

69654-8

69654-8

NO. 69654-8-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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AVIZENT and CRISTA MINISTRIES

Appellant/Defendant,

v.

ALGANSEH MASHO, individual

Respondent/Ms. Masho.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2013 APR -5 PM 1:25

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BRIEF OF APPELLANT

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Drew D. Dalton, WSBA No. 39306  
Of Attorneys for Appellant Corporations  
Avizent and Crista Ministries

FORD LAW OFFICES, P.S.

320 S. Sullivan Rd.  
Spokane Valley, WA 99037  
Tel. 509.924.2400

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**ASSIGNMENTS OF ERROR**  
**Assignment of Error No. 1**

1. The record before the superior court does not support the December 26, 2012 order's Findings of Fact Nos. 7,8, 9, 10, 11, 12, and 13 and Conclusions of Law Nos. 2, 3, 4,5, and 6.

**Issues Pertaining to Assignment of Error No. 1**

1. Did Ms. Masho's expert testimony provide substantial evidence to support the superior court's decision?
2. Do the superior court's conclusions of law flow from the factual findings?

**Assignment of Error No. 2**

1. Ms. Masho's CR 60 .Motion was not the proper vehicle by which to challenge the November 6, 2012 superior court order was in error.

**Issues Pertaining to Assignment of Error No. 2**

1. Did the superior courts finding's facts address medical fixity and entitlement to further treatment? If yes, the CR 60 motion was in error?

2. Does an absence of a specific request in the Conclusions of Law mean the superior court has not addressed the issue and Ms. Masho is entitled to a CR 60 motion?

## **INTRODUCTION**

Crista Ministries brings two separate issues before the court of appeals. We first address whether there is substantial evidence to support the superior court's December 26, 2012 order (listed as December 28, 2012 on the court website) and its February 7, 2012 judgment enforcing that order. The second issue we address is whether the superior court had the authority to change or modify the November 6, 2012 order based on Ms. Masho's CR 60 motion. Regardless of whether the November 6, 2012 or the December 26, 2012 order is the appropriate order of the superior court, it is the employer's position the record does not contain substantial evidence to support either order.

For this reason the employer first addresses the more detailed December 26, 2012 order to give the court the most comprehensive review of the evidence as to resolve all the issues. Ultimately, if the court finds substantial evidence to support the superior court order, the employer believes the only valid order

before the court is the November 6, 2012 order. The November 6, 2012 order only allows depression and treatment for that condition. We address this order second because if the December 26, 2012 order fails the substantial evidence test, both orders fail the substantial evidence test. The case law and legal authority regarding the CR 60 motion and the November 6, 2012 order are found in that part of the brief.

### **PROCEDURAL BACKGROUND**

Alganesh Masho was injured on October 20, 2005 while working at Crista Ministries. The Department issued an order ending time loss and closing the claim on November 9, 2009. AR 89 & 90 Ms. Masho protested the denial of time loss and the Department affirmed closure on March 2, 2010. Id. Ms. Masho again protested and the Department again affirmed on July 1, 2010. Id.

On August 24, 2010, Ms. Masho's attorney appealed closure of this claim to the Board. Id. The case was heard by Judge David Crossland and he issued a Proposed Decision and Order affirming the July 1, 2010 order on August 22, 2011 AR at 52-71. On October 3, 2011 Ms. Masho filed her petition for review with the

Board. Id. at 37. On October 18, 2011 the Board denied her petition for review and affirmed Judge Crossland's order. Id. at 1. Ms. Masho filed an appeal of the October 18, 2011 Board decision and order on November 8, 2011. The parties agreed to file pleadings instead of reading the testimony in open court. Judge Palmer Robinson heard closing arguments on September 21, 2012. Judge Robinson issued a decision on November 6, 2012.

Crista Ministries and Avizent appealed the November 6, 2012 order on December 4, 2012. Ms. Masho filed a CR 60 motion for the November 6, 2012 order on December 4, 2012. The superior court granted Ms. Masho's CR 60 motion on December 28, 2012 and issued a new order on December 26, 2012 (listed as December 28, 2012 on website). Crista Ministries and Avizent filed an amended notice of appeal for the two December 28, 2012 orders on January 25, 2013. Ms. Masho sought a judgment for attorney's fees and costs on February 7, 2013. This judgment was granted and Crista Ministries amended its appeal to include this judgment as of March 1, 2013.

## **STANDARD OF REVIEW**

On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. Dep't of Labor & Indus., v. Shirley, Wash. App. Div. 1 docket No. 66994-0-1 (November 13, 2012), see: RCW 51.52.115. While the Board's decision is reviewed de novo by the superior court, they can only substitute their own findings and decision for the Board's if they find from a "fair preponderance of credible evidence" the Board's decision is incorrect. Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5-6 (1999). Review by the court of appeals is governed by RCW 51.52.140. The court of appeals may only review "whether substantial evidence supports the trial court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings." Rogers v. Dep't of Labor & Indus., 151 Wn.App. 174,180 (2009).

"If, in the opinion of the reviewing court, the evidence as to a factual issue is evenly balanced, the finding of the department [now board of industrial insurance appeals], as to that issue must stand; but, if the evidence produced by the party attacking the finding preponderates in any degree, then the finding should be set aside." McLaren v. Dep't of Labor and Indus., 6 Wash.2d 164 (1940). See

also Goehring v. Dep't of Labor and Indus., 40 Wash.2d 701, 703 (1952).

