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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON

NO. 69654-8-I

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

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AVIZENT AND CRISTA MINISTRIES,

Appellants,

v.

ALGANESH MASHO,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This appeal arises from the orders issued by King County Superior Court Judge Palmer Robinson on November 6, 2012, and December 26, 2012. Appellant challenges various findings of fact, and conclusions of law in the December 26, 2012 order, as not supported by the evidence. Appellant also challenges the trial court's decision to grant Respondent's CR 60 motion.

Respondent Alganesh Masho's (hereinafter "Respondent" or "Ms. Masho") position is that: (A) "sufficient or substantial" evidence exists to uphold *either* of the two orders, and (B) the trial court did not err in granting Respondent's CR 60 motion for more clarification, and even if the trial court did err, the error was harmless.

## II. STATEMENT OF ISSUES

A. Is there "sufficient or substantial" evidence to support the challenged November 6, 2012, and December 26, 2012, findings of fact, conclusions of law, and orders?

B. Did the trial court err in granting Respondent's CR 60 motion? If the trial court did err, is the error harmless if there is no prejudice to the Appellant?

### **III. STATEMENT OF THE CASE**

#### **A. Jurisdictional History**

On October 20, 2007, while working as a certified nursing assistant for Crista Ministries, Ms. Masho injured her right shoulder and clavicle when she was moving a heavy female patient from the middle of her bed to the head of her bed. (See Clerk's Papers ("CP") 7, Alganesh Masho's Hearing Transcript ("Masho Tr."), pp. 5:16-6:19, 37:21-24).<sup>1</sup> Ms. Masho's worker's compensation claim was allowed, and she received treatment for her injury. (CP 7, Jurisdictional History, p. 89). Ms. Masho returned to work for over a year after her injury, up until November 8, 2008. (CP 7, Masho Tr., at p. 10:7-22). At that point, her shoulder and arm pain worsened to such an extent she became unable to work. (*Id.* at pp. 10:23-11:7).

On November 9, 2009, Ms. Masho's worker's compensation claim was closed, with time-loss compensation paid through February 16, 2009. (CP 7, Jurisdictional History, p. 89). The closure was protested by Ms. Masho on two occasions and was ultimately affirmed by order dated July 1, 2010. (*Id.*)

Ms. Masho filed a Notice of Appeal with the Board of Industrial

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<sup>1</sup> In citing to the Certified Appellate Board Record, Respondent references deposition transcripts and hearing testimony by clerk's paper number, followed by the identity of the witness, and then the page and line number of the testimony.

Insurance Appeals on August 24, 2010. (*Id.*) On September 1, 2010, the Board issued an order granting the appeal. (*Id.* at 90.) A hearing was held on May 5, 2011, and both parties took multiple depositions. On August 22, 2011, Industrial Appeals Judge David K. Crossland issued a Proposed Decision and Order affirming the November 9, 2009 closing order (and all subsequent closing orders). (CP 7, PD&O, pp. 52-71). Ms. Masho petitioned for review, which was denied by Order dated October 18, 2011. (CP 7, Order Denying Petition for Review, p. 1).

On November 8, 2011, Ms. Masho filed a Notice of Appeal to Superior Court. (CP 1). A bench trial was conducted and The Honorable Palmer Robinson heard opening and closing arguments on September 14 and 15, 2012. On November 6, 2012, Judge Robinson issued a Findings of Fact, Conclusions of Law and Order (hereinafter “11/6/12 Order,” unless otherwise specified). (CP 21). The 11/6/12 Order ultimately held that Ms. Masho met her burden of proof on appeal. On December 4, 2012, Ms. Masho filed a CR 60 motion seeking more clarification from the judge. *That same day*, Appellant filed their Notice of Appeal to the Court of Appeals. (CP 22). On December 26, 2012, Judge Robinson issued a second order (hereinafter “12/26/12 Order,” unless otherwise specified) clarifying the first order. (CP 31). On January 25, 2013, Appellant filed an Amended Notice of Appeal to encompass the second order.

## **B. Evidence on Appeal**

### 1. Ms. Masho's Testimony

As stated above, Ms. Masho suffered a shoulder and clavicle injury on October 20, 2007, while working as a certified nursing assistant for Crista Ministries. Ms. Masho injured her right shoulder and clavicle when she was moving a very heavy female patient from the middle of her bed to the head of her bed. (CP 7, Masho Tr., pp. 5:16-6:19, 37:21-24).

At the time of her injury, Ms. Masho felt a sharp pop in her right shoulder and clavicle region. (CP 7, Masho Tr., at p. 6:20). Ms. Masho visited the emergency room following the injury. (*Id.* at pp. 7:26-8:3). She was ultimately diagnosed with a sternoclavicular dislocation. (*Id.* at p. 9:13-15). Ms. Masho's shoulder became very weak and painful. (*Id.* at p. 11:6-7). She also developed a right clavicle deformity or prominence following her injury that is still very visible at present. (*Id.* at pp. 17:24-19:4; *see also* Photograph at Exhibit 1 to Masho Tr.)

Following her emergency room visit, Ms. Masho treated with a variety of providers in the hope of finding proper treatment for her right shoulder and clavicle. (*Id.* at pp. 8:9-9:12). In July 2010, Ms. Masho sought treatment from her primary care provider, Dr. Jill Watanabe, M.D. at Harborview Medical Center. (*Id.* at p. 11:24-26). Dr. Watanabe diagnosed a frozen right shoulder and recommended physical therapy,

medication, and referred Ms. Masho to an orthopedic specialist. (*Id.* at pp.12:1-13:19).

In October, 2010, Ms. Masho underwent a psychiatric evaluation by Dr. Ronald Early, M.D. (*Id.* at p. 14:22-26). Following Dr. Early's evaluation, he recommended counseling and "medication." (*Id.* at p. 15:15-20). In January, 2011, Dr. Jennifer James, M.D., a physical medicine and rehabilitation specialist, also evaluated Ms. Masho's right shoulder injury. (*Id.* at p. 16:1-7). Ms. Masho testified that her shoulder and clavicle injury have caused significant pain, leading her to feel "sad," "unhappy," and "depressed." (*Id.* at pp. 16:21-17:6). She feels like she no longer has a "normal life." (*Id.* at p. 17:1).

## 2. Dr. Jennifer James, M.D.'s Testimony

Dr. James is a board-certified physical medicine and rehabilitation physician with a subspecialty certification in spine and spinal cord injury medicine. (CP 7, Dr. Jennifer James, M.D.'s Hearing Transcript ("James Tr."), pp. 40:22-41:2). Dr. James spends the majority of her time treating private practice patients and the rest of her time working as a consultant. (*Id.* at pp. 43:24-44:1).

