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

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 COURT OF APPEALS
 STATE OF WASHINGTON
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DOCKET NO. 709615

SEARS ROEBUCK COMPANY,
 Appellant,

v.

JULIE A. SCOTT,
 Respondent.

Opposition to Superior Court judgment allowing medical and mental conditions under this worker's-compensation claim, remanding for reconsideration of time loss compensation, and awarding attorney's fees

Amended Brief for Appellant

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Assignments of Error

The employer, Sears, assigns error to three major conclusions of the Superior Court: first, finding Scott had thoracic outlet syndrome, headaches, and pain and anxiety disorders related to her March 22, 2003 industrial injury, as those findings are not supported by substantial evidence; second, remanding the issue of time loss compensation from March 3, 2007 to September 30, 2009 to the Department of Labor and Industries, when that conclusion does not follow from the jury's denial of time loss compensation for that period; and third, directing Sears to pay all Scott's Superior Court attorney fees, when the appeal related to two consolidated worker's compensation claims, and Scott completely lost on one of them.

Summary of the Facts

On March 24, 2002 Scott injured her left shoulder while working at Sears when she used her left arm to support a cook top lowered to her from a high shelf.¹ Her complaints after the 2002 injury primarily related to her left shoulder, although the records also reflect some complaints of migraines.² She took some time off work and returned in mid-2002.³

¹ Scott Dep. 16:14-17:21, June 18, 2010.

² Scott Dep. 21:13, June 18, 2010; Ombrellaro Dep. 23:24, June 24, 2010.

On March 22, 2003 Scott injured her right shoulder while working at Sears when she helped a coworker pull a 30-inch convection oven from a wall display.⁴ After taking some time off immediately after the incident, Ms. Scott worked intermittently from August 23, 2003 to March 2, 2007 and did not work at all from March 3, 2007 to September 25, 2009.⁵

After the 2003 claim, Scott's doctors initially concluded Scott had irritated her acromioclavicular or sternoclavicular joints.⁶ Several months later, Scott doctors diagnosed additional conditions related to the 2003 claim, including thoracic outlet syndrome, headaches, and panic and anxiety disorders.⁷ Sears referred Scott to specialists in orthopedic surgery, neurology, physiatry, psychiatry, and general/vascular surgery for additional opinions on whether, *inter alia*, Scott had thoracic outlet

³ Scott Dep. 21:15, June 18, 2010.

⁴ *Id.* at 22:19-

⁵ Scott Dep. 30:4-8, 35:8, June 18, 2010.

⁶ Williamson-Kirkland Dep. 43:17-24, October 29, 2010.

⁷ Williamson-Kirkland Dep. 44:9-12 (headaches and thoracic outlet months after claim); Scott Dep. 38:26, June 18, 2010 (first panic attack March 7, 2008), Ombrellaro Dep. 28:22-23, June 7, 2010 (diagnosing signs of thoracic outlet syndrome in 2004); Holliday Dep. 13:10-11, June 16, 2010 (diagnosing panic and anxiety disorders in 2008); Hyman Dep. 20:10-12 (diagnosing cervicogenic headaches in November or December 2003).

syndrome, headaches, or panic and anxiety disorders.⁸ None of the specialists diagnosed those conditions as related to the 2003 claim.⁹

Actions of the Lower Courts

Department of Labor and Industries:

Scott filed a worker's compensation claim with the Department of Labor and Industries after using her left arm to support a cook top lowered to her from a high shelf while working at Sears on March 24, 2002.¹⁰ The claim was allowed and assigned Department claim number W580135.¹¹ On September 30, 2009 the Department issued an order affirming a prior order which closed claim W580135 (March 24, 2002 date of injury), awarded no permanent partial disability, and indicated the claim was allowed for left rotator cuff tendinitis, but segregated the conditions of thoracic outlet syndrome, carpal tunnel syndrome, headaches, cervical disc disease, and low back condition as unrelated to the claim.¹²

⁸ Brigham Dep. 4:19, July 19, 2010; Valpey Dep. 4:6, August 26, 2010; Williamson-Kirkland Dep. 10:9, October 29, 2010; Robinson Dep. 6:3, August 31, 2010; Kellogg Dep. 3:21, July 20, 2010.

