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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

JUSTIN M. POLLARD,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON, et al,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves the balancing of an injured worker's right to an attending physician of his or her choice with the authority of the Department of Labor and Industries and self-insured employers to require a worker's attendance at independent medical examinations.

Mr. Pollard sustained an industrial injury during the course of his employment with Kaiser Aluminum, a self-insured employer. The claim was allowed by the Department of Labor and Industries; treatment, including surgery, was authorized; and time loss benefits paid. While his claim remained open, Mr. Pollard relocated from Spokane, Washington to Las Vegas, Nevada. Since his previous attending physician in Spokane was over one-thousand miles away, Mr. Pollard repeatedly asked his self-insured employer to authorize a change of attending physician to one more conveniently located. Each request was summarily denied.

While denying Mr. Pollard the right to an attending physician of his choice, the self-insured employer scheduled an independent medical examination for the purpose of rating his permanent partial disability and closing his claim. Without a current, conveniently located attending physician, Mr. Pollard did not believe that the independent medical examination process would be fair. Consequently, he advised his employer

that he would attend its defense examination only if it authorized his choice of attending physician. The self-insured employer again refused. Mr. Pollard, citing good cause, refused to attend the defense examination.

The right of an injured worker to an attending physician "of his or her own choice" is a cornerstone of the Industrial Insurance Act. As detailed in RCW 51.36.010(4), the right clearly extends to the point at which Mr. Pollard made his request. Conversely, while the Department and self-insured employers have the authority to reasonably schedule and require an injured worker's attendance at independent medical examinations, their authority is not unlimited. An injured worker may refuse to attend any such examination upon a showing of good cause.

A determination of good cause requires a balancing of the parties' interests and responsibilities. A worker's interest in a fair and independent examination must be balanced against the Department's and employer's responsibility to adjudicate the claim.

In the present case, the superior court failed to conduct the requisite balancing and erroneously concluded that Mr. Pollard lacked good cause for refusing to attend his employer's examination.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in entering Finding of Fact XII. The preponderance of evidence does not support the findings and decision of the Board of Industrial Insurance Appeals dated February 29, 2016. Specifically, Mr. Pollard had good cause for refusing to attend the independent medical examination scheduled by his self-insured employer for May 27, 2014.
2. The superior court erred in entering Conclusion of Law II, that Mr. Pollard was required to submit to the May 27, 2014, independent medical examination pursuant to RCW 51.36.070, and that he did not have good cause for refusing to attend the examination within the meaning of RCW 51.32.110. Mr. Pollard's belief that he could not obtain a fair and impartial examination due to his employer's refusal to allow a conveniently located attending physician constitutes good cause.
3. The superior court erred in entering Conclusions of Law III and IV. The Department of Labor and Industries' order dated December 30, 2014, and the Board of Industrial Insurance Appeals' order dated February 29, 2016, are not supported by substantial evidence. The self-insured employer is not, therefore, entitled to statutory attorney fees.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When an injured worker relocates while his industrial insurance claim remains open; with loss of earning power benefits continuing to be paid; and prior to issuance of a permanent partial disability award; and when due to the relocation the injured worker's previous attending physician is no longer conveniently located, does the worker retain the right to choose a conveniently located attending physician pursuant to RCW 51.36.010(2)(a) and RCW 51.36.010(4)?

2. Does an injured worker, who has been denied his choice of a conveniently located attending physician, and who, as a result, believes that he cannot obtain a fair and impartial independent medical examination, have good cause for refusing to attend the examination within the meaning of RCW 51.32.110?

IV. STATEMENT OF THE CASE

During the course of his employment with Kaiser Aluminum, Justin Pollard sustained an industrial injury to both shoulders on September 23, 2010. BR 22.¹ He timely filed an application for benefits under the Industrial Insurance Act, and his claim was allowed by the Department of Labor and Industries. BR 22, 35. His original attending physician under the claim was Jeffrey Pederson, D.O., a general practitioner. Dr. Pederson referred Mr. Pollard to Tycho Kersten, M.D., orthopedic surgeon, for an orthopedic consultation and treatment as necessary. BR, Thorp, 121; BR, Exs. 2,3,4,5,6. Ultimately, Mr. Pollard underwent a left rotator cuff repair performed by Dr. Kersten on February 21, 2011. BR 22. Following surgery, Mr. Pollard continued to see Dr. Kersten, who ordered physical therapy and a follow-up MRI of the left shoulder. BR 22. Mr. Pollard last

¹ The record from the Board is paginated separately from the clerk's papers. The Board record consists of the certified appeal board record, cited as "BR," which includes the Board's orders, decisions, jurisdictional history, transcripts of testimony, and exhibits.

