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No. 58454-5-I

ORIGINAL

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KELLY L. SHAFER,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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A. INTRODUCTION

Under the long-established attending physician doctrine, an attending physician who has treated an injured worker over a period of time is deemed better qualified to render an opinion as to the worker's disability than a physician who has seen and examined the worker only once or twice. Accordingly, in cases arising under the Industrial Insurance Act, special consideration should be given to the opinion of the injured worker's treating physician. Here, in deciding to close appellant Kelly L. Shafer's claim and deny her application to reopen, the Department of Labor and Industries (the Department) virtually ignored the testimony of Shafer's treating physician, who treated Shafer regularly for several years for the injuries she sustained in the industrial accident, that Shafer's condition objectively worsened after claim closure. Instead, the Department based its decision on the testimony of its own physician who examined Shafer only a few times. This is directly contrary to the dictates of the attending physician doctrine.

Also at issue here is whether a worker's treating physician, who continuously communicated with the Department throughout the course of her treatment of the worker regarding the worker's industrial injury is a person "affected by" the Department's order closing the worker's claim such that communication of the order to the physician is a necessary

prerequisite to the closing order becoming final. Here, the Department failed to communicate the closing order to Shafer's treating physician. Had the physician received the closing order, she would have timely filed a protest because, in her opinion, Shafer's medical condition was not fixed and stable when the Department closed her claim.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering judgment on the jury verdict and affirming the Department's order denying Shafer's application to reopen her claim for industrial insurance benefits.

2. The trial court erred in awarding the Department its costs of transcribing the deposition of Dr. Schneider.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in entering judgment on the jury verdict, finding the Board of Industrial Insurance Appeals (BIIA) was correct in deciding that, after her claim was closed, Shafer's disability proximately caused by her industrial injury did not worsen or become aggravated, where the weight of the evidence, including the testimony of Shafer's treating physician, showed that Shafer's lower back condition, hip condition, and mental condition objectively worsened after claim closure? (Assignment of Error No. 1).

2. Did the Department's closing order become final and binding where the order was not communicated to Shafer's treating physician who had been in continuous contact with the Department regarding Shafer's claim, where, had the order been communicated to the physician, she would have protested the closing of the claim on the ground that Shafer's condition arising from her industrial injury was not fixed and stable and Shafer was in need of additional curative treatment? (Assignment of Error No. 1).

3. Did the BIIA err in granting the Department's motion for a CR 35 mental examination where the Department failed to establish good cause for the examination in that the Department had access to evidence of Shafer's mental condition from other sources and where it waited until 15 days before the commencement of the hearing to schedule the examination? (Assignment of Error No. 1).

4. Did the trial court abuse its discretion in denying Shafer's motion in limine to exclude Dr. Schneider's testimony where the testimony was based on the results of a CR 35 mental examination that was improperly ordered? (Assignment of Error No. 1).

5. Did the trial court err in awarding the Department the costs of transcribing the deposition of Dr. Schneider, where the deposition consisted of testimony about Dr. Schneider's CR 35 mental examination

of Shafer, an examination that was improperly ordered? (Assignment of Error No. 2).

6. Is Shafer entitled to an award of attorney fees at trial and on appeal? (Assignment of Error No. 1).

C. STATEMENT OF THE CASE

The industrial injury at issue here occurred on October 15, 1998 while appellant Kelly L. Shafer was employed at AMF Sports World as a waitress.¹ BIIA Transcript of Proceedings, April 14, 2004, at 7-8.² On that date, Shafer, while on duty, lifted a keg of beer and heard a snap or crack in her back. *Id.* at 9. Shafer continued to work as a waitress at AMF Sports World until March 1999. *Id.* at 8.

Shafer's physician referred her to Dr. Elizabeth Cook in March or April 1999 for an examination of her back. *Id.* at 9-10. Dr. Cook is certified in physical medicine and rehabilitation, with a subspecialty in musculoskeletal problems, particularly those of the spine. *Id.* at 62. Dr. Cook first treated Shafer in June 1999 and treated her regularly until November 1999. *Id.* at 64, 67. Dr. Cook treated her further in February

¹ There is some evidence in the record that the injury occurred on October 18, 1998. Whether the injury occurred on October 15 or October 18 is of no relevance to the issues on appeal.

² The BIIA transcript will be referred to as "Tr." followed by the date of the proceeding and the page number.

2000, October 2000, and March 2003. *Id.* at 67. Shafer complained of lower back pain radiating to her buttocks and thigh, with tingling in her right leg. *Id.* at 65. After her initial evaluation of Shafer, Dr. Cook diagnosed spondylolysis at the L5 bone in her spine. *Id.* at 66.³ She also diagnosed a pinched nerve on the right side. *Id.* Dr. Cook was “very certain” Shafer’s conditions were caused by the industrial injury. *Id.*

Shafer’s condition did not improve with conservative care consisting of medications and epidural injections. *Id.* at 68. Accordingly, Dr. Cook recommended a more aggressive course of treatment that included additional epidural injections, additional X-rays, and an EMG. *Id.* at 67.⁴ The Department refused, however, to authorize the X-rays and the EMG, which would have assisted Dr. Cook in determining the source of Shafer’s pain. *Id.* at 67-68.

Dr. Kenneth Briggs, an orthopedic surgeon, performed an independent medical examination of Shafer in December 1999 at the behest of the Department. Tr. April 29, 2004, at 3, 9. Shafer’s chief complaint during this examination was low back pain radiating down her

³ Spondylolysis is a degenerative condition of the joints of the spine. Schuster Dep. at 30.

