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64804-7

No. 64804-7-I

IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CHRISTIANA NJOKU,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT NO. 1,

Respondent.

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APPEAL FROM THE SUPERIOR COURT OF KING COUNTY,  
THE HONORABLE STEVEN C. GONZALEZ, PRESIDING

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BRIEF OF APPELLANT

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### **III. ASSIGNMENTS OF ERROR**

1. The trial court erred in giving Instruction 9.
2. The trial court erred in giving Instruction 10.
3. The trial court erred in declining to give appellant's Proposed Instruction 13.
4. The trial court erred in declining to give appellant's proposed instruction proof of a psychiatric injury.
5. The trial court erred in the verdict.
6. The trial court erred in the agreed judgment and order.

#### **IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. In a claim for Post Traumatic Stress Disorder (PTSD) arising from a traumatic work event, did the trial court err in instructing the jury that a psychiatric condition caused by objective conditions of work events may constitute a compensable claim, whereas a psychiatric condition caused by a worker's subjective perceptions of work events was noncompensable? (Pertains to Assignments of Error 1, 2).

2. Is it improper for the trial court to instruct the jury on the objective-subjective distinction in a case involving psychiatric disability? (Pertains to Assignments of Error 1, 2).

3. Was appellant entitled to an instruction that special consideration should be given to testimony by an attending physician? (Pertains to Assignment of Error 3.)

4. Was appellant entitled to an instruction regarding proof of a psychiatric injury? (Pertains to Assignment of Error 4).

5. Do errors by the trial court in instructing the jury require reversal of the verdict? (Pertains to Assignment of Error 5).

6. Do errors by the trial court in instructing the jury require reversal of the agreed judgment and order? (Pertains to Assignment of Error 6).

## **V. STATEMENT OF THE CASE**

### **A. FACTS**

On November 21, 2001, Appellant, Christiana Njoku, sustained an industrial injury to her neck when, during the course of her employment as a teacher with the respondent, Seattle School Dist No. 1, she twisted her neck in response to a student. CABR 73. Also, during the course of her employment, Ms. Njoku also sustained a contusion of her left eye and a contusion of her left ear. CABR 73. Ms. Njoku was then 43 years old. RP 011807 p. 5 l. 26.

At the time of her injury, Ms. Njoku was working as a special education teacher at Garfield High School. RP 011807 p. 9 l. 23-25. Ms. Njoku began her assignment as a special education teacher in September, 2001, but she had been working for respondent since 1997. RP 011807 p. 9 l. 6-8.

Ms. Njoku studied to be an educator. Ms. Njoku graduated from the University of Nigeria with a degree in education, and a specialty in teaching English. RP 011807 p. 6 l. 2-4. Ms. Njoku also holds a masters degree in Christian education from an international seminary in Florida. RP 011807 p. 6 l. 4-11. Ms. Njoku graduated from City University with an endorsement for teaching special education, and she graduated from the Montessori teacher preparation program. RP 011807 p. 6 l. 13-16.

Ms. Njoku came to Seattle School Dist No. 1 with years of experience in teaching. From 1986 to 1991, Ms. Njoku was a senior language arts teacher and co-principal of a bible college in Port Harcourt, Nigeria. RP 011807 p. 7 l. 6-18. From 1992 to 1994, Ms. Njoku was a professor in a bible university in Lagos, Nigeria. RP 011807 p. 7 l. 19-25. Ms. Njoku emigrated to the United States in 1994. RP 011807 p. 7 l. 35. Ms. Njoku taught for one year at the National Bible College, and then moved to Seattle in December, 1995. RP 011807 p. 8 l. 2-11. Ms. Njoku taught at the Covington KinderCare in 1996. RP 011807 p. 8 l. 11-20. Upon completing her teaching credential, Ms. Njoku started teaching for Seattle School Dist. No. 1. RP 011807 p. 8 l. 21- p. 9 l. 7. At the time of her industrial injury in 2001, Ms. Njoku was enrolled in a principalship program at Seattle Pacific University. RP 011807 p. 6 l. 22-26.