Transcription of testimony contained in the Board record is paginated separately and referenced by witness name.

saw Dr. Kersten on November 26, 2013. BR, Pollard, 23; BR 22. On January 31, 2014, two months after his last office visit with Mr. Pollard, Dr. Kersten advised the self-insured employer that no further curative treatment was recommended and that the worker had sustained permanent impairment. BR 22; BR, Ex. 7. Dr. Kersten recommended that Mr. Pollard's permanent impairment be rated by an independent medical examiner since he did not perform impairment ratings of his patients. *Id.*

In February 2014, Mr. Pollard moved from Spokane, Washington to Las Vegas, Nevada. BR 22; BR, Pollard, 5-6. On at least four occasions subsequent to his relocation, Mr. Pollard's attorney requested that the self-insured employer allow Mr. Pollard to obtain an attending physician in his new geographic area. BR 22; BR, Thorp, 59-61. The employer refused each request. *Id.* The fact that Mr. Pollard's proposed new attending physician was out of state and might need to begin the process of obtaining a provider number was not a factor in the denial. BR, Herron, 26.

While denying Mr. Pollard the opportunity to obtain a current, conveniently located attending physician, the self-insured employer scheduled two defense medical examinations. As context for the scheduled examinations, testimony from the employer's claim adjudicator, as well as Mr. Pollard's previous attorney, established that it was historically the

employer's practice to review drafts of defense medical reports prior to a final report being issued. BR, Thorp, 77-86; BR, Moyer, 51-57. Upon receipt of a draft report, the employer's claim adjudicator would, if necessary, meet with the independent examiner to review the report. *Id.* According to the testimony, on at least one occasion known to Mr. Pollard's representative, a draft report in which further treatment was recommended was subsequently changed to a final report recommending no further treatment. *Id.* The change in reports and recommendations occurred after a meeting between the employer's representative and the independent examiner. *Id.*

The first defense examination at issue was scheduled by Mr. Pollard's self-insured employer for March 28, 2014, in Spokane, Washington, with Dr. David Bauer. BR 23. Dr. Bauer had previously been suspended by the Department of Labor and Industries from performing examinations. BR, Thorp, 66-67. Mr. Pollard's attorney at the time testified that she did not believe Mr. Pollard could obtain a fair and independent evaluation from Dr. Bauer based upon her experience with the examiner having conducted multiple examinations of many different clients. *Id.* The self-insured employer was also advised that Mr. Pollard had moved to Las Vegas and was not available for an examination in Spokane. The examination was ultimately rescheduled. BR 23.

The second defense examination was scheduled for May 27, 2014, in Henderson, Nevada, with Dr. Aubrey Swartz. BR 23. After conducting research regarding Dr. Swartz, including online reviews, neither Mr. Pollard nor his attorney believed that Dr. Swartz would be fair and impartial. BR 23; BR, Pollard, 41; BR, Thorp, 73-75. Based upon the employer's continued refusal to authorize the requested change of attending physician, as well as concerns about Dr. Swartz's fairness and independence, Mr. Pollard advised the self-insured employer that he would not attend the scheduled examination. *Id.*

On September 5, 2014, the Department issued an order suspending benefits under Mr. Pollard's claim. BR 37. Following a timely protest filed by Mr. Pollard, the Department issued a further order dated December 30, 2014, which affirmed the previous suspension order. BR 37-38.

Mr. Pollard filed a timely Notice of Appeal with the Board of Industrial Insurance Appeals. BR 29, 38. The Board granted the appeal and hearings were conducted. A Proposed Decision and Order was issued October 23, 2015, affirming the Department's suspension order. BR 20-28. Mr. Pollard filed a Petition for Review, which was granted. BR 5, 7-13. On February 29, 2016, the Board issued its final order adopting the Proposed Decision and Order without comment or discussion. BR 3.

Mr. Pollard appealed to superior court. CP 1. Following a bench trial, the court affirmed the Board order, specifically finding that Mr. Pollard did not have good cause for refusing to attend the May 27, 2014, independent medical examination. CP 37-38, 43-54.

