

FILED

AUG 19 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31333-6

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

DIANA LELAND,
Appellant

v.

JR SIMPLOT, CO.,
Respondent/Cross-Appellant

AND

DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent.

APPELLANT/CROSS-RESPONDENT REPLY BRIEF

RANDY FAIR
WSBA No. 22918

CALBOM & SCHWAB, P.S.C.
Attorneys for Appellant
PO Drawer 1429
Moses Lake, WA 98837
509-765-1851

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATUTES	iii
ARGUMENT	1
I. <u>The Choosing, Use, and Employment of Expert Witnesses to Treat Claimant vs. the Selection And Use of Employment of Expert Witnesses to Strictly Operate as Testifying Experts Is a Very Telling Point of How This System Has Been Misused by Respondent.</u>	3
A. Randy Bruce	4
B. Dr. John Gilbert	5
C. Robert Crouch, Vocational Specialist	5
II. <u>The Claimant Should Be Deemed Conclusively Disabled as of August 12, 2008, as the Respondent Has Not Argued Any Error With a Critical Finding of Fact Issued by the Superior Court That Finds Total Disability at That Point.</u>	10
III. <u>Pain Disorder Is Related to the Industrial Injury and Does Not Require Further Treatment. The Superior Court Erred in Stating That Such Condition Is Not Related to the Industrial Injury and That Such Condition Would Require Further Treatment.</u>	12

IV. The Attending Physician Doctrine Is in Place for a Reason, and Is an Excellent Doctrine and Should Be Followed to Avoid the Use, and Stacking, of Expert Witnesses as 'Hired Guns' Meant to Provide a Dissenting Opinion. 19

CONCLUSION 21

TABLE OF AUTHORITIES

	Page
<i>Fuller v. Employment Sec. Dept. of State of Wash.,</i> 52 Wash.App. 603 (1988)	11, 17

STATUTES

RCW 51	2, 9
RCW 51.04.010	9
RCW 51.32.090	11
WAC 296-20-01002	18

COMES NOW APPELLANT, Diana Leland, (hereafter 'Appellant') and submits her reply to the appeal brief supplied by J.R. Simplot (hereafter 'respondent') on or about May 15, 2013.

ARGUMENT

Appellant will try not to repeat what was said and not misuse the Court's time, but there are some things that need to be pointed out to direct and refine the issues at this moment (and also the fact of this matter). Appellant feels that some simplification and some 'building block' type of arguments are necessary here as Worker's Compensation matters are so different than other matters which reach this stage of litigation.

Please note that in Labor and Industries matters, there is often employment of expert witnesses. Many are hired but have provided no treatment or services. Some are simply treating providers with no agenda other than to provide information and treatment. In this case, there was a total of one (1) lay witness, the Appellant, Diana Leland. There were then twelve (12) expert witnesses presented to testify. This is obviously a very high number.

In Labor and Industries matters, the experts testify in various fields, that are usually broken down into four groups:

(1) Orthopedic and treating doctors – discussing how the body is recovering from injury and any disability suffered by the claimant (there are five in this matter --- Attending Providers Dr. Bunch and Physician's Assistant Betz, Dr. Van Gerpen, Dr. Gamber, and Dr. Barnard); (2) Mental Health Experts – that discuss psychological and emotional impacts upon the injured worker (we have two involved in this matter --- Dr. Gilbert and Dr. Friedman); (3) Physical Therapists – to discuss the body's abilities (there are also two in this matter --- Randy Bruce and Ms. Berkovitch); and, (4) Vocational Experts – to discuss what work, if any, can be done based upon skills, physical abilities, mental and physical limitations, etc. (there are three in this matter --- Robert Crouch, Fred Cutler, and Craig Bock).

Ideally, as we are dealing with a self-insurance company and NOT the Department of Labor and Industries, all tenets and principles of RCW 51 would still be in effect, and the importance of the worker would be tantamount, and the overall goal would be to do what could be done to treat the worker back to the best health

possible, and then try to get the worker back into the workplace.

That is where the resources in this matter, and any other, should be placed. And in this case, that is very clearly what did not happen.

