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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 34757-5-III

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

JUSTIN D. POLLARD,

Plaintiff,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON and KAISER ALUMINUM & CHEMICAL CORP.,

Defendants.

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

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I. INTRODUCTION

Two wrongs don't make a right. The self-insured employer may have been wrong in denying a change of attending physician, but this does not allow Justin Pollard to engage in self-help by opting out of unrelated claim administration procedures. The requirement to attend an independent medical exam is integral to our workers' compensation system because it ensures fairness to all parties and the timely administration of benefits. Pollard asks this Court to allow him to refuse to attend an independent medical exam because his self-insured employer denied his request to switch attending physicians. But the two issues are independent from each other as an independent medical examiner does not consult with the attending physician.

When a worker fails to attend an independent medical exam, the Department of Labor & Industries—or self-insured employer with Department approval—may suspend benefits under the claim unless a worker shows good cause for failing to attend. RCW 51.32.110. Whether good cause exists depends on a balance of factors related to the examination itself such as the availability of the claimant to attend the examination and an objective basis to believe that the claimant would not receive a fair and independent evaluation. Here, substantial evidence supports finding that there was no objective basis shown that Pollard

would not receive a fair and independent examination. This Court should affirm.

II. STATEMENT OF THE ISSUES

1. RCW 51.32.110 allows the Department to suspend benefits if a worker fails to attend an independent medical exam without good cause. The independent medical examiner does not consult with the attending physician. If the two are not in contact, is the self-insured employer's refusal to allow a change in attending physicians an acceptable basis for refusing to attend an independent medical exam?
2. Good cause to not attend an examination may be demonstrated if the claimant shows that the self-insured employer selected the examiner in order to provide a biased opinion. The self-insured employer selected the examiner off a list of Department-approved examiners and had no experience with this examiner. No witness testified as to bias. Does substantial evidence support finding that Pollard did not show good cause to refuse to attend the exam?

III. STATEMENT OF THE CASE

A. Pollard Received Treatment for His Bilateral Shoulder Conditions Until His Treating Physician Indicated He Reached Maximum Medical Improvement

Pollard injured his shoulders while working for Kaiser Aluminum & Chemical Corp. CP 44. Pollard underwent treatment for his shoulder conditions, including surgery of the left shoulder and physical therapy. AR Pollard 5/13/15 at 21-23.¹ Tycho Kersten, MD, was Pollard's treating

¹ The administrative record (the certified appeal board record) is referred to as "AR" followed by the witness name and page number. Exhibits are referred to as "AR Ex."

orthopedic surgeon. CP 44.² Dr. Kersten saw Pollard for his last office visit on November 26, 2013. AR Pollard 5/13/15 at 23. He called Pollard on January 14, 2014, after reviewing an MRI report. AR Moyer 94-95. On January 31, 2014, Dr. Kersten advised Kaiser that Pollard's shoulder conditions were medically fixed and stable (at maximum medical improvement) and Pollard required no further treatment. *See* AR Ex. 7; CP 44. Dr. Kersten advised that Pollard was ready for a permanent partial disability rating. AR Ex. 7; CP 44.³ Dr. Kersten also addressed the right shoulder and found that the findings were essentially normal—no pain with range of motion, good strength, no tenderness to palpation, and no muscle atrophy. AR Herron 35; AR Moyer 93-94.

B. Pollard Relocated to Nevada Shortly After His Treating Physician Notified Kaiser That He No Longer Needed Treatment

Pollard relocated to Las Vegas to pursue a dream of playing poker professionally in February 2014, shortly after he stopped treatment with Dr. Kersten. AR Pollard 5/13/15 at 23-24, 28. In March 2014, Pollard

² His family care practitioner, Jeffery Pederson, DO, remained his attending physician listed on the claim, but Dr. Kersten was the primary point of contact for the shoulder conditions and had treated him for more than three years. *See* AR Ex. 2; AR Moyer 97-99. A worker has an attending physician to coordinate the claim, but may also have treating physicians for specialized treatment. WAC 296-20-071.

