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NO. 58454-5

**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 RESPONDENT

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I. INTRODUCTION

This is a workers' compensation aggravation case governed by Washington's Industrial Insurance Act, Title 51 RCW. Kelly Shafer appeals from a superior court judgment on jury verdict that affirmed an order of the Board of Industrial Insurance Appeals (Board).

Shafer raises three issues on appeal. Shafer first asserts that the *Board's* analysis and findings (as opposed to the *jury's verdict*) that her industrially caused disability did not objectively worsen between October 19, 2000 and July 11, 2003 were not supported by substantial evidence, claiming that the Board's Industrial Appeals Judge (IAJ) gave "short shrift" to the testimony on physical worsening by Dr. Cook, Shafer's attending physician, contrary to the attending physician doctrine, and also that Shafer somehow established as a matter of law that Shafer suffers from a newly revealed mental condition proximately caused by the October 1998 industrial injury. Appellant's Brief (Br. Appellant) at 15-21.

Shafer next posits a challenge under RCW 51.52.050 to the Board's authority to even consider this aggravation case, asserting that the October 19, 2000 order of the Department of Labor and Industries (Department) closing her claim on October 19, 2000 never became final

because her attending physician claimed that the doctor's office did not receive a copy of that order. Br. Appellant at 21-27.

Finally, Shafer challenges the trial court's denial of her motion to strike the expert testimony of Dr. Richard Schneider, M.D., a psychiatrist who examined Shafer on April 1, 2004, pursuant to a Civil Rule 35 Board order. Shafer claims that the Board's IAJ abused the IAJ's discretion in granting the CR 35 order. Br. Appellant at 27-31.

None of Shafer's claims has any merit. The Department and the Board found that Shafer's back condition proximately caused by her October 1998 industrial injury had not objectively worsened between claim closure on October 19, 2000, and the date of final Department denial of reopening, July 11, 2003. The Board also affirmed the Department's decision that the Department was not responsible for a left trochanteric bursitis or tendonitis, which Shafer claimed was caused by her October 1998 industrial injury. After she appealed the July 11, 2003, Department order to the Board, Shafer alleged, for the first time on her claim, that she had a mental condition proximately caused by her October 1998 industrial injury, a claim that the Board also rejected. After a de novo review of all the evidence considered by the Board, the jury concurred with the Board's findings of fact.

In its Argument section below, the Department will address Shafer's RCW 51.52.050 and CR 35 challenges first and her substantial evidence challenge last. **First**, the Board had authority per RCW 51.52.050 to hear Shafer's aggravation appeal because Ms. Shafer admitted that she received a "settlement" of her claim in October 2000, and Shafer understood that her claim was then closed. While Dr. Cook probably was a "person affected" by the 2000 closing order under RCW 51.52.050, 1) lack of service of the closing order on Dr. Cook is not jurisdictional as to any appeal rights of Shafer, 2) Shafer waived her RCW 51.52.050 theory at the Board, and 3) Shafer lacks standing to argue the RCW 51.52.050 rights of Dr. Cook. Therefore, even if Dr. Cook failed to receive a copy of its October 19, 2000 closing order, this omission would not prevent that order from becoming final as to Shafer, who did not timely appeal the order.

Second, as to Shafer's CR 35 motion, the trial court properly denied Shafer's motion to strike Dr. Schneider's testimony. Shafer failed to establish that the Board's IAJ abused the IAJ's discretion in ordering Shafer to appear for a CR 35 independent mental evaluation. Moreover, Shafer waived this theory in not presenting it expressly in her petition to the 3-member Board for review of the IAJ's proposed decision.

Third, the Board's analysis and findings are irrelevant at this point, and the record contains substantial evidence, when viewed in the light most favorable to the Department, to support the jury's verdict.

II. COUNTER STATEMENT OF THE ISSUES

1. Shafer personally received and did not protest or appeal the October 19, 2000 Department order closing her claim with a WAC 296-20-280 Category 2 dorsolumbar/lumbosacral permanent impairment. Regardless of whether Shafer's attending physician contemporaneously received a copy of the closing order, did the closing order become a final order such that the only way Shafer could qualify for additional benefits was, as she did here, to file for reopening of her claim?

2. Did the trial court properly exercise its discretionary authority when it denied Shafer's motion to strike the testimony of Dr. Richard Schneider on Shafer's claim that the Board's order granting a CR 35 mental examination was an abuse of discretion?

3. Under RCW 51.52.104, did Shafer waive argument on either Issue 1 or Issue 2 or both by failing to explicitly raise the issues in her petition to the 3-member Board for review of the IAJ's proposed decision?

4. When the evidence is viewed in the light most favorable to the Department, is there substantial evidence to support the jury's verdict that

the Board was correct in its finding of no worsening of industrial injury-caused disability between October 19, 2000 and July 11, 2003?

III. COUNTER STATEMENT OF THE CASE

A. Summary Of Testimony Presented To The Board Regarding Shafer's Allegations Of Worsening Of Her Physical Disability

Kelly Shafer (Shafer) was born with a congenital defect in her lower spine called spondylosis. Tr. 4/14/04 at 66; Tr. 4/16/04 at 16, 30-31, 33; Tr. 4/19/04 at 12-13, 19, 23, 32.¹ This is a bone defect where the vertebrae at L5 did not fully close, or there was a congenital weakness in the bone which could either spontaneously or traumatically burst open. Tr. 4/16/04 at 30-31; Tr. 4/29/04 at 12-13. Before her industrial injury on or about October 15, 1998², Shafer had no back problems.

On October 15, 1998 Shafer was working as a waitress at AMF Sports World. Tr. 4/14/04 at 8. She injured her low back that day while maneuvering a keg of beer. Tr. 4/14/04 at 8, 10. Shafer sought medical treatment sometime in March 1999 because her back pain had not subsided. About the same time she filed a claim for workers' compensation benefits. Tr. 4/14/04 at 9.

¹ Documents in the Certified Appeal Board Record (CABR) are not separately numbered in the Clerk's Papers (CP). The Department will refer to Board hearing and deposition transcripts (Tr.) by date and page on which the testimony appears. The Department will refer to Board documents by reference to CABR and the number stamped on the documents by the Board. Report of Proceeding is designated RP.

² There are references in the record to an injury date of October 15, or October 18, 1998. The Department agrees with the appellant that this discrepancy is not relevant to the issues raised in this appeal.

Dr. Elizabeth Cook a licensed physician in Washington who specializes in physical and rehabilitative medicine of the spine eventually began treating Ms. Shafer in June 1999. Tr. 4/14/04 at 62, 64. Dr. Cook testified that she offered Shafer conservative care and saw Shafer on June 17, 1999; October 14, 1999; October 28, 1999; November 4, 1999; February 28, 2000; June 8, 2000; and October 28, 2000.³ Tr. 4/14/04 at 67, 74. Dr. Cook then said she did not examine Shafer again until March 3, 2003. *Id.* Tr. 4/14/04 at 67.

In addition to the treatment she received from Dr. Cook, Shafer attended three Independent Medical Examinations (IME) with Dr. Kenneth Briggs, M.D., a board certified orthopedic surgeon in December 1999, again in July 2000 (shortly before the Department's initial closure of her claim), and again in April 2003 (shortly before the Department's denial of reopening of her claim). Tr. 4/29/04 at 6,

³ Dr. Cook never indicated what her examination of October 28, 2000 revealed. However, in his March 24, 2004 examination, Dr. Schuster reviewed her note of that exam and testified that on October 28, 2000, Dr. Cook conducted an examination at the request of DSHS. Tr. 4/16/04 at 22. She diagnosed traumatic spondylitic defects at L5 on x-ray; recorded that Shafer perceived tenderness over the spine with decreased range of motion. Dr. Schuster went on to report that in her note Dr. Cook indicated that Shafer was capable of working at the sedentary level with a 10 pound lifting restriction and that Shafer could be expected to frequently lift objects like documents and small tools on a frequent basis. Tr. 4/16/04 at 22. Dr. Schuster also testified that he observed a note in Cook's treatment records indicating on September 20, 2000, she indicated that Shafer's L&I claim had closed but that Cook thought she should have an EMG and additional x-rays. *Id.*

9-23.⁴ **The Department presented the testimony of Dr. Briggs at the Board. He is the only orthopedic surgeon to testify in this case. Tr. 4/14/04 at 61; Tr. 4/16/04 at 3, 5; Tr. 4/29/04 at 3-5.**

Dr. Cook and Dr. Briggs recorded that Shafer first presented with low back pain that radiated predominately into the right leg. Tr. 4/14/04 at 65; Tr. 4/29/04 at 11. **Following Dr. Briggs' December 1999 examination, he determined that Shafer had not reached a fixed and stable state. He diagnosed a lumbosacral strain and pre-existing spondylosis without spondylolisthesis at L5 lit up by the October 1998 industrial injury. Tr. 4/29/04 at 19. Dr. Briggs thought that Shafer may require more treatment and recommended that Shafer return to Dr. Cook and undergo an epidural steroid injection to her back. Tr. 4/29/04 at 19.**

Dr. Cook performed what she called a therapeutic injection but it failed to provide Ms. Shafer any relief.⁵ Tr. 4/14/04 at 72, 74, 88. In fact, Dr Cook observed that her May 2000 epidural injection resulted in

⁴ For ease of reference in this aggravation case involving a garden-variety battle of the experts, the Department has bolded text that describes or relates to the testimony of Dr. Briggs.