⁴ An EMG is an electromyogram, which is a record produced by an electromyograph, which is an instrument used to diagnose neuromuscular disorders. Medline Plus Medical Dictionary, located online at <http://www.nlm.nih.gov/medlineplus/mplusdictionary.html>, last visited August 8, 2006.

right leg. *Id.* at 11. Dr. Briggs diagnosed a lumbosacral strain and pre-existing spondylolysis that became aggravated by the industrial injury. *Id.* at 19. At the time, Dr. Briggs did not think Shafer's condition was fixed and stable, but rather was of the opinion that she needed further treatment, particularly epidural steroid injections. *Id.* Dr. Briggs next examined Shafer in July 2000. *Id.* at 20. Shafer again complained of low back pain down her legs and numbness and tingling in her toes. *Id.* Dr. Briggs concluded at the July 2000 examination that Shafer's condition was fixed and stable and no further treatment was available that would improve her condition. *Id.* at 23.

The Department closed Shafer's claim on October 19, 2000, with an award of permanent partial disability for permanent dorso-lumbar and/or lumbosacral impairments. Certified Appeal Board Record (CABR) 98. Its decision to close Shafer's claim was based on Dr. Briggs' report. Tr. Apr. 14, 2004 at 71. Dr. Cook disagreed with Dr. Briggs' conclusion that Shafer's condition was fixed and stable. *Id.* at 72. The Department failed to send the order closing Shafer's claim to Dr. Cook, Shafer's treating physician. CABR 78. Had Dr. Cook been aware of the decision to close Shafer's claim, she would have filed a protest because, in her opinion, Shafer's condition was not fixed and stable. *Id.*

Shafer did not seek further treatment from Dr. Cook at the time the Department closed her claim because she did not have medical insurance or the money to pay for further treatment. Tr. Apr. 14, 2004 at 12. When she received her award of permanent partial disability, Shafer still felt pain and discomfort. *Id.* at 14.

After not seeing Shafer for nearly two and a half years, Dr. Cook saw her again in March 2003. *Id.* at 74. At that time, Shafer reported that her back had gotten worse and she had not returned to work. *Id.* Her back pain was so severe she was unable to get out of bed in the morning. *Id.* at 19. Shafer exhibited more symptoms during Dr Cook's March 2003 examination than she did when Dr. Cook initially evaluated her in June 1999. *Id.* at 75. In reviewing X-rays, an MRI, and a CAT scan, Dr. Cook observed objective findings of the worsening of Shafer's condition. *Id.* at 75-76. On the basis of Dr. Cook's finding that Shafer's back condition was getting worse, Shafer filed an application to reopen her claim in March 2003. *Id.* at 17.

On May 6, 2003, the Department denied Shafer's application to reopen her claim. CABR 30. The Department affirmed the order denying Shafer's application to reopen on July 11, 2003. CABR 38. Shafer appealed the Department's order to the BIIA. CABR 35-37.

During an unrecorded telephone conference in January 2004, Shafer raised the issue of whether the Department's October 19, 2000 order closing her claim was final since it was not communicated to Dr. Cook, Shafer's attending physician. *See* CABR 103. A subsequent telephone conference was held before Industrial Appeals Judge (IAJ) Kathleen Stockman, at which the parties addressed the jurisdictional issue. CABR 100. By an interlocutory order dated January 23, 2004, the IAJ ruled the Department's closing order was final and the BIIA had jurisdiction to hear Shafer's appeal. CABR 100. The IAJ ruled Dr. Cook was not an active participant in the proceedings and Shafer could not claim rights through her physician or on her physician's behalf. *Id.* Shafer filed an interlocutory appeal of the IAJ's ruling on jurisdiction. CABR 70-76. In support, she submitted an affidavit of Dr. Cook, in which Dr. Cook stated that had the Department's closing order been communicated to her, she would have protested the order because she believed at that time, on a more probable than not basis, that Shafer's condition caused by her industrial injury was not fixed and stable and Shafer was in need of additional curative treatment. CABR 78. The BIIA denied Shafer's interlocutory appeal and affirmed the IAJ's ruling that the Department's closing order was a final order. CABR 105.

Dr. Gary Schuster, a specialist in sports medicine and internal medicine, conducted an independent medical examination of Shafer in March 2004. Schuster Dep. at 3, 6. Shafer's problems as of that date were constant low back pain, tingling in the legs, and stiffness in the lower back. *Id.* at 10-11. Dr. Schuster diagnosed a lumbar strain secondary to the industrial injury, preexistent spondylolysis in the spine that was made symptomatic by the industrial injury, and a pinched nerve caused by the industrial injury. *Id.* at 33. Dr. Schuster measured Shafer's calf and found muscle atrophy in her left calf. *Id.* at 36. This was indicative of a worsening of her condition. *Id.* Also indicative of the worsening of Shafer's condition were differences in the results of the straight leg test performed when her claim was closed and the test Dr. Schuster performed. *Id.* at 37-38. Also, differences in range of motion tests indicated an acceleration of degenerative changes. *Id.* at 40.

In March 2004, the Department moved pursuant to CR 35 for an order directing Shafer to submit to a mental examination by Dr. Richard L. Schneider. CABR 107-10. Shafer opposed the Department's motion, arguing the Department failed to show good cause to support its request for a CR 35 mental examination. CABR 127-50. By interlocutory order, the BIIA granted the Department's motion for a CR 35 mental examination. CABR 155-56. Shafer requested interlocutory review of the

order granting the Department's motion for a CR 35 mental examination. CABR 157-60. By order dated March 30, 2004, the BIIA denied Shafer's request for interlocutory review. CABR 195-96.

Dr. Schneider examined Shafer on April 1, 2004. Schneider Dep. at 10. He concluded Shafer suffered from dysthymia, which is a constant low mood for at least two years, and clinical depression. *Id.* at 27-28. Dr. Schneider was of the opinion that Shafer's industrial injury did not aggravate, either temporarily or permanently, her preexisting mental health conditions. *Id.* at 54.