⁹ Brigham Dep. 22:25-23:7, July 19, 2010; Valpey Dep. 23:10-13, August 26, 2010; Williamson-Kirkland Dep. 46:8-14, October 29, 2010; Robinson Dep. 33:6, August 31, 2010; Kellogg Dep. 39:4, 43:4-26, July 20, 2010.

¹⁰ CABR 5, Board of Industrial Insurance Appeals (BIIA) Order and Notice.

¹¹ *Id.* at 2.

¹² CABR 127-129, March 2, 2009 and September 30, 2009 Department orders.

Scott filed another worker's compensation claim after she pulled an oven while working at Sears on March 22, 2003.¹³ The claim was allowed and assigned Department claim number W580146.¹⁴ On September 25, 2009 the Department issued an order which closed the claim, awarded three percent permanent partial disability of the right upper extremity, and segregated the conditions of thoracic outlet syndrome, bilateral carpal tunnel syndrome, headaches, cervical disc disease, low back strain, and pain disorder with agoraphobia as unrelated to the claim.¹⁵

Board of Industrial Insurance Appeals:

Ms. Scott appealed the September 30, 2009 (claim W580135, March 24, 2002 date of injury) and September 25, 2009 (W580146, March 22, 2003 date of injury) Department orders to the Board of Industrial Insurance Appeals.¹⁶ The Board granted the appeals and assigned consolidated docket numbers 09 20395 and 09 20396.¹⁷ On September 22,

¹³ CABR 2, 5, BIIA Decision and Order.

¹⁴ CABR 2, 9, BIIA Decision and Order.

¹⁵ CABR 223-224, September 25, 2009 Department order.

¹⁶ CABR 126, 219, Scott's appeals to BIIA.

¹⁷ CABR 130, 226, BIIA orders granting Scott's appeals; CABR 147, BIIA order indicating consolidated appeals.

2011 the Board issued an amended order reversing the two orders on appeal.¹⁸

With regard to claim W580135 (March 24, 2002 date of injury) the Board held the claim open for mental health treatment.¹⁹ The Board found Sears responsible for the conditions of left shoulder strain, tendinitis, and impingement syndrome, temporary aggravation of preexisting cervical degenerative disc disease, aggravation of preexisting somatoform disorder, and panic and anxiety disorders.²⁰ The Board directed Sears to pay time loss from March 3, 2007 to September 30, 2009.²¹ The Board concluded Sears was not responsible for a cervical condition, low back condition, headaches, vascular or neurogenic thoracic outlet syndrome, bilateral carpal tunnel syndrome, or agoraphobia.²²

With regard to claim W580146 (March 22, 2003 date of injury) the Board held the claim should be held open for mental health treatment.²³ The Board found Sears responsible for the conditions of right shoulder strain, tendinitis, and impingement syndrome, aggravation of preexisting

¹⁸ CABR 236, BIIA Amended Decision and Order.

¹⁹ CABR 239, BIIA Amended Decision and Order, 4:15-17.

²⁰ *Id.* at 4:9-14.

²¹ CABR 241, BIIA Amended Decision and Order 6:4-5.

²² CABR 240, BIIA Amended Decision and Order 5:1-12.

²³ CABR 239, BIIA Amended Decision and Order 4:26-28.

somatoform disorder, and panic and anxiety disorders.²⁴ The Board directed Sears to pay time loss compensation from March 3, 2007 to September 30, 2009.²⁵ The Board concluded Sears was not responsible for the conditions of cervical condition, low back condition, headaches, vascular or neurogenic thoracic outlet syndrome, bilateral carpal tunnel syndrome, or agoraphobia.²⁶

Superior Court:

Sears appealed to Superior Court, cause number 11-2-34308-1 KNT. The case was tried to a six-person jury.²⁷ On March 28, 2013 the Superior Court issued an *Amended Judgment and Order*.²⁸ With regard to claim W580135 (March 24, 2002 date of injury) the jury found in favor of Sears on all issues on appeal.²⁹ The jury concluded 2002-claim-related conditions did not render Scott unable to work from March 3, 2007 to September 30, 2009, and Sears was not responsible for the conditions of somatoform disorder, panic and anxiety disorders, cervical condition, headaches, or vascular or neurogenic thoracic outlet syndrome.³⁰

²⁴ CABR 239, BIIA Amended Decision and Order 4:20-25.