Dr. James examined Ms. Masho on January 21, 2011. (*Id.* at p. 44:2-7). As part of that examination, Dr. James reviewed Ms. Masho's medical records; obtained Ms. Masho's past medical and treatment

history; her current complaints; conducted a long, detailed interview; and then performed a physical examination. (*Id.* at p. 44:11-22).

In describing her complaints to Dr. James, Ms. Masho indicated that she had painful spasms pulling the right side of her head and neck toward her right shoulder; instability in her right shoulder and scapula; electrical type of pain and weakness just above her clavicle; a painful right shoulder blade and scapula; pain over her right biceps; numbness and tingling over the top right forearm; and other complaints. (*Id.* at pp. 45:14-46:23). Ms. Masho also described having difficulty while driving because of problems turning her neck. (*Id.*) She also described difficulty with self-care due to right arm and shoulder numbness, tingling, and weakness. (*Id.*) During Dr. James's evaluation, Ms. Masho reported being depressed, having a loss of appetite, and joint pain. (*Id.* at p. 50:17-20).

As part of the physical examination, Dr. James noted that Ms. Masho had "constant right lateral cervical dystonic posturing," which means that her neck was constantly tilted to the right and flexed forward, and could not be changed. (*Id.* at p. 51:11-23). In Dr. James's opinion, this finding was significant for a diagnosis of cervical dystonia, or torticollis. (*Id.* at pp. 52:24-53:4). Dr. James also found decreased range of motion in Ms. Masho's cervical rotation (bilaterally 47 degrees, when normal is 70 to 80 degrees), also significant for cervical dystonia. (*Id.* at

pp. 53:5-26). Dr. James noted tenderness in Ms. Masho's upper neck and shoulder and the inside border of her shoulder blades on the right. (*Id.* at p. 54:1-4). She further noted a "significant deformity" of the junction of the right clavicle and sternum. (*Id.* at p. 54:5-11). Ms. Masho also had a decreased range of motion of her right shoulder flexion, abduction, external and internal rotation, and tenderness over the right bicipital groove and supraspinatus (rotator cuff) region. (*Id.* at p. 54:18-55:17). Dr. James had Ms. Masho perform a modified push-up against the wall to determine whether she had scapular winging. (*Id.* at p. 55:18-26). This testing revealed that Ms. Masho did in fact have scapular winging, and long thoracic nerve palsy. (*Id.* at p. 56:16-24).

Dr. James performed a variety of other objective testing that confirmed her subsequent diagnoses of Ms. Masho's clavicle and shoulder conditions. (*Id.* at pp. 56:25-60:25). Dr. James also reviewed prior diagnostic reports, including a triple phase bone scan, and an MR arthrogram, which were consistent with her observations. (*Id.* at pp. 61:7-62:6). Based on her medical records review, Ms. Masho's subjective symptoms, and her physical examination, Dr. James diagnosed right cervical dystonia; right long thoracic nerve palsy resulting in scapular winging; right bicipital tendinitis and tendon tear; right adhesive capsulitis (frozen shoulder), swelling of the acromioclavicular articulation,

supraspinatus and infraspinatus tear, partial tear and continuing tendinitis; and right cervical C5, C6, and C7 sensory radiculitis of the brachial plexus. (*Id.* at pp. 62:16-63:5). Dr. James opined that all of these diagnoses were **causally related** on a more-probable-than-not basis to Ms. Masho's October 20, 2007 industrial injury and/or the sequelae of the injury. (*Id.* at pp. 62:11-63:13). During her testimony, Dr. James noted in her medical records review that one of Ms. Masho's treating providers at Harborview, Dr. Grierson noted findings in his examination consistent with cervical dystonia, further supporting that diagnosis. (*Id.* at p. 67:12-23). Moreover, Dr. James testified that individuals who suffer clavicle dislocations, such as Ms. Masho, frequently develop long thoracic nerve palsy, or "backpacker's palsy." (*Id.* at p. 69:18-26).

Dr. James recommended various courses of treatment for each condition (from Botox injections and conservative treatment, to medication management). (*Id.* at pp. 63:19-64:3, 70:3-17, 71:1-12, 73:5-74:11). Dr. James testified that her diagnoses would be the same on July 1, 2010, as they would be on the date of her evaluation in January 2011. (*Id.* at pp. 74:23-75:1). Dr. James opined that Ms. Masho's conditions were not fixed and stable and she had not reached maximum medical improvement. (*Id.* at p. 75:2-16). She also did not find any evidence to show that Ms. Masho had any pre-existing shoulder conditions prior to her

industrial injury. (*Id.* at p. 75:17-23). Concerning Ms. Masho's mental health condition, Dr. James testified that Ms. Masho said she felt depressed during her evaluation. (*Id.* at pp. 93:26-94:19). Dr. James felt that Ms. Masho had some kind of mental condition that she might refer to a psychiatrist or psychologist for treatment. (*Id.*)

### 3. Dr. Jill Watanabe, M.D.'s Testimony

Dr. Jill Watanabe is a board-certified internal medicine physician at Harborview who began treating Ms. Masho on July 9, 2010. (CP 7, Dr. Jill Watanabe, M.D.'s Deposition Testimony ("Watanabe Depo."), pp. 5:6-6:23).

During that visit, Dr. Watanabe's physical examination revealed an asymmetry in Ms. Masho's right clavicle that was more prominent than the left; her right shoulder was higher than her left; and her right shoulder had a decreased range of motion. (*Id.* at p. 10:2-11). Based on her physical examination findings, Dr. Watanabe diagnosed Ms. Masho with a frozen right shoulder. (*Id.* at p. 10:12-20). She also noted MRI findings consistent with a "history of the partial tear of her rotator cuff muscles...." (*Id.* at pp. 10:24-11:5). Dr. Watanabe testified that she presumed Ms. Masho's frozen right shoulder was related on a more-probable-than-not basis to Ms. Masho's October 20, 2007 industrial injury. (*Id.* at p. 11:6-11:13). Dr. Watanabe further testified that a frozen shoulder can evolve

“over a long period of time.” (*Id.* at p. 34:9-11). Dr. Watanabe recommended medication and physical therapy to treat Ms. Masho’s shoulder condition. (*Id.* at p. 11:14-22). Ms. Masho underwent approximately nine physical therapy sessions. (*Id.* at p. 12:1-5). Although Dr. Watanabe did not document Ms. Masho’s mental state, she did testify that Ms. Masho has “appeared sad” since she began treating her. (*Id.* p. 12:6-12) Dr. Watanabe also referred Ms. Masho to an orthopedist (who would not treat her due to insurance coverage issues) as well as a rheumatologist at Harborview.