Please read on.

I. **The Choosing, Use, and Employment of Expert Witnesses to Treat Claimant vs. the Selection and Use of Employment of Expert Witnesses to Strictly Operate as Testifying Experts Is a Very Telling Point of How This System Has Been Misused by Respondent.**

This section is meant to reply to and clarify the Respondent's description of experts and their testimony.

In this matter, the Appellant Diana Leland was injured in January 2005 and her claim closed over three and one-half (3 ½) years later. The Respondent J.R. Simplot had serious troubles with the experts that had been employed to treat the claimant, or advise and provide opinions in this matter.

Essentially, there were three experts in various fields, two that treated Appellant, that were greatly going to assist in Appellant's claim that she was disabled. There was also a greatly under-informed vocational consultant. The Appellant retained none of these experts. Appellant is referring to Dr. Gilbert (Psychologist – the only one to treat Ms. Leland, and the only one to see

Ms. Leland during the 3 ½ year life of her claim), Physical Therapist Randy Bruce (the only physical therapist to treat Ms. Leland and the only physical therapist to administer a Physical Capacities Evaluation during the three and one-half (3 ½) year life of the claim), and Vocational Consultant Robert Crouch (the only vocational consultant to assist in this matter during the life of the claim and who would eventually withdraw his opinion that the claimant would be employable upon learning that the Attending Providers, Mr. Betz and Dr. Bunch, once they were able to view the Physical Capacities Evaluation of Randy Bruce, found the claimant disabled from work).

This claim was closed with minimal benefits to Ms. Leland. In fact, upon closing the claim she received no permanent disability benefits, not even partial disability benefits, and her time loss was cut-off months before the claim closed on August 12, 2008.

Had this matter then proceeded to litigation at the time the claim closed, the following would have been presented had no additional witnesses been added:

- A. **Randy Bruce, Physical Therapist** – would have stated the claimant, from his treatment of her from several physical

therapy sessions and his full two-day physical capacities evaluation, was disabled and would never be returned to full time gainful employment. (CP 672, 674, 675, 678, 682, 684, 685) **[NOTE:** Randy Bruce was not hired by the claimant as an expert witness, but was retained through administration of the claim by Respondent.]

B. Dr. John Gilbert, Psychologist – would have stated that the Pain Disorder suffered by Appellant was pre-existing, and that the condition was partially caused or partially ‘lit up’ or aggravated by the industrial injury, and that claimant needed treatment after the injury. (CP 832, 833, 836) **[NOTE:** Dr. Gilbert was one of only two mental health professionals testifying in this matter and found (as did the Grant County Superior Court) that the Pain Disorder suffered by Appellant was pre-existing the industrial injury. The only other mental health professional, Dr. Friedman, stated that the Pain Disorder was diagnosable after the industrial injury.]

C. Robert Crouch, Vocational Specialist – heading into litigation the opinion of Mr. Crouch was that if the Attending Providers, Mr. Betz and Dr. Bunch, were provided the

Physical Capacities Evaluation of Randy Bruce, and were able to review it, and reversed their positions upon such review by then stating that the claimant was not employable on a full time basis, then Mr. Crouch would not find Appellant employable but would have no opinion or would need further study or evaluation. (CP 966-968) However, it is clear he would not be stating that the Appellant was employable.

Now, in looking at the above state of the litigation in this matter, it was clear that Respondent, based upon all treating providers, based upon the professionals administering the case, was going to be unable to disprove the Appellant's allegation that she was disabled. Again, NONE of these experts above-mentioned were retained by the Appellant but simply were administering the case and were not going to be testifying favorably for the self-insured employer. Yet, they were all paid by the employer (or the better term may be 'self-insured' employer) in administering Appellant's claim.

