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CASE NO. 709615

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SEARS ROEBUCK COMPANY, Appellant,

v.

JULIE A. SCOTT, Respondent.

AMENDED RESPONSE BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent Julie Scott, by and through her attorney of record, Robert A. Silber of Foster | Staton, P.C. offers this Response Brief in support of her request for the Court to affirm the Amended Judgment and Order of the King County Superior Court, which concluded Ms. Scott is entitled to receive medical treatment for her claim-related conditions of anxiety and panic disorders, thoracic outlet syndrome (TOS), and headaches, and also directed the Department of Labor and Industries (Department) to adjudicate Ms. Scott's entitlement to temporary total disability benefits between March 3, 2007 and September 30, 2009 when considering the newly-accepted panic and anxiety disorders, TOS, and headache conditions.

II. SUMMARY OF THE FACTS

The respondent/injured worker, Julie Scott, suffered her first industrial injury on March 24, 2002. She was working as an appliance salesperson at Sears Roebuck & Company when she felt a pop in her

left shoulder while trying to lower a 60-pound box overhead with her arms raised above her head. She described this incident as feeling as though her shoulder was pulled out of its socket. (Scott test. at pp. 16 – 18) She received physical therapy for the injury; however, the pain and limitations associated with the injury never went away. (Scott test. at pp. 20 – 21) Even though she returned to work after approximately two to three months, she had to hold her left arm in an upright position and compensated with her right side. (Scott test. at pp. 21 – 22)

Ms. Scott's second work injury occurred on March 22, 2003 when she was trying to pull out a 30-inch convection wall oven and felt a pop in her right shoulder area and chest, which felt as though she had pulled her breast muscles. (Scott test.at pp. 25, 27)

She received treatment for both injuries from Anthony Howell, M.D. followed by Allen Baronni, M.D. and later, Garrett Hyman, M.D. who was her attending physician from November 2003 to 2010. (Hyman test. at pp. 10 - 11) She tried to return to work; however, after several unsuccessful attempts, she had to discontinue working as of March 26, 2004, due to headaches, spasms, inability to lift her hands above her head, depression, anxiety, and vomiting, symptoms

her treating physicians associated with her 2002 and 2003 industrial injuries. (Scott test.at p. 29)

In addition to physical pain in her shoulder and neck, Ms. Scott suffered from migraine headaches. (Scott test. at 41) They were happening frequently and would make her throw up. (Scott test. at p. 42) As of September 30, 2009, Ms. Scott had some good days when she tried to cook and be more cheerful. However, on her bad days, which occurred frequently, her symptoms were so severe that she had to lie down in a dark and silent room to wait for the pain to subside. (Scott test. at 43)

Robert Scott, Ms. Scott's husband of 33 years, described Ms. Scott's lifestyle after the injuries as simple, far less active, and limited. (R. Scott test. at p. 94) He described her as being in continual pain with her arms constantly going numb, shoulders hurting, and persistent headaches. (R. Scott test. at p. 95) Her pain level and limitations were most apparent when she raised her arms above her shoulders. She had horrific headaches resulting in vomiting. On one occasion, he had to rush her to the hospital. (R. Scott test.at p. 97) As Ms. Scott described it, similar to other occasions, she had muscle spasms and became anxious because she feared she was about to

have one of her terrible migraine headaches. She would start shaking, her blood pressure would rise, and she feared she was having a heart attack. (Scott test. at p. 39) On another occasion, her daughter Angela Schmidt went with her parents to the emergency room. She described the incident as the scariest thing she ever experienced because her mom thought she was having a heart attack. (Schmidt test. at p. 84)