Dr. Jeffrey Hart, a psychologist, also examined Shafer in March 2004. Tr. Apr. 16, 2004 at 6. He also reviewed Dr. Schneider's report of his psychiatric evaluation of Shafer and Dr. Schuster's orthopedic evaluation. *Id.* at 7. During the examination. Shafer told Dr. Hart the main problems she was experiencing were anxiousness, depression, and pain. *Id.* at 10. Dr. Hart diagnosed major depression, post-traumatic stress disorder, and an adjustment disorder with anxiety. *Id.* at 21. Dr. Hart stated Shafer's major depression, anxiety, and pain disorder interfered with her ability to be gainfully employed. *Id.* at 28, 32, 33. Dr. Hart disagreed with Dr. Schneider's conclusion that Shafer suffered no detriment in her overall mental health as a consequence of her October 1998 industrial injury. *Id.* at 39. Dr. Hart testified that injuries that cause

chronic pain and loss of physical capacity, such as those Shafer suffered in her industrial accident, inflict severe stress upon the injured person. *Id.* Dr. Hart testified that the fact that Shafer knew her injury was chronic and ongoing caused her to suffer a major depressive episode. *Id.* at 40.

The BIIA through IAJ Stockman issued a proposed decision and order dated September 17, 2004, affirming the Department's order. CABR 19-32. The IAJ found that Shafer's conditions and disability, proximately caused by her industrial injury, did not objectively worsen between the date the Department closed the claim and the date the Department affirmed its order denying Shafer's application to reopen. CP 30. The IAJ further found that Shafer had no mental health conditions proximately caused or aggravated by the industrial injury. *Id.* Shafer filed a petition for review of the proposed decision and order with the BIIA. CABR 2-16. By order dated November 4, 2004, the BIIA denied her petition for review, and the proposed decision and order became the decision and order of the BIIA. CABR 1.

Shafer appealed to the King County Superior Court. CP 1-3. She filed a motion in limine, seeking an order striking Dr. Schneider's testimony, or, alternatively, an order striking Dr. Schneider's testimony to the extent it related to the mental examination of Shafer he conducted pursuant to CR 35. CP 7-20. Shafer's motion was based on the same

grounds upon which she opposed the CR 35 mental examination. The trial court denied the motion.⁵

After a trial, the jury returned a verdict finding the BIIA was correct in deciding that Shafer's disability proximately caused by her industrial injury did not become aggravated after the Department closed her claim. CP 164-67. The trial court, the Honorable Sharon S. Armstrong, issued an order affirming the BIIA's order denying Shafer's petition for review and adopting the proposed decision and order as the final order of the BIIA. CP 218.

The Department requested an award of statutory attorney fees and the cost of transcription of the depositions used at trial. CP 197-202. Shafer opposed the Department's request for costs. CP 203-08. The trial court held a hearing on the Department's motion for fees and costs. RP May 5, 2006. After the hearing, the trial court entered judgment against Shafer and in favor of the Department, awarding the Department \$200 in statutory attorney fees and \$332 for the cost of the transcription of Dr. Schneider's testimony. CP 217-19. Shafer timely appealed to this Court. CP 220-23.

⁵ The trial court's docket does not reflect the entry of an order denying Shafer's motion in limine. As discussed below, however, the trial court awarded the Department the cost of transcribing Dr. Schneider's deposition, thus indicating the court found the testimony admissible.

D. SUMMARY OF ARGUMENT

The physician who treated Shafer regularly for several years in connection with Shafer's industrial injury was of the opinion that Shafer's condition was not fixed and stable when the Department closed her claim for industrial insurance benefits and that her condition objectively worsened after claim closure. A physician who examined Shafer at the behest of the Department concluded to the contrary after a few isolated examinations of Shafer. Notwithstanding the opinion of Shafer's treating physician and the far more extensive involvement of the treating physician in Shafer's treatment and care, the Department and the BIIA ignored the treating physician's opinion and instead adopted the opinion of the physician who conducted the independent medical examination for the Department. Under the attending physician doctrine, which requires special consideration be given the testimony of the treating physician, this was error. Here, *no consideration* was given Dr. Cook's testimony. The Department erred in denying Shafer's application to reopen, and the BIIA and the trial court erred affirming that decision.

Further, the Department's order closing Shafer's claim did not become final because the Department failed to communicate the order to Dr. Cook, Shafer's treating physician, who was a party "affected by" the closing order. The BIIA should have granted Shafer's request that the

matter be returned to the Department for appropriate proceedings so as to render the order final and appealable.

E. ARGUMENT

(1) Standard of Review

In an appeal of a decision of the BIIA, the BIIA's findings and conclusions are presumed correct. *Intako Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 653, 833 P.2d 390 (1992), *review denied*, 120 Wn.2d 1031 (1993). The superior court holds a de novo hearing, but does not hear any evidence or testimony other than that contained in the BIIA record. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560, 897 P.2d 431 (1995); RCW 51.52.115. This Court's review "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." *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402, *review denied*, 130 Wn.2d 1009 (1996). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000), *review denied*, 142 Wn.2d 1018 (2001). The jury's verdict upholding the BIIA's findings and decision is presumed correct. *Intako Aluminum*, 66 Wn. App. at 653.

The Industrial Insurance Act must be liberally construed “for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010. All doubts as to the meaning of the Act must be resolved in favor of the injured worker. *Clauson v. Dep’t of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

(2) Substantial Evidence Does Not Support the BIIA’s Findings that Shafer’s Conditions Proximately Caused by Her Industrial Injury Did Not Objectively Worsen Following Closure of Her Claim

A worker may apply to the Department for reopening of his or her claim if the disability for which the worker received compensation became aggravated since the date of the order closing the claim. RCW 51.32.160(1)(a). Three requirements must be met before the Department may adjust compensation based upon an aggravation application: (1) the worker’s initial claim has been closed, (2) the disability became aggravated since the closing of the initial claim, and (3) the adjustment is sought within seven years of the initial closing date. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 432, 858 P.2d 503 (1993).

There is no dispute in this case that the first and third requirements were met. At issue is whether Shafer’s disability became aggravated since the date the Department closed her claim. Under this requirement, the

burden is on the injured worker to produce objective medical evidence, verified by a physician, that the worker's injury worsened since the initial closure of the claim. *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 68 (1985). The aggravation of the injury need not be the result of the industrial accident itself, but rather may be the worsening of the industrial injury through the incidents of day-to-day life. *Tollycraft Yachts*, 122 Wn.2d at 432. The necessity of objective findings of a worsened condition has been relaxed in the context of psychological conditions because objection conditions are almost nonexistent. *Id.*, 122 Wn.2d at 432 n.3.