Ms. Njoku's tenure as a special education teacher at Garfield High School in September, 2001 was marked by increasing violence. Ms. Njoku's class included students from 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, and 12<sup>th</sup> grades. RP 011807 p. 9 l. 20-22. Students began threatening Ms. Njoku. RP 011807 p. 9 l. 11-16. One student tried to break Ms. Njoku's head with a telephone. RP 011807 p.10 l. 7-15. Another student stated the he wanted to kill Ms. Njoku. RP 011807 p.10 l. 16-17. The student pulled cables off the wall, and removed a valve controlling gas to the heater in the

classroom, causing gas to escape. RP 011807 p.10 l. 18-23. A student attacked Ms. Njoku many times with books. RP 011807 p.10 l. 24-26. A student shot staples at Ms. Njoku. RP 011807 p.10 l. 26-p.11 l.1. A student threw something at Ms. Njoku, injuring her eye. RP 011807 p.11 l. 2-3. Ms. Njoku received puncture wound to her eye that caused a lot of pain in her head. RP 011807 p.11 l. 15-25. Ms Njoku received an injury to her ear in the same incident, causing her ear to swell. RP 011807 p.11 l. 26-p. 12 l. 2.

Ms. Njoku's violent encounters with her students were documented in correspondence that she sent to the administration at Garfield High School. RP 102507 p. 39 l. 16-p. 40 l. 24; p. 45 l. 12-17, p. 46 l. 6-17; p. 46 l. 18-20, p. 41 l. 7-20; p. 57 l. 25-p. 58 l. 15.

On November 29, 2001, in another incident with a student, Ms. Njoku twisted her neck, causing a sharp pain through her neck into her brain. RP 011807 p.11 l. 3-5. Ms. Njoku feared that her brain was injured. RP 011807 p.11 l. 4-5. Ms. Njoku felt very ill and went home early. RP 011807 p.11 l. 5-6. Ms. Njoku was very ill for the next few days. RP 011807 p.11 l. 6. Ms. Njoku could not move her head. RP 011807 p.11 l. 6-7. Ms Njoku started discharging blood through her nose and mouth. RP 011807 p.11 l. 7-8. Ms. Njoku developed a sore ache in

her head in addition to her sore neck. RP 011807 p.11 l. 9-10. The ache in her head lasted a very long time. RP 011807 p.11 l. 10-11.

Following the injury to her neck, Ms. Njoku began experiencing weakness in her right arm, right neck, and the right side of her body. RP 011807 p.12 l. 3-6. Ms. Njoku also experienced sensory deficits in the finger of her right arm. RP 011807 p.12 l. 7-9.

Ms. Njoku suffered emotional distress during the period of time that her students were threatening and attacking her. RP 011807 p.16 l. 21-p. 17 l. 1. Ms. Njoku experienced fear, she cried a lot, she stopped eating normally, she lost concentration while driving, and she experienced nightmares. RP 011807 p.17 l. 7-11. Ms. Njoku has nightmares about people trying to beat her up. RP 011807 p.19 l. 13. Ms. Njoku continues to re-experience such thoughts. RP 011807 p.19 l. 14-15. Ms. Njoku suffers terrible headaches. RP 011807 p.19 l. 11-12. Ms. Njoku experiences acute loss of memory, she had difficulty in organizing her thoughts, she is fearful, jumpy, and easily startled. RP 011807 p.19 l. 15-20.

The last day that Ms. Njoku worked was November 29, 2001. RP 011807 p.19 l. 23-25. Ms. Njoku has not had any gainful employment since that time. RP 011807 p.19 l. 26-p. 20 l.1.

Ms. Njoku saw a progression of doctors for her injuries. Ms. Njoku was referred by her primary care physician to a work clinic, and was put off work for one week by the clinic doctor. RP 011807 p.13 l. 3-7. When she returned to the clinic, and was treated for her eye and ear. RP 011807 p.13 l. 8-10. X-rays taken of Ms. Njoku's neck were unclear, and were not retaken. RP 011807 p.13 l. 11-13.