## ARGUMENT

For a mental or physical condition to be related to the industrial injury Ms. Masho must prove the industrial injury is the proximate cause of her current physical and emotional/mental complaints. Proximate cause requires a showing that “but for” the industrial injury, her conditions would not have occurred. Hertog v. City of Seattle, 138 Wn. 2 265, 282-3 (1999). “But for” causation requires an unbroken link between the alleged injury and the conditions complained off. *Id.*

Merely stating a condition is related is not sufficient to show a causal relationship. See. Eastwood v. Dep't of Labor & Indus., 152 Wn.App. 652, 661 (2009). (“[T]he pertinent statute and case law **do** require more than a physician’s subjective certitude based on nothing more than vague assurances he was familiar with the patient.” (emphasis added.)) Furthermore, the Trier of fact “may not supply findings or a rationale that the expert witness did not articulate in the record.” *Id.* at 664. In this case we will show that Ms. Masho’s experts did not supply findings or rationale that connects the industrial injury with alleged conditions and need for treatment. The employer asserts that based on the lack of

evidence before the superior court, the December 26, 2012 superior court order should be overturned and the Board decision should be affirmed.

**A. Where no substantial evidence exists the superior court decision must be overturned.**

Substantial evidence is evidence in a “sufficient quantum to persuade a fair minded person of the truth of the declared premise.” Garrett Freightlines, Inc. v. Dep’t of Labor & Indus., 45 Wn. App. 335,340 725 P.2d 463 (1986), quoting Nichols Hills Bank v. McCool, 104 Wash 2d. 78, 82, 701 P.2d1114(1985). In other words there must be sufficient facts that connect the alleged conditions to the industrial injury. In this case there are none.

The superior court relied on the testimony of Dr. James, Dr. Watanabe, Ms. Masho and Dr. Early to overturn the Board’s decision. Ms. Masho’s experts did testify her conditions were related to the industrial injury. Primarily this was based on Dr. Jennifer James testimony. We admit that Dr. James testified these conditions were related to the industrial injury. However, the mere assertion these conditions were related is not enough, there must be more. The superior court relied on the medical experts’ mere assertions that the conditions were related to overturn the Board decision. The reliance on Dr. James and Dr. Watanabe’s testimony is flawed and not supported by the record.

Judge Crossland, the Board judge, said it best regarding Dr. James testimony, he said "Under the circumstances, I cannot in good conscience place much weight on the opinions of Dr. James." Appellate Record (AR) Certified Appellate Board Record (CAB) 17:21-22. Judge Crossland was referring, politely, to the lack of causal evidence supporting her testimony. Dr. James based her opinion on the timing of her examination, three years after the injury, her review of the records, the allegations by Ms. Masho and her examination. Dr. James did not once testify as to the connection between the mechanism of injury and Ms. Masho's symptoms.

As to Dr. Watanabe, Judge Crossland stated "I did not find that she really ever testified that in her opinion, on a more-probable-than-not basis, the industrial injury proximately led to Ms. Masho's frozen shoulder." Id.17:31-32 From the Board record it is clear Judge Crossland found no evidence upon which to connect Ms. Masho's physical complaints to her industrial injury. Yet, despite this, Judge Robinson found the conditions related at the superior court. It is hard to see how the superior court applied the proper review standard in this case.

A rational Trier of fact or reasonable person must gather information to come to a conclusion. For a medical condition to be related to the mechanism of injury there has to be a connection

made by medical testimony between certain types of facts. We propose these facts can be classified as follows (1) **who** was injured, (2) **when** were they injured, (3) **where** were they injured, (4) **what** was injured, and (5) **how** did the injury cause the injury. In this case the how is the most important. The how must be established by medical testimony. There must be some explanation of how the injury, at a minimum, could cause the alleged condition. This medical testimony had to be provided by Ms. Masho. It was not.

The employer does not dispute the who, the when or the where. We agree Ms. Masho was injured on October 25, 2007 while at work. The employer contends that the diagnoses provided by Ms. Masho (the what) are not supported by a causal connection or a "how" to the injury. Without a causal connection between the injury and the alleged conditions; the conditions cannot be related to the claim.

Ms. Masho's experts provided no substantial evidence to support a causal connection (the how) between her injury and the alleged conditions. In addition, all of the employer's experts testified the mechanism of injury could not cause, or did not Ms. Masho's conditions. Ms. Masho's mere allegation that they are related is not a sufficient quantum of evidence upon which the superior court could have overturned the Board order.

**B. Ms. Masho provided no testimony supporting a causal connection between her alleged conditions and the industrial injury.**

1. More than words are required to establish a causal relationship between the alleged condition and the mechanism of injury.

Merely stating a condition is related is not sufficient to show a causal relationship. See, Eastwood v. Dep't of Labor & Indus., 152 Wn.App 652, 661 (2009) (“[T]he pertinent statute and case law do require more than a physician’s subjective certitude based on nothing more than vague assurances he was familiar with the patient.”) Furthermore, the Trier of fact “may not supply findings or a rationale that the expert witness did not articulate in the record.” Id. at 664.

In Eastwood, Division III dealt with a similar issue as we have in this case. The primary issue in Eastwood was whether the claimant had provided objective evidence to establish her condition had worsened for purposes of reopening. The court found that the testimony of her doctors relied upon by the superior court to overturn the Board’s decision denying reopening was not substantial. The court stated, “the record does not show that the medical experts engaged in any objectively-based comparative analysis of calcification at the relevant points in time.” Id. at 664. The court also found the mere reference to the condition

(calcification) was not sufficient to support a reopening of the claim. Id. at 665.

The difference between our case and Eastwood is that Eastwood is an aggravation claim. An aggravation claim requires the comparing of two terminal dates, the first closing date of the claim to the subsequent reopening date. The goal is to determine whether an objective worsening occurred. In other words there needs to be medical testimony showing the current symptoms are related to a worsening of the original injury. While Eastwood dealt with a reopening, the same logic and rationale applies in this case. In an injury case there must be substantial evidence that connects the original injury to the alleged conditions. The substantial evidence must be more than a “mere reference” that the condition is related. The evidence must show “how” the condition is related. In the present case the evidence does not show how the majority of the conditions are related.