³ An injured worker receives temporary benefits while he or she is receiving treatment; when the worker's condition becomes "fixed" and stable (maximum medical improvement), then the Department decides whether the worker should receive either permanent partial disability or permanent total disability benefits. RCW 51.32.055, .060, .080; WAC 296-20-01002 (definition of proper and necessary); *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950).

sought to transfer care to a new attending physician at Desert Orthopedics in Nevada. AR Pollard 5/13/15 at 28; AR Pollard 5/28/15 at 25.

Broadspire—Kaiser’s third party administrator—denied Pollard’s request for a new evaluation. AR Pollard 5/13/15 at 25-26; AR Herron 8, 17-18.

The request was denied because Dr. Kersten “indicated that he was at maximum medical improvement [and] wouldn’t require further care.” AR Herron 32, 34.

Broadspire worked with Occupational Health Solutions to schedule an independent medical exam of Pollard based on the information provided by Dr. Kersten. AR Herron 10, 12, 31. Occupational Health Solutions works with Broadspire to manage Kaiser’s industrial insurance claims. AR Herron 8-9; AR Moyer 42.⁴ Broadspire and Occupational Health Solutions use a list of over a hundred Department-approved examiners willing to conduct independent medical exams. AR Herron 10; AR Moyer 90-91. There are approximately 14 available in the Spokane area that are board-certified with an active practice. AR Moyer 47.

Occupational Health Solutions scheduled the exam with an orthopedist,

⁴ Occupational Health Solutions aids workers in the initial filing of claims and access for treatment. AR Moyer 43. The nurse from Occupational Health Solutions continues to follow the claim with the injured worker to obtain diagnoses, treatment recommendations, restrictions, and return-to-work options. AR Moyer 43. Broadspire is responsible for paying time loss compensation, paying medical bills, and ensuring that Occupational Health Solutions follows Washington industrial insurance laws. AR Moyer 43-44.

David Bauer, MD, based on Broadspire's request. AR Herron 12; AR Moyer 47, 71. Randi Moyer, an occupational health nurse for Occupational Health Solutions, selected Dr. Bauer. AR Moyer 41, 47-48, 66. Occupational Health Solutions does not select independent medical examiners based on past outcomes, and Moyer has never discussed any conclusions with Dr. Bauer about his independent medical exams before he drafted a final report. *See* AR Moyer 47-49.

In the early 2000s, it was common practice for self-insured employers to review draft independent medical exam reports before final reports were issued and occasionally discuss those reports with the providers without indicating they had done so. AR Moyer 51-57. That practice has been discontinued. The current practice is to have the examiner submit a report, and then the self-insured employer might submit additional information and questions, and then ask for an addendum. AR Moyer 57.

The exam was scheduled to be performed on March 28, 2014, in Spokane. AR Thorp 61. Pollard, through his attorney, asked Kaiser to reschedule the exam. AR Thorp 61-62. Pollard's attorney testified that she told the third party administrator that based on past experiences with other clients that she did not think that Dr. Bauer could be fair. AR Thorp 62. Pollard's attorney also told Kaiser's third party administrator that she

believed that the law required it to schedule the exam in a location more convenient for Pollard. *See* AR Thorp 72. Ultimately, Kaiser elected to reschedule the examination in Nevada. CP 44; AR Moyer 66.