In October, 2002, Ms. Njoku was seen by an IME doctor. RP 011807 p.13 l. 24-p. 14 l. 1. In 2003, Ms. Njoku saw Drs. Fitzum, Odderson, and Johnson, who treated her neck. RP 011807 p.14 l. 12-p. 15 l.16. In 2005, Ms. Njoku saw Dr. Thompson for post-traumatic stress, and to evaluate her emotional problems. RP 011807 p.21 l. 26-p. 22 l 11. In June, 2006, Ms. Njoku saw Dr. Mary Bartels, a psychiatrist, for post-traumatic stress and depression. RP 011807 p.21 l. 1-8. Dr. Bartels diagnosed Ms. Njoku with post traumatic stress disorder and depression. Dep. M Bartels 092707 p. 16 l. 7-p. 17 l. 16. In March, 2007, Ms. Njoku was seen by Dr. Richard Coder, Ph. D., a psychologist. RP 090607 p. 11 l. 26-p. 12 l. 5. Dr. Coder also diagnosed Ms. Njoku with PTSD. RP 090607 p. 30 l. 16-24.

## **B. PROCEDURAL HISTORY**

On February 13, 2002, Ms. Njoku filed an application for benefits with respondent, Seattle School Dist. No. 1. Therein, Ms. Njoku alleged that she sustained multiple injuries on November 29, 2001, during the course of her employment with respondent. On March 19, 2002, the Department of Labor & Industries (Department) issued an order, allowing Ms. Njoku's claim, denying responsibility for stress, and accepted responsibility for the conditions of contusion/laceration of the left ear and contusion of the left eye. CABR 72.

Ms. Njoku filed a protest and a request for reconsideration of the order dated March 19, 2002. In its order of May 21, 2002, the Department held the March 19, 2002 order in abeyance. On December 17, 2002, the Department issued an order correcting the order dated March 19, 2002, and allowing Ms. Njoku's claim for conditions of contusion/laceration of the left ear, contusion of the left eye, and cervical strain, and denying responsibility for psychosis/stress. CABR 72.

On March 9, 2004, the Department issued an order closing Ms. Njoku's claim without an award for permanent partial disability, and with time-loss compensation benefits as paid through December 4, 2002. On May 10, 2004, Ms. Njoku filed a protest and request for reconsideration of

the order dated March 9, 2004. On May 25, 2004, the Department issued an order affirming the order dated March 9, 2004. CABR 72.

On June 21, 2004, Ms. Njoku filed an application to reopen her claim. On August 19, 2004, the Department issued an order holding in abeyance the order dated May 25, 2004. On October 29, 2004, the Department issued an order affirming the order dated May 25, 2004. CABR 73.

On December 23, 2004, the Department reissued its order dated October 29, 2004. On January 10, 2005, Ms. Njoku filed a protest and request for reconsideration of the Department's order dated October 29, 2004. On February 1, 2005, the department issued an order affirming the order dated October 29, 2004. CABR 73.

On March 31, 2005, Ms. Njoku filed a protest and request for reconsideration of the Department's order dated February 1, 2005. CABR 88-89. On July 21, 2005, the Department forwarded Ms. Njoku's protest to the Board of Industrial Insurance Appeals (Board) as a direct appeal. Cabr 90-91. On July 27, 2005, the Board issued an order in which it granted the appeal, and ordered that further proceedings be held. CABR 94.

On January 29, 2008, the Industrial Appeals Judge issued a proposed decision and order sustaining the Department's February 1, 2005 order. CABR 62-75. On March 13, 2008, Ms. Njoku filed a petition for review of that proposed decision. CABR 33. On March 31, 2008, the Board granted review of that proposed decision. CABR 34-36. On June 24, 2008, the Board adopted the proposed decision as the Board's final order. CABR 2-7. In a dissenting opinion, Judge Fennerty stated that the testimony overwhelmingly established that Ms. Njoku's post traumatic stress disorder was related to the industrial accident, that the traumas suffered by Ms. Njoku as a result of the assaults by her students proximately caused Ms. Njoku to develop post traumatic stress disorder, that Ms. Njoku was unable to work, and that the matter should be remanded to allow the claim for post traumatic stress disorder and to pay time-loss compensation for the period December 5, 2002 through February 1, 2005. CABR 5-6.