⁵ Dr. Cook never indicated when that injection occurred, but while explaining the facts and data upon which he relied in forming his opinion following his July 25, 2000 independent examination, Dr. Briggs indicated that he reviewed treatment records of Dr. Cook that revealed that the injection had been done by the time his second examination. Tr. 4/29/04 at 20. Dr. Schuster, in his March 25, 2004 examination noted an epidural block was performed in Cook's treatment record dated May 17, 2000. Tr. 4/16/04 at 19-20.

increased symptoms on the right and a new complaint of numbness into Ms. Shafer's toes. Tr. 4/14/04 at 88; Tr. 4/29/04 at 19-20. After he reviewed the medical treatment records between his initial December 1999 and July 2000 examination, Dr. Briggs physically examined Shafer again on July 25, 2000. Tr. 4/29/04 at 20. Dr. Briggs observed that Shafer is 5 ft 3 in. tall and weighed 221 lbs. Shafer demonstrated normal motor strength, normal tone, bulk, and strength in the lower extremities with excellent effort. Tr. 4/29/04 at 21.

Dr. Briggs recorded Shafer's deep tendon reflexes at the knees and ankles were normal bilaterally; he noted a claimed diminished perception of feeling to sharp and cool over the dorsum of her right foot, dorsi-lateral calf and on the right leg into the distal lateral right thigh. Tr. 4/19/04 at 21-22. He noted normal perception of vibratory sensation. Tr. 4/29/04 at 22. His orthopedic examination revealed an individual who stood erect, with level shoulders and pelvis, leg lengths equal. *Id.*

Dr. Briggs noted diminished range of motion in the lumbar spine of 20 degrees flexion, 20 degrees extension and 30 degrees lateral bending to the left and right, all self-limited by Shafer's subjective reports of pain. *Id.* Dr. Briggs noted no atrophy in the left or right leg. *Id.* Shafer subjectively reported tenderness in her low back L5 to

the sacrum and also at the sacroiliac joints and at the sciatic notches. *Id.* In his July 2000 IME, Dr. Briggs confirmed his diagnoses from his December 1999 examination and concluded that Ms. Shafer's industrially related back condition had reached its maximum medical improvement, that further medical treatment was unlikely to improve her function further. Tr. 4/29/04 at 23.

Acting on Dr. Briggs' July 25, 2000 IME, the Department issued an order closing the claim with a permanent disability award of WAC 296-20-280, Category 2, for pre-existing impairments to Shafer's dorsolumbar/lumbosacral spine. CABR at 96.

Shafer or someone on her behalf appealed the Department's September 11, 2000 order closing her claim because the Department issued an order in which it reassumed jurisdiction and reconsidered its position. CABR at 97. Shafer later testified in this case that she agreed to "settle and close" her claim with the same WAC 296-20-280 Category 2 dorsolumbar/lumbosacral impairment award in the amount of \$6,773.22, because she and the Department agreed that the October 1998 industrial injury "lit up" her previously asymptomatic pre-existing spondylosis. CABR at 98; Tr. 4/14/04 at 13, 31; Tr. 4/14/04 at 54, Tr. 4/29/04 at 19, 23. The Department entered its final closure order on October 19, 2000; no protest or appeal was taken from that closing order. CABR at 98.

About the closure, Dr. Cook testified, "I knew that her claim had been closed. I do not remember at this time how I learned that it was closed as a Category 2 pre-existing. Given that I said Category 2 pre-existing that sounds like verbiage that likely came from an official record, not from the patient, but I don't know that though." Tr. 4/14/04 at 93. Dr. Cook testified that she physically examined Shafer on October 28, 2000, but Dr. Cook did not indicate the nature or extent of disability observed at that examination. Tr. Cook 4/14/04 at 67, footnote 3, supra.

After Dr. Cook examined Shafer in October 2000, Dr. Cook did not see Shafer again until March 3, 2003, when Ms. Shafer returned for an evaluation. Tr. 4/14/04 at 67. In connection with the March 3, 2003 examination, Shafer filed a re-opening application, reporting that the pain in her back had only gotten worse since November 2002, especially with regard to her left leg. Tr. 4/14/04 at 7-19, Tr. 4/14/04 at 74-75. By March 2003, Shafer complained of constant low back pain and pain in her left hip and leg. However Dr. Cook did not testify as to her findings from the March 2003 examination. *Id.*

Upon receipt of the re-opening application, the Department asked Dr. Briggs to examine Shafer a third time on April 15, 2003, and supplied him with Dr. Cook's March 3, 2003 examination report. Tr. 4/29/04 at 24. At the April 15, 2003 examination, Shafer

complained that she had never been completely pain free since she had last seen Dr. Briggs in July 2000. She reported pain in the same areas as she had described in 2000 except she was now complaining of left leg symptoms instead of the right. Tr. 4/29/04 at 24-25.

Dr. Briggs found Shafer was still 5 ft. 3 in. tall and weighed 221 lbs. Her lumbar range of motion was 40 degrees flexion, 15 degrees extension and 20 degrees lateral bending right and left, noting again that Shafer stopped moving with reports of pain. Tr. 4/29/04 at 25-26. Dr. Briggs noted that upon physical inspection Shafer's back seemed to show a slight curve to the right but concluded that this was not a significant finding and only suggested that her muscles were a little tight that day. Tr. 4/29/04 at 26, 50. Dr. Briggs further explained that the minor curvature of Shafer's spine slightly to the right was insignificant because Shafer only reported left-sided symptoms. *Id.*

Dr. Briggs noted no evidence of atrophy in Shafer's legs, Shafer demonstrated that she could walk on her heels and toes and did not walk with a limp before, during, or after the examination. Tr. 4/29/04 at 26-27, 29. He recorded that Shafer subjectively reported tenderness over the greater trochanter on the right, but Dr. Briggs did not detect any paraspinous asymmetry, guarding or spasm. Tr. 4/29/04 at 29. Shafer also reported tenderness when

Dr. Briggs palpated her lower lumbar spine. *Id.* Dr. Briggs' neurological assessment was that Shafer was normal with no perceived sensory deficit, or motor weakness observed or reported. *Id.*

Also at the April 15, 2003 examination, Dr. Briggs considered the November 2002 MRI results revealing an L4-5 mild disc bulge asymmetric to the right without significant spinal stenosis and mild bilateral foraminal stenosis. Tr. 4/29/04 at 40. He also noted the November 2002 MRI revealed the L5-S1 pars defect,⁶ further noted that the disc at that level appeared normal; there was a finding of moderate posterior facet arthoropathy, mild bilateral foraminal stenosis, and he opined that the arthritis in the joints of her low back were caused by the pars defect. Tr. 7/29/04 at 41. Concerning the MRI, Dr. Briggs testified that the MRI results did not reveal objective worsening. Tr. 4/29/04 at 47-48. The bulges revealed in the MRI did not interfere with any nerve roots. Tr. 4/29/04 at 48. The asymmetry of the bulge to the right should have produced right, not left sided symptoms had there been nerve root involvement. Tr. 4/29/04 at 48, 50, 53.