C. Pollard Refused to Attend the Rescheduled Examination in Nevada, Citing Internet Inquiries and Kaiser's Refusal to Assign a New Attending Physician

The independent medical exam was rescheduled for May 27, 2014, in Henderson, Nevada, approximately thirty minutes outside of Las Vegas. CP 44. Occupational Health Solutions selected Aubrey Swartz, MD, an orthopedic surgeon, from the Department's approved-provider list because he was the only approved orthopedic examiner licensed in Washington and willing to perform the exam in Nevada. AR Moyer 67. Pollard testified that he looked up Dr. Swartz on the internet to determine if he felt that he would be treated fairly. AR Pollard 5/13/15 at 36. Pollard could not remember what websites he read, but he went to "four or five different websites of reviews of what people had said" and concluded that he "didn't think that [he] would be treated fairly at all by this person." AR Pollard 5/13/15 at 41. He also testified that because "[he] also didn't have a doctor to be able to basically help [him] with any of the decision of where [his] shoulders were at or anything like that, so [he] didn't think [he] would be treated fairly" AR Pollard 5/13/15 at 41. Although Pollard's attorney was unfamiliar with Dr. Swartz, she testified that she

read online reviews of Dr. Swartz that she found “extremely concerning” and the fact that he traveled from California to Nevada for the exam “raised a red flag.” AR Thorp 73-74. Cross-examination of Pollard’s attorney revealed that she was not familiar with Dr. Swartz beyond what she had read about him in online reviews: she did not know whether he had an active practice, she did not know whether he was a Board-certified orthopedic surgeon, she did not know whether he had ever been suspended by the Department, she did not recall ever seeing an independent medical exam report from Dr. Swartz, and she did not know whether Kaiser had ever referred a worker to Dr. Swartz for an independent medical exam before. AR Thorp 105-06.

Pollard’s attorney sent an email on May 22, 2014, to Broadspire indicating that she advised Pollard not to attend the examination because Kaiser had not allowed him a new attending physician in his new place of residence. AR Guadagnoli 108. In a subsequent letter to the Department, Pollard’s attorney indicated that the refusal was because Kaiser had denied his change of physicians and that he needed to be evaluated for both of his shoulders and his depression was worsening. AR Guadagnoli 108.

Pollard skipped the May 27th exam, and on June 6th, Kaiser sent a letter to Pollard’s attorney requesting an explanation for the failure to attend the examination. AR Thorp 122-23; AR Guadagnoli 109-10; AR

Ex. 8. Kaiser advised Pollard through his counsel that a suspension of benefits could occur if written, good cause was not provided within thirty days. AR Thorp 122; AR Guadagnoli 110; AR Ex. 8. Neither Pollard nor his attorney provided a written response explaining why he did not attend the examination within either 30 or 60 days, but his attorney later sent emails to Broadspire seeking to discuss resolution. AR Guadagnoli 111, 117-18. Yet another independent medical exam was scheduled with Dr. Swartz for November 19, 2014, and Pollard's attorney again instructed him not to attend. AR Thorp 127-28.

D. The Department Suspended Benefits After Kaiser Provided Documentation That Pollard Failed to Show Good Cause for Refusing to Attend the May Independent Medical Exam

Kaiser sent a request to the Department to issue an order suspending benefits on August 22, 2014. AR Thorp 123; AR Guadagnoli 111.⁵ The Department issued an order suspending Pollard's benefits on September 5, 2014, because Pollard failed to attend the medical examination scheduled with Dr. Swartz. AR Guadagnoli 110; AR Exs. 2, 4. Pollard protested the order and in the protest indicated that Pollard

⁵ The Department "has the authority to reduce, suspend or deny benefits when a worker (or worker's representative) is noncooperative with the management of the claim." WAC 296-14-410(1); *see also* RCW 51.32.110(1), (2). Noncooperation is defined as behavior by the worker or worker's representative which obstructs and/or delays the Department from reaching a timely resolution of the claim. WAC 296-14-410(2) (noncooperation includes "[n]ot attending or cooperating with medical examinations or vocational evaluations requested by the department or self-insurer").

would attend an independent medical exam if “the claimant’s request to see a physician was approved.” AR Thorp 126. The Department affirmed the September 5, 2014 order. AR Ex. 4.

