NO. 98288-1

SUPREME COURT
STATE OF WASHINGTON

KATHRYNE L. CONNER,

Petitioner,

v.

HARRISON MEDICAL CENTER, and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

HARRISON MEDICAL CENTER'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent, Harrison Medical Center, respectfully requests the Court to deny Ms. Conner's Petition for Review of *Conner v. Harrison Med. Ctr*., 11 Wn. App. 2d 467, 454 P.3d (Div. II 2019).

II. COUNTER-STATEMENT OF THE CASE

On May 27, 2015, the Petitioner filed an appeal to Kitsap County Superior Court of a Board's Decision and Order affirming four Department orders. A jury was impaneled, the evidence was presented, and on November 16, 2017, the Jury entered its Special Verdict. The Jury answered 18 Special Verdict questions in favor of Harrison, affirming those portions of the Board Decision and Order. The Jury answered Questions 16 and 17 in favor of the Petitioner.

Special Verdict Question 16 asked whether the Board was "correct in deciding that Kathryne L. Conner's March 10, 2010 industrial injury (SE-06580 – 'Scooter' Claim) did not proximately cause or aggravate the following conditions: degenerative disc disease of the cervical spine; [DDD] of the thoracic spine; [DDD] of the lumbar spine; depression; and anxiety?" The Jury answered "No."

Special Verdict Question 17 asked the Jury to identify which of the conditions enumerated under Question 16 were caused or aggravated by the industrial injury under SE-06580. The Jury indicated that aggravation of

lumbar spine degenerative disc disease was causally related to the SE-06580 claim. No other conditions were found by the Jury to be related to her SE-06580 claim.

Under Question 18, the Jury indicated that the Board was correct in deciding that the Petitioner was not entitled to time-loss benefits under SE-06580. Under Question 19, the Jury indicated that the Board was correct in deciding that as of October 3, 2013, the Petitioner's industrially related conditions under this claim were fixed and stable and therefore not in need of further necessary and proper treatment under this claim. And under Question 20, the Jury indicated that the Board was correct in deciding that the Petitioner was not totally and permanently disabled.

On April 11, 2018, counsel for Harrison received the Petitioner's Motion and Memorandum for Attorney Fees and Costs, and associated documents. The Petitioner sought fees and costs totaling $94,495.60. On June 26, 2018, Harrison filed its Objection and Response to the Plaintiff's Motion and Memorandum for Attorney Fees and Costs. Harrison argued that the Petitioner was not entitled to attorney fees and costs in superior court, and argued that even if she was entitled to fees and costs, the amount requested was improper. Petitioner's counsel filed a Reply brief on June 28, 2018. On June 29, 2018, the Parties engaged in oral argument on the Petitioner's motion for attorney fees and costs.

On July 5, 2018, Kitsap County Superior Court issued an Order on Plaintiff's Motion for Attorney Fees and Costs, denying the Petitioner's Motion for Attorney Fees and Costs. On July 17, 2018, the superior court issued its Judgment and Order in this case. Petitioner appealed the trial court's denial of attorney fees and costs to the Division II Court of Appeals.

On December 17, 2019, Division II issued its Opinion affirming Kitsap County Superior Court's denial of attorney fees and costs to Petitioner. *Conner v. Harrison Med. Ctr.*, 11 Wn. App. 2d 467, 454 P.3d (Div. II 2019). On February 21, 2020, Division II filed its Order Denying Petitioner's Motion for Reconsideration. Ms. Conner's current Petition for Review with this Court follows.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

The December 17, 2019 Opinion by the Division II Court of Appeals accords with the plain language of RCW 51.52.130 and this Court's prior decisions, accords with published cases of the Court of Appeals, does not involve issues of Constitutional magnitude, and does not involve issues of substantial public interest. *See* RAP 13.4(b).

First, Harrison will argue that Division II's December 17, 2019 *Conner* Opinion is correct under the Industrial Insurance Act and existing case law. Second, Harrison will argue that the Petitioner has failed to plead a colorable argument for the Court of Appeals decision being in conflict

with Supreme Court precedent, and *Brand* specifically. Third, Harrison will argue that Division II's *Conner* opinion does not create issues of substantial public interest, and that the Petitioner's argument to the contrary should not be found persuasive.