Ms Njoku sought review of the Board's final order. CP 1. Following trial, the jury found that the Board was correct in finding that Ms. Njoku did not suffer from post-traumatic stress disorder proximately caused by either the industrial injury of November 29, 2001, or her employment conditions with respondent during the fall of 2001. CP 47-48. On December 16, 2009, the court entered an agreed order affirming

the Board's order of June 24, 2008. CP 75-77. Ms. Njoku thereafter timely filed a notice of appeal. CP 78-82.

## **VI. ARGUMENT**

### **A. STANDARDS OF REVIEW**

A challenged jury instruction is reviewed to determine whether it permits the parties to argue their theories of the case, whether it is misleading, and whether the jury instructions when read as a whole accurately inform the jury of the applicable law. *Leeper v. Department of Labor & Industries*, 123 Wn. 2d 805, 809, 872 P. 2d 1160 (1991); *Williams v. Virginia Mason Medical Center*, 75 Wn. App. 582, 584, 880 P. 2d 539 (1994).

The trial court's decision to give or refuse an instruction is reviewed for abuse of discretion. *Chunyk & Conley/Quad-C v. Bray*, -- Wn. App. --, --P. 3d -- 2010 WL 2195704 at 4. Discretion is abused if based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 530 n. 43, 20 P. 3d 447 (2001).

Failure to give a requested instruction on a party's theory of the case is reversible error, where there is substantial evidence to support it. *Barrett v. Lucky Seven Saloon*, 152 Wn. 2d 259, 266-67, 96 P. 3d 386 (2004). A party's right to an instruction supported by substantial evidence

is not affected by the fact that the law was covered in a general way by the instructions given. *Kiemele v. Bryan*, 3 Wn. App. 449, 452, 476 P. 2d 141 (1970).

Errors of law in instructions are reviewed *de novo* on appeal. *Joyce v. Department of Corrections*, 155 Wn. 2d 306, 323, 119 P. 3d 825 (2005); *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn. 2d 447, 453, 105 P. 3d 478 (2005); *Barrett v. Lucky Seven Saloon*, 152 Wn. 2d 266; *Blaney v. International Association of Machinists and Aerospace Workers*, 151 Wn. 2d 203, 210, 87 P. 3d 757 (2004).

An erroneous statement of the applicable law in a jury instruction is reversible error if it is prejudicial. *Joyce v. Department of Corrections*, 155 Wn. 2d 323; *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 308, 189 P. 3d 178 (2008); *Capers v. Bon Marche*, 91 Wn. App. 138, 142, 955 P. 2d 822 (1998). Omission of a proposed statement of the governing law is also reversible error if it prejudices a party. *Barrett v. Lucky 7 Saloon*, 152 Wn. 2d 267; *Hue v. Farm Boy Spray*, 127 Wn. 2d 67, 92, 896 P. 2d 683 (1995). A prejudicial error affects or presumptively affects the case to a substantial extent. *Blaney*, 151 Wn. 2d 211. Prejudice is presumed from an erroneous instruction given on behalf of the party in whose favor the verdict was returned, subject to a comprehensive examination of the record. *Blaney*, 151 Wn. 2d 211; *Zwink v. Burlington Northern, Inc.*, 13

Wn. App. 560, 569, 536 P. 2d 13 (1975). A clear misstatement of the law is also presumed to be prejudicial. *Thompson v. King Feed & Nutrition*, 153 Wn. 2d 453; *Keller v. City of Spokane*, 146 Wn. 2d 237, 249-50, 44 P. 3d 845 (2002).