⁶ Both Dr. Cook and Dr. Briggs use the terms spondylosis and pars defect interchangeably. Tr. 4/14/04 at 66,-67; Tr. 4/16/04 at 41.

Dr. Briggs also explained that the variation in the recorded lumbar range of motion did not demonstrate an objective worsening. Tr. 4/29/04 at 46. He explained that in each plane, Shafer reported that she stopped her movement because of subjective perception of pain, which the doctor said revealed that she could mechanically flex, extend, and laterally side bend further, but because of perception of pain, she chose to go no farther. Tr. 4/29/04 at 43-46.

Following this examination, Dr. Briggs' confirmed his July 2000 diagnoses of lumbar/sacral strain, spondylosis without spondylolisthesis at L5, pre-existing, but lit up by the October 1998 industrial injury. In addition he diagnosed left tronchanteric tendonitis or bursitis but opined that this condition was not related to the industrial injury. Tr. 4/29/04 at 30, 49. Dr. Briggs reconfirmed that this condition was unrelated in a June 2003 addendum report in which he explained that, because there was no record that Shafer demonstrated an abnormal gait, the left hip problem was unrelated to her accepted low back condition. Tr. 4/29/04 at 32, 48-49.

As a result of his April 15, 2003 examination, Dr. Briggs opined that on a more probable than not basis, he could not find objective evidence that the conditions proximately caused by Shafer's industrial injury worsened since claim closure in October 2000.

Tr. 4/29/04 at 31. The Department denied reopening based on Dr. Briggs' report, with the final Department order to that end issued July 11, 2003. CABR at 33-34.

On March 24, 2004, a year after she had filed her reopening application, Shafer's attorney had her seen in another medical examination, this one by Dr. Gary Schuster, M.D., who is board certified in internal medicine and sports medicine. Tr. 4/16/04 at 5-6. Dr. Schuster did a thorough record review (Tr. 4/16/06 at 12-31) and conducted a physical exam, during which he reported diminished lumbar range of motion in all planes, abnormal straight leg signs, positive for back pain; and he recorded atrophy measuring a 1.8 centimeter decrease in the left calf compared to the right, some perceived sensory deficits in the left lower extremity and a mild general weakness in the left leg. Tr. 4/16/04 at 31-33. Based upon his record review and examination Dr. Schuster diagnosed a lumbar strain, secondary to her industrial injury; a "lit up" asymptomatic pre-existing spondylosis in the lumbar spine, left greater than right; lumbar radiculitis based upon subjective reports of constant mechanical low back pain. Tr. 4/16/06 at 33. According to Dr. Schuster, Shafer's conditions proximately caused by her October 1998 industrial injury objectively worsened between October 19, 2000 and July 11, 2003 and Shafer's permanent impairment is best described as a Category 4

WAC 296-20-280 based upon the atrophy he noted in her left calf and perceived sensory deficits when combined with the radiographic studies.

Tr. 4/16/04 at 36, 44-46.

B. Summary Of Testimony Presented To The Board Regarding Shafer's Allegation Of A Newly Arising Mental Condition

The Department will discuss the testimony of the two examining psychiatric experts *infra* Part VI.C.3. in its response to the mental condition aspect of Shafer's substantial evidence argument.

C. Facts And Procedural Background Pertaining To The Question That Shafer Poses Under RCW 51.52.050

On January 14, 2004, the IAJ entertained Shafer's oral challenge to the Board's authority, which the IAJ denied by interlocutory order, dated January 23, 2004. CABR at 53-54. In her interlocutory appeal of the IAJ's order, Shafer articulated her argument under RCW 51.52.050. CABR at 57-63. Shafer asserted that the Board lacked authority to hear her appeal to the July 11, 2003 Department order, claiming that the October 19, 2000 Department closing order never became final. *Id.* Shafer argued: 1) that because Dr. Cook could not locate a copy of the October 19, 2000 order in her treatment file, this was evidence that the Department never communicated the closing order to Dr. Cook⁷; 2) that such communication was required by RCW 51.52.050; and 3) that this

⁷ It appears from the face of the Department's order that a copy of the October 19, 2000 order that closed Shafer's claim was mailed to Dr. Cook. CABR at 98.

was a jurisdictional impediment that prevented the October 19 2000 closing order from becoming final, thus requiring that the matter be remanded to the Department for the Department to administer a still-open claim. CABR at 57-65. The Board denied Shafer's interlocutory appeal. CABR at 105.⁸

D. Facts And Procedural Background Pertaining To The Board's CR 35 Order

On July 11, 2003, the Department issued its final administrative order affirming its May 6, 2003 order denying reopening. CABR at 33-34. Shafer appealed this order to the Board. CABR at 35-36.

In her September 10, 2003 Notice of Appeal, Shafer vaguely alleged: "claimant appeals injuries consisting of low back and any other conditions relating to this industrial injury or occupational exposure and any other conditions aggravated by this industrial injury or occupational exposure." In her prayer for relief, she asked the Board "For acceptance of the denied conditions, reopening of the claim, . . ." among other things. CABR at 36.

At an unrecorded settlement conference in late November 2003, Shafer's counsel said he intended to seek acceptance of a mental condition

⁸ Shafer did not mention her RCW 51.52.050 theory in her petition for review to the Board (CABR at 2-16), and she never moved for relief on her theory in the superior court. Her criticisms of the IAJ's RCW 51.52.050 ruling were set forth in her superior court briefing, but there is nothing in the superior court record reflecting that she actually sought relief on this issue at superior court. *See* CP at 38-39; 59-62.

under this claim. CABR at 189-90 (Declaration of Lynda Smith wherein she recites, “4) I participated in a telephonic mediation conference presided over by Judge Sawtell on November 26, 2003. Also participating were David B. Vail representing Ms. Shafer and Lisa Balcom representing the Department. 5) During this conference, Judge Sawtell asked Mr. Vail what the claimant was seeking in this claim. 6) Mr. Vail indicated that the claim involved Ms. Shafer’s hip condition, depression, and lower back condition.” *Id.*

Later, at an unrecorded scheduling conference, Shafer’s representative again vocalized a mental health conditions issue. CABR at 51. William B. Lane, Shafer’s attorney, stated:

That the issue of psychiatric condition or mental health was raised in the scheduling conference for this matter held on January 4, 2004, as documented in the Interlocutory Order.”

CABR at 192.

The Interlocutory Order contains the following,

“The issue presented in this appeal is whether the claimant’s condition, proximately caused by the industrial injury of October 15, 1998, objectively worsened between October 19, 2000 and July 11, 2003, such that the claimant is entitled to time-loss compensation benefits... and an increased permanent partial disability award or further necessary and proper treatment. In addition, whether the claimant has trochanteric tendonitis of the left hip and mental health conditions that were proximately caused by the industrial injury of October 15, 1998, such that the

claimant is entitled to industrial insurance benefits for these conditions . . .

CABR at 51.

The Department's legal representative eventually learned that Shafer had not sought any mental health treatment until late September 2003. CABR at 136-46. Late September 2003 was apparently the first time she told any medical provider of mental health problems or her history of depression prior to her industrial injury, a history that apparently went as far back as her childhood. Tr. 4/14/04 at 32-36. Hart Tr. 4/16/04 at 10-12. Schneider Tr. 6/28/04 at 13-15, 19, 22, 23.⁹

The only available information concerning Shafer's mental health was contained in 11 pages of treatment records commencing September 26, 2003 through October 31, 2003. CABR at 136-46. These records include a series of counselor notes from therapy sessions and a four-page mental health examination report dated October 31, 2003, and authored by an advanced registered nurse practitioner named Alan Simons. CABR at 142- 46. In Nurse Simon's report he identifies a number of mental health diagnoses, but does not relate any of these

⁹ As Dr. Cook testified she gave no indication that she observed that Shafer presented any symptoms of a mental health condition, nor did she indicate that Shafer ever reported any symptoms consistent with a mental illness during the time that she treated Shafer in 1999, 2000, and 2003. Tr. 4/14/06 at 64-69, 74-78.

current conditions to Shafer's October 1998 industrial injury. CABR at 145-46.

On March 3, 2004, after she received a two-week extension of the Board's witness confirmation deadline, Shafer identified and confirmed to the Board and Department that she would call psychiatrist Dr. Hart to testify. CABR at 51, 107-24. Dr. Hart did not examine her until March 18, 2004. Tr. 4/16/04 at 6.