A. The Court of Appeals' December 17, 2019 Opinion Below Is Correct Under the Industrial Insurance Act and Existing Case Law.

Division II's opinion correctly determined that the Petitioner's request for attorney fees and costs was not warranted on the plain language of the jury's verdict, the plain language of RCW 51.52.130(1), and case law interpreting "additional relief" within the meaning of this statute. The Court of Appeals correctly found that the Petitioner's purported "eligibility" for future benefits is speculative and insufficient to sustain an award of attorney fees and costs.

1. The plain language of the superior court's Judgment and Order proves that no "additional relief" was obtained by the Petitioner in her appeal to the trial court.

The Court of Appeals correctly noted that the superior court's Judgment and Order "directed DLI to issue an order allowing [aggravation of degenerative disc disease] *effective July 18, 2012 and closing the claim the same day*." *Conner v. Harrison Med. Ctr.*, 11 Wn. App. 2d 467, 475, 454 P.3d 131 (Div. II 2019). Emphasis added. The express terms of the Judgment and Order unambiguously precludes further benefits from

flowing to the Petitioner until such time as her claims may be reopened by the Department in the future.

The Petitioner has failed to present any colorable argument or evidence as to how she could conceivably be eligible for reimbursement of past lumbar degenerative disc disease ("DDD") treatment under SE-06580 in light of the express language of the Judgment and Order allowing the lumbar DDD effective on the date of claim closure, and the express finding that no further benefits are due under the claims. Petitioner's argument appears to fly in the face of logic and the plain meaning of the Judgment and Order. The Court of Appeals' opinion is correct.

2. The plain language of RCW 51.52.130(1) requires more than mere reversal or modification of a decision at the trial court to sustain an award for attorney fees and costs.

Harrison Medical Center has no opportunity to recover any meaningful amount of its attorney fees and costs from these years of litigation, regardless of the outcome. Under Title 51 RCW, the ability to recover attorney fees and costs on appeal to superior court is a statutory privilege afforded only to workers' compensation claimants; not the Department of Labor and Industries or employers. RCW 51.52.130(1). This apparent disparity in rights was part of the "grand compromise" of the Industrial Insurance Act. *See* RCW 51.04.010. But the right of claimants

to obtain comprehensive attorney fees and costs is not unfettered or intended to be a windfall for litigious claimants' attorneys.

RCW 51.52.130 is the statute that governs awards of attorney fees and costs in workers' compensation appeals not governed by other statutes. *See, e.g.*, RCW 51.32.185. Here, the Court of Appeals correctly noted that RCW 51.52.130(1) requires two elements be satisfied before attorney fees and costs may be awarded: "said decision and order is reversed or modified *and additional relief is granted to a worker or beneficiary*." *Conner*, 11 Wn. App. 2d at 472 (citing RCW 51.52.130(1)). Emphasis in original.

The Legislature plainly intended for more than just a "paper act" as a result of litigation to trigger entitlement to attorney fees and costs. The Court of Appeals correctly affirmed denial of attorney fees and costs for the Petitioner's narrow "paper act" victory adjusting her "allowed-condition" status under a closed claim.

3. The Court of Appeals correctly concluded that existing case law militates a conclusion that no "additional relief" had been afforded to Petitioner by the superior court Judgment and Order.

The Industrial Insurance Act does not define "additional relief," so Division II pointed to two published opinions supporting its holding that "additional relief" requires "the grant of some further benefits, treatment, or award. Under the facts of this case, a reversal of the Board's finding did

not result in 'additional relief.'" *Conner*, 11 Wn. App. 2d at 473. The two cases relied upon by Division II were *Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 288 P.3d 675 (Div. III 2012) and *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (Div. I 2008), *aff'd on other grounds*, 169 Wn.2d 81, 233 P.3d 853 (2010). All three divisions of our Court of Appeals are consonant in their interpretation of "additional relief."