The Industrial Insurance Act is a unique piece of legislation. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 572, 761 P.2d 618 (1988). It is remedial in nature, and its beneficial purpose must be liberally construed in favor of its beneficiaries. *Id.* In furtherance of the purposes of the Act to promote benefits and protect workers, the attending physician doctrine requires special consideration to be given the testimony of the worker's attending physician. *Id.*, 111 Wn.2d at 572-73; *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 604, 676 P.2d 538, review denied, 101 Wn.2d 1023 (1984). The doctrine is grounded in the fact that an attending physician who has cared for and treated an injured worker over a period of time is better qualified to give an opinion as to the

worker's disability than a physician who has seen and examined the worker only one or two times. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 6, 977 P.2d 570 (1999); *Spalding v. Dep't of Labor & Indus.*, 29 Wn.2d 115, 128-29, 186 P.2d 76 (1947).

Here, Dr. Cook was Shafer's attending physician from June 1999 through at least March 2003. Tr. Apr. 14, 2004 at 64, 67. Dr. Cook disagreed with the IME the Department used as a basis for closing Shafer's claim in which the physician concluded Shafer's condition was fixed and stable. *Id.* at 72. Dr. Cook found significant objective findings during her March 2003 examination of Shafer of the worsening of Shafer's condition. *Id.* at 75-78. Dr. Cook also noted Dr. Schuster's finding of atrophy in Shafer's calf, which is an objective finding of the worsening of a lower back condition. *Id.* at 79.

Far from giving the requisite special consideration to Dr. Cook's opinion, the IAJ, in the opinion the BIIA adopted and the trial court affirmed, gave unreasonably short shrift to Dr. Cook's unequivocal testimony that Shafer's condition objectively worsened after the Department closed her claim. In fact, the IAJ effectively ignored Dr. Cook's testimony. The entire extent of the IAJ's analysis of Dr. Cook's testimony is:

I recognize that Dr. Cook actively treated the claimant and was in an excellent position to offer an opinion on the claimant's worsening. However, Dr. Cook's opinion that Ms. Shafer was still having problems in 2000 when the claim was closed was contrary to Ms. Shafer's testimony that she was very active at that time with Mr. Osborne.

CABR 29. Mr. Osborne was Shafer's boyfriend. Tr. Apr. 14, 2004 at 38.

The IAJ's reasons for disregarding the testimony of Dr. Cook's treating physician, who, by the IAJ's own admission, was in an "excellent position" to evaluate the worsening of Shafer's conditions, are not legitimate. Dr. Cook offered the required objective medical evidence of the worsening of Shafer's condition. Testimony by the worker about his or her activity level with family and friends is not objective medical evidence. Further, Shafer *did not* testify she was active with Osborne when her claim was closed. In fact, she testified that, from the time of the disability award and claim closure until she saw Dr. Cook in 2003, she stopped camping and riding off-road vehicles, activities she participated in with Osborne prior to her injury. Tr. Apr. 14, 2004 at 19-20. She testified she could no longer drive because her injury caused her to have problems sitting, no longer walked much, was unable to stand long enough to wash dishes, was unable to push a vacuum cleaner, and was unable to get much sleep. *Id.* at 20. The IAJ erred by disregarding Dr. Cook's unequivocal

testimony, based on her extended treatment of Shafer, that Shafer's condition objectively worsened after claim closure.

Dr. Cook's opinions are fully supported by Dr. Schuster's testimony. He testified that atrophy in Shafer's left leg was objective evidence of the worsening of her condition. Schuster Dep. at 36. Changes in the results of straight leg tests performed on Shafer several years apart provided further objective evidence of worsening, as did differences in range of motion tests and changes in a disk bulge. *Id.* at 38, 40, 45. Dr. Cook agreed with Dr. Schuster's finding that changes in the range of motion tests indicated a worsening of Shafer's condition. Tr. Apr. 14, 2004 at 81.

The IAJ ignored the testimony of Shafer's treating physician and Dr. Schuster's fully corroborating testimony and instead based her decision on the testimony of *Dr. Briggs*, who found no worsening of Shafer's lower back condition because, in the IAJ's opinion, Dr. Briggs was "in the best position to determine whether Ms. Shafer's condition had worsened." CABR 29. This is a faulty premise. As treating physician, Dr. Cook, not Dr. Briggs, was in the best position to evaluate whether Shafer's condition worsened. In fact, the IAJ noted Dr. Cook's "excellent position" for evaluation of Shafer's condition. *Id.* Dr. Briggs' testimony, viewed in relation to that of Dr. Cook and Dr. Schuster, does not constitute

substantial evidence supporting the IAJ's finding of no worsening of Shafer's lower back condition. Moreover, Dr. Briggs acknowledged that three out of four measurements of Shafer's range of motion showed a decrease in range of motion from 25 to 30 percent following claim closure. Tr. Apr. 29, 2004 at 46. Substantial evidence supports the finding that Shafer's lower back condition did objectively worsen following closure of her claim. For the same reasons, the IAJ erred in accepting Dr. Briggs' testimony that Shafer's left hip condition was not caused or aggravated by her industrial injury, in light of the testimony of Dr. Cook, Shafer's treating physician, that her hip condition was in fact caused or aggravated by the industrial injury.