In this case Dr. James provided no testimony connecting the alleged conditions to the mechanism of injury. Her “mere reference” to the injury, without more, does not provide enough evidence to create a causal link to the condition. Simply put, Dr. James did not tell us how the injury caused the alleged conditions; she simply said that it did. Her mere allegations do not provide the substantial evidence required to overturn the Board order.

2. The alleged physical conditions were not caused by the actual mechanism of injury.

We will provide a detailed look at the testimony from both sides regarding each condition allowed by the superior court. The superior court judge found Ms. Masho had right cervical dystonia, right long thoracic nerve palsy resulting in right scapular winging, right sternoclavicular dislocation, right bicipital tendinitis and tendon tear, right adhesive capsulitis, swelling of the acromioclavicular articulation, supraspinatus and infraspinatus tear, partial tear and continuing tendinitis and right cervical 5, 6, and 7 sensory radiculitis of the brachial plexus related to the industrial injury. See Findings of Fact 7 from December 27, 2012 Order.

While Dr. James related six new conditions to the claim, she did not articulate a rationale basis for connecting any of the new conditions, to the injury. The only condition not disputed is the actual subluxation of the clavicle, also referred to as a right sternoclavicular dislocation. Dr. James testimony provided no evidence that logically connected the subluxation of the clavicle on October 25, 2007 to the remainder of Ms. Masho's alleged conditions nor did she provide evidence that supported a need for additional treatment for these conditions. Each of these diagnoses will be reviewed in the order provided in the findings of fact No. 7 and Dr. James transcript. AR James Hrg Tr. 62-63 (May 5, 2011).

### **(1) Cervical Dystonia**

The medical testimony shows that this condition was non-existent at the time of injury and not related to the mechanism of injury. Dr. Alan Jackson, attending physician, testified:

She (Ms. Masho) didn't have cervical dystonia when I saw her. She didn't have a fixed torticollis of her cervical spine when I saw her. But no reason to believe that -- you know, that if she didn't have that condition, within a year of the time of the injury, that if she has it now that I can't imagine that it's related. AR Jackson Tr. 35:16-23 (June 2, 2011).

Dr. Jackson testified if Ms. Masho did not have the condition within a year of the injury, it was not related. Id. Dr. Provencher, a shoulder specialist, confirmed there was no indication of cervical dystonia in May 2010 when he performed his examination. AR Provencher Tr. 24:11 (May 26, 2011). Dr. Provencher testified the time between the injury and the alleged manifestation of the condition on Dr. James' exam, would not support a finding of cervical dystonia related to the claim. Id. at 25:1-3.

Dr. Kirschner, a board certified neurologist, saw Ms. Masho at the request of Dr. Jackson to evaluate her varying nerve like pain complaints. He testified there are very few instances in the scientific literature that support a finding of cervical dystonia related to a specific injury. AR Kirschner Tr. 30:7-24 (June 1, 2011). He testified Ms. Masho did not have the condition when he saw her. It was his opinion that due to the lapse of time between the injury and

Dr. James' findings, it was not related. Id. The attending physician along with a neurologist and shoulder specialist agreed this condition was not related to the claim. They based their findings on the scientific literature, mechanism of injury, duration between injury and alleged onset (over three years after the injury).

Dr. James testified she diagnosed cervical dystonia during her January 21, 2011 examination. She provided a lot of testimony as to her diagnosis and need for treatment but no evidence as to how the condition was related to the mechanism of injury, no evidence as to why there was a latent onset (three years), and no testimony contrary to that provided by the other experts.

When asked why the Cervical Dystonia was related to the injury, she simply explained: "My opinion is based on the development of this condition after the industrial injury, the clinical examination, the scientific literature, and the review of records." AR James Hrg Tr. 63:16-18. The literature she provided was not admitted nor did she testify how it supported a causal link. She did not testify how the records showed a causal connection nor did she provide evidence as to how her diagnosis meant the condition was related to the clavicle subluxation. She did not even provide an opinion on how the accident either immediately or over time would cause the condition. Her sole contention is that it developed after the injury. This is not substantial evidence.

The Washington Supreme Court stated a plaintiff ““must establish a causal connection between an industrial injury and a subsequent physical condition with a least some degree of probability.” Jacobson v. Dep’t of Labor & Indus., 37 Wn. 2d 444. 450-51 (1950). They expounded stating “there must be some probative value that removes the question of causal relation from the field of speculation and surmise.” Id.

In this case we have an opinion with no probative value. Dr. James is the only doctor to find this condition related. That being said she provides no facts to connect the dots. Three experts said the condition was non-existent on their exams around the time of the injury, two years after the injury and even six months before Dr. James exam. All of them said that it would have developed much closer in time to the injury had it been related and that this type of injury did not cause the alleged condition. Saying the condition is simply related because it occurred three years after the injury does not provide the degree of probability required to allow this condition under the claim.

Dr. James’ testimony provides no more than speculation as to causation and is unhelpful to the Trier of fact. Especially, as here, the alleged condition did not manifest until over three years later. Saying a condition is related does not make it so. This condition was properly denied by the Department and Board.

## **(2) Right Long Thoracic Nerve Palsy**

The superior court ignored the testimony both by Dr. James and the employer's experts in this matter. Specifically, the testimony demonstrates that Ms. Masho's mechanism of injury could not have injured the long thoracic nerve.

Dr. Jackson testified to injure the long thoracic nerve; one must have a downward force on top of the shoulder with the neck turned. AR Jackson Tr. 14:14-24. He testified the type of subluxation Ms. Masho had, would have moved the clavicle away from the long thoracic nerve and would not have injured it. AR Jackson Tr. at 15:11-17. Therefore, the mechanism of injury was not consistent with an injury to this nerve. He also testified that clinically there was no winging on his exam; this is the clinical test for injury to the long thoracic nerve. Based on his testimony there was no injury to the long thoracic nerve while he treated Ms. Masho under this claim. Id. at 14:1-9.