Within a week of the Department's receipt of Ms. Shafer's witness confirmation in which she disclosed her psychiatric expert, the Department formally moved for an order pursuant to Civil Rule 35 directing Ms. Shafer to submit to an independent mental evaluation by Dr. Richard Schneider, M.D., a licensed psychiatrist. CABR at 107-24. The examination was to take place on April 1, 2004, approximately two weeks prior to the hearing date. *Id.* Over Shafer's objection the Board granted the motion for a CR 35 examination and directed the Department to deliver a copy of the examination report to Shafer no later than April 6, 2004, one week prior to the hearing. CABR at 127-55. Shafer filed an interlocutory appeal, which the Board denied on March 30, 2004. CABR at 157-60, 195.

E. Board Decision

The Board hearings were held on April 14, 16, and 29, 2004. Tr. 4/14/04, Tr. 4/16/04, Tr. 4/29/04. On September 17, 2004, the IAJ issued a Proposed Decision and Order in which she affirmed the Department's July 11, 2003 order. CABR at 19-31. In rejecting Shafer's claim that her physical disability proximately caused by the industrial injury had worsened between October 19, 2000 and July 11, 2003, the IAJ found most persuasive the testimony of IME doctor, Dr. Briggs, the Board certified orthopedic surgeon who examined Shafer in 1999, 2000 and 2003. CABR at 25-26, 29. As to Shafer's claim of a newly arising mental health condition, the IAJ found that any mental health problems were entirely pre-existing:

Ms. Shafer has a long history of mental health issues that pre-existed her October 15, 1998 industrial injury. Ms. Shafer does not have any mental health conditions that are proximately caused or aggravated by the October 15, 1998 industrial injury.

CABR at 19-31, quoting finding of fact 4. (See also CP at 179-80, jury instruction 9 read to the jury.)

Shafer filed a petition for review to the 3-member Board. CABR at 2-15. In that petition, she did not challenge the proposed decision's first Conclusion of Law, which was that the Board had jurisdiction over the appeal. After vaguely, very briefly and very broadly stating that she was

challenging all adverse evidentiary and interlocutory rulings (CABR at 2), the remainder of her petition focused exclusively on the medical testimony and the question of whether she had proven worsening of her injury-caused disability. The Board denied Shafer's petition. CABR at 1.

F. The Superior Court Proceedings

Shafer appealed to superior court. CP at 1-3. She filed a motion in limine on the CR 35 issue, but she did not file any other motions. The record does not reflect the trial court's ruling on the motion in limine, but the parties agree the trial court rejected the motion. *See* Br. Appellant at 12, n. 5.

The case was tried to a jury, which heard the Board testimony, received instruction (including an agreed "attending physician" instruction 8 (CP at 178), heard arguments of counsel, and returned a verdict in favor of the Department. CP at 164-67. In the trial court's judgment on the verdict, the court, after considering the parties' briefs and hearing argument, assessed costs against Shafer in the amount of \$332, representing the transcription costs of Dr. Schneider's perpetuated testimony. CP 217-19; RP at 1-10. Shafer appealed to this Court. CP at 220-23.

IV. STANDARD OF REVIEW

In a case before the Board, the appealing party has the burden to present evidence against a contested order of the Department. RCW 51.52.050; *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966). The Board reviews a Department Order de novo, hearing testimony in the matter and entering Findings of Fact and Conclusions of Law. RCW 51.52.100; *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001).

The Superior Court reviews a Board decision de novo on the record developed at the Board. RCW 51.52.115. The Board's findings and conclusions are prima facie correct. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). The party attacking the Board's decision has the burden of overcoming that statutory presumption of correctness. RCW 51.52.115; *Ruse*, 138 Wn.2d at 5.

The rule of "liberal construction" does not apply to questions of fact. *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 13, 163 P.2d 142 (1945). Nor does the liberal construction rule dispense with the requirement that the plaintiff must produce competent evidence to prove the facts upon which he relies to substantiate entitlement to the benefits sought. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). That is, while the court should liberally interpret the

Industrial Insurance Act in favor of “those who come within its terms, persons who claim rights there under should be held to *strict proof* of their right to receive benefits under the act.” *Cyr v. Dep’t of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955) (emphasis added). RCW 51.12.010.

Review of the Superior Court decision is under the ordinary standard for civil cases. RCW 51.52.140, *Ruse*, 138 Wn.2d at 5. Issues of law are subject to de novo review under the error of law standard, while factual issues must be evaluated under the substantial evidence standard. *Littlejohn Const. Co., v. Dep’t of Labor & Indus.*, 74 Wn. App. 420, 873 P.2d 583 (1994). In a workers’ compensation appeal, the plaintiff bears the burden of producing “sufficient, substantial facts, as distinguished from a mere scintilla of evidence, to make a case for the trier of fact.” *Sayler v. Dep’t of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966); *Miller v. Dep’t of Labor & Indus.*, 1 Wn. App. 473, 478, 462 P.2d 558 (1969).

“Substantial evidence is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560-61, 897 P.2d 431 (1995) The substantial evidence standard of review mandates appellate deference to the decision by the trier of fact even if the appellate court would have

resolved a factual dispute in another way. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Under the “substantial evidence” standard, the appellate court must view the evidence presented to the jury in a light most favorable to the party who prevailed at superior court.

“The jury is the sole judge of the credibility and weight of the evidence.” *Arthurs v. Nat’l Postal Transp. Ass’n*, 49 Wn.2d 570, 577, 304 P.2d 685 (1956).¹⁰ The trier of fact “is not required to accept the opinion testimony of experts solely because of their special knowledge; rather, [it] decides an issue upon its own fair judgment, assisted by the testimony of experts.” *In re Pilant*, 42 Wn. App. 173, 178, 709 P.2d 1241 (1985). “A trial court has the right to reject expert testimony in whole or in part in accordance with its views as to the persuasive character of that evidence.” *Brewer v. Copeland*, 86 Wn.2d 58, 74, 542 P.2d 445 (1975).

¹⁰ “The fact finder is given wide latitude in the weight to give expert opinion.” *In re Sedlock*, 69 Wn. App. 484, 491, 849 P.2d 1243 (1993) (trier of fact may assess the value of an asset by adopting a “compromise” figure between the values testified to by two experts); *see also Reese v. Stroh*, 74 Wn. App. 550, 565, 874 P.2d 200 (1994) (jurors are perfectly capable of determining what weight to give this kind of expert testimony); *State v. Moon*, 45 Wn. App. 692, 698, 726 P.2d 1263 (1986), *review denied*, 108 Wn.2d 1029 (1987) (an expert cannot usurp the jury’s duty of deciding facts because the jury may always accept or reject the expert’s evidence or opinion, in whole or in part); Washington Pattern Instruction (WPI) 6.51 (“You are not bound, however, by [an expert] opinion.”); *State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843 (1998) (referring to WPI 6.51 as a “proper instruction”); CP at 177 (jury instruction 7, given in Shafer’s trial was virtually identical to WPI 6.51).

The trier of fact may even “refuse to accept uncontradicted expert testimony as long as it does not act in an arbitrary or capricious manner.” *State ex rel. Flieger v. Hendrickson*, 46 Wn. App. 184, 190, 730 P.2d 88 (1986) (trial court properly rejected unrefuted testimony of two experts on paternity, especially when the experts used a formula without meeting preliminary statistical tests). This is because even an unrefuted expert opinion is not *binding* on the jury. *Richey & Gilbert Co. v. N. W. Natural Gas Corp.*, 16 Wn.2d 631, 649-50, 134 P.2d 444 (1943). The fact finder may believe entirely the testimony of some of the witnesses and disbelieve entirely the testimony of others, as well as draw from the evidence any reasonable inference fairly deducible there from. *Dempsey v. Joe Pignataro Chevrolet, Inc.*, 22 Wn. App. 384, 390, 589 P.2d 1265 (1979).

A workers’ compensation claim, once closed, may be reopened, if a condition proximately caused by an industrial injury becomes aggravated after the claim closure. RCW 51.32.160; *Moses v. Dep’t of Labor & Indus.*, 44 Wn.2d 511, 517, 268 P.2d 665 (1954). The “burden is on the claimant to produce medical evidence, some of it based on objective findings, to prove that there has been an aggravation of the injury which resulted in increased disability.” *Moses*, 44 Wn.2d at 517.