In determining whether an instruction could have confused or misled the jury, the court examines the instructions in their entirety. *Hamilton v. Department of Labor & Industries*, 111 Wn. 2d 569, 573, 761 P. 2d 618 (1988); *Intalco Aluminum v. Department of Labor & Industries*, 66 Wn. App. 644, 663, 833 P. 2d 390, *review denied*, 120 Wn. 2d 1031 (1993).

## **B. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY.**

Appellant assigns error to the trial court's Instruction No. 9:

As a matter of law, claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of occupational disease. A psychiatric condition caused by the objective conditions of work events can constitute a compensable claim. A psychiatric condition caused by a worker's subjective perception of work events cannot cause a compensable claim. SCP\_\_.

Instruction 9 was taken in part from respondent's proposed instruction 15-A. RP I at p. 16 l. 19-p. 17 l. 2; p. 22 l. 25; SCP\_\_. The instruction sparked a vigorous debate between the parties' counsel. RP I

at p. 17-21. Appellant objected to the instruction as misleading in that it addressed stress, whereas appellant's claim was for PTSD. RP I at p. 17 l. 5-8; p. 21 l. 23-p. 22 l. 2. Appellant also objected to the third sentence of the instruction, that a worker's subjective perceptions of work events cannot cause a compensable claim, as inappropriate in a PTSD claim. RP I at 17 l. 8-12. Appellant thereby adequately preserved the objection for appeal. CR 51 (f); *Zwink v. Burlington Northern R. Co.*, 13 Wn. App. 560, 567-68, 536 P. 2d 13(1975); *Franks v. Department of Labor & Industries*, 35 Wn. 2d 763, 768-69, 215 P. 2d 416 (1975).

Instruction 9 instructed that jury that a psychiatric condition based upon the objective conditions of work events can constitute a compensable claim, whereas a psychiatric condition caused by a worker's subjective perceptions of work events was not compensable. Instruction 9 cannot be reconciled with *Price v. Department of Labor & Industries*, 101 Wn. 2d 520, 682 P. 2d 307 (1984). In *Price*, the Court rejected a distinction between subjective and objective evidence is a claim for psychiatric injury:

...Medical opinions derived from psychiatric examination are primarily based on conversations with the patient. Symptoms of psychiatric injury are necessarily subjective in nature. Viewed in this context, an instruction on objective-subjective evidence is improper...

We hold that it is improper to instruct the jury on the objective-subjective distinction in a case involving psychiatric disability. Instruction 14 did not properly state the law as to psychiatric disability and Price was precluding from arguing her theory of the case.

101 Wn. 2d 528, 529.

Here, as in *Price*, Instruction 9 impermissibly instructed the jury on the objective-subjective distinction in a case involving PTSD. Therefore, as in *Price*, appellant was precluded from arguing her theory of the case.

Respondent cited *Dennis v. Department of Labor & Industries*, 109 Wn. 2d 467, 745 P. 2d 1295 (1987) in support of Instruction 9. CP\_\_\_. In *Dennis*, the issue was whether osteoarthritis was an occupational disease that arose naturally and proximately out of the worker's employment. Here, in contrast, the issue is whether appellant's PTSD was a proximate result of an industrial injury. Nor did *Dennis* address whether a psychiatric condition can be established by subjective complaints from the claimant. Thus, the facts and the issues in *Dennis* bear no resemblance to this case.

Equally misplaced was respondent's reliance upon *Favor v. Department of Labor & Industries*, 53 Wn. 2d 698, 336 P. 2d 382 (1959). In *Favor*, the court held that the claimant's coronary occlusion resulting

from stress arising from the performance of his duties as an agricultural inspector was not an occupational disease, that statements by a claimant as to purely subjective conditions, peculiar to himself, do not provide objective circumstances necessary to establish that a claimant's disease arose naturally and proximately from his employment, and that the claimant had failed to establish that the disease was proximately caused by the claimant's employment. 53 Wn. 2d 704-06. *Favor* does not address whether PTSD resulting from a traumatic work injury is compensable, nor whether PTSD can be established by the claimant's subjective complaints. *Favor* is therefore inapplicable here.