Dr. Provencher also testified Ms. Masho had no winging of the scapula. AR Provencher Tr. 16&17:22-4. When asked "[D]oesn't the long thoracic nerve run along the same anatomical area as the sternoclavicular joint?" He answered, "No, not even close. It's on the back." Id. at 38:22-25; See Id. at 50-51. Dr. Kirschner also testified there was no evidence of damage to the

long thoracic nerve. AR Kirshner Tr. 26:3-13. He testified any damage caused by the injury would not be so “delayed in time” as in this case. Id. He testified with no evidence of damage near the time of injury, since this was a mechanism of injury that should not hurt this nerve, the long thoracic nerve condition could not be related to the injury. Id. at 27:5-8.

However, Dr. James related the condition to the industrial injury. She simply stated “It is not uncommon to injure the right long thoracic nerve. AR Dr. James Hrg. Tr. 68:6-7. Just because an injury is not uncommon does not mean it is related to the injury Ms. Masho sustained. In addition, Dr. James explanation of the mechanism of injury for the long thoracic nerve is not what happened to Ms. Masho. Dr. James provided testimony that the long thoracic nerve is sometimes called backpacker’s palsy. She stated the injury occurs in backpackers because of the downward pressure on the nerve caused by carrying a heavy backpack. Id. at 69:18-23. This is similar to the testimony of the employer’s experts. A downward force is required to get backpacker’s palsy. However, she goes on to state “individuals with clavicle dislocations can frequently get long thoracic nerve palsy.” Id. at 69:24-25. This general statement does not address how the injury caused Ms. Masho’s alleged condition.

All of the doctors agree this alleged condition is caused by a downward force. No one says that an outward force, as occurred in Ms. Masho's accident, could cause the injury. Despite testifying that a different type of force was required to cause this injury she still testified the condition was related because it is "not uncommon to injure the nerve." This provides no credibility to her testimony or her statements. This is mere speculation and creates no causal link between the injury and the condition.

Dr. James also believes she was the first and only doctor to do the diagnostic test for this condition, a modified push up against the wall maneuver. This was to support her finding the condition related to the claim. This maneuver determines if there is winging of the scapula. Despite her belief, the test was done by three experts prior to January 2011, the tests revealed no injury until done by Dr. James, three years after the injury. The latent onset and mechanism for injuring the nerve, as testified to by the other doctors, is not consistent with the industrial injury. Ms. Masho's injury produced an outward force or a forward subluxation of the clavicle, as testified to above by Dr. Jackson. This force moves clavicle force away from the nerve. Thus, Dr. James finding this type of subluxation causes injury to the long thoracic nerve is erroneous and not supported by the medical evidence or her own description of the type of force required to injure the nerve.

Furthermore, there was no physical evidence on any exam of an injury to this nerve until January 2011, three years later. This lends even less credibility to Dr. James findings.

Accordingly, a condition cannot be related where the evidence shows it was anatomically impossible for the mechanism of injury to damage the nerve. The fact that Dr. James would relate an anatomically impossible injury to the claim lends serious doubt to her overall credibility. The Department and Board properly denied this condition.

### **(3) Right Sternoclavicular Dislocation**

This condition is not in dispute. The dispute is whether the mechanism that caused this condition caused the additional diagnosed physical conditions listed by Dr. James in January 2011. The evidence shows Dr. James and Dr. Watanabe cannot establish a causal connection between the mechanism of injury and the additional alleged conditions. The only condition allowed under this claim is the right sternoclavicular dislocation. The Department and Board got this right.

### **(4) Right Bicipital Tendinitis and Tendon Tear**

Ms. Masho was seen by at least two orthopedic specialists during her claim. Dr. Alan Jackson was her treating provider and Dr. Provencher, a shoulder specialist, did a closing exam on behalf

of the employer. Dr. Provencher testified he reviewed her actual MRI films and the split biceps tear (seen on the films) was a normal variant of the tendon. AR Provencher Tr. 18:1-11. This means the biceps tear was a condition she was born with and not related to the injury. Id. Dr. Jackson confirmed this opinion. AR Jackson Tr. 39:13-25. Dr. Jackson further testified Ms. Masho never presented with any pain in the biceps area after the injury. Id. Dr. Provencher and Dr. Jackson's testimonies are more persuasive and relevant because they have expertise in this area and they actually address the mechanism of injury as related to the findings. Also, Dr. Jackson treated Ms. Masho for the first year and one-half after the injury and reviewed the actual MRI films. Dr. James did not do this. Based on their testimonies, the condition is not related as it was a developmental variant and had no findings relevant to the alleged condition until after the claim closed.

Ms. Masho provided no evidence linking this condition to the mechanism of injury. Dr. Watanabe did not testify as to this condition. Dr. James testified only that this condition was temporally consistent with the injury, clinical findings, medical documentation and radiographic imaging. AR James Hrg. Tr. 72-73:26-4. As above, this provides no instruction on how or why it is related to the condition. She provides no evidence to show how the supraclavicular subluxation could cause a right bicipital tendinitis

and tendon tear. Just because a tear is on an MRI does not mean it's related to the industrial injury. Merely saying it is related, does not make it so. See Eastwood, 152 Wn.App at 661.

Further, Dr. James admitted reviewing MRI's of the shoulder is not her specialty. AR James 85:10-11. She would also defer all recommendations for treatment of the condition to the orthopedic surgeons. Id. at 85:6-8. This area of diagnosis is not her specialty and the area of treatment was not her specialty. She also does not deal with surgical treatment of biceps tears. The treating physician (an orthopedic surgeon) who does deal with these conditions, found no evidence for this condition in his exams around the time of the injury. This condition did not exist as a result of the injury. Dr. James provides no rational explanation as to how three years later this condition was related to or aggravated by the October 25, 2007 industrial injury.