E. The Board and Superior Court Found that Pollard’s Claims of Bias Did Not Show Good Cause for Refusing to Attend Scheduled Independent Medical Exams

At the Board of Industrial Insurance Appeals, Pollard asked that the Board also consider within the scope of the appeal a request for a penalty under RCW 51.48.017 against Kaiser for refusing to allow him to change his physician in accordance with WAC 296-20-065. AR 20-21. In the proposed decision, the industrial appeals judge refused to expand the scope of what the Board reviewed to include a consideration of whether Pollard could ask for penalties. AR 20-21. The industrial appeals judge also concluded that Pollard did not show good cause for refusing to attend the independent medical exam. AR 27. Pollard petitioned the Board to review the proposed decision and, after granting review, the Board found that a preponderance of the evidence supported the proposed order and adopted it in its decision. AR 3, 5.

The Spokane County Superior Court affirmed the Board. CP 37-38, 46. It determined that Pollard did not have good cause to refuse to attend the examination. CP 46.

IV. STANDARD OF REVIEW

In workers' compensation cases, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). The appellate court reviews the trial court's decision, not the Board's decision, and the Administrative Procedure Act does not apply. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

The question presented—whether good cause existed to refuse an RCW 51.32.110 medical examination—is a mixed question of law and fact. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 357, 962 P.2d 844 (1998). The factual findings are reviewed for substantial evidence, and the ultimate, good cause conclusion de novo. *Garcia v. Dep't of Labor & Indus.*, 86 Wn. App. 748, 752, 939 P.2d 704 (1997); *see also Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

V. ARGUMENT

This case involves the question of whether a worker can refuse to attend an independent medical exam for reasons unrelated to the examination. The requirement for an injured worker to attend a medical exam requested by the Department is a foundational principle of the Industrial Insurance Act. *See* Laws of 1911, Ch. 74, § 13. The Department or self-insured employer may order an injured worker to attend an

examination. RCW 51.32.110, .055(4); RCW 51.36.070; WAC 296-23-307. In Pollard's case, Kaiser requested the exam to establish an impairment rating at the recommendation of his treating physician—a reason provided by WAC 296-23-307(6). Pollard refused to attend and has cited two primary bases for his refusal—that he should have been allowed to select a new provider in Nevada as his new attending physician before being required to attend an independent medical exam and that he did not think that the examiner selected by Kaiser would be fair.

Pollard's claims for good cause fail for two reasons. First, Pollard may not use Kaiser's unrelated refusal to switch attending physicians to obstruct claim adjudication. The issues are unrelated and a dispute with claims management is not a basis for refusing to attend an independent medical exam. Second, Pollard's perceived bias of Dr. Swartz fails to meet the good cause criteria established by the courts because the claimant's subjective belief that he would not get a fair and independent medical exam is not "good cause" to refuse a medical examination authorized under RCW 51.32.110(2).

A. Pollard's Request to Change Attending Physicians Is Not a Basis for Refusing to Attend an Independent Medical Exam

Pollard cannot engage in self-help to remedy his dissatisfaction regarding the change of physician issue—he may only refuse to attend the

independent medical exam for reasons related to the exam. The two issues are unrelated because the independent medical examiner and attending physician do not consult regarding the independent medical exam.

1. Workers are required to attend independent medical exams in order to allow the Department or self-insured employer to administer the claim

The Department or self-insured employer may order an injured worker to attend an independent medical exam. RCW 51.32.110, .055(4); RCW 51.36.070. They may request examinations to establish a diagnosis, to outline a program of treatment, to evaluate whether conditions are related to the industrial injury or occupational disease, to determine whether a pre-existing condition has been aggravated, to establish whether a condition has reached maximum medical improvement, to establish an impairment rating, to evaluate worsening, or to evaluate work restrictions, among other reasons. WAC 296-23-307. The Department may reduce, suspend or deny benefits when a worker refuses to attend a medical examination or otherwise fails to cooperate with the management of the claim. RCW 51.32.110(2). RCW 51.32.110(2) states in part:

If the worker refuses to submit to medical examination, or obstructs the same, or, if any injured worker shall persist in unsanitary or injurious practices which tend to imperil or retard his or her recovery, or shall refuse to submit to such medical or surgical treatment as is reasonably essential to his or her recovery or refuse or obstruct evaluation or examination for the purpose of vocational rehabilitation or

does not cooperate in reasonable efforts at such rehabilitation, *the department or the self-insurer upon approval by the department, with notice to the worker may suspend any further action on any claim of such worker so long as such refusal, obstruction, noncooperation, or practice continues and reduce, suspend, or deny any compensation for such period*: PROVIDED, That the department or the self-insurer shall not suspend any further action on any claim of a worker or reduce, suspend, or deny any compensation if a worker has good cause for refusing to submit to or to obstruct any examination, evaluation, treatment or practice requested by the department or required under this section.

(emphasis added). The statute requires the Department to notify the worker before it suspends benefits.⁶ The worker then may show good cause for the noncooperation. RCW 51.32.110(2); *see also Anderson v. Weyerhaeuser Corp.*, 116 Wn. App 149, 156, 64 P.3d 669 (2003).

An exam request made under RCW 51.32.110 is not a “defense examination” as Pollard claims, but rather an examination necessary to adjudicate a worker’s compensation claim. *Contra* App. Br. 2. Pollard did not show good cause to not cooperate with the adjudication of his claim.

2. Pollard’s remedy for addressing the self-insured employer’s refusal to switch attending physicians was to ask the Department to order a change of providers—not to engage in claim management obstruction

Nothing in the statutes or regulations supports Pollard’s claim that he could engage in self-help by refusing to attend the independent medical

⁶ The notice requirements are set forth in WAC 296-14-410(4). Pollard has not claimed that the self-insured employer or Department failed to provide the proper notice and opportunity to provide a good cause explanation before suspending his benefits.

exams provided by the employer. Indeed, the statutes and regulations stand for opposite proposition. And the issues have nothing to do with each other.

The refusal to allow transfer of an attending physician may aggrieve a worker and a worker may appeal a Department order that addresses the issue. *See* RCW 51.52.050; RCW 51.32.190; WAC 296-15-480.⁷ Such an order—either ordering or denying the transfer—could then be appealed to Board. *See, e.g., In re Maria Gonzalez*, No. 97 0261, 1998 WL 34076960, *4 (Wash. Bd. Ind. Ins. App. April 7, 1998). Pollard’s claim that the Department joined the self-insured employer’s argument that “Pollard was not entitled to a conveniently located attending physician because he was already at maximum medical improvement [MMI]” is incorrect. App. Br. 14. The Department agrees that workers might be entitled to change attending physicians after a relocation, but Pollard has not appealed an order denying a transfer.⁸

Change of an attending physician is not automatic. A transfer will be allowed if the self-insured employer or the Department determines the

⁷ If the Department refused to issue an order, the claimant could seek mandamus compelling the Department to enter an order. *Dils v. Dep’t of Labor & Indus.*, 51 Wn. App. 216, 220, 752 P.2d 1357 (1988).

⁸ The fact that he was receiving loss of earning power benefits and undergoing vocational assessment, which requires attending physician involvement, points to being able to change his physician to a locally available doctor. AR Moyer 82. But the Department has not issued an order on this and in doing so would consider all the circumstances presented.

transfer is in the best interest of returning the injured worker to a productive role in society, and other treatment criteria are met as explained in WAC 296-20-065. *Gonzalez*, 1998 WL 34076960, *4. The Department would consider these criteria in an order addressing whether the self-insured employer correctly refused a transfer of attending physicians.

But significantly this question has nothing to do with a finding of good cause for refusing to attend an independent medical exam. Pollard's attempt to recast his dispute with switching providers as a "good cause" basis for refusing to attend the May 2014 examination is without merit. The independent medical examiner does not consult with the attending physician either before or after the examination. The independent medical examiner conducts an examination, which may later be reviewed by the attending physician, but there is no need for a worker to have his or her preferred attending physician when attending the independent medical exam itself.