From July 9, 2010, to the present, Dr. Watanabe continued to report physical findings consistent with a frozen right shoulder diagnosis. (*Id.* at pp. 13:14-20:16). Dr. Watanabe opined that Ms Masho’s right shoulder dislocation contributed to the evolution of her right frozen shoulder. (*Id.* at pp. 24:15-25:4). Dr. Watanabe further indicated that Ms. Masho still needs treatment for her right frozen shoulder. (*Id.* at p. 22:3-4). In an examination on April 12, 2011, Ms. Masho reported crying, difficulty living like she was, wanting to return to a normal life, feeling very sad, having low energy, feeling isolation, problems with eating, difficulty sleeping, and wanting to return to work. (*Id.* at pp. 17:2-18:14). Dr. Watanabe opined that Ms. Masho suffers from depression. (*Id.* at p. 19:15-19). Dr. Watanabe testified that if a psychiatrist recommended

weekly psychotherapy or pharmacologic management for her mental health conditions it would be up to Ms. Masho to determine whether the treatment is appropriate for her. (*Id.* at p. 22:12-20). Dr. Watanabe also testified that it would be reasonable to ask Ms. Masho whether she would be “interested” in that type of care at present. (*Id.* at p. 23:19-23). As far as the limitations on Ms. Masho’s ability to work, Dr. Watanabe concluded that Ms. Masho has “difficulty doing simple tasks at this point physically and that limits her ability to work.” (*Id.* at pp. 23:24-24:4).

#### 4. Dr. Ronald Early, M.D.’s Testimony

Dr. Ronald Early is a board-certified psychiatrist who has been practicing psychiatry since 1977. (CP 7, Dr. Ronald Early, M.D.’s Deposition Testimony (“Early Depo.”) pp. 5:15-6:9). Eighty percent of Dr. Early’s practice consists of treating patients, and twenty percent involves performing evaluations. (*Id.* at pp. 5:25-6:3). Dr. Early evaluated Ms. Masho on October 8, 2010. (*Id.* at p. 6:15-16). During Dr. Early’s evaluation, Ms. Masho described her neck and right shoulder pain, feelings of extreme depression and hopelessness about her future, poor sleep, no motivation, low energy, feeling overwhelmed, tearfulness, irritability, difficulty relating to others, becoming socially withdrawn, difficulty experiencing pleasure, poor appetite, loss of libido, inability to experience pleasure, and chronic worry about her situation. (*Id.* at pp.

8:25-10:10).

Dr. Early also took Ms. Masho's psychosocial history. (*Id.* at p. 11:11-13). Ms. Masho described both her parents in positive terms, and difficulty growing up in her teens due to an unstable government. (*Id.* at p. 11:14-19). Ms. Masho emigrated from Ethiopia to Russia in her late teens before moving to the United States. (*Id.* at p. 40:22-24). When Ms. Masho moved to the United States, she met a man from Ethiopia and they had a daughter together. Although there were conflicts during their relationship, in the ten years since their split, their relationship has resolved and Ms. Masho's ex-partner is currently "supportive." (*Id.* at pp. 12:7-25, and 41:10-21). As part of his evaluation, Dr. Early had Ms. Masho undergo a Beck Depression Inventory and MCMI-III. The Beck Depression inventory revealed a score of 53 indicating a "severe level of depression," which was consistent with the symptoms she described during Dr. Early's clinical interview. (*Id.* at p. 13:15-25). Ms. Masho's MCMI-III profile also revealed that she suffered from depression, anxiety, and chronic pain. (*Id.* at p. 14:1-5). Dr. Early testified that the MCMI-III is an objective assessment, which is helpful if there is any difference of opinion about symptoms or severity between examining psychiatrists. (*Id.* at pp. 15:18-16:5).

Dr. Early also performed a mental status examination that revealed

Ms. Masho's mood was depressed. (*Id.* at p. 19:1-13). Using the *Diagnostic and Statistical Manual, Fourth Edition*, Dr. Early diagnosed Ms. Masho with the following: (1) Axis I: depressive disorder NOS, 311.00, anxiety disorder NOS, 300.00, pain disorder with psychological factors, 307.89; (2) Axis II: diagnosis deferred; (3) Axis III: right shoulder, the right sternoclavicular and right acromioclavicular joint sprains with secondary myalgia; (4) Axis IV: psychosocial stressors: loss of employment, the inability to engage in usual social, recreational, and public interactions as consequences of the industrial injury; (5) Axis V: General Assessment of Functioning of 45 (major impairment of functioning). (*Id.* at pp. 20:4-21:18). In Dr. Early's professional opinion, Ms. Masho's depressive disorder, anxiety disorder, and pain disorder are causally related on a more-probable-than-not basis to the October 20, 2007 industrial injury. (*Id.* at pp. 21:19-23:7). Dr. Early's opinions and diagnoses on October 8, 2010, would be the same as on July 1, 2010. (*Id.* at p. 23:13-20).

Dr. Early testified Ms. Masho's mental conditions are not fixed and stable nor have they reached maximum medical improvement and she requires treatment including psychotherapy and medication. (*Id.* at pp. 23:24-24:13). Dr. Early further testified that Ms. Masho did not suffer any mental health condition or seek mental health treatment prior to her

October 20, 2007, industrial injury, and she is incapable of performing any work on a full-time meaningful basis. (*Id.* at pp. 24:21-25:24). In his opinion, based on his evaluation of Ms. Masho, Dr. Early had no reason to suspect Ms. Masho of malingering or having a factitious disorder. (*Id.* at p. 38:5-8).

5. Dr. Allen Jackson, M.D.

Dr. Jackson testified on behalf of the self-insured employer. Dr. Jackson is an orthopedic surgeon who treated Ms. Masho from October 25, 2007, to April 14, 2009. (CP 7, Dr. Allen Jackson, M.D.'s Deposition Testimony ("Jackson Depo."), pp. 7:14-15, and 34:1-8). He has not treated Ms. Masho since April 13, 2009, over a year before the Department's July 1, 2010, closing order. (*Id.* at p. 34:1-8).

When Ms. Masho first presented to Dr. Jackson on October 25, 2007, she reported injuring her upper neck, and trapezius muscle area on her neck, and having pain in the medial part of her clavicle. (*Id.* at p. 7:16-23). Upon examination, Dr. Jackson determined that Ms. Masho had tenderness to palpation about her sternoclavicular joint, swelling of that joint as well, and slight enlargement of the AC joint. (*Id.* at pp. 7:24-8:9). He diagnosed her with an acute sternoclavicular joint injury or subluxation. (*Id.* at p. 8:10-12).