With respect to Shafer's mental condition, the IAJ relied on Dr. Schneider's testimony and rejected that of Dr. Hart in finding Shafer's mental health issues were not caused or aggravated by her industrial injury. CABR 28, 30. As discussed above, Dr. Schneider's CR 35 examination was improperly ordered and his testimony should have been stricken. The IAJ relied on Dr. Schneider's testimony attributing Shafer's mental condition to the series of disappointments Shafer suffered from men in her life. CABR 28. Dr. Hart recognized these problems and agreed that they attributed to Shafer's mental condition. Tr. Apr. 16, 2004 at 39. However, after examining Shafer, Dr. Hart concluded that her

injury caused further mental problems or exacerbated those she was already suffering. *Id.* at 39-40. Dr. Hart concluded that the fact that Shafer was aware her injury was going to be chronic and ongoing “clearly caused her to go back into a major depressive episode.” *Id.* at 40.

In sum, substantial evidence does not support the IAJ’s findings that Shafer’s conditions caused by her industrial injury did not objectively worsen following the closure of her claim. The Department, the BIIA, and the trial court erred by failing to give special consideration to Dr. Cook’s testimony. Nor does substantial evidence support the findings that Shafer’s mental health condition and left hip condition were not caused or aggravated by her industrial injury.

(3) The Department’s Closing Order Was Not Final Because the Department Failed to Communicate the Order to Shafer’s Treating Physician, an Affected Party

When the Department makes an order, decision, or award, it is required to promptly serve the worker, beneficiary, employer, and “other person affected thereby” with a copy thereof by mail. RCW 51.52.050.⁶ Where the order, decision, or award is a final order, it becomes final within 60 days “from the date the order is communicated to the parties” unless a written request for reconsideration is filed with the Department or

⁶ A copy of the full text of RCW 51.52.050 is in the appendix.

an appeal is filed with the BIIA. RCW 51.52.050. An order is considered “communicated” to a party upon receipt. *Kaiser Aluminum & Chem. Corp. v. Dep’t of Labor & Indus.*, 57 Wn. App. 886, 889, 790 P.2d 1254 (1990).

When the Department has taken action or made a decision relating to any phase of the administration of the Industrial Insurance Act, the worker, beneficiary, employer, “or other person aggrieved thereby” may request reconsideration by the Department or may appeal to the BIIA. RCW 51.52.050.

Case law construing the phrases “other person affected by” and “other person aggrieved” as used in RCW 51.52.050 is scarce. The Supreme Court held that the Department is not an “other person aggrieved” under the statute. *Dep’t of Labor & Indus. v. Cook*, 44 Wn.2d 671, 673, 269 P.2d 962 (1954).

Courts have not determined whether an injured worker’s treating physician is an aggrieved or affected party under RCW 51.52.050. The attorney general ruled a physician may appeal to the board from an order rejecting the physician’s bill for medical aid, Op. Atty. Gen. 1945-46 at 1154, demonstrating that, under some circumstances, a physician is indeed

an aggrieved or affected party.⁷ Under the mandatory liberal construction of the Industrial Insurance Act, RCW 51.12.010, and the mandatory resolution of all doubts as to the meaning of the Act in favor of the injured worker, *Clauson*, 120 Wn.2d at 584, an injured worker's treating physician should be deemed an aggrieved party. The Act places the duty on the treating physician to inform the injured worker of his or her rights under the Act and requires the treating physician to "lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the worker." RCW 51.28.020. The Department is required to provide physicians with a manual outlining the procedures to be followed in applications for worker compensation benefits and describing claimants' rights and responsibilities related to claims. *Id.* Although these provisions do not require a treating physician to advise an injured worker concerning protests or appeals, the statutory imposition of certain duties on treating physicians lends significant support to the conclusion that the Act intended physicians to be included within the ambit of persons entitled to communication of an order, decision, or award by the Department and of persons entitled to protest such order, decision, or award.

⁷ A copy of the Attorney General Opinion is in the appendix.

Further, treating physicians are subjected to stringent duties and requirements imposed by the Department. By statute, treating physicians must comply with rules and regulations promulgated by the Department and must make reports on the condition or treatment of the worker that the Department requests, as well as reports on any other matters concerning workers under the physician's care. RCW 51.36.060. Regulations set forth the numerous reports physicians must provide the Department upon the latter's request. WAC 296-20-06101 (noting "the information provided in these reports is needed to adequately manage industrial insurance claims"). Treating physicians are also required to follow detailed requirements as to bills for services rendered an injured worker. WAC 296-20-125. Treating physicians are also subject to for-cause or random records review by the Department to ensure workers are receiving proper and needed care and to ensure physicians' compliance with the Department's medical aid rules, fee schedules, and policies. WAC 296-20-02010.

Given the strict supervision and control by the Department to which physicians treating injured workers are subjected and the degree to which treating physicians are required to be involved in the administration of a claim for compensation, it follows that treating physicians can be significantly affected by an order or a decision of the Department

regarding a worker whom the physician is treating and should be included among parties deemed aggrieved or affected by an order or decision of the Department within the meaning of RCW 51.52.050.

Here, Dr. Cook was Shafer's treating physician from June 1999 through at least January 2004. CABR 77-78. Dr. Cook received numerous notices and orders from the Department, except the October 2000 closing order, concerning Shafer's claim. CABR 77, 79-80. Dr. Cook reviewed and initialed the notices and orders and, in some cases, made notations on the documents concerning action taken or to be taken. CABR 83-97, 99. Dr. Cook communicated on numerous occasions with the Department regarding Shafer's medical condition. *See, e.g.*, CABR 84-85, 94-95. The Department requested Dr. Cook to provide a medical report on Shafer's condition to support an award of temporary total disability, and Dr. Cook complied with this request. CABR 88. The Department asked Dr. Cook to provide progress reports on Shafer's condition, and Dr. Cook complied with this request. CABR 90. Dr. Cook likewise complied with the Department's request, made after Dr. Cook submitted a letter to the Department regarding proposed surgery, that she review the results of the IME performed on Shafer and indicate why variance from the accepted treatment plan would be appropriate. CABR 91. Dr. Cook also complied with the Department's request for her opinion

as to Shafer's ability to work and the recommendations of a vocational rehabilitation specialist. CABR 94-95.