Under the Industrial Insurance Act, the existence of a disability and its causal relationship to an industrial injury are generally questions of fact

for the jury. See *Collins v. Dep't of Labor & Indus.*, 50 Wn.2d 194, 195, 310 P.2d 232 (1957) (the extent of a disability is “purely a question of fact”); *Mathers v. Stephens*, 22 Wn.2d 364, 370, 156 P.2d 227 (1945) (“[U]sually the question of proximate cause is for the jury[.]”).

The courts review discovery rulings, including CR 35 rulings, for abuse of discretion. *In re Detention of Halgren* 124 Wn. App. 206, 221, 98 P.3d 1206 (2004), *affirmed*, 156 Wn.2d 795, 132 P.3d 714 (2006); *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991).

V. SUMMARY OF ARGUMENT

Shafer's **RCW 51.52.050** issue is without merit. Pursuant to RCW 51.52.050 the Legislature expressly requires the Department to serve a copy of its orders to the worker, beneficiary, employer, or “other person affected thereby.” Shafer claims that: (1) because her attending physician was a “person affected” by the closing order within the meaning of RCW 51.52.050 and therefore entitled to receive a copy of the order; and (2) because Dr. Cook could not find a copy of the October 19, 2000 closing order in the files of the doctor's office, the closing order was not effectively communicated to her physician, and thereby preventing the Department's closing order from becoming final. This is an issue of first impression and requires this Court to engage in statutory construction.

Here Shafer, the injured worker, admitted she received a copy of the October 19, 2000 closing order. She realized the order awarded her over \$6,000 in a permanent partial disability which she considered a "settlement" of her claim; she understood the order meant that her claim had been closed. While Dr. Cook was a "person affected" by the closing order within the meaning of RCW 51.52.050 and should have been served, Shafer's theory under that statute fails because: 1) under RCW 51.52.104, Shafer waived argument on the issue by not raising it in her petition for review that she submitted to the 3-member Board following receipt of the IAJ's proposed order and by not seeking and obtaining a ruling on her theory at superior court; 2) as has been held in decisions under the Administrative Procedures Act and Mandatory Arbitration Rules, the failure of the initial decision-maker, here the Department, to serve another party does not relieve a party served from meeting the time limit on appeal; and 3) Shafer does not have standing to assert any appeal rights that are vested in Dr. Cook.

As for the **CR 35 discovery issue**, this record does not show abuse of discretion on the part of the Board in granting the Department's CR 35 motion, or on the part of the trial court in denying the motion in limine. The record reveals that the Department demonstrated good cause to request the Board-ordered mental examination. Shafer did not allege a

mental health condition until after the Department issued its final order, and until after she filed her appeal with the Board. Contrary to Shafer's argument, a mere allegation that a party's mental condition is at issue, is not sufficient to require a motion for, or to justify the granting of, a CR 35 examination. It was not until Shafer actually confirmed her psychiatric expert for hearing that she truly put her mental condition at issue.

The Department could not have obtained discovery of her mental health condition from any other source. While there were limited records of some mental health treatment in September and October 2003, none of these records made any reference to her industrial injury, nor did they suggest the requisite causal connection to her industrial injury. Therefore, Shafer's claim that the Department did not act with diligence because it did not ask for these records earlier is simply wrong.

Shafer is also wrong in her argument that the Board abused its discretion when it allowed the examination to be scheduled for a date close to the hearing date. Relying on CR 35(b) Shafer asserts that because the examiner's report could not be filed at least 30 days from the hearing date it was error to grant the motion. CR 35(b) vests the hearing tribunal (here, the Board) with discretion to adjust the time frames under the rule. The Board acted within its lawful discretion when it ordered (1) that the CR 35 examination to go forward on April 1, 2004, and (2) that the report

of the examination be delivered by April 6, 2004. Shafer can show no prejudice in this adjustment of the time frame under CR 35(b).

Because the Board did not abuse its discretion when it granted the Department's motion, it logically follows that the trial court did not abuse its discretion when it denied Shafer's motion to strike Dr. Schneider's testimony from the record. And, it also follows that the trial court did not err when it assessed Shafer with the Department's cost to transcribe Dr. Schneider's testimony.

Furthermore, under RCW 51.52.104, Shafer waived argument on the CR 35 discovery issue by not raising it in the petition for review that she submitted to the 3-member Board following receipt of the IAJ's proposed order.

Finally, **on the substantial evidence issue**, Shafer invites this Court to focus its attention on the wrong tribunal - - to reach back to the *Board's* fact finding - - asserting that the Board's IAJ failed to follow the attending physician rule when the IAJ weighed the testimony. While there is no merit to this attack on the IAJ's fact-finding, this focus on the IAJ is contrary to well established law governing the standard of review that this Court exercises - - the sole question in this regard is whether substantial evidence supports *the jury's verdict*.

The jury considered all the evidence admitted in the Board proceedings. The trial court properly instructed the jury on the law, including the attending physician rule¹¹. The jury conducted its own independent review of the evidence and concluded that the Board's findings and decision were correct. Therefore, because there is substantial evidence that supports the jury's verdict, the judgment and order of the superior court must be affirmed.

VI. ARGUMENT

A. It Does Not Matter Whether Dr. Cook Contemporaneously Received A Copy Of The Department's October 19, 2000 Closing Order

1. Overview Of Department's Response To Shafer's RCW 51.52.050 Argument

RCW 51.52.050 provides in part:

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...

RCW 51.52.050 (Emphasis added).

The Department agrees with Shafer that her attending physician was and is a "person affected" by the Department's October 19, 2000 closing order. The Department disagrees, however, with Shafer's attempt

¹¹ The "attending physician rule" as will be explained later Part VI.C.2., simply states that the trier of fact must give "special consideration to the opinions of the attending physician." *See generally, Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964).

to employ RCW 51.52.050 to attack the finality of the Department's October 19, 2000 closing order (she apparently hopes to moot the aggravation issue in this case, and to require remand of this matter to the Department to treat her claim as if it had never been closed).

Her RCW 51.52.050 argument must be rejected for at least four reasons: 1) she waived the argument by not raising it in her petition for review at the Board; 2) she failed to preserve the argument at superior court when she did not move for or obtain a ruling or findings on the issue; 3) RCW 51.52.050's requirement for service on other parties and persons is not jurisdictional; and 4) she had no standing to raise this issue involving purported appeal rights of Dr. Cook.

2. Shafer Waived Her RCW 51.52.050 Argument At The Board.

Shafer waived argument on her RCW 51.52.050 theory when she failed to raise the issue in her petition for review at the Board. *See* CABR at 2-16. RCW 51.52.104 requires that, in order to preserve an issue for court appeal, a party expressly raise that issue in a petition seeking review of an IAJ's adverse proposed decision. *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 711, n. 5, 57 P.3d 248 (2002) (failure to raise a theory in one's petition to the Board waives argument on that theory on subsequent judicial appeal); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422,

832 P.2d 489 (1992) (same); *Rose v. Dep't of Labor & Indus.*, 57 Wn. App. 751, 756, 790 P.2d 201 (1990) (same); *Garrett Freightlines v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 346, 725 P.2d 463 (1986) (same); *Homemakers Upjohn v. Russell*, 33 Wn. App. 777, 782-83, 658 P.2d 27 (1983) (same).

There is not one word in Shafer's petition for Board review expressly addressing her theory under RCW 51.52.050. CABR at 2. Based on waiver, this Court should not address her theory.

3. Shafer Did Not Preserve Her RCW 51.52.050 Issue At Superior Court

Even assuming arguendo that Shafer can be deemed to have raised the RCW 51.52.050 argument in her petition to the Board, she failed to preserve the argument at superior court. While Shafer discussed her RCW 51.52.050 theory in her briefing to the superior court, she did not move for relief on that theory, nor did she attempt to obtain findings or a ruling on the theory. *See generally* RAP 2.5(a) (claim of error not raised at superior court); *Postema v. Postema Enter., Inc.*, 118 Wn. App. 185, 193, 72 P.3d 1122 (2003) (error not adequately raised at superior court); *Cosmopolitan Engineering Group, Inc. v. Ondeo*, 128 Wn. App. 885, 894, 117 P.3d 1147 (2005) (raising an issue in a footnote only in a brief did not adequately preserve the issue under RAP 2.5(a)); *State v. Ward*, 125 Wn.