The Psychologist employed, Dr. John Gilbert was going to testify (and did testify) that the claimant suffered from Pain Disorder and that it was **at least partially caused by the industrial injury,**

(CP 833, 836) the Physical Therapist Randy Bruce was going to testify claimant was disabled from working full time employment (and did testify to such [CP 678, 682-685]), and the Vocational Expert Robert Crouch, once knowing about the informed opinions of the attending providers, was going to learn that they were stating the Appellant was disabled and that would affect his opinion and cause withdrawal of such opinion. (CP 966-968)

So where does that leave the Respondent? Just what can the Respondent, the 'self-insured' employer, do? It can expend proper resources to get the claimant treated, improve her conditions, and see if Appellant can improve to a point of being employable. Or, the Respondent can close the matter, and (if the Appellant contests this matter) expend resources to fight the Appellant's claim of disability.

In this case, Respondent chose the latter option. In desperation, and after claim closure in August 2008, the Respondent hired three more expert witnesses to counter the first three witnesses who had been on the claim through its administration and who had already stated their opinion on the condition of Ms. Leland. **[NOTE:** In no way did the Appellant have

any financial ability or luxury to switch and obtain new expert witnesses like this.] In 2009 (four years after the injury), several months after claim closure and with hearings coming up very quickly in this matter, the Respondent hired Elyse Berkovitch (a vocational witness to combat the opinion of Physical Therapist Randy Bruce [CP 1161-1227]), Dr. Freidman (a mental health witness who was hired to combat the opinion of Dr. Gilbert --who was hired several years prior and provided treatment to Ms. Leland [CP 1046-1088]), and Craig Bock (a vocational witness retained well after claim closure who found the claimant employable – he was employed to combat the vocational opinions in this matter [CP 998-1040]).

None of the three recently hired witnesses mentioned above provided any type of service for administering the claim or bettering the Appellant or treating the Appellant in any curative way.

Please note that Ms. Berkovitch and Mr. Bock ***never even saw or interviewed the Appellant or met the Appellant***, not only during the lifetime of the claim, ***but never*** --- they simply never met the Appellant and never interviewed the Appellant at any time.

(CP 1249-1257)

Dr. Friedman performed an examination in May 2009, more than four years after the injury and testified two months later in July 2009, *almost one year after the claim was closed*. (CP 1045, 1051)

So please note the desperate scramble to get witnesses after claim closure, for no purposes whatsoever to heal the Appellant or get the Appellant back to work. This is clearly not what was envisioned in the preamble of RCW 51 — at RCW 51.04.010. The Appellant asserts that this is a huge marker, a giant indicator, of the employer's lack of good faith and the lack of serious effort whatsoever to help her back into good health or help her back into the workforce. The Appellant also states, and outright wishes, that the Respondent would simply have provided the same expense for professional help when the claim was open so that she just may have obtained some additional benefit. Why couldn't these expenditures for expert witnesses have occurred while the claim was open and the treatment was needed?

///

///

II. The Claimant Should Be Deemed Conclusively Disabled as of August 12, 2008, as the Respondent Has Not Argued Any Error With a Critical Finding of Fact Issued by the Superior Court That Finds Total Disability at That Point.

The Superior Court Judgment has awarded the Appellant time loss and a finding of total disability for the time period of March 27, 2008 until August 12, 2008. (CP 1481, 1482)

The Grant County Superior Court specifically found at Finding of Fact No 4, "During the Period March 27, 2008, through August 12, 2008, residual effects of the industrial injury, when considered in conjunction with her age, education, and employment history, did preclude Ms. Leland from obtaining or performing reasonably continuous gainful employment in the competitive labor market." (CP 1481)

Respondent found no error in this finding, thus, it should be a verity on appeal, and the Appellant should be conclusively deemed to be disabled right up to and including the date that this matter closed on August 12, 2008.

The Grant County Superior Court went on to state at Conclusion of Law No. 2, "During the period March 27, 2008,

through August 12, 2008, Ms. Leland was a temporarily totally disabled worker within the meaning of RCW 51.32.090. (CP 1482)

The Respondent also found no error with this conclusion, and no appeal has been taken from this conclusion and the Appellant should now be deemed conclusively disabled as of August 12, 2008.

The Grant County Superior Court also stated at Conclusion of Law No. 3, "During the period of March 27, 2008 through August 12, 2008, Ms. Leland was entitled to loss of earning power benefits as contemplated by RCW 51.32.090 (3)." (CP 1483) The Respondent also asserted no error with this finding.