During the course of her treatment, Ms. Masho continued to report

neck, right shoulder, and clavicle pain, and Dr. Jackson referred her to physical therapy for her conditions. (*Id.* at pp. 45:19-47:10). Dr. Jackson also noted a “permanent” prominence over the sternoclavicular joint of her medial clavicle. (*Id.* at p. 49:2-8). Dr. Jackson was unable to state whether Ms. Masho’s frozen right shoulder was related to the October 20, 2007, industrial injury, but he did acknowledge that a frozen shoulder can develop over time. (*Id.* at p. 56:8-10). He further acknowledged that partial rim-vent tears of the supraspinatus and partial bursal-sided infraspinatus tendon tears can be caused by an injury. (*Id.* at pp. 58:15-59:1). Dr. Jackson testified that he recommended Ms. Masho receive treatment for a thalamic pain syndrome. (*Id.* at p. 55:19-25). Dr. Jackson testified that, objectively, he could not find any reasons to keep Ms. Masho off work as of December 3, 2008, but subjectively her pain was such that she was unable to work. (*Id.* at 28:21-29:1). He also noted that Ms. Masho’s complaints were consistent throughout her treatment and that there was no indication Ms. Masho had an injury to her neck, shoulder, or sternoclavicular joint before or after the October 20, 2007 injury. (*Id.* at p. 61:20-25).

6. Dr. Matthew Provencher, M.D.

Dr. Provencher is a defense medical examiner orthopedic surgeon who evaluated Ms. Masho on one occasion on May 13, 2010. During Dr.

Provencher's evaluation, he indicated that Ms. Masho suffered a sternoclavicular joint separation with pain. (CP 7, Dr. Matthew Provencher, M.D.'s Deposition Testimony ("Provencher Depo."), pp. 12:6-15, and 15:8-14). He also diagnosed cervical and trapezius strain related to her industrial injury. (*Id.* at p. 15:13-16). Moreover, almost all of Dr. Provencher's objective examination findings concerning range of motion, revealed that Ms. Masho's range of motion in her neck, shoulder, and clavicle were **not** within normal limits, evidencing significant restrictions. (*Id.* at pp. 31:3-34:16, 35:1-37:4). Dr. Provencher opined that Ms. Masho's sternoclavicular joint separation, as well as her cervical and trapezius strain were related to the October 20, 2007 industrial injury. (*Id.* at p. 15:13-16).

In his examination, Dr. Provencher significantly noted that Ms. Masho's right sternoclavicular joint or breastbone, collarbone area was quite prominent and also tender. (*Id.* at p. 26:5-7). He also noted that Ms. Masho's sternoclavicular joint is at least 50 to 75 percent subluxed (out of the joint), whereas normal is 0 percent. (*Id.* at pp. 33:23-34:10). Dr. Provencher acknowledged that Ms. Masho has a "pretty extensive subluxation." (*Id.* at p. 34:8-10). He further acknowledged that partial rim-vent tears of the supraspinatus and partial bursal-sided infraspinatus tendon tears can be caused by an injury. (*Id.* at p. 37:20-25). Dr.

Provencher did not find evidence of adhesive capsulitis because Ms. Masho's pain and restrictions prevented him from testing for it, but notably, both Dr. Watanabe and Dr. James found physical findings consistent with a frozen right shoulder diagnosis, and Dr. Provencher admitted a frozen shoulder can develop over time. (*See* above testimony, and Provencher Depo., at p. 41:1-9).

7. Dr. Marc Kirschner, M.D.

Dr. Kirschner testified on behalf of Appellant. Dr. Kirschner is a neurologist who treated Ms. Masho on three occasions on October 21, 2008, November 11, 2008, and November 24, 2008. (CP 7, Dr. Marc Kirschner, M.D.'s Deposition Testimony ("Kirschner Depo."), pp. 33:24, and 41:11-12). Dr. Kirschner essentially testified that he could not find any nerve injuries or neurological conditions that would be related to the industrial injury or would prevent Ms Masho from working. However, during Dr. Kirschner's initial evaluation of Ms. Masho, he conducted a variety of testing that demonstrated a loss of sensation, or sensory abnormalities, consistent with Ms. Masho's complaints. (*Id.* at p. 14:14-16).

During Dr. Kirschner's initial visit with Ms. Masho on October 21, 2008, he noted that she appeared "despondent," or depressed and sad. (*Id.* at p. 34:17-22). He also noted that she was "emotionally labile," or

tearful. (*Id.* at pp. 34:23-35:2). Dr. Kirschner also diagnosed Ms. Masho with a chronic pain disorder. (*Id.* at pp. 35:17-36:1). Although Dr. Kirschner testified on direct that Ms. Masho's EMG findings were essentially normal, he went on to testify on cross-examination that one of the findings, "a median orthodromic mixed nerve transcarpal conduction latency that is mildly prolonged," is **not** in fact a normal finding, and could be related to her industrial injury. (*Id.* at pp. 40:17-41:4, and 42:23-43:5). Dr. Kirschner, similar to the other defense doctors, also noted Ms. Masho's sternoclavicular prominence. (*Id.* at p. 45:2-10). Dr. Kirschner's last visit with Ms. Masho on was over a year-and-a-half prior to the Department's July 1, 2010, closing order. (*Id.* at p. 41:11-12).

8. Dr. Douglas Robinson, M.D.

Defense Medical Examiner Douglas Robinson testified on behalf of the Appellant. Dr. Robinson conducted an independent medical examination on May 13, 2010. (CP 7, Dr. Douglas Robinson, M.D.'s Deposition Testimony ("Robinson Depo."), p. 9:11-14). Dr. Robinson opined that any emotional difficulties suffered by Ms. Masho were the result of war in her country, immigration, limited acculturation, her separation from her ex-partner, parenting difficulties, and custody difficulties. (*Id.* at p. 38:11-14). Nevertheless, Ms. Masho left Ethiopia in the late 1970's, over 30 years ago, and reported to Dr. Robinson that she

does not have dreams arising from witnessing death or experiencing danger or have any intrusive or cognitive memories concerning those wartime events. (*Id.* at p. 18:15-21). Moreover, Ms. Masho separated from her ex-partner in 1999. (*Id.* at p. 19:4-9). According to Ms. Masho's and Dr. Early's testimony, she and her ex-partner co-parent cooperatively at present. (*See* Ms. Masho's, and Dr. Early's testimony above).

Although Dr. Robinson denied that Ms. Masho was depressed, he also noted that she feels sad as a result of sleeping and pain, has trouble falling asleep and staying asleep due to pain, and is fearful while driving. (*Id.* at pp. 27:17-28:22). Dr. Robinson noted that Ms. Masho made "frequent references to pain and numbness and limitations that arise" during his examination. (*Id.* at p. 31:17-23). At no point during his testimony, does he describe or discuss Ms. Masho's "frequent references to pain and numbness and limitations." Dr. Robinson also conceded that difficulty sleeping, tearfulness, and despondency may be indicative of or symptoms of depression, or a depressive disorder. (*Id.* at pp. 62:8-23, and 100:12-101:5).