As evident from the foregoing, Dr. Cook was extensively involved in the administration and processing of Shafer's claim for compensation. As Shafer's treating physician, Dr. Cook had an interest in Shafer's recuperation, rehabilitation, and treatment. She was entitled to be apprised of the Department's decision to close Shafer's claim, particularly if she could no longer treat Shafer because Shafer lacked the funds or insurance to pay Dr. Cook for her services. Further, Dr. Cook was entitled to protest the Department's decision to close Shafer's claim if, in her informed medical judgment based on her extended treatment of Shafer, she did not agree with the Department's determination that Shafer's condition was fixed and stable.

It is not disputed that Dr. Cook did not receive a copy of the Department's October 19, 2000 closing order. CABR 78. Dr. Cook testified that had the order been communicated to her, she would have responded with a protest because she believed at that time, on a more probable than not medical basis, that Shafer's condition caused by her industrial injury was not fixed and stable and she was in need of additional curative treatment. *Id.*

Shafer is not, as the Department argued below, attempting to stand in Dr. Cook's shoes or assert any rights of Dr. Cook by arguing the jurisdictional issue. Rather, she is arguing that because the closing order was not communicated to an affected party, the order did not become final. Accordingly, the BIIA was without jurisdiction in this matter.

(4) The Trial Court Abused Its Discretion in Affirming the BIIA's Order Affirming the IAJ's Ruling Granting the Department's Motion for a CR 35 Mental Examination

CR 35(a) applies in worker's compensation cases. *Tietjen v. Dep't of Labor & Indus.*, 13 Wn. App. 86, 89, 534 P.2d 151 (1975). Under that rule, when the mental condition of a party is in controversy, the court may order the party to submit to a mental examination by a physician. "The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties." CR 35(a). The party causing the examination to be held must deliver to the party examined a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings. CR 35(b). The report must be delivered within 45 days of the examination "and in no event less than 30 days prior to trial." CR 35(b).

At issue in this appeal is whether the Department showed good cause for a CR 35 mental examination of Shafer. Where, as in the case of CR 35, Washington has adopted the federal rule as the state rule, the

construction of the federal rule is pertinent. *Eberle v. Sutor*, 3 Wn. App. 387, 389, 475 P.2d 564 (1970). The United States Supreme Court has emphasized that the “good cause” requirement is not a mere formality, but rather is a plainly expressed limitation on the use of the rule. *Schlagenhauf v. Holder*, 379 U.S. 104, 118, 85 S. Ct. 234, 13 L.Ed.2d 152 (1964). The rule vests in the trial court the discretion to decide whether the good cause requirement has been met in a particular case. *In re Green*, 14 Wn. App. 939, 943, 546 P.2d 1230 (1976). The ability of the movant to obtain the desired information by other means is a relevant consideration. *In re Green*, 14 Wn. App. at 942.

The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by Rule 26(b). Thus, by adding the words “showing good cause therefore,” the Rules indicate that there must be a greater showing of need under Rules 34 and 35 than under the other discovery rules.

Guilford Nat'l Bank of Greensboro v. Southern Ry. Co., 297 F.2d 921, 924 (4th Cir. 1962) (footnote omitted).

The Department argued Shafer waived her objection to the CR 35 examination because she did not raise the issue in her petition for review with the BIIA. CP 62-64. The Department is wrong in this assertion. A petition for review must set forth in detail the grounds therefor. RCW

51.52.104. However, a general objection to all evidentiary rulings adverse to the party constitutes sufficient compliance with this requirement. WAC 263-12-145(3). In her petition for review, Shafer excepted to “all adverse evidentiary and interlocutory rulings.” CABR 2. This is sufficient compliance with the requirement of RCW 51.52.104.

The Department failed to establish good cause for the CR 35 examination for several reasons. First, the Department did seek with reasonable diligence information regarding Shafer’s mental condition available from other sources. The Department concedes that the issue of Shafer’s recovery for depression was raised at a mediation conference on November 26, 2003. CP 66; *see also* CABR 149, 151-52.⁸ Predating the conference by as much as two months are medical records documenting Shafer’s depression and the treatment she received for it. CABR 136-46. Included among these records is a detailed psychiatric evaluation dated October 31, 2003. There is no evidence that the Department sought, obtained, or reviewed these readily available records. The Department’s lack of diligence in obtaining available records demonstrates the absence of good cause for the CR 35 examination. *See Tietjen*, 13 Wn. App. at 91-92. The Department should not have been allowed to rectify its failure to

⁸ Although the Department asserted that neither Shafer’s application for benefits nor her application to reopen alleged a mental health condition, CP 66, the Department did not argue she was not entitled to mental health benefits on this ground.

review available records by compelling Shafer to undergo further mental evaluations.

Further, the Department failed to comply with the timing requirements of CR 35(b) in that it sought to compel Shafer's mental examination only 15 days before the hearing on Shafer's reopening application was set to commence. Given the Department's awareness that Shafer's mental condition was at issue as early as November 26, 2003, the Department's March 9, 2004 request for a CR 35 examination was unreasonably late. Further, the trial court's affirmance of the IAJ's allowance of the Department's request to hold the mental examination on April 1, 2004, only a few days before the commencement of the hearing on April 14, 2004, was an abuse of discretion. CABR 173. Shafer was prejudiced by the BIIA's allowance of the CR 35 examination and the trial court's affirmance thereof. The IAJ placed significant weight on Dr. Schneider's testimony regarding Shafer's mental condition, wholly rejecting the testimony of Dr. Hart on the same issue. *See* CABR 28.

Because the BIIA abused its discretion in ordering the CR 35 examination by Dr. Schneider, the superior court abused its discretion in denying Shafer's motion in limine to exclude Dr. Schneider's testimony on the ground the CR 35 examination was erroneously ordered. *See Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 91, 549 P.2d

483 (1976). Further, because Dr. Schneider's deposition was improperly admitted, the court erred in awarding the Department the costs it incurred in transcribing the deposition. See *Kiewit-Grice v. State*, 77 Wn. App. 867, 874, 895 P.2d 6 (a party is entitled to the costs of taking depositions, but only if the depositions were taken and used for trial purposes), *review denied*, 127 Wn.2d 1018 (1995). Here, although Dr. Schneider's deposition was used at trial, it was improperly admitted because his testimony was based on his CR 35 examination of Shafer, which, for the reasons outlined above, was improperly ordered.