Mr. Pollard appeals. CP 55.

V. SUMMARY OF THE ARGUMENT

The critical facts are undisputed. After Mr. Pollard moved from Spokane, Washington to Las Vegas, Nevada, the self-insured employer refused his repeated request to obtain a current, conveniently located attending physician. Pursuant to the clear and unambiguous language of RCW 51.36.010(4), Mr. Pollard was entitled to an attending physician of his choice. At the same time it was denying Mr. Pollard the opportunity to have his own attending physician; to be treated by a physician of his choice within his geographic area; and to receive input regarding medical recommendations made by his employer's examiners, the self-insured employer demanded that he attend a defense medical examination which could result in the denial of benefits or even the closure of his claim. Without an attending physician to assist in the claim process and provide guidance, Mr. Pollard did not believe that he could obtain a fair and

independent evaluation by his employer. That fact, taken alone, constitutes good cause for refusing to attend a defense medical examination.

Weighing against Mr. Pollard's right to an attending physician of his choice and the expectation of a fair and impartial examination, neither the Department nor the self-insured employer has presented any evidence establishing that granting Mr. Pollard's request would have adversely impacted its statutory obligation to adjudicate claims at a first-step administrative level.

Faced with the prospect of an independent medical examination without the benefit of a conveniently located attending physician of his choice, Mr. Pollard had no expectation of receiving a fair and independent examination by a physician hand-selected by his employer. Since granting his request would not have adversely impacted adjudication of the claim, a good cause balancing heavily favors Mr. Pollard.

VI. STANDARD OF REVIEW

The general civil standard of review applies to appeals of superior court decisions in industrial insurance cases. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). Review by the Court of Appeals is limited to "examination of 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 of law 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 is that sufficient to persuade a fair-minded, rational person of the truth of the matter asserted. *Ruse*, 138 Wn.2d at 5 (citing *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987)).

Statutory interpretation is a question of law subject to de novo review. *Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 87, 233 P.3d 853 (2010). Provisions of the Industrial Insurance Act shall be liberally construed with doubts resolved in favor of the worker. RCW 51.12.010; *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 213 P.3d 591 (2009); *McClelland v. ITT Rayonier*, 65 Wn. App. 386, 828 P.2d 1138 (1992).

VII. ARGUMENT

Pursuant to RCW 51.36.010(2)(a) and RCW 51.36.010(4), Mr. Pollard's right to a conveniently located attending physician of his choice was clearly present as of May 27, 2014, the date of the independent medical examination with Dr. Swartz. Denied this most basic right by his self-insured employer at a critical time in his claim, Mr. Pollard had no expectation of a fair and independent examination as arranged by his

employer. He therefore had good cause to refuse to attend the examination. RCW 51.32.110(2). Balanced against this, neither the Department nor the self-insured employer has presented any competing factor or interest. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App 348, 355, 962 P.2d 844,848 (1998).

A. The Industrial Insurance Act is Remedial in Nature, the Purpose of which is to Promote Benefits and Protect Workers.

The Industrial Insurance Act, under which Mr. Pollard's claim is governed, is remedial in nature and shall be liberally construed with doubts resolved in favor of the worker. RCW 51.12.010; *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 213 P.3d 591 (2009); *McClelland v. ITT Rayonier*, 65 Wn. App. 386, 828 P.2d 1138 (1992). The underlying purpose of the Act is "to promote benefits and to protect workers." *Clark County v. McManus*, 185 Wn.2d 466, 472, 372 P.3d 764 (2016) (citing *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988)).

B. Mr. Pollard's Right to an Attending Physician of his Choice Continued to be Present as of May 27, 2014, the Date of the Independent Medical Examination.

The right of an injured worker to choose his or her attending physician under the Industrial Insurance Act is fundamental. RCW 51.36.010(2)(a). Indeed, the ability of an injured worker to freely choose an attending physician is critically important to ensuring that the underlying purpose of the Act is promoted rather than stymied.

RCW 51.36.010(2)(a) provides that:

Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive proper and necessary medical and surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice, if conveniently located, except as provided in (b) of this subsection, and proper and necessary hospital care and services during the period of his or her disability from such injury.