Dr. Robinson did not perform any psychological testing (Beck Depression Inventory or the MCMI-III), and questioned the reliability of both tests. (*Id.* at pp. 47:3-21, 51:4-12, and 68:14-21). Despite that fact, Dr. Robinson uses the MCMI "occasionally," but in his opinion, it is "not

that reliable.” (*Id.* at p. 51:4-12). Later on, during cross-examination, Dr. Robinson contradicted himself and denied ever stating that the MCMII-III was not “reliable.” (*Id.* at pp. 75:25-76:3). Dr. Robinson also admitted that in reviewing the findings Dr. Early made in his report, Ms. Masho met the criteria for a depressive disorder. (*Id.* at pp. 55:10-56:3).

#### IV. ARGUMENT

##### A. Standard of Review

With regard to appellate review of worker’s compensation cases, “[a] party seeking to reverse a trial court’s finding of fact must meet a difficult standard.” *Garrett Freightlines, Inc. v. Dep’t. of Labor & Indus.*, 45 Wn. App. 335, 339-40, 725 P.2d 463 (1986). “[R]eview is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court’s de novo review, and whether the court’s conclusions of law flow from the findings.” *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep’t of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). In addition, the function of the Court of Appeals is “to review for sufficient or substantial evidence, taking the record *in the light most favorable to the party who prevailed in superior court.*” *Rogers v. Dep’t of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009) (citing *Harrison*

*Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002)). (Emphasis added). The Court of Appeals does not “reweigh or rebalance the competing testimony and inferences, or apply anew the burden of persuasion, for doing that would abridge the right to trial by jury.” *Id.* at 180-181.

Although the appellate court “may view the evidence presented at trial differently from the trier of fact [*sic*], we cannot substitute our judgment for” the trier of fact’s judgment. *Garrett Freightlines, Inc.*, 45 Wn. App. at 340 (quoting *Allen v. Seattle Police Officers’ Guild*, 100 Wn.2d 361, 378, 670 P.2d 246 (1983)). The court concluded that “where there is disputed evidence, the standard for ‘substantial evidence’ is ‘any reasonable view [that] substantiates [the trial court’s] findings, even though there may be other reasonable interpretations.’” *Id.* (quoting *Ebling v. Gove’s Cove, Inc.*, 34 Wn. App. 495, 501, 663, P.2d 132 (1983)). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Cantu v. Dep’t of Labor & Indus.*, 168 Wn. App. 14, 22, 277 P.3d 685 (2012) (citing *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003)).

Appellant’s Brief, in effect, is requesting this appellate court to “reweigh or rebalance the competing testimony and inferences” and substitute its judgment for that of the trier of fact. Specifically, Appellant

is asking this court to make a determination as to which medical experts are more believable or credible. However, this is not the proper role of the reviewing court. The role of the reviewing court is to make sure there is “sufficient or substantial” evidence to support the trial court’s order. Moreover, the standard of review requested by Appellant is far more restrictive than the law dictates. As stated above, “where there is disputed evidence, the standard for ‘substantial evidence’ is ‘any reasonable view [that] substantiates [the trial court’s] findings, even though there may be other reasonable interpretations.’” *Id.* The trial court’s interpretation of the evidence need only be reasonable despite the fact there may be other reasonable interpretations.

**B. The 12/26/12 Order Should Be Affirmed Because There is “Sufficient or Substantial Evidence” to Establish a Causal Relationship Between Ms. Masho’s Industrial Injury and Her Subsequent Medical and Mental Health Conditions.<sup>2</sup>**

Appellant argues that none of the evidence presented establishes that the physical conditions were caused by the “actual mechanism of injury.” Nowhere does Appellant cite or reference any case law or legal standards requiring such a showing. Indeed, injured workers, such as Ms. Masho, need only establish through expert medical testimony that it is more probable than not that an industrial injury caused a subsequent

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<sup>2</sup> Respondent’s arguments are equally applicable to both the 11/6/12 Order, and the 12/26/12 Order.

disability or condition. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). The Washington State Supreme Court has long held that a showing of medical testimony coupled with competent lay testimony, including the testimony of the claimant, is sufficient if it tends to show a causal relationship. See *Bennett v. Dep't. of Labor and Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981); *Vasquez v. Dep't. of Labor and Indus.*, 44 Wn. App. 379, 385, 722 P.2d 854 (1986). The cases do not require that "in every case and under any and all circumstances the production of a medical opinion upon the ultimate issue, . . . It is sufficient if the medical testimony shows the causal connection." *Sacred Heart Medical Center v. Dep't. of Labor & Indus.*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979).

Additionally, in *Vasquez*, the employer challenged the only medical testimony presented because the doctor used the word "possible" to describe the relationship between the claimant's condition and the work place accident. The Court stated:

A doctor's use of such words as "might," "could," "likely," "possible" and "may have," particularly when coupled with other credible evidence of a non-medical character, such as a sequence of symptoms or events corroborating the opinion, is . . . sufficient to sustain an award.

*Id.* at 385 (quoting 2 A. Larson, *Workman's Compensation*, §80.30, 15-86 to 15-87(1986)).

Also, in *Long-Bell Lumber Co. v. Parry*, 22 Wn.2d 309, 313, 156 P.2d 225 (1945), the Supreme Court held that an industrial injury may be proven by circumstantial as well as direct testimony. The Court reasoned, "It is not necessary that there be eye witnesses to the accident, or that the accident should be evidenced by external marks or wounds." *Id.* at 312 (citing *Guiles v. Dep't. Of Labor and Indust.*, 13 Wn.2d 605, 126 P.2d 195 (1942)); see also *Intalco Aluminum v. Dep't. Of Labor and Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992). Likewise:

If, from the medical testimony given and the facts and circumstances proven by other evidence, a reasonable person can infer that the causal connection exists, we know of no principle which would forbid the drawing of that inference.

*Sacred Heart Medical*, 92 Wn.2d at 636-637.

Similarly, in *Bennett*, the Court held that:

Lay witnesses may testify to such aspects of physical disability of an injured person as are observable by their senses and describable without medical training, and further that an injured person can testify regarding the subjective aspects of an injury and to the limitations of [her] physical movements.

*Bennett*, 95 Wn.2d at 533-34 (following *Bitzan v. Parisi*, 88 Wn.2d 116, 558 P.2d 775 (1977)). Therefore, the claimant still meets her burden of proof by introducing lay testimony such that "a reasonable person can infer that the causal connection exists, . . ." *Id.* at 533.

Viewing the evidence in the light most favorable to Ms. Masho, there is “sufficient or substantial” evidence to establish the requisite causal relationship between Ms. Masho’s industrial injury and her physical and mental health conditions.