(5) Shafer Is Entitled to an Award of Attorney Fees at Trial and On Appeal

If the BIIA's decision and order are reversed or modified on appeal to the superior court or this Court and additional relief is granted to a worker, the court must fix a reasonable attorney fee for the worker's attorney. RCW 51.52.130. This statute encompasses fees in both the superior and appellate courts when both courts review the matter. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999); *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 363-64, 115 P.3d 1031 (2005). For the reasons set forth above, Shafer is entitled to compensation for the worsening of her conditions proximately caused by her industrial injury that occurred after the Department closed her claim.

The BIIA's decision and order affirming the Department's order denying Shafer's reopening application, and the judgment on the jury verdict, should be reversed. Shafer is entitled to an award of attorney fees in both this Court and the superior court pursuant to RCW 51.16.130 and RAP 18.1.

F. CONCLUSION

The Department's and the BIIA's complete disregard of the testimony of Shafer's treating physician, when determining whether to reopen Shafer's claim, was error. The attending physician doctrine requires that special consideration be given the testimony of the treating physician. Of course, the doctrine does not require that the treating physician's testimony always and automatically be adopted. But, there is no doubt the doctrine requires special consideration be given to it. Here, it is evident that no such special consideration was given Dr. Cook's testimony. In fact, virtually no consideration was given to it. Further, the BIIA's reasoning in disregarding Dr. Cook's testimony and adopting that of Dr. Briggs was faulty. Clearly, between Dr. Cook and Dr. Briggs, Dr. Cook was in a far better position to render an opinion as to Shafer's condition. Substantial evidence does not support the BIIA's decision, which the trial court affirmed.

Further, although there is very little case law interpreting RCW 51.52.050, it follows, in light of the involvement of treating physicians in the administration of an injured worker's claim and the stringent rules and regulations to which they are subject, that a worker's treating physician is an "aggrieved or affected party" entitled to a copy of an order directing closure of a claim. Here, this conclusion is even more compelling given that the Department routinely sent its notices, orders, and other documents to Dr. Cook. Dr. Cook was an aggrieved or affected party and, as such, was entitled to notice of the Department's order closing Shafer's claim. The Department's failure to provide Dr. Cook with such notice prevented her claim from becoming final and deprived the BIIA of jurisdiction to review the matter.

The trial court erred in entering judgment on the jury's verdict. This Court should reverse the judgment in favor of the Department and remand with directions to enter judgment in favor of Shafer. Shafer is entitled to an award of attorney fees at trial. Costs on appeal, including reasonable attorney fees, should be awarded to Shafer.

DATED this 1ST day of September, 2006.

Respectfully submitted,



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APPENDIX

West's RCWA 51.52.050

West's Revised Code of Washington Annotated Currentness

Title 51. Industrial Insurance (Refs & Annos)

Chapter 51.52. Appeals (Refs & Annos)

**➔51.52.050. Service of departmental action--Demand for repayment--
Reconsideration or appeal**

Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, which shall be addressed to such person at his or her last known address as shown by the records of the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia: PROVIDED, That a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal: PROVIDED, That in an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

CREDIT(S)

[2004 c 243 § 8, eff. June 10, 2004; 1987 c 151 § 1; 1986 c 200 § 10; 1985 c 315 § 9; 1982 c 109 § 4; 1977 ex.s. c 350 § 75; 1975 1st ex.s. c 58 § 1; 1961 c 23 § 51.52.050. Prior: 1957 c 70 § 55; 1951 c 225 § 5; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1947 c 247 § 1, part; 1911 c 74 § 20, part; Rem. Supp. 1947 § 7676e, part. (iii) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (iv) 1923 c 136 § 7, part; 1921 c 182 § 10, part; 1917 c 29 § 3, part; RRS § 7712, part. (v) 1917 c 29 § 11; RRS § 7720. (vi) 1939 c 50 § 1, part; 1927 c 310 § 9, part; 1921 c 182 § 12, part; 1919 c 129 § 5, part; 1917 c 28 § 15, part; RRS § 7724, part.]

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STATE OF WASHINGTON

Twenty-Eighth Biennial Report

OF THE

ATTORNEY GENERAL

SMITH TROY
Attorney General

1945-1946

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1947

PHYSICIAN MAY APPEAL TO JOINT BOARD OF DEPARTMENT OF LABOR AND INDUSTRIES

(a) An attending physician aggrieved by any order, decision or award by the Department of Labor and Industries can appeal to the joint board as provided in Rem. Rev. Stat. 7697. (b) If the attending physician's first notice of a Department's previous order is a letter, he then may appeal from the order, the letter being a mere narrative of the order.

November 19, 1946.

Honorable Earl N. Anderson, Director of Labor and Industries, Olympia, Washington.

Dear Sir: Receipt is acknowledged of your request of October 14, 1946, as follows:

"We would appreciate your opinion on the following question: "Must an attending physician who renders treatment to an injured workman without authority from the Department and before any claim has been allowed therefor, appeal to the Joint Board from (a) the notice of rejection communicated to the claimant, a copy of which was mailed to the attending physician, or (b) a subsequent letter rejecting his medical bill for the reason that the injured workman's claim was not recognized by the Department?"