The duration of a worker's right to an attending physician of his or her choice depends upon the nature and extent of disability. In cases of permanent partial disability, the right extends either to the date at which a permanent partial disability award is made or the date monthly allowances cease if the worker has already returned to work. RCW 51.36.010(4). In cases of temporary disability, including cases where loss of earning power benefits are paid, the right to an attending physician of one's choice extends to the date at which monthly allowances cease. *Id.*

In terms of who may serve as an attending physician, the Department's rules define "attending provider" as a licensed provider who "actively treats an injured or ill worker," and an "attending doctor" as a "treating doctor." WAC 296-20-01002.

In Mr. Pollard's case, the stated purpose of the independent medical examination was to rate his permanent impairment. Although Dr. Kersten

advised that he would not personally rate the disability, Mr. Pollard had nonetheless sustained permanent impairment. The question was not whether he had such impairment but merely the appropriate rating. Consequently, Mr. Pollard's claim is accurately characterized as a case of permanent partial disability as described in RCW 51.36.010(4). As such, his right to a conveniently located attending physician of his choice extends until such time that a permanent partial disability [PPD] award is issued. Since a PPD award had not yet been made, his right to an attending physician of his choice remained in effect at the time of the May 27, 2014, independent medical examination.

Similarly, the self-insured employer continued to pay loss of earning power benefits to Mr. Pollard after his relocation to Las Vegas, Nevada. BR, Pollard, 20. Since Mr. Pollard had not yet been determined to be employable at gainful employment, the self-insured employer likewise continued its vocational assessment through September 2014. BR, Moyer, 82. Consequently, his claim is also accurately characterized as a case of temporary disability as described in RCW 51.36.010(4). His right to choose his attending physician, therefore, continued until such time that his temporary disability payments ceased. Since those payments continued after his move to Las Vegas, he was entitled to a conveniently located attending physician.

Clearly, none of the applicable events listed in RCW 51.36.010(4), which would otherwise terminate a worker's right to a freely chosen attending physician, had yet occurred in Mr. Pollard's claim at the time his benefits were suspended. His right to choose a conveniently located attending physician near his residence in Las Vegas, Nevada remained in effect.

While asserting that they were not required to authorize Mr. Pollard's request, neither the Department nor the self-insured employer has offered any response to the clear and unambiguous language of RCW 51.36.010(2)(a) and RCW 51.36.010(4). Instead, they assert various reasons for refusing Mr. Pollard's request; assertions which have no basis in law or fact.

The Department and self-insured employer argue that Mr. Pollard was not entitled to a conveniently located attending physician because he was already at maximum medical improvement [MMI] as stated by Dr. Kersten. However, pursuant to the clear and unambiguous language of RCW 51.36.010(4), being at MMI is not a disqualifying event. Rather, the right to a conveniently located attending physician remains through the date of either a PPD award or termination of temporary disability payments. Neither occurred in Mr. Pollard's case.

The fact that being at MMI does not preclude the right to, or need of, an attending physician is perfectly illustrated by the self-insured employer's actions in this case. Not only did it continue to pay loss of earning power benefits after the alleged date of MMI, but it continued to meet with Dr. Kersten for the purpose of completing a vocational assessment at least through September 2014. BR, Moyer, 82.

Furthermore, Mr. Pollard did not believe he was at maximum medical improvement. Specifically, he desired further testing and treatment for his right shoulder condition which Dr. Kersten had not treated, as well as psychological treatment for depression resulting from his injury. To the extent that Dr. Kersten had not seen Mr. Pollard for six months prior to May 27, 2014, he was in no position to intelligently comment upon his former patient's medical fixity at the time of the IME.

A second reason offered by the Department and self-insured employer for its refusal to authorize Mr. Pollard's request is that he already had an attending physician; Dr. Kersten.

However, acceptance of this argument would render meaningless the phrase "of his or her own choice." RCW 51.36.010(2)(a). The Department does not get to choose the attending physician. The self-insured

employer does not get to choose the attending physician. Such a right is reserved exclusively for the injured or ill worker.

The false choice offered by the Department and self-insured employer is further highlighted by the fact that Mr. Pollard had last seen Dr. Kersten in November 2013. Certainly, the right to an attending physician includes the right to an effective attending physician. Not having seen his former patient for six months, Dr. Kersten's opinions and recommendations in response to the IME would have been speculative at best.