First, **no** evidence has been presented to suggest that Ms. Masho suffered any other upper extremity injuries before *or* after the October 20, 2007, industrial injury.

Second, she has consistently reported the same or similar symptoms in her neck, right shoulder, and clavicle to her medical providers since her industrial injury on October 20, 2007.

Third, all of the doctors who testified noted objective findings upon physical examination, including, but not limited to, a decreased range of motion in her shoulder region. Also, Ms. Masho’s MRI findings were consistent with a “history of the partial tear of her rotator cuff muscles...” (CP 7, Watanabe Depo., pp. 10:24-11:5). Drs. Jackson and Provencher both acknowledged that partial rim-rent tears of the supraspinatus and partial bursal-sided infraspinatus tendon tears *can* be caused by an injury. (CP 7, Jackson Depo., pp. 58:15-59:1, and Provencher Depo., p. 37:20-25). Dr. Kirschner’s EMG findings revealed “a median orthodromic mixed nerve transcarpal conduction latency that is mildly prolonged,” which was **not** a normal finding, and could be related

to her industrial injury. (CP 7, Kirschner Depo., at pp. 40:17-41:4, and 42:23-43:5). All of the medical experts also agreed that Ms. Masho had a visible prominence over the sternoclavicular joint of her medial clavicle. (See, e.g., CP 7, Jackson Depo., at p. 49:2-8). Appellant relies on *Eastwood v. Dep't. of Labor & Indus.*, 152 Wn. App. 652, 219 P.3d 711 (2009) in support of its argument that “merely stating a condition is related is not sufficient to show a causal relationship.” Brief of Appellant , p. 14. In *Eastwood*, however, the medical expert there did not “specify the objective findings or diagnostic criteria by which he defined or diagnosed an ‘irritable shoulder.’” Alternatively, here, the medical expert testimony *has* specified the objective findings and diagnostic testing utilized to arrive at the related diagnoses. (See generally, § III. B., Evidence on Appeal).

Appellant also argues that Dr. James testimony provided no evidence that “logically connected the subluxation of the clavicle” to “Ms. Masho’s alleged conditions.” Appellant is incorrect. Dr. James testified that she based her diagnoses on the development of the condition after the industrial injury, her detailed clinical examination, the scientific literature (which she described during her testimony), and her records review. (CP 7, James Tr., pp. 63:16-18).

In response to each of the physical conditions set forth in Appellant’s brief, Respondent responds as follows:

1. Cervical Dystonia

Appellant dismisses this diagnosis as unrelated to the October 20, 2007, industrial injury based on Dr. Jackson and Dr. Kirschner's testimony. The issue in the underlying case was what were Ms. Masho's physical and mental health conditions as of the date of the Department's closing order, e.g., July 1, 2010. Neither Dr. Jackson nor Dr. Kirschner had seen or treated Ms. Masho for over a year prior to July 1, 2010, and therefore, their testimony has little probative value. Even if there is a different interpretation of the evidence, the trial court's decision will be upheld so long as they interpreted the evidence reasonably. Dr. James testified that Ms. Masho's neck was "constantly tilted to the right and flexed forward," so she measured Ms. Masho's neck using an inclinometer and a handheld goniometer. (CP 7, James Tr., pp. 51:11-52:18). A normal midline neutral position of the neck is 180 degrees, or zero. (*Id.* at p. 52:14-18). Ms. Masho's was 27 degrees away from the midline, which was significant for a diagnosis of cervical dystonia. (*Id.* at pp. 52:14-53:4). Moreover, during her testimony, Dr. James noted in her medical records review that one of Ms. Masho's treating providers at Harborview, Dr. Grierson noted in his examination findings consistent for cervical dystonia, further supporting that diagnosis. (*Id.* at p. 67:12-23).

The evidence unequivocally demonstrates that Ms. Masho suffered no other intervening injuries following the October 20, 2007, industrial injury. Dr. James testified as to how she arrived at the diagnosis, and, as a result, the trial court did not error in findings the diagnosis related on a more-probable-than-not-basis to the industrial injury.

2. Right Long Thoracic Nerve Palsy

Appellant argues that Ms. Masho provided no testimony to support the diagnosis of right long thoracic nerve palsy. However, Dr. James provided detailed testimony concerning the testing she performed, (a modified push-up against the wall), to arrive at that diagnosis. (CP 7, pp. 55:14-56:24). Likewise, Dr. James also testified that individuals who suffer clavicle dislocations, such as Ms. Masho, frequently develop long thoracic nerve palsy, or “backpacker’s palsy” because the nerve is damaged. (*Id.* at p. 69:18-26). Appellant argues that Dr. Jackson and Dr. Provencher did not find evidence of scapular winging. While there may be a differing medical interpretation between Dr. James and Dr. Provencher, as long as there is sufficient evidence supporting the trial court’s interpretation, its decision will be upheld. Here, the trial court’s interpretation was reasonable in light of Dr. James’ testimony, the fact that Ms. Masho consistently reported similar complaints in the same area of her body, and the fact she had no upper extremity injuries prior to or after

the October 20, 2007, industrial injury.

3. Right Sternoclavicular Dislocation

This condition is not disputed.

4. Right Bicipital Tendinitis and Tendon Tear

Neither Dr. Jackson nor Dr. Kirschner ordered a CT or MRI of Ms. Masho's right shoulder. An MRI was finally obtained in January 2010 (after they were no longer treating Ms. Masho). The MRI revealed partial rim-rent tears of the supraspinatus and partial bursal-sided infraspinatus tendon tears. Drs. Jackson and Provencher immediately dismissed the suggestion that the tears were related to Ms. Masho's industrial injury despite the fact that both agree that these types of tears *can* be caused by an injury. (CP 7, Jackson Depo., pp. 58:15-59:1, and Provencher Depo., p. 37:20-25). Further, Ms. Masho reported the same symptoms in the same shoulder region since the October 20, 2007, injury. (*See generally*, Evidence on Appeal). Dr. James concluded the tendinitis and tendon tears were related as a result of the MRI findings; the temporal relationship to the industrial injury; Ms. Masho's consistent complaints; consistent physical examination findings; and her clinical examination findings, which were also consistent with the radiographic imaging studies. (CP 7, James Tr., pp. 72:22-73:4). Therefore, it was reasonable for the trial court to conclude that the right bicipital tendinitis and tendon tear were related

on a more-probable-than-not basis to the October 20, 2007, industrial injury.

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

Appellant argues that Judge Robinson's Findings of Fact do not support a frozen shoulder diagnosis. Appellant is incorrect. Finding of Fact No. 7 provides that Dr. James diagnosed "right adhesive capsulitis," that was "the result of the October 20, 2007, industrial injury." Conclusion of Law No. 3 provides that Ms. Masho's "shoulder injury" was proximately caused by the October 20, 2007, industrial injury.