²⁵ CABR 241, BIIA Amended Decision and Order 6:4-5.

²⁶ CABR 240, BIIA Amended Decision and Order 5:1-12.

²⁷ CP 37, Amended Judgment and Order 2:15-20.

²⁸ *Id.* at 9:18.

²⁹ *Id.* at 2:20-3:12, 4:6-11, 4:20-23, 5:5-9.

³⁰ *Id.*

With regard to claim W580146 (March 22, 2003 date of injury) the jury found partially for Sears and partially for Scott. The jury concluded [for Scott] the claim should be held open for mental health treatment; the 2003 industrial injury did cause or aggravate Scott's headaches, vascular or neurogenic thoracic outlet syndrome, and preexisting somatoform disorder rendering it symptomatic to proximately cause panic and anxiety disorders.³¹ However, the jury concluded [for Sears] claim-related conditions did not render Scott unable to work from March 3, 2007 to September 30, 2009.³² The jury also concluded the 2003 industrial injury did not cause or aggravate Scott's preexisting somatoform disorder rendering it symptomatic, or cause or aggravate a cervical condition.³³

In spite of the jury's verdict, the Superior Court remanded the issue of Ms. Scott's time loss compensation between March 3, 2007 and September 30, 2009 to the Department, to be adjudicated in light of the newly accepted conditions.³⁴ The Superior Court awarded Ms. Scott \$51,994 in attorneys' fees and \$21,868 in costs (\$73,862 total),

³¹ *Id.* at 3:18-4:5, 5:1-4, 5:10-14.

³² *Id.* at 4:6-11.

³³ *Id.* at 3:13-17, 4:16-19.

³⁴ *Id.* at 8:20-25.

representing the total attorney's fees attributed to the Superior Court appeal.³⁵

Argument and Authorities

A. With regard to thoracic outlet syndrome, headaches, and panic and anxiety disorders, the Superior Court's judgment should be reversed for lack of substantial evidence.

The Appellate Court is charged with reviewing superior court judgments to determine if they are supported by substantial evidence.³⁶ If the Appellate Court is convinced the judgment is wrong and there is no evidence, if believed, which would support the verdict, the Appellate Court may substitute its judgment for that of the jury.³⁷

1. Scott does not have thoracic outlet syndrome related to her 2003 claim.

The only expert witnesses who testified that Scott had thoracic outlet syndrome related to her 2003 worker's compensation claim are outliers. Their opinions are inconsistent with the majority of the medical community, their own objective findings, the mechanism of Scott's 2003 injury, and the timing of her symptoms. Accordingly, those opinions are

³⁵ *Id.* at 9:5-10.

³⁶ *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128 (1996).

³⁷ *Raum v. City of Bellevue*, 171 Wn. App. 124, 151 (2012) *review denied* 176 Wn.2d 1024 (2013).

not substantial and the Superior Court judgment attributing Scott's alleged thoracic outlet syndrome to the 2003 claim should be reversed.

There is controversy in the medical community with regard to the diagnosis of thoracic outlet syndrome.³⁸ The majority (perhaps 80-90 percent) of doctors believe thoracic outlet syndrome is very uncommon.³⁹ In light of the thoracic outlet syndrome controversy, the Department of Labor and Industries has medical guidelines for diagnosis and/or surgical treatment for this condition in injured workers.⁴⁰ Those guidelines require specific electrodiagnostic findings before performing thoracic outlet surgery.⁴¹ None of Scott's electro-diagnostic studies have shown those findings.⁴²

Despite Scott's normal electrodiagnostic findings, her attending physicians have diagnosed thoracic outlet syndrome and are recommending thoracic outlet surgery based on Scott's subjective symptoms alone. Dr. Ombrellaro criticizes the Department guidelines for being "stringent," not addressing the "vast majority" of people – but that is

³⁸ Williamson-Kirkland Dep. 24:18-24, October 29, 2010.