App. 138, 145, 104 P.3d 61 (2005) (absence of a finding on an issue is construed as a finding against the party with the burden of proof on the issue).

Thus, even assuming Shafer did not waive at the Board, she thus failed to preserve the issue when she let it go at superior court.

4. RCW 51.52.050's Requirements For Service Of Department Orders On Other Persons Are Not Jurisdictional And Do Not Relieve Aggrieved Injured Workers From Protesting Or Appealing Adverse Department Orders Within 60 Days Of Receipt Of The Orders

In a worker benefits case, the failure of the Department to serve an employer or "other person affected" is not a jurisdictional defect and does not relieve an injured worker of the requirement under RCW 51.52.050 for filing a protest or appeal within 60 days of the worker's receipt of the Department order. On this first-impression statutory construction issue, this Court should follow the logic of the decisions of this Court in previous analogous circumstances in cases presented under the Administrative Procedures Act (APA) and under the Mandatory Arbitration Rules (MAR). *See Wells v. Western Washington Growth Management Hgs. Bd.*, 100 Wn. App. 657, 677-79, 997 P.2d 405 (2000) (APA); *Simmerly v. McKee*, 120 Wn. App. 217, 221-23 (84 P.3d 919 (2004) (MAR).

In *Wells* and *McKee*, this Court held under the APA and MAR, respectively, that once a particular party has received notice of the initial decision-maker's order under the APA and MAR, that party must appeal within the time limits specified in those schemes, and, as a matter of law, that person is not prejudiced by requiring that the person meet the time limit for seeking review, regardless of whether other persons or parties have also been served. *Wells*, 100 Wn. App. at 677-79; *Simmerly*, 120 Wn. App. at 221-23.

Two related considerations of this Court in each of those cases were whether, in the event of an appeal by a served party, other parties would be prejudiced and whether piecemeal litigation would be fostered by allowing the appeal to go forward. *Wells*, 100 Wn. App. at 678-79; *Simmerly*, 120 Wn. App. at 223. In each case, this Court noted that there was a mechanism in the procedural scheme before it for notice of the appeal to the other parties. *Wells*, 100 Wn. App. at 678-79; *Simmerly*, 120 Wn. App. at 223. The same situation holds here.

Assuming as we do that an attending physician is "another person affected" by a closing order, RCW 51.52.060(2) requires that the Board notify "other interested parties" of the appeal, and the statute gives those parties the opportunity to file a cross appeal. Shafer cannot persuasively argue that a "person affected" by a Department order under

RCW 51.52.050 is not an “other interested part[y]” under RCW 51.52.060(2). Thus, if Shafer had filed an appeal from the October 19, 2000 Department closing order, and if her attending physician was a “person affected” by the order, then the Board would have been required to inform attending physician Dr. Cook, as an “interested part[y],”¹² along with her employer, of the appeal. Dr. Cook and the employer would have had an opportunity to file a cross appeal.

In addition, this Court in *Simmerly* noted that its interpretation was consistent with the important purpose of the MAR procedural scheme to reduce delays in resolution of disputes. *Simmerly*, 120 Wn. App. at 223. The same holds under the Industrial Insurance Act. *See* RCW 51.04.010 (a purpose of the IIA is to replace the slow procedural scheme of common law tort actions); *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 312, 622 P.2d 271 (1992) (same, citing RCW 51.04.010).

For these reasons, even assuming that RCW 51.52.050 required that Dr. Cook be served with the Department’s October 19, 2000 closing order, and that she was not in fact served, this is not a jurisdictional defect

¹² This may or may not reflect the current practice of the Board, but the Board’s practices in this regard are not of record and, in any event, would present another case for another day. Also, in this same vein, Shafer did not make a record or argument regarding Board service, nor did Shafer at superior court notify the Board of any argument regarding Board service. *See generally* the waiver discussion *supra* Parts VI.A. 2, 3.

that prevented the closing order from becoming final as to Shafer, who admits that she was contemporaneously served with the closing order.

5. Shafer Has No Standing To Assert The Rights Of Dr. Cook

Finally, again assuming arguendo that the Department was required under RCW 51.52.050 to serve Dr. Cook with the closing order (and did not), any such assumed error was not an error as to Shafer. The injured worker lacks standing to assert the RCW 51.52.050 rights of Dr. Cook. *See generally Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 138-39, 744 P.2d 1032 (1987) (the doctrine of standing prohibits a litigant from raising another's legal rights).

B. Granting The CR 35 Motion And Permitting Dr. Schneider's Testimony To Be Read To The Jury Was Not An Abuse Of Discretion

1. Shafer Waived Her CR 35 Issue By Not Raising It In Her Petition To The Board For Review Of The IAJ's Proposed Decision

As the Department explained *supra* Part III.E., Shafer's petition seeking Board review of the IAJ's proposed decision did not mention "CR 35" or discuss the facts or controversy surrounding the special examination by Dr. Schneider. CABR at 2-16. Shafer asserts, however, that she satisfied the requirements of RCW 51.52.104, discussed *supra* Part IV.A.3.) merely by broadly asserting on page one of her petition that

she was challenging “all adverse evidentiary and interlocutory rulings” Br. Appellant at 29. She cites WAC 263-12-145(3), which purport to permit general objections to “evidentiary” rulings. CR 35, however, is a “discovery” rule, not an “evidentiary” rule, and therefore does not allow her to avoid the requirement under RCW 51.52.104 for detailed argument on any adverse non-evidentiary rulings.

2. The Board And Superior Court Did Not Abuse Their Discretion On The CR 35 Issue

As the Department explained *supra* Part III.D., after her appeal had been lodged with the Board, Shafer raised, for the first time, the possibility that she suffered from a recently disclosed mental health condition proximately caused by her 1998 industrial injury. In order to prepare its defense for this issue, it was essential that the Department have Shafer examined by a psychiatrist.

Therefore, the Department moved for an order directing her to submit to a mental examination pursuant to CR 35. In *Tiejten v. Department of Labor and Industries*, 13 Wn. App. 86, 89, 534 P.2d 151 (1975) the Court ruled that CR 35 examinations apply in workers’ compensation cases as in other civil matters. CR 35(a)(1) provides in part:

(1) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending

may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. 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 and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

One must meet the initial thresholds of "in controversy" and "good cause" before a hearing tribunal will entertain a motion for a mental examination under CR 35. Shafer argues that her representative's verbal allegation (the exact content of which is unknown) of a possible mental claim during an unreported Board mediation conference and again during an unreported Board scheduling conference put the Department on notice that Shafer intended to raise her mental condition as an issue in the claim. Br. Appellant at 29. However, putting the Department on notice of an intended issue is not the same as putting Shafer's mental condition in controversy.

The "in controversy" and "good cause" requirements cannot be met by mere conclusory allegations of the pleadings – nor by mere relevance to the case, but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular exam. *Jackson v. State*, 14 Wn. App. 939, 942, 546 P.2d 1230

(1976). In *Beagle v. Beagle*, 57 Wn. 2d 753, 756, 359 P.2d 808 (1961), the Supreme Court held that the trial court did not abuse its discretion in denying a request for a CR 35 examination where the moving party could point to nothing in the record other than a statement that the other party's mental condition would have a bearing on the issues raised in the case.

When Shafer's counsel orally indicated that a mental condition would be raised in the appeal both at the unrecorded mediation conference (CABR at 151-52) and at the unrecorded scheduling conference (CABR at 51), the Department had only informal notice that an issue likely would be raised; this was insufficient information to place Shafer's mental health condition was in controversy under CR 35.

Shafer also faults the Department for not obtaining information concerning Shafer's mental health condition "available from other sources." Br. Appellant at 29. The Department presumes that Shafer here is referring to the 11 pages of treatment records attached to Shafer's Board brief opposing the motion for examination. CABR at 136-46. The first obvious flaw in Shafer's reasoning is there is no requirement that the Department exhaust other available sources of information in order to meet the "good cause" and "in controversy" thresholds to get an order directing her to submit to the examination. Also, the information (*see* CABR at 136-46) about her mental health condition did not address any

causal connection to Shafer's October 1998 industrial injury, and therefore what little information might have been available was incomplete and still would not have placed Shafer's mental health condition in controversy in a workers' compensation appeal to reopen her claim - - the causation element - - an essential requirement necessary for her to meet her burden of proof, was still missing.