Of the above Findings of Fact and the above-stated Conclusions of Law --- none were challenged or assigned any error by the Respondent. Unchallenged Findings of Fact are considered verities on appeal. *See Fuller v. Employment Sec. Dept. of State of Wash.*, 52 Wash.App. 603 (1988).

Therefore, the Finding of Fact that the Appellant was totally disabled in the months leading up to the closing order, including the date of the closing order, is a verity at this point and cannot be

challenged. Appellant is now conclusively deemed to be disabled at the time of claim closure.

In the event that the claimant is not entitled to further treatment, and we argue she isn't (and Respondent also argues that Appellant is not entitled to treatment), then we now have at this point a totally disabled claimant with a claim that should be closed. Both sides have argued that the claimant is not entitled to further treatment. The Grant County Superior Court did not agree but does not have valid legal reason for stating that further treatment meets the necessary standard, and should be ordered. (See Court's Ruling CP 1483-1484)

III. Pain Disorder Is Related to the Industrial Injury and Does Not Require Further Treatment. The Superior Court Erred in Stating That Such Condition Is Not Related to the Industrial Injury and That Such Condition Would Require Further Treatment.

The mental health experts (there were only two) have not stated that the claimant will in fact gain further assistance for her Pain Disorder from more treatment. (CP 831, 836, 837, 845, 846, 1069 1081) Dr. Gilbert, who appears by far the more qualified to make any opinion, and who was the doctor who treated Appellant back in 2006, stated that she had a Pain Disorder, that such

condition was related (at least in part) to the industrial injury, and that he couldn't see if she would benefit from further treatment. (CP 831, 836, 837, 845, 846) He did also say that Appellant was predisposed to obtaining a Pain Disorder due to factors occurring prior to the injury. (CP 844, 845, 846) He had by far the better viewpoint, spent much more time with the Appellant, and spent all of that time treating around the time of injury. (CP 816, 818-822, 827-828, 830-837, 843-845)

Next enter Dr. Friedman, who was much less forthright, and was much more cagey and deceptive with his answers. He only observed the claimant one time, more than four years after the injury, that was two months before he testified (he saw claimant in May 2009), and he evaluated the claimant almost a year after the claim had closed. (CP 1051) He spoke with Ms. Leland for fifteen (15) minutes and administered a test. (CP 427-429)

Dr. Friedman stated that Appellant's Pain Disorder was not a diagnosable condition before the industrial injury. (CP 1071, 1072, 1075, 1076)

However, Dr. Friedman stated that the Appellant did have an Anxiety condition that existed prior to the industrial injury.

(CP 1075) He did also acknowledge that Appellant had Pain Disorder when he saw her, and all experts seem to agree that Pain Disorder does require a painful event (made very clear by Dr. Gilbert [CP 1058]).

So, in essence, according to Dr. Freidman, the Appellant had Pain Disorder, diagnosable after the industrial injury, but not in any way caused by the "fall on the ice" Appellant suffered.

(CP 1064-1065, 1073)

Upon Cross-examination, Dr. Freidman was then asked what was caused by the industrial injury, and the subsequent pain and disability and injury caused by the injury. (He stated the fall, and subsequent pain are a factor in the pain disorder [CP 1073]).

Dr. Friedman did admit that the fall and subsequent pain were a lesser cause of the Pain Disorder. (CP 1074-1076) This was uncovered by a very different thread of questions and answers, it seems a minor point, but when speaking definitively about the industrial injury Dr. Freidman wasn't considering any effects of the injury or the pain suffered and adopted a very narrow view of the injury so as to exclude its effects. Appellant argues that this was a

very cagey way of answering questions that really caused Appellant's counsel to pry to get to the truth.