In *Favor*, the court carefully distinguished the distinction between injury and occupational disease as it relates to heart cases, noting that a worker with a preexisting heart condition may suffer, as the result of unusual exertion, a compensable injury. 53 Wn. 2d 705. That distinction continues to be drawn today, as evidenced by WAC 296-14-300:

(1) Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an occupational disease in RCW 51.08.140.

Examples of mental conditions or mental disabilities caused by stress that do not fall within occupational disease shall include, but are not limited to, those conditions and disabilities resulting from:

- (a) Change of employment duties;
- (b) Conflicts with a supervisor;

- (c) Actual or perceived threat of loss of a job, demotion, or disciplinary action;
  - (d) Relationships with supervisors, coworkers, or the public;
  - (e) Specific or general job dissatisfaction;
  - (f) Work load pressures;
  - (g) Subjective perceptions of employment conditions or environment;
  - (h) Loss of job or demotion for whatever reason;
  - (i) Fear of exposure to chemicals, radiation biohazards, or other perceived hazards;
  - (j) Objective or subjective stresses of employment;
  - (k) Personnel decisions;
  - (l) Actual, perceived, or anticipated financial reversals or difficulties occurring to the businesses of self-employed individuals or corporate officers.
- (2) *Stress resulting from exposure to a single traumatic event will be adjudicated with reference to RCW 51.08.100.***  
(Emphasis added).

Instruction 9 failed to recognize the objective-subjective distinction for purposes of a psychiatric condition. The trial court therefore erred in giving that instruction.

*Boeing Co. c. Key*, 101 Wn. App. 629, 5 P. 3d 16, *review denied*, 142 Wash.2d 1017 (2001) does not compel a contrary conclusion here. In *Boeing Co. v. Key*, the court upheld a jury instruction that a worker may not receive benefits for mental distress cause by stress resulting from relationships with co-workers, unless the mental disability caused by stress resulted from a sudden and tangible traumatic happening producing an

immediate and prompt result. The court concluded that the instruction did not prevent the claimant from arguing that her PTSD resulted from a sudden, tangible and traumatic event. 101 Wn. App. 633-34. Here, in contrast, Instruction 9 does not allow appellant to establish her PTSD by her subjective perceptions of work events. *Boeing Co. v. Key* is therefore distinguishable here.

Appellant assigns error to the trial court's Instruction 10:

Job conditions which a worker contends proximately caused an occupational disease must be objective in character. An objective condition is one which can be observed and described by someone other than the worker. Perceptions of employment conditions which are peculiar to the worker are subjective and not sufficient.  
SCP \_\_\_.

Appellant objected to the third sentence of Instruction 10 as inappropriate in appellant's claim for PTSD, and that the jury could be confused by the instruction into thinking that an objective condition was required to find a psychiatric condition. RP I p. 14 l. 15-p. 16 l. 11. Appellant thereby adequately preserved the objection for appeal. CR 51 (f); *Zwink*, 13 Wn. App. 567-68; *Franks v. Department of Labor & Industries*, 35 Wn. 2d 768-69.

Instruction 10 repeated the same objective-subjective distinction that was held improper in a case involving psychiatric disability by *Price, supra*. Thus, Instruction 10 impermissibly instructed the jury on the objective-subjective distinction in a case involving PTSD, thereby preventing appellant from arguing her theory of the case.

Appellant assigns error to the trial court's refusal to give appellant's Proposed Instruction 13:

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 believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.

SCP \_\_.

Respondent objected to appellant's Proposed Instruction 13 on the grounds that neither Dr. Coder nor Dr. Bartels were attending physicians within the meaning of the Industrial Insurance Act. RP I p. 26 l. 12-p. 27 l. 7. Appellant responded that appellant's Proposed Instruction 13 was a Washington Pattern Instruction (WPI 155.13.01), and under that instruction, an attending physician is one who treated a patient, as opposed to one who examined the patient once. RP I p. 27 l. 8-21. The trial court declined appellant's Proposed Instruction 13. RP I p. 28 l. 13-14.