The *Sacred Heart* Case

Division II correctly noted that the Ms. Conner's appeal is similar to Division III's *Sacred Heart* case. In *Sacred Heart*, the claimant appealed a Department determination that she was not entitled to vocational benefits under her claim, the Board and the superior court remanded the claim to the Department with instruction to "consider additional information before making any further vocational determinations." *Conner*, 11 Wn. App. 2d at 473 (citing *Sacred Heart*, 172 Wn. App. at 27-28). In *Sacred Heart*, Division III denied the claimant's request for attorney fees and costs, concluding that no "additional relief" was awarded because "It is for the director [of DLI] to resolve whether the claim has any remaining value." *Id*. Division II noted that the "key fact" in *Sacred Heart* was that *the court* did not grant any vocational benefits, rather it was left to the Department to "determine at some point in the future" whether the claimant would be entitled to vocational benefits. *Id*.

Division II observed that here, like *Sacred Heart*, the superior court "did not order DLI to pay any benefits relating to Conner's degenerative disc disease or even direct DLI to consider claims arising from that condition. Instead, the court merely stated that the degenerative disc disease was an allowable condition under the March 2010 claim." *Id*. at 475-76. The superior court's "order specified that DLI should make this change 'without further time loss compensation, award for permanent partial disability, and without award for total permanent disability.'" *Id*. at 475 (citing Clerk's Papers at 244-45).

Petitioner asserts that *Sacred Heart* is "factually inapplicable" because that case did not "reverse[] a board decision" and did not "involve an appeal of an order rejecting a claim or segregating a condition." Petition at 11. Petitioner further argues that *Sacred Heart* merely involved "a deferral to the Director," but "[h]ere we have a decision on the merits resulting in…an additional medical condition for which Ms. Conner has the *right to seek additional benefits*." *Id*. Emphasis added. Petitioner's arguments are misplaced.

First, Petitioner asserts that *Sacred Heart* is "inapplicable" because a Board decision was not reversed there. Not only is this assertion factually incorrect, but the distinction makes no sense in context of RCW 51.52.130. In *Sacred Heart*, the worker appealed a Department order closing her claim.

Sacred Heart, 172 Wn. App. at 28. On appeal, the Board reversed the Department closing order, finding "that vocational rehabilitation plan development services *were required*." *Id*. Emphasis added. Sacred Heart appealed the Board's award of vocational benefits to superior court, where the trial court "remanded the matter back to the Department to consider such additional information *before rendering any further vocational determinations*," presumably to include such "determinations" as vocational plan development. *Id*. The Board's award of vocational benefits *was* reversed, instead the matter being remanded to the Department for its vocational determinations to be rendered upon consideration of "additional information."

And even if the Board order was not reversed in *Sacred Heart* (which it was), whether the Board decision was reversed in *Sacred Heart* or not is immaterial under the plain language of RCW 51.52.130(1). RCW 51.52.130(1) provides that attorney fees and costs may be awarded to a claimant where the Board order is reversed *and additional relief is granted*, or "in cases where a party other than the worker or beneficiary is the appealing party and the worker's…*right to relief* is sustained." Emphasis added. As the superior court remarked in *Sacred Heart*,

> when you look at the relief granted here, I think that it was more in the nature of…a technical correction of a flaw that occurred in the Tribunal before it got to this Court. I don't

> think I would characterize it as a situation where the worker here prevails for purposes of the triggering of the attorney's fees."

Sacred Heart, 172 Wn. App. at 28. Both here and in *Sacred Heart*, the worker's right to "relief" was not sustained, nor was the worker afforded "additional relief.

Second, Petitioner argues that this case is materially distinguishable from *Sacred Heart* because *Sacred Heart* merely involved "a deferral to the Director," but "[h]ere we have…an additional medical condition for which Ms. Conner has the *right to seek additional benefits*." The Petitioner attempts to draw a distinction that does not exist.

In this case and in *Sacred Heart*, the matters were remanded back to the Department. In *Sacred Heart*, the Department was instructed to take further evidence and make further determinations regarding vocational benefits. Here, Petitioner argues that the superior court's allowance of lumbar DDD aggravation entitles her to "seek additional benefits" *from the Department* at some nebulous time in the future *if* her condition should ever worsen, which would necessarily require the Department passing upon such claim reopening benefits in the first instance. The only material distinction between *Sacred Heart* and the present case is that Petitioner's future receipt of benefits is more speculative because her claims are closed *without further*

benefits, whereas the Ms. Knapp's claim was to remain open for purposes of passing upon the issue of vocational benefits by the Department.