So one needs to look closer at what was stated by Dr. Friedman upon cross-examination when the questions were very pointed and specific. There is no question he stated that Appellant was very susceptible to obtaining Pain Disorder due to her past, and he also stated that she was very likely to get Pain Disorder, and likened this matter to a branch getting weaker and weaker, and this was the 'final flake' that broke the branch. (CP 1065-1067) He admitted that the causes of Appellant's Pain Disorder were certainly 'multi-factorial' and he stated that this injury and pain was one of the factors. (CP 1065-1067)

However, Dr. Friedman felt that this Pain Disorder was a certainty and unavoidable, therefore it wasn't caused by the industrial injury and its effects because it would have been caused anyway. (CP 1065-1067) (Appellant argues this is speculative reasoning). Still, he acknowledges the Pain Disorder was multifactorial and that the effects of the injury (such as pain) were a factor --- *just not the fall on the ice itself*, (a very tricky way of splitting hairs over words).

Dr. Friedman also stated that Appellant's Pain Disorder, and this injury itself, is something that the Appellant has focused on and he described her reaction to the Pain Disorder as not being physically based. (CP 1073) Dr. Freidman did not doubt, and did agree, that the claimant was in pain, had expressed that to him, and that he did not doubt her pain. (CP 1072)

At this point, we now have both mental health specialists stating that the injury (or certainly the pain and effects of such injury) played a part in the causation of the Pain Disorder, being the factor, or one of the factors of such Pain Disorder. The Superior Court's ruling that Pain Disorder was not caused by the industrial injury is now unsupported by the evidence, and is unsupported by both mental health experts.

The significant reason for these appeals, likely by both parties, is the Court then stating that the Appellant "may respond" to further treatment. (CP 1482) This resulted in a remand to the *Department of Labor and Industries*. (CP 1482-1483) If no treatment was proper and necessary, and meeting with legal requirements, then this matter should have remained closed. However, the Court ruled that further treatment was needed for a

condition not caused by the injury (and we certainly argue it was caused by the injury [at least in part]) because both experts state so. *Fuller v. Employment Sec. Dept. of State of Wash.*, 52 Wash.App. 603 (1988).

But by finding an unrelated condition 'may respond' to further treatment, the Grant County Superior Court is asserting a role that gives it virtually unlimited power in keeping claims open and preventing any permanent disability benefits from being granted. This, of course, keeps the Appellant working with the self-insured employer (Respondent) in a situation where there is no trust at all.

A judge, if this ruling is given credence, can now find that any condition that a claimant has, whether related or not, whether more likely to benefit from treatment or not, can cause an entire Department of Labor and Industries' claim to remain open and be sent back to the Department. Thus, someone with a bad back injury and closed claim can have their claim opened (or the closure canceled) at Superior Court level due to an unrelated asthmatic condition. Likewise, someone with horrible arthritic shoulders who is a chronic smoker can have their claim remanded to the

department if they 'may respond' to further treatment of an unrelated emphysema condition. This would lead to absurd results.

Therefore, we are not only asking that the Appellant's Pain Disorder be deemed to be related, but we ask that it be found to be NOT in need of further treatment as it simply has not been shown to need any further treatment.

As stated in the claimant's first brief filed months ago, WAC 296-20-01002 states when the worker is entitled to more treatment, and it is a four-part test. In summary, the treatment must reflect accepted standards of good practice, the treatment must be curative or rehabilitative, not delivered primarily for convenience of claimant, **and** must be provided at the lowest cost. All four criteria must be met.

Again, we have two mental health experts – only two that are qualified to testify on this subject. Dr. Gilbert stated that he could not say the claimant would benefit from further treatment. Dr. Friedman stated that the Appellant's depressive condition might benefit from further treatment, and for further treatment he would focus strictly on the depression condition (the depressive condition is not the subject of this appeal), but he did not mention any

treatment that was 'proper and necessary' or even 'curative' for the Pain Disorder.

This is almost a dead issue, there is no treatment for Pain Disorder to which the Appellant is legally entitled, pursuant to all experts who testified on this subject, or were qualified to testify on this subject.

The ruling of the Grant County Superior Court that this matter be remanded back to the Department of Labor and Industries for further treatment should be overturned as no further treatment is 'proper and necessary' or 'curative'.