One of appellant's health care providers who testified before the Board of Industrial Insurance Appeals is Dr. Mary Bartels. Dr. Bartels has bachelor of arts degree from Vassar, an M.D. degree from the University of North Carolina, received psychiatry training at Dartmouth and the University of Washington, and is licensed in the State of Washington. Dep. M. Bartels 092707 p. 4 l. 2-25. Dr. Bartels saw appellant for psychiatric treatment on numerous occasions in 2006 and 2007. Dep. M. Bartels 092707 p. 8 l. 2-16; p. 18 l. 24-p. 19 l. 20; p. 20 l. 4-24; p. 20 l. 26-p. 21 l. 9; p. 21 l. 10-p. 22 l. 17; p. 22 l. 18-p. 23 l. 19; p. 23 l. 23-p. 24 l. 25; p. 25 l. 1-p. 26 l. 20; p. 26 l. 23- p. 28 l. 22. Dr. Bartels therefore meets the definition of an "*attending physician*" found in WAC 296-20-01002:

Physician or attending physician (AP): For these rules, means any person licensed to perform one or more of the following professions: Medicine and surgery; or osteopathic medicine and surgery. An AP is a treating physician.

In addition, regardless whether Dr. Bartels meets the definition of an attending physician, because she treated appellant for a considerable amount of time, her testimony should be given special consideration. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 188 n. 12, 968 P. 2d 14, review denied, 137 Wash.2d 1034 (1999) ("*No Washington cases were*

*found that specifically define who is an "attending" or "treating" physician. Case law reflects, however, that a physician's testimony should be given special consideration if he or she attended to the patient for a considerable period of time for the purpose of treatment. (Citing Young v. Department of Labor & Industries, 81 Wn. App. 123, 128, 913 P. 2d 402, review denied, 130 Wash.2d 1009 (1996)).*

Because Dr. Bartels meets the definition of an attending physician, appellant was entitled to submit her Proposed Instruction 13 to the jury. It is a long-standing rule of law in workers' compensation cases that special consideration should be given to the opinion of a claimant's attending physician. *Spalding v. Department of Labor & Industries*, 29 Wn. 2d 115, 128-29, 186 P. 2d 76 (1947); *Groff v. Department of Labor & Industries*, 65 Wn. 2d 35, 45, 395 P. 2d 633 (1964); *Chalmers v. Department of Labor & Industries*, 72 Wn. 2d 595, 599, 434 P. 2d 720 (1967); *Hamilton v. Department of Labor & Industries*, 111 Wn. 2d 571; *Zipp v. Seattle School Dist. No. 1*, 36 Wn. App. 598, 605, 676 P. 2d 538, review denied, 101 Wn. 2d 1023 (1984); *Intalco Aluminum v. Department of Labor & Industries*, 66 Wn. App. 654; *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 739, 981 P. 2d 878 (1999).

WPI 155.13.01 implements the purpose of the Industrial Insurance Act, to provide compensation to all covered persons injured in their employment. *Young v. Department of Labor & Industries*, 81 Wn. App. 128. Therefore, because there was substantial evidence to support appellant's Proposed Instruction 13, the trial court committed reversible error by refusing to give that instruction. *Barrett. v. Lucky Seven Saloon*, 152 Wn. 2d 274-75.

Respondent objected to appellant's Proposed Instruction 13, arguing that Dr. Bartels had not been selected as appellant's AP when the claim was filed, and therefore she did not qualify as appellant's AP. RP I p. 26 l. 12-p. 27 l. 7. Appellant pointed out that she could not have appointed Dr. Bartels as her AP when the claim was filed because her claim for PTSD was not allowed in the first place. RP I p. 27 l. 8-10.