**(5) Right Adhesive Capsulitis (Frozen Shoulder),  
Supraspinatus and Infraspinatus Tears**

The findings of fact do not find the frozen shoulder was related to the industrial injury. Finding of Fact No. 7 makes no mention of the condition by Dr. James and findings of fact number 9 does not support a conclusion that the frozen shoulder was claim related. December 26, 2012 Order As frozen shoulder is a

shoulder injury, conclusion of law number 3 is not supported by the facts.

Finding of fact no. 9 states Dr. Watanabe diagnosed frozen shoulder however; it does not relate the condition to the claim. There is no finding of fact relating the condition to the claim. Nonetheless, the testimony by Ms. Masho's experts also does not support the conditions being related to her mechanism of injury.

*A. Frozen Shoulder*

Ms. Masho may or may not have frozen shoulder at this point but there is no evidence it is related to the industrial injury. Dr. Watanabe testified as of July 1, 2010 Ms. Masho had a frozen shoulder condition in need of treatment. AR Watanabe Tr. 20 & 21 (May 2, 2011). As to causation of the frozen shoulder condition, she testified; "I **presume** it was related on a more-probable-than-not basis." (emphasis added.) AR Watanabe Tr. 11:12-13. She affirmed this position on page 21 again stating, "I **presume** it's related." (emphasis added.) Despite Ms. Masho's assertions, Dr. Watanabe's presumption that the conditions are related, does not meet her burden of proof. As Judge Crossland aptly pointed out, her testimony did not rise to the level of an opinion on a more

probable than not basis and therefore it does not meet the burden for this condition. AR at 68-69.

The more probable than not standard requires “some probative value that removes the question of causal relation from the field of speculation and surmise.” Jacobson, 37 Wn. 2d at 451. To presume is to speculate, to surmise and to do so without any probative evidence in support of your position. Dr. Watanabe presumption of facts does not provide any medical evidence to support a relationship between the dislocation and the physical conditions.

To illustrate this point, Dr. Watanabe testified this was the first time she had ever seen a patient for this type of dislocation of the shoulder. AR Watanabe Tr. 33:11-16. She also testified she had no knowledge as to the cause of Ms. Masho’s rotator cuff tears. Id. at 32:7-17. Finally, she testified she had not reviewed all of the medical records. Id. at pg 29-31. As she did not have all the evidence, she could do nothing more than “presume” the conditions were related to the claim. Even in conjunction with Dr. James testimony her testimony is of no probative value and it does not help Ms. Masho meet her burden in this case.

Dr. James did testify both the frozen shoulder and the rotator cuff tears were related to work. AR James Hrg. Tr. 73:23. Yet,

again she provided no medical testimony to connect the dots between the mechanism of injury and the complained symptoms. She did not explain how the dislocation of the clavicle bone next to the neck tore the tendons in the shoulder at the opposite end of the clavicle bone.

Dr. Provencher, a shoulder specialist, testified he regularly treats adhesive capsulitis. AR Provencher Tr. 20:4-10. He testified Ms. Masho's mechanism of injury combined with his examination did not support a finding of adhesive capsulitis related to the claim. Id. at 20-21:20-5; see also 22:1-16. His exam was in May 2010 6 months prior to Dr. James examination. Again, the timing of Dr. James examination does not correlate with the mechanism of injury. Dr. Provencher testified the energy applied to the subluxation injury would not appreciably affect a determination of adhesive capsulitis. Id. at 22:15-16. He also testified Ms. Masho had extensive range of motion findings over 2.5 years in the records and her doctors did not find adhesive capsulitis. Id. This is evidence that the time between injury and development of the condition do not correlate.

Dr. Jackson, an orthopedist, also testified it was not related. Dr. Jackson stated he did not find adhesive capsulitis related to the injury. AR Jackson Tr. 40:15-20. He testified if Ms. Masho had it in 2011, it would not be related to the industrial injury. Id. Based on this testimony, there is no evidence that correlates the claimed

condition with the mechanism of injury. We cannot imply what the experts do not provide. Eastwood, 152 Wn.App 664. Dr. James provided no testimony as to how the industrial injury caused this condition. Therefore, the Trier of fact is not allowed to “presume” it is related and responsibility for the frozen shoulder should be denied.

*B. Supraspinatus and Infraspinatus*

Dr. Provencher testified the mechanism of injury would not have caused the tears in Ms. Masho shoulder. AR Provencher Tr. 19:1-13. He testified he had reviewed the actual films. Id. at. 17:19-23. Dr. James did not even review the films, she only read the reports. AR James Hrg Tr. 80:14-18. She had no firsthand knowledge of the medical evidence. Dr. Provencher did. He stated the tears and pathology seen in the rotator cuff were not consistent with the industrial injury. AR Provencher Tr. 19:2-16. He said the “injury and the energy where she was injured was a long ways away from her shoulder.” Id. Thus, it could not have hurt the shoulder. He further testified the only condition related to and consistent with the injury was the clavicle subluxation. Id. at 19:15-16.

Dr. Jackson supported his review of the medical evidence. Dr. Jackson also reviewed the actual films. AR Jackson Tr. 39:6-8.

His review of the films did not show an acute injury to the rotator cuff, only wear and tear. Jackson Tr. 40:1-11. He also stated these were not related to the industrial injury. AR Jackson Tr. 72-73:20 - 10.

There is no reliable evidence from Dr. James connecting the mechanism of injury to the tears in the shoulder or the adhesive capsulitis. She has not reviewed the actual films nor was she present during the initial intake as was Dr. Jackson. Her specialty is physical medicine and rehabilitation. She has referred Ms. Masho to an orthopedist for treatment when two have seen her. AR James Hrg. Tr. 73:7 & 26. Dr. James provided no testimony as to how the mechanism of injury could cause the condition. Dr. Jackson and Dr. Provencher are orthopedists who do or have regularly performed shoulder surgeries. They testified the mechanism of injury is not consistent with either condition. There is no reasonable evidence that connects this condition to the claim.