³⁹ *Id.*

⁴⁰ *Id.* at 23:18.

⁴¹ Ombrellaro Dep. 39:22, June 7, 2010.

⁴² Valpey Dep. 32:3-16, August 26, 2010; Brigham Dep. 14:23-24, July 19, 2010; Kellogg Dep. 38:22 July 20, 2010.

exactly why the majority of doctors rely on those objective findings.⁴³ Thoracic outlet syndrome is a rare diagnosis, and surgery is only appropriate in those most severe cases.⁴⁴ In light of Scott's normal electrodiagnostic studies, specialists in neurology (Dr. Valpey), physiatry (Dr. Williamson-Kirkland), general and vascular surgery (Dr. Kellogg), and orthopedic surgery (Dr. Brigham) determined Scott did not have thoracic outlet syndrome and thoracic outlet surgery was not appropriate.⁴⁵

In addition to being consistent with the Department's thoracic outlet syndrome guidelines, the neurology, physiatry, general and vascular surgery, and orthopedic surgery specialists' opinions are also consistent with the onset of Scott's symptoms and the mechanism of her 2003 injury. If a person has trauma-induced thoracic outlet syndrome, the symptoms are immediate. An example of this can occur when football players collide. One of the player's shoulders may be jammed at high impact, causing his arm to dangle at his side.⁴⁶ The symptoms should be most dramatic and acute in the first few days.⁴⁷ Scott's alleged symptoms of

⁴³ Ombrellaro Dep. 38:18-19, June 7, 2010.

⁴⁴ Kellogg Dep. 67:10, July 20, 2010; Williamson-Kirkland Dep. 22:8-23:3, October 29, 2010.

⁴⁵ Valpey Dep. 24:9-10, August 26, 2010; Williamson-Kirkland Dep. 46:8-14, October 29, 2010; Kellogg Dep. 39:4, July 20, 2010; Brigham Dep. 30:16, July 19, 2010.

⁴⁶ Williamson-Kirkland Dep. 28:9-18, October 29, 2010.

⁴⁷ Williamson-Kirkland Dep. 53:19-20, October 29, 2010.

thoracic outlet syndrome are inconsistent with the diagnosis because she did not report those subjective symptoms until months after her 2003 injury.⁴⁸

Moreover, the mechanism of Scott's 2003 injury – pulling an oven from the wall – is not logically the type of injury to cause thoracic outlet syndrome. It is important to consider the human anatomy when determining if Scott's 2003 incident was a likely cause of this condition. The thoracic outlet is the space where nerves and veins run from the chest to the arm.⁴⁹ Thoracic outlet syndrome occurs when veins in that space become compressed, or nerves are stretched.⁵⁰ For a traumatic incident to cause thoracic outlet syndrome, the shoulder must be impacted dramatically, with significant force.⁵¹ Examples include the collisions football players experience, injury at a motorcycle crash, or shoulder impact from a blunt object falling a significant distance on a construction site.⁵² Although one physician, Dr. Ombrellaro, posited that pulling an oven from the wall was consistent with causation of thoracic outlet syndrome, his opinion is not supported by substantial evidence, in light of

⁴⁸ Williamson-Kirkland Dep. 53:23-54:1, October 29, 2010.

⁴⁹ Williamson-Kirkland Dep. 21:2-3, October 29, 2010.

⁵⁰ Williamson-Kirkland Dep. 28:5-6, October 29, 2010.

⁵¹ Williamson-Kirkland Dep. 28:3-29:22, October 29, 2010.

⁵² *Id.*

the vast majority of well-reasoned expert medical opinion and the reality of the human anatomy.⁵³

2. Scott does not have headaches related to her 2003 claim.

Relating headaches to Scott's 2003 injury – using her right arm to pull an oven from the wall – is certainly not immediately obvious.⁵⁴ Some experts testified that the headaches were a secondary diagnosis, resulting from other orthopedic problems. However, because the foundational diagnoses are not related to the 2003 claim and the timing of Scott's headaches is inconsistent with being caused by the 2003 injury, substantial evidence does not support attributing the headaches to the 2003 claim.