In objecting to appellant's Proposed Instruction 13, respondent relied upon *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 968 P. 2d 14, review denied, 137 Wash.2d 1034 (1999). RP I p. 27 l. 22-p. 28 l. 4. In *Boeing Co. v. Harker-Lott*, the court held that the trial court did not abuse its discretion in refusing to give the special consideration instruction, as the testimony of the claimant's attending physicians was in conflict. 93 Wn. App. 188-89. No such conflict is present in this case. Therefore,

*Boeing Co. v. Harker-Lott* does not support the trial court's refusal to give appellant's Proposed Instruction 13.

Appellant assigns error to the trial court's refusal to give the following proposed instruction:

A medical expert's opinion regarding a worker's claim for compensation based upon a psychological condition may be based solely on the worker's subjective complaints.  
SCP\_\_.

The trial court declined to give that instruction. RP 1 p. 28 l. 15-18. In *Price*, the court described the nature of the testimony needed to establish a psychological condition: "*Medical opinions derived from psychiatric examination are primarily based on conversations with the patient. Symptoms of psychiatric injury are necessarily subjective in nature.*" 101 Wn. 2d 528. Appellant's proposed therefore accurately instruction described the testimony needed to establish a psychiatric injury.

**C. ERRORS IN THE JURY INSTRUCTIONS REQUIRE REVERSAL OF THE VERDICT AND JUDGMENT.**

Appellant assigns error to the verdict. CP 47-48. Appellant also assigns error to the agreed judgment and order. CP 75-77. As more fully set forth in paragraph VII B, above, the trial court committed reversible error in giving Instructions 9 and 10, and in declining to give appellant's

Proposed Instruction 13. It therefore follows that the verdict and agreed judgment and order must be reversed.

**D. APPELLANT REQUESTS AN AWARD OF ATTORNEY FEES ON APPEAL.**

RCW 51.52.130 (1) provides as follows:

(1) If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or

less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

Central to the award of attorney fees under RCW 51.52.130 is the underlying purpose of the statute. *Brand v. Department of Labor & Industries*, 139 Wn. 2d 659, 667, 989 P. 2d 1111 (1999) (“*The purpose behind the award of attorney fees in workers' compensation cases is to ensure adequate representation for injured workers who were denied justice by the Department...*”). In the event that appellant obtains relief from this Court, the underlying purpose of the statute will be served by an award of attorney fees.

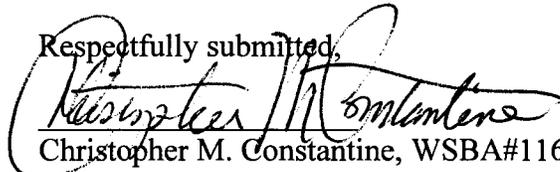
RCW 51.52.130 (1)'s directive that “*a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court*” imposes a mandatory duty. *Erection Co. v. Department of Labor & Industries*, 121 Wn. 2d 513, 518, 852 P. 2d 288 (1993) (“*It is well settled that the word “shall” in a statute is presumptively imperative and operates to create a duty.*”).

In awarding attorney fees on appeal, the court is not required to segregate successful and unsuccessful claims for purposes of calculating attorney fees under RCW 51.52.130. *Brand*, 139 Wn. 2d 673.

**VII. CONCLUSION**

The verdict and agreed judgment and order should be reversed, and the matter remanded to the trial court for a new trial. Appellant's request for attorney fees should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher M. Constantine". The signature is written in a cursive style with a large initial "C".

Christopher M. Constantine, WSBA#11650  
Attorney for appellant

**VIII . CERTIFICATE OF MAILING**

I, Christopher M. Constantine, do hereby certify under the Law of the State of Washington in the County of Pierce that on the 28<sup>th</sup> day of June, 2010, I deposited in the United States mail, first class postage prepaid, the Brief of Appellant and this Certificate addressed to the following:

Michael P. Graham  
EIMS & FLYNN, P.S.  
Grand Central on the Park  
216 First Ave S., Ste 310  
Seattle, WA 98104

A handwritten signature in black ink, appearing to read "C.M. Constantine". The signature is written in a cursive style with a horizontal line underneath the name.