The *Kustura* Case

Division II correctly noted that the present case is also analogous to Division I's *Kustura* decision. Division II observed that in *Kustura*, the claimant successfully obtained correction of a Board order finding her to be single, and sought attorney fees and costs under RCW 51.52.130 upon the argument that her changed marital-status would necessarily result in a greater benefit rate. *Conner*, 11 Wn. App. 2d at 474 (citing *Kustura*, 142 Wn. App. at 692-93). However, the claimant's request for attorney fees and costs were denied because the superior court did not adjust her benefits as a result or otherwise remand the claim for the purpose of wage rate recalculation. *Id*. In *Kustura*, the trial court "merely changed the worker's marital status without changing the terms of DLI's order." *Id*. at 476.

In this case, "the superior court [] merely ruled that the degenerative disc disease should be included in the enumeration of conditions that had become fixed and stable and directed" the Department to allow aggravation of lumbar DDD as of the same date as claim closure. *Id*. Here, "[t]he court did not order DLI to pay any additional benefits." *Id*.

Petitioner asserts, contrary to logic or authority, that *Kustura* is distinguishable from the present case because in Petitioner's case there is

no final and binding order that would preclude her from "pursuing additional benefits…*upon remand back to the department*." Petition at 12. The Petitioner's argument is blind to RCW 51.52.130(1)'s express requirement that a decision or order be reversed or modified *and* additional relief be granted. Petitioner appears to insist that a reversal of any provision of an order or decision *necessarily* equates to "additional relief," in overt disregard of the plain language of RCW 51.52.130(1), *Sacred Heart*, and the clear implications of *Kustura*. RCW 51.52.130(1) requires a present grant of "additional relief" by the superior court Judgment, not additional relief that may become possible at a speculative time in the unforeseen future. *See* RCW 51.52.130(1)(providing that attorney fees and costs may be provided when additional relief "is" granted upon reversal or modification of the Board decision).

The Petitioner goes on to assert that her eligibility for *possible* future benefits "must be sufficient" to sustain an award of attorney fees and costs because "To hold otherwise would negate any value to the inclusion of her lumbar condition." Petition at 12. This argument is incorrect, and duplicitous. Attorney fee awards are not a "value" of allowed conditions under a claim, and the Petitioner's brief concedes that a *future value* of lumbar DDD aggravation as an allowed condition may include "reopening rights in the event her now accepted condition becomes aggravated." *Id*. at

13. It is hard to conceive how denial of attorney fees and costs could "negate any value" to having lumbar DDD aggravation allowed under a workers' compensation claim, even one that has been closed with no further benefits owed.

B. The Court of Appeals' December 17, 2019 Opinion Is Not in Conflict with this Court's *Brand* Decision.

The Petitioner argues that Division II's *Conner* decision conflicts with *Brand*, 139 Wn.2d 659 (1999) because "it narrowly construes the meaning of 'additional relief' and because its opinion was influenced by the limited degree of Ms. Conner's success on appeal." Petition at 5; *see also, id*. at 9-10, 12-13. However, Division II's *Conner* decision is consistent with the *Brand* holding, and Petitioner offers no colorable argument for Division II's opinion being "influenced" by the fact that Petitioner did not prevail on the majority of issues alleged.

In *Brand*, the claimant sustained a knee injury for which her workers' compensation claim was allowed and treatment was provided. *Brand*, 139 Wn.2d 659, 662, 989 P.2d 1111 (1999). Several years after claim allowance, the Department issued an order closing her claim without an award for additional permanent partial disability and Ms. Brand appealed that closing order to the Board. *Id*. The Board affirmed the terms of the Department closing order, but also found that Ms. Brand had sustained a

Category 1 lumbar permanent partial disability as a proximate result of her knee injury. *Id*. at 663. Ms. Brand appealed the Board's decision to superior court. *Id*.