If Pollard does not like decisions that are made based on the independent medical examination report, he can appeal those orders. RCW 51.52.050, .060. What he cannot do is obstruct claims management by refusing to attend the exam.

3. The merits of Pollard's request to switch attending physicians are not before this Court

This Court should decline to consider the issue of whether Pollard should have been allowed to switch providers because the Department did not address that question in its orders. AR Exs. 2, 4. The Board may decide questions considered in a Department order, as limited by the issues raised by the notice of appeal. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (plurality opinion) (Board “review[s] the specific Department action” from which the party appealed); *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491, 288 P.3d 630 (2012); *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661-62, 879 P.2d 326 (1994); *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970); see *Leary v. Dep't of Labor & Indus.*, 18 Wn. 2d 532, 541, 543, 140 P.2d 292 (1943).

That the issues being litigated are those set forth by the Department order is consistent with the Supreme Court’s acknowledgment that the Industrial Insurance Act confers purely an “appellate function” on the Board and the courts in workers’ compensation appeals under RCW Title 51. *Kingery*, 132 Wn.2d at 171. It is the order that is the central inquiry of a Board appeal—it sets the Board’s and subsequent courts’ “scope of review,” which cannot be expanded beyond the matters adjudicated in the Department’s order. See *Hanquet*, 75 Wn. App. at 661-62. Here, the Department issued an order to address the suspension request

by the self-insured employer after Pollard failed to attend the May 2014 examination. It did not address whether he should be allowed to seek a new attending provider.

B. Pollard Lacked Good Cause for Refusing to Attend the May Examination Because the Employer Needed an Examiner to Rate Permanent Impairment and Pollard Failed to Present Compelling Evidence That the Proposed Examiner Was Biased

Pollard has not shown good cause—that the balancing of his individual circumstances outweighs the interests of the self-insured employer in the examination—sufficient to overturn the suspension of his workers’ compensation benefits. *See Romo*, 92 Wn. App. at 356, 358.

1. Pollard needed to present “evidence in the record to suggest that scheduled examination would have been unobjective” as required by *Romo*

Pollard fails to show that his reasons for refusing to attend the May 2014 independent medical exam constitute good cause. RCW 51.32.110 places the burden on Pollard to show good cause to refuse an examination. *Romo*, 92 Wn. App. at 358. The factors “personal to the worker” that courts have considered are the “claimant’s physical capabilities, 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 examination.” *Id.* at 356 (quoting *In re Bob*

Edwards, No. 90 6072, 1992 WL 218711 (Wash Bd. Ind. Ins. App. June 4, 1992)). In his testimony, Pollard did not discuss the factors provided in *Romo*, rather he relied on factors external to the examination by arguing a perceived bias based on impressions he gained from the internet and by the employer's refusal to allow a new orthopedic consultation. AR Pollard 5/13/15 at 36, 41.

Although *Romo* does not reject the possibility of putting on evidence to show that a "good cause" refusal can be based on a well-founded fear of bias, it provides that there needs to be "evidence in the record to suggest the scheduled examination would have been unobjective." 92 Wn. App. at 359. This objective evidence should show "examiner bias or 'doctor shopping'" specific to the worker's case, not just a generalized perception. *See id.*

2. Substantial evidence supports that Pollard did not have good cause for refusing to attend May 2014 independent medical exam

Substantial evidence supports the superior court's findings of fact. The record below established that the exam was properly scheduled and necessary for the administration of the claim. AR Herron 22. After three years with surgery and other treatment, his doctor concluded treatment. AR Pollard 5/13/15 at 21-23; AR Ex. 7. The Department and self-insured employers like Kaiser have a compelling interest to resolve medical issues

in accordance with WAC 296-14-410. Here, after three years of treatment, Kaiser received notification from Pollard's attending physician that Pollard had reached maximum medical improvement and needed a permanent partial disability rating. CP 44; AR Herron 30-31 34. That notification prompted the scheduling of the independent medical exam here. Pollard has not denied that the self-insured employer could schedule an independent medical exam to determine the level of impairment in his shoulder. *See App. Br. 20.*