The first two sentences in Rem. Rev. Stat. 7697, which authorize judicial review of departmental orders, are as follows:

"Whenever the department of labor and industries has made any order, decision or award, it shall promptly serve the claimant, employer or other person affected thereby, with a copy thereof by mail, which shall be addressed to such claimant, employer or person at his last known address as shown by the records of the department. Any claimant, employer or other person aggrieved by any such order, decision or award must before he appeals to the courts serve upon the director of labor and industries, by mail or personally, within sixty days from the day on which such copy of such order, decision or award was communicated to the applicant, an application for rehearing before the joint board of said department, consisting of the director of labor and industries, the supervisor of industrial insurance and the supervisor of safety. * * "

It has been the uniform practice since the enactment of the Industrial Insurance Act to recognize the right of a physician to appeal from a departmental order rejecting his bill for medical aid furnished an injured workman. Careful research has not disclosed any instance in which such right has been challenged. In Purdy & Whitfield v. Department of Labor and Industries, 12 Wn. (2d) 131, the right of the undertaker to appeal from an

order rejecting his claim for burial services was recognized, and in Jones v. Department of Labor and Industries, 193 Wash. 358, the right of a physician to appeal from an order denying his bill for professional services was recognized.

That the Industrial Insurance and Medical Aid Acts are to be liberally construed is established by a long line of decisions.

- Hilding v. Department of Labor and Industries, 162 Wash. 168; Mackay v. Department of Labor and Industries, 181 Wash. 702; Lindquist v. Department of Labor and Industries, 184 Wash. 194; State ex rel. Crabbe v. Olinger, 196 Wash. 308; Campbell v. Department of Labor and Industries, 2 Wn. (2d) 173; Harrington v. Department of Labor and Industries, 9 Wn. (2d) 1; Berry v. Department of Labor and Industries, 11 Wn. (2d) 154.

In Jones v. Department of Labor and Industries, 193 Wash. 358, affirming a judgment reversing an order of the Department of Labor and Industries denying a physician's claim for professional services, the Supreme Court said:

" * * * it cannot, from the record, be held that Dr. Jones was not justified in operating in an attempt to do something to save the patient's life. The continuity of what Dr. Jones did is too strong to break at any particular point. Had the operation demonstrated that Mr. Zalusky's condition was the result of the accident, the doctor would beyond question, be entitled to his compensation. It cannot be held that the operation was improper, or that the direct cause of the patient's illness could have been determined without an operation."

In Rem. Rev. Stat. 7714, the legislature has commanded that the workman is entitled to medical aid by his own physician, and has declared in Rem. Rev. Stat. 7715:

" * * * that the injured workman shall have the most prompt and efficient care and treatment at the least cost consistent with promptness and efficiency, without discrimination or favoritism. * * * "

If, therefore, a physician is required to obtain authority from the Department before providing care for an injured workman, many workmen are going to die while that authority is being obtained, and any such rule is in direct conflict with the de-

clared legislative intent. A letter subsequent to the order rejecting the claim is a mere narrative of past events. See *Haugen v. Department of Labor and Industries*, 183 Wash. 398. The legislature has only provided for an appeal from an order or decision. If such letter is the first information that the physician has that an order rejecting his bill has been entered, he may at that time rightfully appeal the previous order.

You are specifically advised in answer to your question (a) that a physician can appeal from such notice, and (b) such letter being a mere narrative of past events, it is not an order but may for the first time acquaint the physician with the existence of a previous order and, if so, such physician may then appeal from the order.

SMITH TROY, Attorney General.

WORKMEN'S COMPENSATION—ORDER RES ADJUDICATA

Unless appealed from within the time limited by law, a previous order allowing a claim and awarding time loss is *res adjudicata* (final) to all parties in a subsequent proceeding respecting the closing order awarding permanent partial disability.

November 19, 1946.

Honorable Earl N. Anderson, Director of Labor and Industries,
Olympia, Washington.

Dear Sir: Receipt is acknowledged of your request of October 14, 1946:

"May we have your opinion on the following question:

"Has an employer, when appealing to the Joint Board from an order closing a workman's claim with a permanent partial disability award, the right to raise the additional issue of the correctness of the supervisor's action in (1) allowing the claim, and (2) in awarding monthly time loss compensation thereunder?"

"For your information, it is the practice of the Department to notify the employer of the allowance of the claim and of each monthly payment."

Any order, decision or award of the Department of Labor and Industries resting upon a finding, or findings of fact becomes a complete and final adjudication, binding upon all parties con-

cerned unless such action of the Department is set aside upon appeal, or vacated for fraud, or something of like nature.

- LeBire v. Department of Labor and Industries*, 14 Wn. (2d) 407;
Abraham v. Department of Labor and Industries, 178 Wash. 160;
Powell v. Department of Labor and Industries, 178 Wash. 699;
Kloppel v. Department of Labor and Industries, 178 Wash. 699;
Ele v. Department of Labor and Industries, 181 Wash. 91;
Soko v. Department of Labor and Industries, 181 Wash. 153;
Laton v. Department of Labor and Industries, 183 Wash. 105;
Nigel v. Department of Labor and Industries, 189 Wash. 631;
Hunter v. Department of Labor and Industries, 190 Wash. 380;
Mud Bay Logging Co. v. Department of Labor and Industries, 193 Wash. 275;
Prince v. Saginaw Logging Co., 197 Wash. 4;
Carlson v. Department of Labor and Industries, 200 Wash. 533.
- This applies not only to an order of the Joint Board, but also to an order of the supervisor.
Prince v. Saginaw Logging Co., *supra*.
Kuhale v. Department of Labor and Industries, 15 Wn. (2d) 427.
- The previous award of time loss is *res adjudicata* in a subsequent proceeding respecting the closing order awarding a permanent partial disability. *Kuhale v. Department of Labor and Industries*, *supra*.
- You are, therefore, advised that the order allowing the claim and awarding time loss was final as to all parties unless appealed from within the time limited by law.

SMITH TROY, Attorney General.

DECLARATION OF SERVICE

On said day below I deposited in the U.S. Postal Service a true and accurate copy of the following document: Brief of Appellant in Court of Appeals Cause No. 58454-5-I to the following:

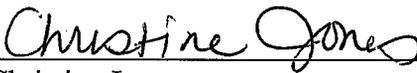
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 1, 2006, at Tukwila, Washington.



Christine Jones
Legal Assistant
Talmadge Law Group PLLC

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