It was only as of March 3, 2004 - - when Shafer confirmed an actual psychiatric expert would testify - - that her mental health, and its relationship to the industrial injury, was in controversy. The Department could then, for the first time, clearly demonstrate good cause.

Shafer also challenges the timing of the order and argues that the Board abused its discretion in granting the Department's order because the report of the examiner would be delivered less than 30 days before the hearing was scheduled to begin. Br. Appellant at 30. Here the plain and unambiguous language of the rule reveals how fatally flawed Shafer's argument is. CR 35(b) provides:

(b) Report of Examining Physician or Psychologist. The party causing the examination to be made shall deliver to the party or person examined a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. The report shall be delivered within

45 days of the examination and in no event less than 30 days prior to trial. These deadlines may be altered by agreement of the parties or by order of the court.

Emphasis added.

Finally, because the Board did not abuse its discretion when it granted the Department's CR 35 motion and ordered Shafer to attend the April 1, 2004 mental examination, the trial court likewise did not abuse its discretion when it denied Shafer's motion in limine to strike Dr. Schneider's testimony from the record. There has been no showing of abuse here. Therefore the trial court's evidentiary ruling must be affirmed. It necessarily follows that the court properly assessed the transcription costs against Shafer.

C. Substantial Evidence Supports The Jury's Verdict

1. Overview Of Substantial Evidence Analysis

As the Department noted *supra* Parts IV and V, in an appeal from a jury verdict upon which judgment is entered, the appellate court does not review the Board's decision or engage in a de novo review of the evidence, but merely reviews the evidence to ensure there is substantial evidence to support the verdict.

Shafer takes issue with the Board IAJ's analysis and fact-finding, claiming the IAJ did not give sufficient weight to the testimony of the attending physician. Br. Appellant at 15-21. Shafer invites this court to

depart from the long established standard of review, ignore the jury's verdict and reach back to the Board's fact finding. This Court must decline Shafer's invitation.

At superior court the review is de novo based solely on the evidence contained in the certified appeal board record. *Grimes*, 78 Wn App. at 560. The jury hears all the same evidence that the Board considered. Although the Board's findings are presumed to be correct, the jury is not bound to accept them if, upon review of the evidence contained in the record, the jury finds by a preponderance of the evidence that the findings are incorrect. In addition, the trial court instructed the jury on the law related to expert witnesses and in particular the attending physician rule. CP at 177-78. This Court does not reach behind the jury's verdict to review the Board's analysis of the evidence or the Board's findings.

Instead this Court must review the record to determine if substantial evidence supports the jury's verdict. The jury entertained and weighed all evidence contained in the record and applied the law as instructed by the court. The record contains substantial evidence to support the verdict and Shafer failed to show otherwise. Therefore the Judgment of the Superior Court must be affirmed.

2. Substantial Evidence Relating To Shafer's Injury-Caused Physical Disability Supports The Jury's Verdict Of No Worsening

Shafer, her boyfriend, and her mother all testified about Shafer's personal struggles and the impact her October 1998 industrial injury had on her life. But Shafer's lay testimony alone cannot meet her burden of proof to establish that her condition worsened between October 19, 2000 and July 11, 2003.

Shafer presented the testimony of Dr. Cook, but her testimony did not include much in the way of objective findings that the jury could use to compare Ms. Shafer's condition in 2000 to Shafer's condition in 2003. Many of Dr. Cook's opinions were based on guesses, estimates, and assumptions. For example Dr. Cook testified that Shafer's condition worsened because of the atrophy that Schuster recorded in March 2004 in her left leg, despite the fact that Dr. Cook herself never observed any atrophy. Tr. 4/14/04 84-86, 94-96. Dr. Cook assumed that the left trochanteric bursitis was related to an awkward gait, but did not remember or record having ever observed Shafer limp or walk awkwardly. Tr. 4/14/06 at 65, 67, 73, 75, 82-83, 91. Dr. Cook guessed that an EMG would be positive despite the lack of nerve root irritation revealed in the 1999 CT scan and 2002 MRI. Tr. 4/14/04 at 95-96.

Dr. Briggs, who examined Shafer in 1999, 2000 and 2003¹³ (and whose testimony is described in greater detail *supra* Part III.A), provided the most complete evidence of Shafer's objective findings and subjective complaints, both in the report that led to the closing of her claim in 2000 and in the report that led to the denial of her application to reopen her claim in 2003. Dr. Briggs testified about the measurements he took, and the examination findings he made. He explained what represented objective findings and what constituted mere subjective complaints. Dr. Briggs had three opportunities to examine Shafer, near the beginning of her claim (1999), near the first claim closure (2000), and a few weeks after she filed her application to reopen (2003).

Dr. Briggs was the only orthopedic surgeon to testify. He is board certified by his peers in this specialty. It would have been reasonable for the jury to consider that fact, as well as the timing and thoroughness of his examinations, together with the clarity and persuasiveness of his testimony, among other things, in weighing the evidence, and in rejecting Shafer's medical evidence relating to her back and hip conditions.

¹³ Dr. Schuster, on the other hand, examined Shafer only one time, at her attorney's request, in 2004 nearly a year after the reopening application was submitted. Tr. 4/16/04 at 6-7. He was the only physician to record atrophy in Shafer's left lower extremity; he was the only physician to record a minor muscle weakness. These were findings that not even Dr. Cook was able to confirm from her examinations. Tr. 4/14/06 at 94, 96; Tr. 4/16/04 at 31.

Shafer appears to argue that the court-made “attending physician” rule requires that, even if the jury found Dr. Briggs’ testimony to be more persuasive, the jury should have ignored his testimony. Br. Appellant at 1, 13, 15-21, 32. Nothing in the case law under the “attending physician” rule, however, requires that result.

The “attending physician” rule in workers’ compensation cases is a long-standing principle. The fact finder must give “special consideration” to the opinions offered by an attending physician who may have enjoyed a long-lasting therapeutic relationship with the injured worker. *Hamilton v. Dep’t of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988); *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 981 P.2d 878 (1999).

The attending physician rule does not require that the fact finder believe the testimony of the treating physician; “. . . the trier of facts determines whom it will believe.” *Hamilton*, 111 Wn.2d at 572.

What the Supreme Court meant by “special consideration” has never been fully revealed. In *McClelland v. ITT Rayonier, Inc.*, the Court of Appeals pondered,

We are unsure what the Supreme Court means by “special consideration.” *Hamilton* explained that this does not require a jury to give more weight or credibility to the attending physician’s testimony, but to give it careful thought. We assume that the jury gives careful thought to every witness’s testimony.

McClelland v. IIT Rayonier, Inc., 65 Wn. App. 386, 394 n. 1, 939 P.2d 1138 (1992).

Eventually the rule became a Washington Pattern Instruction, WPI 155.13.01; an agreed instruction given to the *Shafer* jury:

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.

CP at 178, jury instruction 8.

Shafer's jury had substantial evidence to support its verdict. The jury was not required under the attending physician rule to afford Dr. Cook's testimony greater credibility or weight. Instead, after the jury considered and weighed all the evidence before it, in the end it concurred with the Board's findings and returned a verdict in favor of the Department. Shafer posits no credible or persuasive reason for this Court to disturb the jury's verdict.

3. Substantial Evidence Relating To Shafer's Mental Health Condition Supports The Jury's Verdict Of No Worsening Proximately Caused By The Industrial Injury

Psychiatrist Dr. Hart conducted an abbreviated interview of Shafer, leaving her to take standardized, computer-scored assessments and inventories upon which to base his opinions. Tr. 4/16/04 at 19-23.

Dr. Hart did not elicit much information about her mental health from Ms. Shafer but instead relied heavily on Shafer's responses to the inventories. Tr. 4/16/04 at 22-23. Dr. Hart asserted that he was able to relate Shafer's depressive disorder to her industrial injury because her declining mood could readily be explained in the context of increasing pain and loss of financial support. Tr. 4/16/04 at 31, 36-38. The historical information Dr. Hart obtained from Shafer appeared less detailed and there were gaps in the history, leaving Dr. Hart with the impression (or assumption) that her depressive disorder reappeared right after the industrial injury. Tr. 4/16/04 at 26. Hart either ignored or assigned little significance to recent relationship problems Shafer reported with her mother, sister, and live-in boyfriend. Tr. 4/16/04 at 15, 19, 27, 43-48.