Dr. James and Dr. Watanabe testified that Ms. Masho's frozen shoulder was related on a more-probable-than-not basis to her October 20, 2007, industrial injury. (CP 7, James Tr., at pp. 62:11-63:13, and Watanabe Depo., at p. 11:6-11:13). Dr. Watanabe opined that Ms. Masho's right shoulder dislocation contributed to the evolution of her right frozen shoulder. (CP 7, Watanabe Depo., at pp. 24:15-25:4).

Dr. Jackson and Dr. Provencher both agreed a frozen shoulder can develop over time. (CP 7, Jackson Depo., at p. 56:8-10, and Provencher Depo., at p. 41:1-9). Dr. Provencher also testified that Ms. Masho "had significant restrictions due to pain, so it was difficult" for him to determine whether she had adhesive capsulities. (CP 7, Provencher Depo.,

at p. 20:11-19).

Dr. Watanabe's usage of the word "presume" in her testimony, as to the relatedness of the shoulder condition, does not diminish the value of her testimony particularly when coupled with other "...credible evidence of a non-medical character, such as a sequence of symptoms or events corroborating the opinion." See *Vasquez*, 44 Wn. App. at 385. Therefore, Dr. Watanabe's testimony, coupled with her other testimony, including her opinion that Ms. Masho's shoulder dislocation contributed to the evolution of her frozen shoulder, along with the testimony of Dr. James and Ms. Masho, is more than sufficient in supporting Judge Robinson's Findings of Fact Nos. 7 and 9, holding that the frozen shoulder condition was related to the October 20, 2007, industrial injury.

Additionally, Dr. James provided extensive testimony concerning the relatedness of the supraspinatus and infraspinatus (shoulder) tears to the industrial injury, and how she arrived at that diagnosis. (CP 7, James Depo., 56:25-59:4). Appellant relies on Dr. Provencher's testimony that the injury and "the energy where she was injured" indicates she did not hurt her shoulder. This is unsupported by the record, as Ms. Masho consistently reported shoulder pain and discomfort to Dr. Jackson immediately following the October 20, 2007, industrial injury, and even underwent physical therapy (as ordered by Dr. Jackson) to treat her injury.

(CP 7, Jackson Depo., at pp. 45:19-47:10). As explained above, there is sufficient evidence to support this diagnosis as well.

6. Right Cervical 5, 6, and 7 Sensory Radiculitis of the Brachial Plexus

Again, Dr. James provided detailed testimony concerning Ms. Masho's Right C5, C6, and C7 sensory radiculitis of the brachial plexus, and how she arrived at that diagnosis. (CP 7, James Tr., pp. 57:18-59:24, and 71:15-19). This diagnosis is consistent with Ms. Masho's testimony, involves the same area of her body (the right upper extremity), and Ms. Masho suffered no other injuries to that area of her body before or after the October 20, 2007, industrial injury. As a result, regardless of whether Dr. Kirschner and Dr. Provencher disagree with Dr. James's diagnosis, there is sufficient evidence in the record to uphold the trial's court findings of fact and conclusions of law relating to this condition.

7. Mental Health Conditions

There record is replete with evidence establishing that Ms. Masho's depression is related on a more-probable-than-not basis to her industrial injury, supporting the 11/6/12 Order's Findings of Fact No.10, and 12/26/12 Order's Finding of Fact No. 10, and Conclusion of Law No. 4.

First, Ms. Masho testified that her shoulder and clavicle injury

have caused significant pain, leading her to feel “sad,” “unhappy,” and “depressed.” (CP 7, Masho Tr., at pp. 16:21-17:6). Dr. James testified that Ms. Masho said she felt depressed during her evaluation. (CP 7, James Tr., at pp. 93:26-94:19). Dr. James also felt that Ms. Masho had some kind of mental condition that she might refer to a psychiatrist or psychologist for treatment. (*Id.*) Dr. Watanabe further opined that Ms. Masho suffers from depression. (CP 7, Watanabe Tr., at p. 19:15-19). Dr. Early conducted a mental health examination, and had Ms. Masho undergo mental health testing including the MCMI-III and the Beck Depression Inventory. The Beck Depression inventory revealed a score of 53 indicating a “severe level of depression,” which was consistent with the symptoms she described during Dr. Early’s clinical interview. (CP 7, Early Depo., at p. 13:15-25). Ms. Masho’s MCMI-III profile also revealed that she suffered from depression, anxiety, and chronic pain. (*Id.* at p. 14:1-5).

Based on the clinical interview, examination, and testing, Dr. Early diagnosed Ms. Masho with (1) Axis I: depressive disorder NOS, 311.00, anxiety disorder NOS, 300.00, pain disorder with psychological factors, 307.89; (2) Axis II: diagnosis deferred; (3) Axis III: right shoulder, the right sternoclavicular and right acromioclavicular joint sprains with secondary myalgia; (4) Axis IV: psychosocial stressors: loss of

employment, the inability to engage in usual social, recreational, and public interactions as consequences of the industrial injury; (5) Axis V: General Assessment of Functioning of 45 (major impairment of functioning). (*Id.* at pp. 20:4-21:18).

In Dr. Early's professional opinion, Ms. Masho's depressive disorder, anxiety disorder, and pain disorder are causally related on a more-probable-than-not basis to the October 20, 2007, industrial injury. (*Id.* at pp. 21:19-23:7). Dr. Early further testified that Ms. Masho did not suffer any mental health condition or seek mental health treatment prior to her October 20, 2007, industrial injury. (*Id.* at pp. 24:21-25:24).

During Dr. Kirschner's initial visit with Ms. Masho on October 21, 2008, he noted that she appeared "despondent," or depressed and sad. (CP 7, Kirschner Depo., at p. 34:17-22). He also noted that she was "emotionally labile," or tearful. (*Id.* at pp. 34:23-35:2).

Appellant argues that three years passed before Ms. Masho presented with depression, but that is incorrect, as Dr. Kirschner noted her depressed mental state as early as 2008.

Also, the fact Ms. Masho may have had other earlier stressors in her life: war in her country of origin (30 years ago); separation from the father of her child (over 10 years ago); and parenting difficulties (which have all resolved according to Ms. Masho and Dr. Early) does not mean

her mental condition was not caused by her industrial injury. Tellingly, none of the events that purportedly caused Ms. Masho's current mental health condition, as testified to by Dr. Robinson, were close in time to the date of the industrial injury. All of the events described occurred long in the past. Indeed, Ms. Masho reported to Dr. Robinson that she does not have dreams arising from witnessing death or experiencing danger or have any intrusive or cognitive memories concerning those wartime events. (CP 7, Robinson Depo. at p. 18:15-21).