Moreover, it is Mr. Pollard's contention that Dr. Kersten was precluded from serving as his attending physician following his relocation to Las Vegas for two reasons. First, an attending physician must be "conveniently located." RCW 51.36.010(2)(a). Dr. Kersten, located over one-thousand miles from Mr. Pollard's residence, was not conveniently located. Second, as defined in WAC 296-20-01002, an attending provider or attending doctor must actually treat the injured or ill worker. Dr. Kersten last saw Mr. Pollard on November 26, 2013. Subsequent to that date, he no longer provided treatment. Dr. Kersten is therefore precluded from serving as Mr. Pollard's attending physician.

A final reason asserted by the Department and self-insured employer for refusing Mr. Pollard's request is that he was simply "doctor shopping,"

or looking for a more favorable opinion. Setting aside the fact that the Department and self-insured employers regularly seek out favorable opinions through the IME process, there is absolutely no evidence suggesting that Mr. Pollard had such motivation. It cannot be reasonably argued that Mr. Pollard moved from Spokane to Las Vegas in search of a more favorable medical opinion.

C. An Injured Worker's Right to a Conveniently Located Attending Physician of his or her Choice is of Fundamental Importance

The Washington State Supreme Court has consistently recognized the crucial role played by an attending physician in industrial insurance claims.

For example, in concluding that the closure of an injured worker's claim cannot become final and binding unless a copy of the closing order is served upon the attending physician by the Department, the court in *Shafer v. Dep't of Lab. & Indus.*, 166 Wn.2d 710, 213 P.3d 591 (2009), explained that it is "abundantly clear that a worker's attending physician plays an important role" under the Industrial Insurance Act. *Shafer*, 166 Wn.2d at 720. As noted by the court, specific statutory duties imposed upon an attending physician under the Act include: the obligation to inform his patient of his rights under the Act; the duty to assist in filing a claim; the

requirement to follow the Department's rules and regulations; as well as "numerous other statutory and regulatory obligations." *Id.*

The court in *Shafer* emphasized that although an attending physician plays an "intricate" role throughout the entire claim process, he or she "is a **critical** component to the final resolution of claims." *Id.* (emphasis added). In reaching its decision, the court further reasoned that failing to notify the attending physician of a closing order "would prevent the person primarily responsible for treating the injured worker from participating in the process that can result in closing a worker's claim." *Id.* at 721.

The analysis in *Shafer* is directly applicable to Mr. Pollard's appeal. Just as an attending physician is "critical" to final claim resolution, so too is it essential that an injured worker have an attending physician when compelled to attend defense medical examinations. Indeed, to the extent that defense medical examinations are used to adjudicate medical and legal issues that can result in claim closure, it would be directly contrary to the holding and rationale of *Shafer* to conclude that an attending physician is not necessary, let alone statutorily required, during the independent medical examination process.

In the present case, Mr. Pollard was denied his fundamental right to a conveniently located attending physician of his choice. Unfortunately, the

denial of an attending physician in the present case is arguably more significant than the Department's failure to notify the attending physician of claim closure in *Shafer*. In *Shafer*, the injured worker was at least granted the right to *have* an attending physician. Conversely, not only was Mr. Pollard refused the opportunity to have an attending physician review and intelligently comment upon a subsequent defense medical examination report, he was denied the right to have such a physician in the first place.

Reinforcing the importance of an attending physician in this context, the Washington State Supreme Court recently held that the *Hamilton* instruction, advising a jury that it should give special consideration to the testimony of an attending physician, is mandatory in cases where an attending physician has testified. *Clark County v. McManus*, 185 Wn.2d 466, 372 P.3d 764 (2016); *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988).

Rejecting arguments by the self-insured employer and Department of Labor and Industries that the *Hamilton* instruction was either optional or an inappropriate comment upon the evidence, the court in *McManus* reasoned that instructing a jury regarding the special consideration to be afforded an attending physician is based on "long-standing policy surrounding workers' compensation cases." *McManus*, 185 Wn.2d at 476.

Noting further that both the Department of Labor and Industries and self-insured employers apply the “special consideration rule” during the claims handling process, the court concluded that giving special consideration to the opinion of an attending physician “supports the purpose of the Act, which is to promote benefits and to protect workers.” *McManus*, 185 Wn.2d at 472 (citing *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988)).

