court reasoned that attorney fees and costs for successfully

defending the order on appeal were warranted under RCW 51.52.130. *Id.* at 313. The court succinctly stated, “Because she prevails, we award her reasonable attorney fees and costs subject to RAP.” *Id.* at 313.

Here, the appellant did not prevail in defending the Board’s decision before Superior Court, which is in opposition to the worker’s victory in *Shearer*. *Id.* at 313; CP 49-52. As stated directly from the appellant’s counsel to Superior Court, they maintained the Board’s vocational determination was correct. CP 15, 32. On the other side, the respondent would be considered to have prevailed in the event the Superior Court ordered one of two things. First, the respondent sought relief from the Superior Court to enter an order finding that the Board had erred in determining that the Department was without jurisdiction to issue the order closing the claim. *Id.* at 26-27. In the alternative, the respondent argued that the matter should be remanded back to the Department Director to issue a new decision as to whether vocational services were necessary. *Id.* The respondent prevailed by having this alternative form of relief granted by the Superior Court. *Id.* at 52. Looking at this from the appellant’s prospective; the appellant had lost because the Superior Court did not sustain the Board’s finding that required vocational services. *Id.*

Appellant argues that denial of attorney fees and costs by the trial court was improper given the appellant sustained her right to relief following the trial court's ruling. Appellant's Opening Brief at 1. The appellant contends further, contrary to the law explained above, "There is no requirement that a prevailing party even be recognized in order to "trigger" RCW 51.52.130, rather, it is automatic." *Id.* at 3. Appellant then maintains that the degree of success on appeal is irrelevant so long as the worker sustains her right to relief. *Id.* In support of this argument the appellant cites to *Brand v. Department of Labor and Industries*. *Id.* at 3; see generally *Brand v. Department of Labor and Industries*, 139 Wash.2d 659, 989 P.2d 1111 (1999). The appellant's reliance on the decision in *Brand* as justification for an award of attorney fees and costs in this case is misplaced.

In *Brand*, the worker alleged in an appeal to Superior Court from a Board order that she was totally disabled and incapable of working and in the alternative argued she was entitled to a greater permanent partial disability award than had been provided by the Board. *Brand*, 989 P.2d at 1113. The jury rejected her position that she was totally disabled but did award her additional permanent partial disability for her related conditions. *Id.* The worker's attorneys requested fees and costs. *Id.* at 1113. The trial court awarded attorney fees without regard to whether she

failed or succeeded on a particular issue. *Id.* The Court of Appeals found the trial court's basis for attorney fees was inadequate and further required that the trial court segregate costs and fees attributable to successful and unsuccessful claims. *Id.* at 1114. The worker sought review to the Washington Supreme Court. *Id.*

The issue addressed by the Supreme Court was whether the worker's degree of overall recovery was a relevant factor in calculating the attorney fees and costs award under RCW 51.52.130. *Id.* at 1112. The Supreme Court reasoned that the plain language in RCW 51.52.130 does not "suggest that the award of attorney fees is dependent upon the worker's overall success on appeal." *Id.* at 1116. From this, the Supreme Court held "that reducing attorney fees awards to account for a worker's limited success is inappropriate in this context." *Id.* at 1116. The Supreme Court went on to state, "Awarding full attorney fees to workers who succeed on appeal before the superior or appellate court will ensure adequate representation for injured workers." *Id.* at 1116.

The point contained within *Brand*, which appears to have evaded appellant, is that the worker must realize some degree of success on appeal to be entitled to an award for attorney fees and costs under RCW 51.52.130. See generally *Id.* That limited degree of success in the appeal

contained within in *Brand* was entitlement to a greater award for permanent partial disability. *Id.* at 1113. Here, the appellant did not share a similar limited degree of success to that experienced by the worker in *Brand*. CP 52. The respondent was the only party to have prevailed in the appeal following the Superior Court's remand. CP 52.

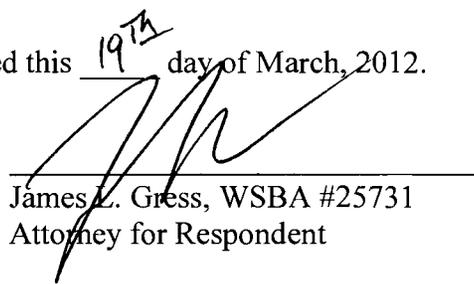
Appellant confusingly argues that the Board's decision to reverse claim closure was somehow upheld by the Superior Court thereby satisfying the requirement under RCW 51.52.130 that her right to relief in the appeal be sustained. Appellant's Opening Brief at 5. To the contrary, the Board's decision that provided for vocational services was found to be incorrect by the Superior Court following a motion for summary judgment and the matter remanded back to the Department Director to render a fresh vocational determination. CP 52. It is premature for claimant to proclaim her right to relief had been sustained when the decision as to the appropriateness of that relief rests with the Director who has yet to consider additional medical evidence proving vocational services are not warranted and that claim closure is proper. It is unclear how appellant can in good faith argue her right to relief was sustained absent the Superior Court affirming the Board's determination that found she was entitled to the disputed vocational services. Because the appellant was unsuccessful

in having the Board's order that provided for vocational services upheld, attorney fees and costs under RCW 51.52.130 should not be awarded.

V. CONCLUSION

The law is clear that a worker must prevail, even in the slightest degree, in order to justify an award for attorney fees and costs under RCW 51.52.130. To allege that the appellant's right to relief was sustained by the Superior Court warranting an award for attorney fees and costs is illogical and contrary to the law. The appellant would have enjoyed some degree of success and/or her relief would have been sustained in the event the Superior Court entered an order affirming the Board's order on appeal that entitled her to vocational services. This simply did not happen in this case and it is disingenuous for the appellant to insist that she was nevertheless victorious when it was the respondent's request for relief that had been granted by the Superior Court. Accordingly, an award for attorney fees and costs pursuant to RCW 51.52.130 would be inappropriate.

Respectfully submitted this 19th day of March, 2012.



James L. Gress, WSBA #25731
Attorney for Respondent

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF MAILING

I hereby certify that I caused to be served the foregoing **RESPONDENT'S BRIEF** on the following individuals on March 19, 2012, by mailing to said individuals true copies thereof, certified by me as such, contained in sealed envelopes, with postage prepaid, addressed to said individuals at their last known addresses to wit:

Patrick Stiley
Attorney at Law
Stiley & Cikutovich, PLLC
1408 W. Broadway
Spokane, WA 99201

Molly M. Parish
Assistant Attorney General
Attorney General of Washington
Labor & Industries Division
1116 W. Riverside Ave
Spokane, WA 99201-1194

\\
\\
\\

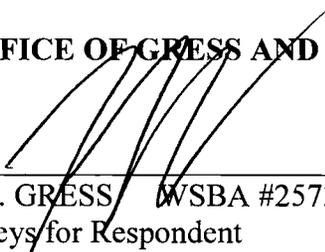
1 And deposited in the post office at Portland, Oregon on said date.

2 I further certify that I filed the original of the foregoing with:

3
4 Court Clerk
5 The Court of Appeals
6 of the State of Washington
7 Division III
8 500 N. Cedar Street
9 Spokane, WA 99201

10 by FEDEX overnight mailing it on: March 19, 2012.

11
12 **LAW OFFICE OF GRESS AND CLARK, LLC**

13 
14 _____
15 JAMES L. GRESS WSBA #25731
16 Of Attorneys for Respondent
17
18
19
20
21
22
23
24
25