Any possible reason Scott may have headaches is unrelated to the 2003 claim. Some experts testified Scott had headaches related to thoracic outlet syndrome.⁵⁵ However, as explained above, substantial evidence does not support a diagnosis of thoracic outlet syndrome related to the 2003 claim.⁵⁶ Other experts testified Scott's headaches were caused by

⁵³ Ombrellaro Dep. 29:2-4, June 7, 2010; *see also* Hyman Dep. 43:17-18, 76:15-20, July 14, 2010 (finding claim-related thoracic outlet syndrome symptoms but agreeing thoracic outlet is not his area of expertise and he must defer to specialists for the diagnosis).

⁵⁴ Robinson Dep. 49:7-10, August 31, 2010.

⁵⁵ Hyman Dep. 44:19-20, July 14, 2010.

⁵⁶ *See* §A.1., *infra*.

cervical pain.⁵⁷ However, the jury determined Scott did not have a cervical condition related to her 2003 claim.⁵⁸

Additionally, the timing of Scott's reported headaches is inconsistent with attribution to the 2003 injury. If Scott had 2003-claim-related headaches, they would have appeared immediately, and been temporary.⁵⁹ However, Scott did not seek medical attention for headaches until several months after the 2003 injury.⁶⁰ Moreover, Scott's headaches did not begin with the 2003 claim. Medical records document a history of migraines long before March 22, 2003.⁶¹ The preexisting history of headaches before the 2003 injury, failure to seek medical attention for subsequent reports of headaches until several months after the 2003 injury, and the delayed onset of the reported headaches break any alleged causal connection to the 2003 incident.

3. Scott does not have panic or anxiety disorders related to her 2003 claim.

The Superior Court judgment with regard to Scott's alleged panic and anxiety disorders is internally contradictory and not supported by

⁵⁷ Hyman Dep. 16:5, 20-23, July 14, 2010; Brigham Dep. 23:3-4, July 19, 2010.

⁵⁸ CP 37, Amended Judgment and Order 4:16-19.

⁵⁹ Williamson-Kirkland Dep. 46:20-22, October 29, 2010.

⁶⁰ Williamson-Kirkland Dep. 44:9-10, *see also* Ombrellaro Dep. 23:12-24:9, June 7, 2010 (no mention of headaches in April 19, 2004 report of symptoms).

⁶¹ Ombrellaro Dep. 23:24, June 24, 2010.

substantial evidence. In the Superior Court judgment, the jury found: 1) the 2003 injury did not cause Scott's preexisting somatoform pain disorder to become symptomatic and disabling; and 2) the 2003 injury did cause Scott's preexisting somatoform pain disorder to become symptomatic and disabling to proximately cause panic and anxiety disorders.⁶² The jury verdict is inconsistent as it indicates the 2003 injury both did, and did not, cause or aggravate Scott's preexisting somatoform disorder.

Although the employer did not raise this verdict inconsistency at trial, the employer did not waive its right to raise the issue at the Court of Appeals. In cases of inconsistency in a special verdict, where parties fail to raise the issue in order to "try [their] luck with a second jury," the parties have waived the right to raise the issue in appellate review.⁶³ However, in cases of a general verdict, where there is no indication the appellants deliberately remained silent in order to "try [their] luck with a second jury, there is no waiver."⁶⁴ Here, because the jury verdict was general and Sears did not deliberately postpone addressing the inconsistencies, the employer

⁶² CP 37, Amended Judgment and Order 3:13-22 (emphasis added).

⁶³ *Gjerde v. Fritzsche*, 55 Wn. App. 387, 393-94 (1989).

⁶⁴ *Malarkey Asphalt Co. v. Wyborne*, 62 Wn. App. 495, 510-11 (1991), citing *Gjerde*, *supra*, 55 Wn. App. at 394 (indicating there was no waiver when "[t]here is no indication in that portion of the record submitted with this appeal that appellants deliberately remained silent in order to 'try [their] luck with a second jury.'")

has not waived its right to have the Court of Appeals correct the contradictory jury findings.