The trial court properly found that Pollard did not have good cause to not attend the examination. Pollard asserts bias but the absence of findings related to Pollard's bias claims are supported by substantial evidence because Pollard's contentions he would not receive a fair exam from Dr. Swartz are entirely speculative. The fairness of the examination for the purposes of a good cause for refusal is judged by how the independent medical examiner will treat the worker and whether the worker is available to attend the exam, not by whether a worker is frustrated by the claims process or has inchoate impressions gained from the internet. *See Romo, 92 Wn. App. at 358-59.*

Pollard relies on the fact that "it was historically the employer's practice to review drafts" of the independent medical examination reports before they were finalized as "context for the scheduled examinations."

App. Br. 5-6. But Pollard does not explain how a no longer current practice is a good cause for failing to attend an examination by an examiner who has never been shown to participate in the alleged practice. *See* AR Moyer 57.

Likewise, Pollard appears to believe that the first exam scheduled with Dr. Bauer is relevant. App. Br. 6. But Pollard's former attorney's negative opinion about Dr. Bauer is irrelevant to the question of whether Dr. Swartz could provide a fair and unbiased examination. *Contra* App. Br. 6. Dr. Bauer's examination was cancelled and the Department did not base its suspension determination on the failure to attend this exam. *See* AR Exs. 2, 4.

No admissible evidence was presented to show Dr. Swartz was biased. The trial court correctly refused to make any findings related to the independent medical examiner's motivations, biases, or lack thereof. The trial court correctly rejected Pollard's statements and his attorney's conclusory and speculative testimony based on internet research—with no actual, firsthand experience. *See* AR Pollard 12; AR Thorp 73-74. Pollard points to no recognized measurements of bias in his argument. His attorney and he made a judgment based on their review of information available on the internet with no specifics or corroboration about the accuracy of the information. App. Br. 7. But the trial court acting as a fact-

finder could reject their assessments given the paucity of direct proof regarding bias.

Additionally, substantial evidence shows that Kaiser was not “doctor shopping.” The examiner was the only doctor on the Department’s provider list willing to examine Pollard in Nevada. AR Moyer 67. Kaiser’s third party nurse case manager had never engaged Dr. Swartz before. AR Moyer 67. And she testified that she had no expectations about what his opinion would be. AR Moyer 68.

Pollard testified that he thought the independent medical exam could not be fair because his employer would not let him have a new doctor in Nevada. AR Pollard 41. But Pollard fails to show how a new attending physician is related to the requirement to attend an independent examination (other than as a bargaining tool in claims administration). The independent medical examiner does not consult with the attending physician. Wanting to have one’s own doctor review the independent report once it is issued is a separate issue from having the examination in the first place. As discussed above, there are ways to achieve obtaining a new doctor but no statute or rule allows a claimant to obstruct the claims administration process in order to force the claims administration outcomes he or she desires.

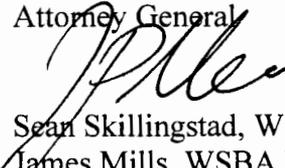
VI. CONCLUSION

Whether a worker may refuse to attend an independent medical exam scheduled to help adjudicate his worker's compensation claim and whether a self-insured employer may deny his request to switch attending physicians are two independent issues. The issue here is whether Pollard had "good cause" to refuse to participate in a scheduled examination and Pollard fails to establish good cause for not attending the May 2014 independent medical exam.

Accordingly, the Department requests that this Court affirm the superior court decision.

RESPECTFULLY SUBMITTED this 16th day of May, 2017.

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PROOF OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that the Brief of Respondent, to which this proof of service is attached, was delivered as follows:

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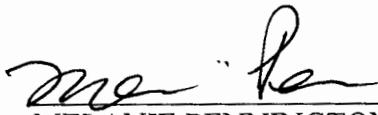
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