There is "sufficient or substantial evidence" to affirm the 11/6/12 Order's Finding of Fact No. 10, and 12/26/12 Order's Finding of Fact No. 10, and Conclusion of Law No. 4, which hold that Ms. Masho's depression is proximately related on a more-probable-than-not basis to her October 20, 2007, industrial injury, and she needs treatment.

While Appellant did not address Ms. Masho's ability to work, the evidence demonstrates she is incapable of working. Ms. Masho testified that she has been unable to work since November 2008, as a result of her injuries. (CP, Masho Tr., pp. 17:18:7). Dr. Watanabe concluded that Ms. Masho has "difficulty doing simple tasks at this point physically and that limits her ability to work." (CP 7, Watanabe Depo., at pp. 23:24-24:4). Dr. Early further testified that Ms. Masho is incapable of performing any work on a full-time meaningful basis. (CP 7, Early Depo., at pp. 24:21-

25:24).

**C. The Lower Court Did Not Err In Granting Respondent's CR 60 Motion, And Even If The Court Did Err, The Error Was Harmless.**

Appellant argues that Ms. Masho incorrectly moved pursuant to CR 60 for more clarification to the 11/6/12 Order. Instead, Appellant, relying on *Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 917 P.2d 100 (1996) argues that Ms. Masho should have sought reconsideration under CR 59(a) or (h). However, neither CR 59(a) or (h) provide the relief sought by Ms. Masho, and a CR 60 motion was proper under the circumstances.

CR 60 provides in relevant part:

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reason...

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(11) Any other reason justifying relief from the operation of the judgment.

CR 59(a) provides that a party may file a motion for a new trial or reconsideration under the following circumstances:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

CR 59(h) permits a party to move to alter or amend a *judgment*.

Appellant wrongfully argues that Ms. Masho should have moved for a new trial or reconsideration under CR 59(a) or (h), or sought appellate review. First, none of the grounds set forth in CR 59(a) apply to the present circumstances, and CR 59(h) applies to *judgments*, not orders. Ms. Masho was not seeking a new trial, she did not want the judge to reconsider her 11/6/12 Order, and she did not want to challenge the order on appeal. Ms. Masho simply wanted Judge Robinson to clarify her order by supplying more information.

*Presidential Estates* reasons:

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. *Marchel v. Bunger*, 13 Wash.App. 81, 84, 533 P.2d 406, *review denied*, 85 Wash.2d 1012 (1975). 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.

*Id.* at 326-327. *See also State v. Snapp*, Wn. App. 614, 627, 82 P.3d 252 (2004) (where the Court held that the trial court had the authority to correct a judgment and sentence to reflect its original intention, as reflected in the clerk's minutes).

Appellant argues that Ms. Masho has not identified how the 11/6/12 Order "reflects the actual intentions of the court." Yet the language of the 11/6/12 Order supports Ms. Masho's interpretation. Finding of Fact No. 4 sets forth the burden of proof, time loss benefits, and Ms. Masho's mental health condition. Finding of Fact No. 7 lists all of the physical conditions Dr. James diagnosed and their relatedness to Ms. Masho's October 20, 2007 industrial injury. Finding of Fact No. 9 sets forth Dr. Watanabe's treatment and diagnosis of a right frozen shoulder. Finding of Fact No. 10 indicates that the trial court found Dr. Early's diagnosis of depression (proximately resulting from the industrial injury) credible as well and his recommendation that Ms. Masho undergo psychotherapy treatment. Finally, Conclusion of Law No. 2 provides that "[h]aving considered the argument and evidence, the court concludes that petitioner has met her burden of proof. (CP 21). The trial court's intention is clear: Ms. Masho has the burden of proof in demonstrating that the Board decision is incorrect and she met her burden.

Ms. Masho moved pursuant to CR 60 for a more-detailed findings of fact, conclusions of law, and order, to better reflect the trial court's intention in order to prevent any problems with enforcement at the Department level. Indeed, Appellant and Ms. Masho have a very different interpretation of the 11/6/12 Order. Ms. Masho asserts that the clear language of the 11/6/12 Order holds that she has met her burden of proof on all issues on appeal since there is no limiting language indicating otherwise. Appellant, on the other hand, contends that the 11/6/12 Order only allows depression under the industrial injury claim, and treatment for the depression.

Appellant further argues that there is no mention of time loss compensation in the 11/6/12 Order. Finding of Fact No. 4 provides that "the burden is on the petitioner to show by a preponderance of the evidence, that the decision of the Board is incorrect. Petitioner challenges the findings that Ms. Masho was not entitled to time loss compensation after February 17, 2009...." (CP 21, Finding of Fact No. 4). Also, in Findings of Fact Nos. 7, 9, and 10, Judge Robinson describes the physical and mental health conditions Ms. Masho alleges are related on a more-probable-than-not basis to her industrial injury. Consequently, Ms. Masho's interpretation of the 11/6/09 Order is consistent with its plain language.

Additionally, even if the trial court erred in granting Ms. Masho's CR 60 motion and proffering the 12/26/12 Order instead, the error was harmless. "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it." *State v. Smith*, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997) (quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). Appellant filed a notice of appeal on the same day Ms. Masho filed her CR 60 motion. (CP 22). As a result, Appellant clearly intended to appeal the 11/6/12 Order. The CR 60 motion and the 12/26/12 Order simply supply more information so that there is less ambiguity as to the issues on appeal. In granting the CR 60 motion, even if in error, Appellant was not prejudiced because it would have appealed the trial court's 11/6/12 Order anyway, and, if anything, the 12/26/12 Order more thoroughly describes and elucidates the findings of the trial court, allowing the parties to discuss and respond to all the pertinent issues on appeal. Accordingly, the trial court did not err in granting Ms. Masho's CR 60 motion, and even if the trial court did err, the error was harmless.

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V. CONCLUSION

For the reasons set forth above, Ms. Masho respectfully requests that this Court affirm the 12/26/12 Order.

DATED this 16<sup>th</sup> day of May 2013.

Respectfully submitted,

By: 

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NO. 69654-8-I

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

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AVIZENT AND CRISTA MINISTRIES,

Appellants,

v.

ALGANESH MASHO,

Respondent.

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**PROOF OF SERVICE OF BRIEF OF RESPONDENT**

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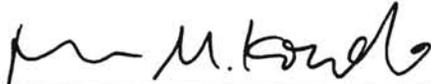
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I certify under penalty of perjury that I sent, this day, a true and correct copy of the BRIEF OF RESPONDENT via first class, postage paid, U.S. mail to:

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DATED this 16<sup>th</sup> day of May 2013.

  
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Laura M. Kondo