## **(6) Right Cervical 5, 6, and 7 Sensory Radiculitis of the Brachial Plexus**

### *A. Sensory Radiculitis*

Dr. Kirschner, a board certified neurologist, put it best when asked to discuss Dr. James' diagnosis of sensory radiculitis. He stated,

That is not a diagnosis that I'm familiar with. It is not a diagnosis I would make. Why not?

I have never heard of a, quote, unquote, sensory radiculitis. Now, there is a condition called neuralgic amyotrophy, which affects the nerve roots. But radiculitis of the brachial plexus is a mixing of terms that doesn't -- it is not something that I would -- that I've seen in the textbooks or the literature that I refer to. AR Kirshner Tr. 29:2-15.

He went on to testify:

I don't know what it means. It's not a textbook diagnosis that I'm familiar with, and I -- I don't -- I just don't know what Dr. James is referring to. Generally, doctors, in using technical terms, have an understanding between each other; we use a term and the other person immediately knows the significance of that term anatomically, and physiologically. And I don't quite understand this fusion of the terms sensory radiculitis and brachial plexus.

That doesn't mean it's not a valid diagnosis; correct?

I think it's -- from my standpoint, it is not valid, because the -- if the problem -- there is a term called brachial plexitis, which may be what she meant, which is acceptable, even though it's a little old fashioned. The more modern term is neuralgic amyotrophy, perhaps. I don't know what she's referring to. I'm guessing now what she means. But to make simultaneous reference to an inflammation of nerve roots, just sensory nerve roots, and the brachial plexus, which is sensory and motor nerves, and anatomically distinct, it makes no sense to me. I mean, if one of my medical students were to come up with a comment like that, I would have to correct them about it. *Id.* at 46-47:3-2.

Dr. Kirschner, a neurologist and medical professor, made it clear the condition of sensory radiculitis is not a valid diagnosis when

dealing with the brachial plexus. Furthermore, Dr. James again provided no clear evidence connecting the alleged condition to the claim. She simply states the same factors as to which she previously testified. AR Dr. James Hr. Tr. 74:7. This diagnosis must fail as do the others. Nonetheless, Dr. James testified this condition may be caused by an injury to the Brachial Plexus, yet she provided no evidence to support this condition was related to the claim. The other doctors all state how it was not caused by the injury. There is no reasonable evidence that can tie this condition to the industrial injury.

*B. Brachial Plexus*

Dr. James testified another EMG was needed to verify no injury occurred. It was her opinion the one done was not sufficient yet her testimony seemed to imply it would not show anything anyway. AR Dr. James Hrg. Tr. 72:2-19. Despite this contradictory testimony she states EMGs are part of her specialty. *Id.* at 72:21. She also did not know that two had already been done. Yet, she claimed the condition was related but did not identify how it was related to the mechanism of injury.

Dr. Provencher testified that the mechanism of injury combined with the time line of events was not consistent with an injury to the brachial plexus. AR Provencher Tr. 23:12-25 He

stated you would need a huge force to the shoulder, like a motorcycle accident at 40 miles per hour. Id. That did not occur in this case. Ms. Masho lifted a patient out of bed. There was no downward force. This is similar to Dr. James backpacker palsy argument.

Dr. Kirschner supported this testimony, stating he would have expected an EMG to show issues within four weeks of the injury. AR Kirschner Tr. 20:1-22. He testified he regularly performs and reviews EMGs in his practice. Id. at 18:20-23. He performed an EMG on Ms. Masho. Id. at 18:24:25. He testified that there was no evidence of a brachial plexus injury on the November 8, 2008 EMG a year after the injury or the August 13, 2010 EMG. *Id.* at 20:1-22; See also 24-25:13-5. Dr. Jackson also testified the injury was not the type that would cause a brachial plexus condition. AR Jackson Tr. 36-37:9.

Ms. Masho's experts provided no more than mere speculation that the condition was related to the claim. Dr. James's testimony that she had reviewed the records, performed an examination on Ms. Masho and read the scientific literature is not a basis for relating all these conditions to the claim. The testimony provides no causal connection between the injury and the diagnoses. This case is like Eastwood in that Dr. James and Dr. Watanabe provided no testimony to create a causal link between

the injury and the requested relief. The doctors looked only at the conditions Ms. Masho had. They did not testify how those conditions could be caused by the alleged injury.

Judge Crossland aptly found, "Under the circumstances, I cannot in good conscience place much weight on the opinions of Dr. James." AR CAB 17:21-22. The superior court should have affirmed the Board decision. As there is no substantial evidence to support findings of fact no. 7, 8, 9, 11, 12, & 13 this court should reverse the superior court decision and affirm the Board decision of October 18, 2011.

### **C. Mental Conditions**

Ms. Masho has not shown the industrial injury proximately caused her current physical complaints. As such, she cannot show her industrial injury is the cause of any depression, pain disorder, or anxiety. Proximate cause requires a showing that "but for" the industrial injury, her conditions would not have occurred. Hertog v. City of Seattle, 138 Wn. 2d 265, 282-3 (1999). "But for" causation requires an unbroken link between the alleged injury and the conditions complained of. Id. Just because the industrial injury is the last reported physical event, it does not make it the cause of an

underlying mental disorder. The evidence also shows no correlation between a mental condition(s) and the industrial injury.

Dr. Watanabe testified Ms. Masho had depression but did not want treatment and that it was related to life circumstances from not being able to work, and not the injury. AR Watanabe Tr. 22. Dr. Watanabe further attributed the inability to work, to the frozen shoulder, not the clavicle subluxation. AR Watanabe Tr. 24:3-10. The frozen shoulder was found not related to the industrial injury, i.e., any depression related to that condition cannot be related to the industrial injury. Judge Crossland had a chance to observe Ms. Masho and he was perplexed by her life pattern and testimony. AR at 64. He found Dr. Robinson's testimony tracked most with Dr. Jackson and Dr. Watanabe's findings and experiences with Ms. Masho. *Id.* at 15. Judge Crossland who had an opportunity to interact with Ms. Masho is in a better position to judge her testimony and credibility.