On appeal to superior court, the jury increased Ms. Brand's left knee permanent partial disability award from 30% to 40%, and found that she had a Category 2 lumbar permanent partial disability. *Id*. *The jury's "verdict resulted in a one-time benefit for Ms. Brand in the amount of $3,120." Id*. Emphasis added. The trial court awarded Ms. Brand attorney fees and costs. *Id*. at 664. On appeal, the Court of Appeals reversed the superior court's award of attorney fees, instructing the trial court to "consider Brand's 'very limited success at trial'" instead of awarding attorney fees and costs for all issues. *Id*. at 665. Ms. Brand petitioned this Court for review. *Id*.

In *Brand*, this Court observed that "[t]he 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." *Id*. at 667. This Court further noted that "The statute, by its plain language, sets the criteria for a worker to receive attorney fees: the Board's decision must be reversed or modified and additional relief granted to the worker." *Id*. at 669, 674. The Court further explained that there was no "evidence that the Legislature intended to limit attorney fees to those

attributable to successful claim, or to reduce the award when the worker receives *little overall financial relief*." *Id*. at 669. Emphasis added. "[F]ees awards under RCW 51.52.130 should not be reduced in light of the total *benefits obtained* by the worker." *Id*. at 675. Emphasis added.

Here, the Petitioner received zero overall financial relief on appeal to superior court, and received nothing in the way of further benefits arising from the superior court's judgment. The denial of Petitioner's request for attorney fees and costs is not inconsistent with *Brand*. Rather, what the Petitioner asks this Court to do is to go far beyond *Brand*, and to nullify the Legislature's requirement that a claimant receive "additional relief" in addition to modification or reversal of a Board decision.

C. The Court of Appeals' December 17, 2019 Opinion Does Not Involve an Issue of Substantial Public Interest that Should be Determined by This Court.

The Petition makes baseless and sweeping assertions that Division II's *Conner* decision will operate to deprive workers from ever obtaining award for attorney fees and costs if they prevail on challenging claim rejection or segregation of conditions. *See* Petition at 5-6, 8, 15. Petitioner's unsupported assertion is false, and does not follow from the facts in this case.

As a threshold matter, this case is not analogous to a routine appeal of claim denial or segregation of conditions under an open and allowed

claim. Here, the jury returned a verdict affirming *closure* of all of the Petitioner's claims, *affirmatively* finding Ms. Conner to be entitled to no further benefits under her four claims because she was medically fixed and stable. By contrast, cases involving appeals of claim denial or segregation of conditions are usually replete with evidence tending to prove that the worker would be entitled to benefits under the claim, thereby supporting the allowance of the claim or condition, in the first instance.

Where a party fails to cite authority to support his or her argument, "We deem the failure to make such an argument as a concession that such an argument has no merit." *State v. McNeair*, 88 Wn. App. 331, 340, 944 P.2d 1099 (Div. I 1997). The Court of Appeals has also held, "courts may assume that where no authority is cited, counsel has found none after diligent search…This court is not required to search out authorities in support [the party's] proposition." *Lodis v. Corbis Holdings, Inc*., 172 Wn. App. 835, 862, 292 P.3d 779 (Div. I 2013)(citing *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978); *also* citing *McNeair*, 88 Wn. App. at 340).

The Petitioner cites to zero examples or precedent for attorney fees being denied to claimants (or even being contested by employers or the Department) when they successfully obtain claim allowance or reversal of segregation on appeal to superior court. Nor does the Petitioner make any colorable argument for how Division II's *Conner* decision could be

misapplied to support denial of attorney fees and costs in "segregation" or claim allowance cases without explicit holdings that no further benefits are allowed under the claim. Petitioner's "substantial public interest" argument should not be found persuasive.

IV. CONCLUSION

Harrison Medical Center respectfully requests the Court to deny Ms. Conner's Petition for Review of the December 17, 2019 Published Opinion of the Court of Appeals.

RESPECTFULLY SUBMITTED this 16th day of April, 2020.

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SUPREME COURT
OF THE STATE OF WASHINGTON

KATHRYNE CONNER, Petitioner, v. HARRISON MEDICAL CENTER and THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondents.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served Harrison Medical Center's Answer to Petition for Review and this Certificate of Service in the below-described manner:

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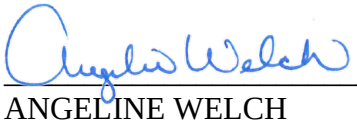

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