Pursuant to the decisions in *Shafer* and *McManus*, as well as long-standing policy, the role of an attending physician is critical. His or her opinion must be given special consideration, not only by a jury, but also by the Department of Labor and Industries and self-insured employers when adjudicating claims. To perhaps state the obvious, special consideration cannot be given if the right to an attending physician has been denied.

D. Mr. Pollard had Good Cause for Refusing to Attend the May 27, 2014 Independent Medical Examination

Mr. Pollard does not contest or otherwise dispute the Department's and self-insured employer's authority under the Act to require a worker's attendance, from time to time, at reasonably scheduled independent medical examinations. RCW 51.32.110(1). However, any such right is not “unbridled.” *Romo v. Dep't of Labor & Indus.*, 92 Wn. App 348, 355, 962 P.2d 844, 848 (1998).

As a limitation upon the Department and self-insured employers in compelling workers' attendance at defense examinations, the Act allows for injured workers to refuse any such examination, without consequence, as long as he or she has "good cause" for doing so. RCW 51.32.110(2); *Romo v. Dep't of Labor & Indus.*, 92 Wn. App 348, 355, 962 P.2d 844, 848 (1998).

The question of what constitutes "good cause" under the statute has been addressed by the Board of Industrial Insurance Appeals and courts. In *Romo* the court considered the appeal of an injured worker who refused to attend a defense medical examination based solely upon her assertion that the Department lacked authority to schedule the examination. In affirming the Department's decision to suspend her benefits, the court quoted with approval a significant decision of the Board of Industrial Insurance Appeals:

Whether good cause exists in a given case will depend on a variety of factors that require balancing from one instance to the next. Among those factors that may be considered are the claimant's physical capacities, sophistication, circumstances of employment, family responsibilities, proven ability or inability to travel, medical treatment and other relevant concerns, not the least of which is the expectation of a fair and independent medical evaluation.

Balanced against this are the interests of the Department and its statutory responsibility to act in attempting to resolve disputes at the first-step administrative level. This may include the need to resolve conflicting medical documentation, the location of willing and qualified physicians, the length of time before a physician is available to perform an examination, and the comparative expense of

such. Neither of the above lists are exhaustive. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App 348, 356, 962 P.2d 844, 848 (1998)(quoting *In re Bob Edwards*, BIIA Dec., 90 6072 (1992).

As explained by Mr. Pollard, the self-insured employer's repeated refusal to authorize a current, conveniently located attending physician resulted in profound mistrust of the claim process. He had no one to present a competing medical opinion based upon current evidence. He had no one to expertly compare the anticipated defense findings with current examination findings. He had no one, of his choice, to serve as a check and balance against the defense examiner hand-selected by the employer.

The employer's refusal to authorize a transfer of attending physician, while simultaneously demanding that Mr. Pollard submit to a defense examination with an examiner of the employer's choosing, reasonably resulted in the complete absence of any expectation of a fair and independent medical evaluation. According to the rationale of the court in *Romo*, such a reasonable belief by Mr. Pollard, coupled with the denial of his right to an attending physician, constitutes good cause for refusing to attend the defense examination.

Adopting the balancing test as set forth by the Board in *Edwards*, the court in *Romo* further reasoned that a good cause determination is a mixed question of law and fact and should include consideration of the

circumstances of the requested examination, “even beyond those personal to the worker.” *Id.* at 357. Consequently, Mr. Pollard’s belief that a defense examination would not be fair and independent absent a conveniently located attending physician, must be understood within the overall context of his employer’s past practices regarding defense examinations.

E. A Good Cause Balancing Favors Mr. Pollard

The superior court's decision in this matter failed to adequately address the issue of whether the employer’s refusal to allow Mr. Pollard to obtain a current, conveniently located attending physician constitutes good cause. Although the court found that a preponderance of evidence supported the Board's decision, remarkably the Board’s full and complete analysis of the issue is comprised of one sentence. BR 26. Aside from being inadequate, the Board’s analysis as adopted by the superior court is furthermore erroneous in reasoning that the denial of an attending physician “is not an enumerated or anticipated basis for good cause refusal to attend a properly scheduled IME.” *Id.*

As clearly and unequivocally stated by the court in *Romo*, the list of relevant factors to be considered in a good cause balancing is not exhaustive. *Romo*, 92 Wn. App. at 356. Consequently, it is immaterial

whether the reason given by Mr. Pollard for his refusal to attend the examination is enumerated.