As to relatedness, forensic examiner, Dr. Early testified: "If her (Ms. Masho's) general medical condition were found not related to the industrial injury, the diagnosis would still stand, but the causation would be different." AR Early Tr. 37:11-14 (April 25, 2011). Dr. Early acknowledged if the condition was not related to the claim, neither was the depression. To establish a psychiatric

link to an industrial injury event, one must prove the injury caused the physical disability on a more probable than not basis.

Furthermore, no doctor found Ms. Masho to have depression from the date of the injury through claim closure. Prior to the July 1, 2010 closing order, there was no evidence relating a mental condition to the claim. It was not until three months after closure that Ms. Masho saw a forensic examiner for an alleged psychiatric condition.

Ms. Masho has not shown the industrial injury was a cause of her mental condition. The evidence shows that her current physical ailments were not related to the industrial injury. The only condition related to the claim was the subluxation of the clavicle, and there was no testimony as to need for treatment of that condition.

#### **CONCLUSION ASSIGNMENT OF ERROR No. 1**

The November 6, 2012, December 26, 2012 and February 7, 2013 superior court orders and judgment are not supported by substantial evidence. The case law makes it clear that there must be more than mere speculation and surmise to overturn a Board order. In this case the superior court order should be overturned and the Board order affirmed.

## ASSIGNMENT OF ERROR No. 2

Ms. Masho's CR 60 Motion was not the proper vehicle by which to challenge the November 6, 2012 superior court order.

### SUMMARY

The superior court issued an order on November 6, 2012. Ms. Masho did not file a motion for reconsideration or request an extension of time within the 10 day limitation of CR 59. Instead on or around December 4, 2012 she filed a CR 60 motion to address what she deemed to be a mistake in the November 6, 2012 order. Appellant opposed the motion; however, the court granted the motion on December 26, 2012 stating it had authority to clarify the November 6, 2012 order. Appellant will provide the brief legal authority for this issue followed by its argument.

### LEGAL AUTHORITY

#### A. CR 60(a): Judicial v. Clerical Error:

A court cannot correct judicial errors." In re: Presidential Estates Apartment Associates v. Barrett, 129 WN.2d 320,326 (1996).

In deciding whether an error is "judicial" or "clerical," a reviewing court must ask itself whether the judgment, as amended, embodies the trial court's intention, **as expressed in the record at trial.** Id. (emphasis added).

If the answer to that question is yes, it logically follows that the error is clerical in that the amended judgment merely corrects language that did not correctly convey the intention of the court, or supplies language that was inadvertently omitted from the original judgment.

If the answer to that question is no, however, the error is not clerical, and, therefore, must be judicial. Thus, even though a trial court has the power to enter a judgment that differs from its oral ruling, once it enters a written judgment, it cannot, under CR 60(a), go back, rethink the case, and enter an amended judgment that does not find support in the trial court record. Id.

#### **B. CR 60(b)(11)**

“The use of CR 60(b) (11) is to be “confined to situations involving extraordinary circumstances not covered by any other section of the rule.” In re The marriage of Linda Tang, 57 Wn.App. 648, 655 (1990). “Such circumstances must relate to irregularities extraneous to the action of the court”. Id. at 656. The rule has previously been invoked in unusual situations which typically involve reliance on mistaken information. Id.

## **ARGUMENT**

A rule CR 60 motion is to provide relief from a judgment or order due to mistake, fraud, newly discovered evidence or satisfaction of judgment. None of these issues were present when superior court granted of Ms. Masho's CR 60 Motion. Ms. Masho moved the court to change the November 6, 2012 order based on CR 60(a) and CR 60(b). CR 60 is for relief based on a clerical mistake or omission by the court and CR 60(b) (11) is a catch all provision for any circumstance that does not meet the other provisions for relief. No evidence has been provided that establishes the November 6, 2012 order contained clerical mistakes or other problems that can be dealt with by the trial court. Essentially, Ms. Masho is moving to have the court rewrite the order to grant her more benefits than to which she is entitled. The appropriate motion in which Ms. Masho should have raised these issues would have been under Civil Rule 59 (a) or (h). A motion under CR 59 must be filed within 10 days of the order. In this case it was not. In fact, it was not filed until after Appellant appealed the November 6, 2012 order to the court of appeals. Therefore, any attempts to have the order reconsidered or amended by plaintiff are untimely.

## **CIVIL RULE 60 MOTIONS**

CR 60 (a) deals with clerical mistakes. CR 60(b) (11) is a catch all provision stating “Any other reason justifying relief from the operation of the judgment.” Neither section provides relief to Plaintiff in this matter. Washington Supreme Court case law clearly defines when a judge may make amendments to an order under CR 60 (a).

**1). CIVIL RULE 60(a) does not provide the sought after relief.**

In Presidential Estates Apartment Associates v. Barrett the Washington Supreme Court provided a simple test to determine whether CR 60(a) applied to the relief requested. The court stated: “A court cannot correct judicial errors.” In re: Presidential Estates Apartment Associates v. Barrett, 129 WN.2d 320,326 (1996). To determine whether a judicial mistake or clerical mistake occurred, “the reviewing court must ask itself whether the judgment, as amended, embodies the trial court’s intention, as expressed in the record at trial.” Id. This is a simple process.

The Trier of fact must simply determine if the amended order clearly reflects the courts intentions as stated on the record then it is a clerical mistake and may be corrected.