IV. The Attending Physician Doctrine Is in Place for a Reason, and Is an Excellent Doctrine and Should Be Followed to Avoid the Use, and Stacking, of Expert Witnesses as 'Hired Guns' Meant to Provide a Dissenting Opinion.

This is a reply brief, and Appellant has already cited the Attending Provider doctrine, and argued that it is a strong doctrine, and should be followed. We wish to further address, that of all the thirteen witnesses (13) called to testify, twelve (12) of them were expert witnesses, and only four (4) were treating providers.

(CP 440, 498, 641, 807)

Those four were Dr. Bunch, his longtime assistant Mr. Betz (a physician's assistant), Randy Bruce, the attending physical therapist, and Dr. Gilbert who provided counseling services. (CP 440, 498, 641, 807) All four of these providers weighed in strong in favor of the Appellant and what the Appellant was trying to prove. The first three stating the Appellant was disabled, and the fourth stating that Appellant had a mental health condition that was related to the industrial injury.

To simply pay witness expenses to make these opinions go away, seems legally unfair and inappropriate – and a way that can be certain to keep a claimant from getting justice. Unhappy with an opinion? Respondent can just go get another. What if the witnesses providing opinions unpopular to the Respondent were administering the claim for Respondent? And provided detail reports and the claim was then closed? And the 'new' post-closure experts have never been a part of the claim or met the claimant? And are simply professional witnesses? Well ---- you can see our point. Each claimant, when hurt, and disabled, and unable to work, would have to take on the added stress and expense of evidence accumulation.

There needs to be a certain trust, a certain weight that is meaningful, granted to the attending providers or this Worker's Compensation system simply will not work. Appellant asserts that *substantial and due weight should be given to those treating providers.*

CONCLUSION

The Respondent has benefitted, unfairly from the use of the most convenient, and most available witness, when the Respondent has been faced with unfavorable opinions when closing this matter. The Appellant, by all rights, should be deemed totally disabled as of the time of claim closure. The Grant County Superior Court made such finding and neither party has appealed such finding. Because there is no further treatment that is curative, or 'proper and necessary' as of the date of claim closure, there should be no remand of this matter, and this matter is ready for final closure. Furthermore, the 'Pain Disorder' suffered by the claimant is related to her injury, and it is uncontested by any expert that such *condition is simply unrelated in total to this industrial injury and the pain and effects of such injury.* Also, the Attending Providers need to be honored, as they have no 'stake' in this matter, and are

objective, and involved in this matter simply to provide treatment.
The Appellant is totally disabled, and should be found to be totally disabled, as she needed no further treatment as of August 12, 2008.

Finally, the Appellant is entitled to legal fees and costs for litigating this matter at the Court of Appeals, Division III.

RESPECTFULLY SUBMITTED this 16 day of August, 2013.

CALBOM & SCHWAB, P.S.C.
Attorneys for the Plaintiff

By: 

RANDY FAIR, WSBA #22918

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the date entered below, I mailed the Reply Brief of Appellant Diana Leland to counsel for all parties of record. I certify that I caused to be mailed or delivered on the 10th day of August, 2013, the following document(s):

APPELANT'S REPLY BRIEF

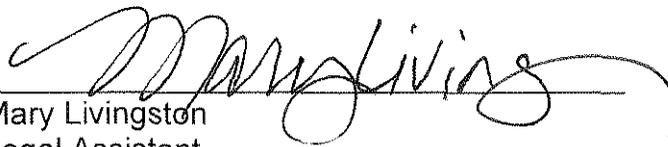
ORIGINAL VIA U.P.S. NEXT DAY AIR:

Ms. Renee S. Townsley, Clerk
Washington State Court of Appeals, Div III
500 N. Cedar Street
Spokane, WA 99210

COPIES VIA U.P.S. NEXT DAY AIR:

Anastasia R. Sandstrom, AAG
Office of the Attorney General
800 5th Ave Ste 2000
Seattle, WA 98104-3188

Aaron Bass
Attorney at Law
111 SW 5th Ave Ste 1200
Portland, OR 97204-3613


Mary Livingston
Legal Assistant