The record plainly establishes Mr. Pollard's reasons for not expecting that either of the employer's two defense medical examinations at issue would have been fair and independent. Specifically, he testified that he wanted his own attending physician to be able to explain the results of a defense examination, as well as offer recommendations for further treatment, if any. BR, Pollard, 5/28/15, 6-8, 12.

Considering further the broader circumstances and context of the employer's use of defense medical examinations, including the employer's history of secretly meeting with defense examiners, concealing "draft" reports, and ultimately persuading examiners to alter their opinions, coupled with its attempted use in the present case of an examiner who had been suspended by the Department and appeared to have been predisposed against the worker's attorney, Mr. Pollard clearly had good cause for refusing to attend the defense examination at issue.

Balanced against Mr. Pollard's reasonable belief that he could not obtain a fair and independent examination without a current, local attending physician, is quite frankly nothing. Neither the Department nor the self-insured employer has a valid interest in denying Mr. Pollard the right to an

attending physician. Moreover, requiring the Department and self-insured employer to grant the requested transfer does nothing to impede the defense examination process. Considering the various factors discussed by the court in *Romo*, there is absolutely no evidence that granting Mr. Pollard's repeated request for a local attending physician would have negatively impacted the Department's or employer's responsibility to resolve disputes at the first-step administrative level. To the contrary, allowing Mr. Pollard to have an attending physician to assist with the claim and review medical determinations made by defense examiners would further the underlying purpose of the Act as described in *Shafer* and *McManus*.

F. Attorney Fees and Expenses

If successful in his appeal, Mr. Pollard requests attorney fees and costs pursuant to RCW 51.52.130, RAP 18.1, and *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999).

VIII. CONCLUSION

The court must liberally construe the Industrial Insurance Act "for the purpose of reducing to a minimum the suffering and economic loss arising from injuries. . .occurring in the course of employment." RCW 51.12.010. In doing so, any doubts shall be resolved in favor of the injured

worker. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 598, 257 P.3d 532 (2011).

It is undisputed that the Department and self-insured employer repeatedly denied Mr. Pollard's request to obtain a conveniently located attending physician of his choice after he relocated from Spokane to Las Vegas. RCW 51.36.010(4) is clear and unambiguous in establishing that Mr. Pollard's right to an attending physician of his choice remained in effect throughout the timeframe that his repeated requests were denied. Considering further the critical role played by attending physicians throughout the claim process generally and during independent medical examinations specifically, the self-insured employer's attempt to compel his attendance at an examination while simultaneously denying access to an attending physician of his choice, understandably fostered a deep mistrust of the process. Mr. Pollard's belief that he could not obtain a fair and independent defense examination without the expertise and input of his own attending physician was completely reasonable and constitutes good cause for refusing to attend the May 27, 2014 IME.

Balanced against Mr. Pollard's belief, the Department and self-insured employer have no valid interest in denying the right of an attending physician as guaranteed under the Act. Moreover, there is no evidence in

the record establishing, or even suggesting, that granting Mr. Pollard's request for a conveniently located attending physician would have adversely impacted the Department's and self-insured employer's obligation to resolve disputes at the first-step administrative level. To the contrary, granting the request would have allowed the IME and claim adjudication to proceed. Considering the preponderance of evidence establishing Mr. Pollard's good cause for refusing to attend the May 27, 2014 IME, balanced against the complete absence of any valid interest by the Department and self-insured employer in denying Mr. Pollard's right to a conveniently located attending physician of his choice, it is respectfully requested that the superior court's decision dated September 9, 2016, be reversed.

RESPECTFULLY SUBMITTED this 16th day of March, 2017.

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NO. 34757-5-III

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

JUSTIN M. POLLARD,

Appellant,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON; et al,

Respondents.

**CERTIFICATE OF
SERVICE**

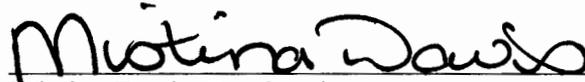
I certify that I served a copy of the Brief of Appellant on all parties
or their counsel of record via U.S. Mail, postage prepaid, on the date
below as follows:

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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 16th day of March, 2017.

A handwritten signature in black ink that reads "Mistina Davis". The signature is written in a cursive style with a horizontal line underneath it.

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