The only record of the superior court's intentions is the November 6, 2012 order. The verbatim report includes no mention as to the court's intentions. Verbatim Report 9/21/12 Transcript

The court reviewed additional documents but did not provide any oral or written evidence to either party as to its intentions. Ms. Masho has not identified how its proposed order reflects the actual intentions of the court. Ms. Masho simply asserts that Judge Robinson must have meant for Ms. Masho to get all possible benefits under the claim.

The order provides no support for Ms. Masho's motion. The November 6, 2012 order states "the court concludes that petitioner has met her burden of proof." November 6, 2012 order at page 4. This does not say as to all of plaintiff's issues the burden was met. In fact, a reading of the order shows that the Judge accurately stated in Finding of Fact 4 Ms. Masho had the burden to show a need for time loss and an allowance of a mental health condition. There is no finding of fact allowing time loss or finding Ms. Masho disabled during the time period for which time loss was sought. There is also no conclusion of law stating she gets these benefits.

However, there is a finding of fact that states: “this court finds credible the diagnosis of depression as a result of the October 20, 2007 industrial injury and recommendation for psychotherapy.” November 6, 2012 order. This is the only condition to which the Judge expressed an opinion in the facts or conclusions of law. As such, any adding of the physical complaints, time loss requests or other benefits would be an amendment to the order that required the court to “rethink” its cases. Barrett, 129 WN.2d at 326. This is not allowed by the case law.

The Supreme court clearly stated in Barrett: “[E]ven though a trial court has the power to enter a judgment that differs from its oral ruling, once it enters a written judgment, it cannot, under CR 60(a), go back, rethink the case, and enter an amended judgment that does not find support in the trial court record.” Id. See footnote (5) (“Whether a trial court intended that a judgment should have a certain result is a matter involving legal analysis and is beyond the scope of CR 60(a)).

The superior court’s changing of the November 6, 2012 order required a legal analysis that was beyond the scope of CR 60 (a). This is not allowed under Barrett. The November 6, 2012 order

makes no findings as to time loss, or other physical conditions. To allow these conditions would require additional legal facts and analysis not supplied by the order or trial court record. Ms. Masho's remedy was a CR 59 motion to amend or reconsider the order. She did not do that. She also did not file an appeal another action to clarify the order. Therefore, its action under CR 60(a) is to correct a judicial mistake; is untimely and unsupported by the record. Civil Rule 60(b) (11) also does not allow the relief requested by Ms. Masho

**2). CIVIL RULE 60(b) (11).**

Ms. Masho also alleges that CR 60(b) (11) is appropriate as a "catch all" provision. This is not true. The courts have found that CR 60(b) (11) can only be used "in unusual situations which typically involve reliance on mistaken information." In re The marriage of Linda Tang, 57 Wn. App. 648, 656 (1990). This information must be extraneous to the proceedings themselves. *Id.* Ms. Masho has provided no evidence to show a need to rely on CR 60(b) (11). Plaintiff simply asserts that the motion is needed to avoid confusion regarding enforcement at the Department level. This is not an unusual situation. If she wanted to clarify these

issues she could have filed a motion for reconsideration under CR 59 or appealed the order. She chose to do neither.

The order is clear as to the condition allowed, depression, and its need for treatment. It is clear that no time loss was awarded and no further physical medical treatment is needed based on the order. The only evidence the judge found credible is that of Dr. Early. The record speaks for itself. There are no other conditions to be allowed by this order. Plaintiff is striving to bypass the established mechanisms for relief to amend an order for which she failed to appeal or file reconsideration. A CR 60 motion was not the proper forum. Plaintiff should have brought a CR 59 motion to reconsider or amend the order within 10 days of the November 6, 2012 filing. Plaintiff did not and cannot seek to remedy its position through a CR 60 motion. Plaintiff also may have appealed the November 6, 2012 order but did not. Defendant has filed an appeal in this matter. That is the proper way to address the disputed terms of the order.

## **CONCLUSION**

The court should deny the superior court order allowing the CR 60 motion. The court should overturn the December 26, 2012 order and the February 7, 2013 judgment. Plaintiff has provided no new evidence to support its position. Time loss was not awarded or mentioned in the findings of facts or conclusions of law. In fact, Judge Robinson specifically noted Dr. Jackson found Ms. Masho could work. November 6, 2012 order Findings of Fact #5 & 6. The order does not award time loss as requested by Plaintiff. If either order should be affirmed, it is the November 6, 2012 order. If the CR 60 motion was not proper and we are on appeal before the court on the November 6, 2012 order it should be overturned for the same reasons as the December 26, 2012 order as mentioned above. The October 18, 2011 Board order should be reinstated.

April 3, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Drew D. Dalton', written over a horizontal line.

Drew D. Dalton, WSBA 39306  
Attorney for Appellant, Crista Ministries

**CERTIFICATE OF SERVICE**

I hereby certify that I filed the foregoing **BRIEF OF APPELLANT and CERTIFICATE OF SERVICE** by US Mail transmittal on today's date, addressed as follows:

**ORIGINAL TO:** Court of Appeals Clerk  
600 University St  
Seattle, WA 98101-1176

I further certify that I served the foregoing **BRIEF OF APPELLANT and CERTIFICATE OF SERVICE** on the following parties on April 3, 2013, by mailing to said parties to this action a copy thereof, certified by me as such, with postage prepaid, addressed to said parties at their last-known addresses as follows, and deposited in the post office at Spokane Valley, WA on said day:

**COPIES TO:**

Court of Appeals Clerk  
600 University St  
Seattle, WA 98101-1176

Erica Shelley Nelson  
Scott Kinney & Fjelstad  
600 University St., Ste. 1928  
Seattle, WA 98101-4115

Docket Manager  
Office of the Attorney General/Tumwater  
PO Box 40121  
Olympia, WA 98504-0121

DATED: April 3, 2013

FORD LAW OFFICES PS



Drew D. Dalton, WSBA No. 39306  
of Attorneys for CRISTA Ministries