Although the typical remedy for contradictory jury findings is remand to Superior Court, remand is unnecessary in this case because there is not substantial evidence to support attributing panic or anxiety disorders to the 2003 claim. Similar to the analysis with regard to headaches, any possibility of attributing a mental health diagnosis to Scott's 2003 injury – pulling an oven from the wall – must be secondary to other diagnoses. However, between the jury verdict and analysis above, Scott does not have a lumbar condition, cervical condition, thoracic outlet syndrome, or headaches related to the 2003 claim.⁶⁵ Because there is no underlying diagnosis related to the 2003 claim that could possibly trigger a panic or anxiety disorder, there is not substantial evidence to support attributing those disorders to the 2003 claim.

B. The Superior Court's judgment with regard to time loss compensation does not flow from the jury's verdict.

The Court of Appeals may reverse a Superior Court judgment if the Superior Court's conclusions of law do not flow from the jury's findings.⁶⁶ Here, the portion of the Superior Court judgment remanding the issue of Scott's entitlement to time loss compensation from March 3,

⁶⁵ See §A.1., *infra*; §A.2., *infra*; CP 37, Amended Judgment and Order.

2007 to September 30, 2009 to the Department of Labor and Industries does not flow from the jury's verdict and must be reversed.⁶⁷

The jury was presented with the following question:

Was the Board of Industrial Insurance Appeals correct in deciding that between March 3, 2007 and September 30, 2009, the industrial injuries on March 24, 2002 and March 22, 2003 proximately caused Ms. Scott to be unable to obtain or perform any form of gainful occupation in the competitive labor market on a reasonably continuous basis?

It clearly answered "No."⁶⁸ Although whether or not the Department considered various medical conditions when closing the 2003 claim is not established on the record, the issue before this Court is not what the Department did or did not consider. The issue is whether the Superior Court judgment flows from the jury's findings. Given that the jury clearly found Scott was not entitled to time loss compensation for the period at issue, the Superior Court's conclusion to remand that issue to the Department does not flow from jury's findings and must be reversed.

C. The attorney's fees awarded by Superior Court should be equitably reduced.

Under RCW 51.32.130 and relevant case law, employers are responsible for a worker's Superior Court attorney's fees if, but only if,

⁶⁶ *Young*, 81 Wn. App. at 128.

⁶⁷ See CP 37, Amended Judgment and Order 8:21-25.

⁶⁸ *Id.* at 4:6-11.

the worker prevails on at least some issues on appeal.⁶⁹ In interpreting the application of RCW 51.32.130 to attorney's fees awarded in a single appeal, the Supreme Court held that the employer is responsible for the total attorney fees, rather than a proportion, regardless of the number of issues on the appeal on which the worker prevails.⁷⁰ As foundation for the holding, Supreme Court pointed to the liberal interpretation of the Industrial Insurance Act in favor of injured workers, and the fact that RCW 51.32.130 does not explicitly allow proportionate awards.⁷¹

The Supreme Court recognized that prior cases outside of the Industrial Insurance framework limited attorney fee awards to only those attributable to successful claims unrelated and separable from the unsuccessful claims.⁷² However, it held claims under the Industrial Insurance Act were not discrete, unrelated claims because worker's

⁶⁹ RCW 51.52.130(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 in cases where a party other than the worker ... is the appealing party and the worker's ... right to relief is sustained, a reasonable fee for the services of the worker's ... attorney shall be fixed by the court. 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.

⁷⁰ *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 670-71 (1999).

⁷¹ *Id.* at 668

⁷² *Id.* at 672-673.

compensation claims are statutorily based, and deal with one set of facts and legal issues.⁷³

Sears acknowledges the effect of *Brand*, but respectfully requests the Court of Appeals reconsider whether that decision applies to this appeal, which is fundamentally different than *Brand*. In *Brand*, the worker appealed one Department order with regard to one worker's compensation claim, and prevailed on only some of the issues in the single appeal.⁷⁴ Here, however, Scott appealed two Department orders with regard to two worker's compensation claims, and only prevailed on some issues related to one of the claims (shaded boxes indicate issues Scott lost at Superior Court):⁷⁵

⁷³ *Id.* at 673.