Dr. Hart diagnosed a depressive disorder, recurrent, with the most recent episode related to her industrial injury. Tr. 4/16/04 at 26. Dr. Hart also diagnosed an anxiety disorder aggravated by her industrial injury, this diagnosis was based on his observation that she appeared anxious to me, also somewhat somber." Tr. 4/16/04 at 24.

Dr. Schneider, on the other hand, devoted nearly an hour-and-one-half interviewing Shafer. Tr. 4/14/04 at 25; Tr. 6/28/04 at 12. He learned about her past history of emotional problems, he found a positive family history for mental health issues. Tr. 6/28/04 at 13-16, 21-22. He learned

as much as he could about the pre-injury depressive episode she experienced in 1997. *Id.* at 13-16.

Unlike the limited history Dr. Hart recorded, Dr. Schneider learned that Shafer's recent bout with the symptoms of depression involved relationship problems with her mother, sister, and boyfriend. Schneider Tr. 6/28/06 at 22. Dr. Schneider inquired of Shafer and assessed whether she manifested the classical signs of depressive disorders. *Id.* at 17. For example, Shafer reported that she enjoyed eating; she said she possessed the ability to experience pleasure "as good as ever," and listed things that gave her pleasure. *Id.* at 17. She told Dr. Schneider that she had no problems with energy and motivation, indicating that only pain and age kept her from having as much energy as she ever had. Shafer told Dr. Schneider that she had no problems sleeping once she found a physically comfortable position. *Id.* Shafer denied suicidal ideation since 1997 and reported no feelings of guilt. *Id.* Shafer also denied feelings of hopelessness or despair. *Id.* at 18. These revelations led Dr. Schneider to

conclude that Shafer presented no indicators of a depressive disorder except a sad or low mood.¹⁴ *Id.*

Dr. Schneider reviewed the criteria for post-traumatic stress disorder and determined Shafer did not meet those criteria because Shafer denied having nightmares, flashbacks, hypervigilance.¹⁵ *Id.* Like Dr. Hart, Dr. Schneider determined that Shafer's mental status was normal. Dr. Schneider diagnosed a dysthymic disorder of long duration that was not related to her industrial injury, remarking, she is one of the "sad people." *Id.* at 28.

In sum, the jury had before it substantial evidence on the mental health question that supports its verdict.

¹⁴ Under the diagnostic criteria for a major depressive disorder, the *Diagnostic and Statistical Manual of Mental Disorders IV* at 327 (4th ed. 1994) lists the diagnostic criteria for a major depressive disorder. The patient must demonstrate or present five of nine behavioral or mood markers to support a diagnosis of a major depressive disorder. The nine markers are (1) depressed mood most of the day nearly every day... (2) markedly diminished interest or pleasure in all, or almost all activities most of the day...(3) significant weight loss ...or weight gain..., (4) insomnia or hypersomnia nearly every day, (5) psychomotor agitation or retardation nearly every day...(6) fatigue or loss of energy nearly every day (7) feelings of worthlessness, or excessive or inappropriate guilt... nearly every day...(8) diminished ability to think or concentrate, or indecisiveness, nearly every day...(9) recurrent thoughts of death...recurrent suicidal ideation.... A complete copy of the criteria can be found in Appendix 1 and formed the basis for Dr. Schneider's diagnostic opinions. TR 6/29/04 at 16-18, 27-30.

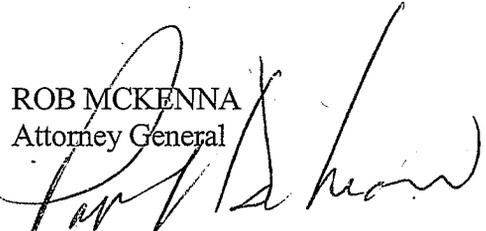
¹⁵ The diagnostic criteria for Post-Traumatic Stress Disorder under the *Diagnostic and Statistical Manual of Mental Disorders IV* are located in Appendix 2.

VII. CONCLUSION

Accordingly, the Department requests that this Court affirm the judgment on jury verdict below

RESPECTFULLY SUBMITTED this 2nd day of November, 2006.

ROB MCKENNA
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APPENDIX 1

■ Criteria for Major Depressive Episode

- A. Five (or more) of the following symptoms have been present during the same 2-week period and represent a change from previous functioning; at least one of the symptoms is either (1) depressed mood or (2) loss of interest or pleasure.

Note: Do not include symptoms that are clearly due to a general medical condition, or mood-incongruent delusions or hallucinations.

- (1) depressed mood most of the day, nearly every day, as indicated by either subjective report (e.g., feels sad or empty) or observation made by others (e.g., appears tearful). **Note:** In children and adolescents, can be irritable mood.
 - (2) markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day (as indicated by either subjective account or observation made by others)
 - (3) significant weight loss when not dieting or weight gain (e.g., a change of more than 5% of body weight in a month), or decrease or increase in appetite nearly every day. **Note:** In children, consider failure to make expected weight gains.
 - (4) insomnia or hypersomnia nearly every day
 - (5) psychomotor agitation or retardation nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed down)
 - (6) fatigue or loss of energy nearly every day
 - (7) feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day (not merely self-reproach or guilt about being sick)
 - (8) diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others)
 - (9) recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide
- B. The symptoms do not meet criteria for a Mixed Episode (see p. 335).
- C. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.
- D. The symptoms are not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition (e.g., hypothyroidism).
- E. The symptoms are not better accounted for by Bereavement, i.e., after the loss of a loved one, the symptoms persist for longer than 2 months or are characterized by marked functional impairment, morbid preoccupation with worthlessness, suicidal ideation, psychotic symptoms, or psychomotor retardation.

APPENDIX 2

■ **Diagnostic criteria for 309.81 Posttraumatic
Stress Disorder**

A. The person has been exposed to a traumatic event in which both of the following were present:

- (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others

(continued)

□ **Diagnostic criteria for 309.81 Posttraumatic Stress Disorder** (*continued*)

- (2) the person's response involved intense fear, helplessness, or horror.
Note: In children, this may be expressed instead by disorganized or agitated behavior
- B. The traumatic event is persistently reexperienced in one (or more) of the following ways:
- (1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. **Note:** In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.
 - (2) recurrent distressing dreams of the event. **Note:** In children, there may be frightening dreams without recognizable content.
 - (3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). **Note:** In young children, trauma-specific reenactment may occur.
 - (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
 - (5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
- C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
- (1) efforts to avoid thoughts, feelings, or conversations associated with the trauma
 - (2) efforts to avoid activities, places, or people that arouse recollections of the trauma
 - (3) inability to recall an important aspect of the trauma
 - (4) markedly diminished interest or participation in significant activities
 - (5) feeling of detachment or estrangement from others
 - (6) restricted range of affect (e.g., unable to have loving feelings)
 - (7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)
- D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:
- (1) difficulty falling or staying asleep
 - (2) irritability or outbursts of anger
 - (3) difficulty concentrating
 - (4) hypervigilance
 - (5) exaggerated startle response

(*continued*)

Diagnostic criteria for 309.81 Posttraumatic Stress Disorder (*continued*)

- E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month.
- F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:

Acute: if duration of symptoms is less than 3 months

Chronic: if duration of symptoms is 3 months or more

Specify if:

With Delayed Onset: if onset of symptoms is at least 6 months after the stressor

NO. 58454-5

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

KELLY L. SHAFER,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

DECLARATION OF
SERVICE

DATED at Tacoma, Washington:

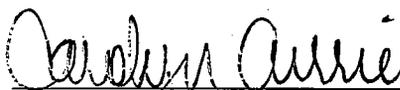
The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Brief of Respondent to counsel for all parties on the record to the addressed as follows:

Philip A. Talmadge
Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, WA 98188-4630

and placed the original Brief of Respondent with ABC Legal Messenger for service to:

Clerk of the Court
Court Of Appeals Division I
One Union Square
600 University Street
Seattle, WA 98101

DATED this 2nd day of November 2006.



Carolyn Currie
Legal Assistant 3

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