⁷⁴ *Id.* at 662-63 (emphasis added).

⁷⁵ See CP 236-24, BIIA Amended Decision and Order; CP 37, Amended Judgment and Order 4:6-11 (emphasis added).

	March 24, 2002 injury W580135		March 22, 2003 injury W580146	
	9.22.11 BIIA order	3.28.13 Superior Ct.	9.22.11 BIIA order	3.28.13 Superior Ct.
Claim open for treatment?	Open for treatment	Reversed, closed	Open for treatment	Open
Thoracic Outlet Syndrome	Deny under claim	Affirmed, denied	Deny under claim	Reversed, allowed
Headaches	Deny under claim	Affirmed, denied	Deny under claim	Reversed, allowed
Cervical condition	Deny under claim	Affirmed, denied	Deny under claim	Affirmed, denied
Low back condition	Deny under claim	Affirmed, denied	Deny under claim	Affirmed, denied
Mental health condition	Allow under claim	Reversed, denied	Allow under claim	Affirmed, allowed
Time loss	Allow under claim	Reversed, denied	Allow under claim	Remanded

In *Brand*, the Supreme Court held: “the sole issue on appeal before the superior or appellate court in an Industrial Insurance Act case is whether or not the Board adequately addressed the worker’s degree of injury. Alternative theories regarding the nature and extent of the worker’s injury cannot be said to be unrelated, inseparable claims.”⁷⁶ While that may be true for any single injury, Scott’s appeal was not a single injury or worker’s compensation claim; it was two injuries and two claims consolidated on appeal. Scott had separate, distinct injuries in 2002 and

⁷⁶ *Id.* at 673 (emphasis added).

2003 which affected different parts of her anatomy, different than the single injury identified by the Supreme Court.

The policy behind awarding a worker's attorney's fees in a successful appeal to Superior Court is to ensure adequate representation for injured workers.⁷⁷ That makes sense when the worker is granted attorney's fees in successful appeals related an industrial injury. However, when the worker is awarded attorney's fees when he or she loses on all issues related to a claim, there is no greater good served other than to encourage litigation that should never have been initiated in the first place. Accordingly, Sears respectfully requests Scott's attorney's fees be reduced by an amount found equitable by this Court.

Conclusion

Over a decade ago, in 2002 and 2003, Scott sustained two relatively innocuous industrial injuries while working at Sears. There is no objective evidence or logical basis for diagnosing thoracic outlet syndrome, headaches, or panic and anxiety disorders related to those injuries. The jury found Scott was not entitled to additional time loss compensation related to the claims, and found in favor of Sears on all issues related to the 2002 claim. Accordingly, the Superior Court judgment attributing thoracic outlet syndrome, headaches, and panic and

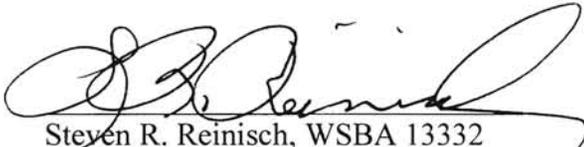
⁷⁷ *Id.* at 670.

anxiety disorders to the 2003 claim; remanding the issue of time loss compensation back to the Department of Labor and Industries; and awarding Scott's full attorney's fees is incorrect and should be reversed.

Sears respectfully requests:

1. The Superior Court judgment with regard to thoracic outlet syndrome, headaches, and panic and anxiety disorders be reversed for lack of substantial evidence;
2. The Superior Court conclusion remanding the issue of time loss compensation to the Department of Labor and Industries be reversed because it does not flow from the jury's findings; and
3. Scott's attorney's fee award be reduced in an amount found equitable by this Court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. Reinisch', with a large, sweeping flourish extending to the right.

Steven R. Reinisch, WSBA 13332
Attorney for Sears Roebuck Co.

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CERTIFICATE OF MAILING

I hereby certify that I filed the foregoing AMENDED BRIEF for APPELLANT on the following individuals on April 28, 2014, by depositing them with the U.S. Postal Service in envelopes with first class postage affixed and addressed to:

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