In 2004, Ms. Scott's attending physician Dr. Hyman referred Ms. Scott to Dr. Mark Ombrellaro, a board certified vascular surgeon, for a thoracic outlet syndrome (TOS) evaluation. Based on his examination, her mechanism of injuries, and non-invasive vascular testing, Dr. Ombrellaro diagnosed Ms. Scott with TOS and recommended a decompression surgery. (Ombrellaro test. at pp. 22 – 29) Even though Ms. Scott had a negative EMG, Dr. Ombrellaro did not consider this a reliable indication of whether a person has TOS. (Ombrellaro test. at pp. 17, 36) Dr. Ombrellaro saw Ms. Scott again in 2008 and 2010 and, on both occasions, he concluded she still had bilateral TOS and needed surgery. (Ombrellaro test. at pp. 43, 45 – 47) Dr. Hyman concurred with Dr. Ombrellaro that Ms. Scott's two separate injuries resulted in bilateral TOS for which she needed

surgery.

Dr. Ombrellaro also concluded that 80 to 90 percent of individuals with TOS have headaches due to muscle spasm. (Ombrellaro test. at 44) This was the case for Ms. Scott. She reported her headaches started in 2003 and were one of the reasons she had to stop work as a result. (Scott test. at 48)

As a result of her deteriorating physical condition, Ms. Scott began treating with psychiatrist William Holliday, M.D. on July 31, 2008. Following his initial evaluation, he concluded she had developed anxiety and panic disorders proximately caused by her industrial injuries. (Holliday test. at pp.13, 20) She fit the criteria for an anxiety disorder due to her excessive apprehension about her medical condition by engaging in significant catastrophic thinking. Dr. Holliday concluded there was an interaction between her physical symptoms and her deep concerns about these symptoms, which caused her to feel out of control. (Holliday test. at p. 15) For example, she would experience neck pain; then, as a result of the neck pain, she would become anxious that a debilitating headache was imminent and subsequently vomit, which would then lead to a panic attack. (Holliday test. at p. 16)

Dr. Holliday treated Ms. Scott on nine different occasions. He understood from Ms. Scott that she would have attended treatment more regularly but she was forced to pay out-of-pocket. He concluded Ms. Scott was in need of psychotherapy and medications for her injury-related conditions. He reviewed various medical records evidencing anxiety and/or depression symptoms going back to June 19, 2002 (Dr. Clark), January 22, 2004 or November 22, 2004 (Dr. Howell), and December 14, 2004 (Dr. Hyman), which went untreated until she started seeing Dr. Holliday. (Holliday test., pp. 41 – 42) Dr. Holliday also reviewed medical records prior to 2002 indicating that Ms. Scott attended a pain clinic associated with a prior injury. This supported his opinion that Ms. Scott was predisposed to focusing on her pain. (Holliday test. at p. 46) Dr. Holliday concluded that his diagnoses and treatment recommendations would not change even if Ms. Scott did not have TOS. (Holliday test. at p. 48) Furthermore, she was not capable of gainful employment between March 3, 2007 and September 25, 2009, due to the combination of her physical conditions and emotional limitations caused by her industrial injuries. Dr. Ombrellaro also concluded that Ms. Scott was quite limited in her abilities to engage in basic activities of daily living, which made it fairly

unlikely that she would be employable.

III. PROCEDURAL HISTORY

On September 30, 2009, the Department of Labor and Industries (Department) issued an order affirming a Department order dated March 4, 2009 closing Ms. Scott's W-580135 claim with time loss compensation benefits paid through August 22, 2002, and without an award for permanent partial disability, and segregated as unrelated to the industrial injury the conditions of cervical disc disease, headaches, thoracic outlet syndrome, carpal tunnel syndrome, and a low back condition. (CABR at pp. 127 - 129) Ms. Scott filed an appeal of the September 30, 2009 Department order with the Board of Industrial Insurance Appeals (Board) on October 6, 2009. (CABR at 126) On September 25, 2009, the Department issued an order affirming a December 12, 2008 Department order closing Ms. Scott's W-580146 claim with time loss compensation benefits paid through March 2, 2007, with compensation for permanent partial disability equal to 3 percent of the amputation value of her right arm at or above the deltoid insertion or by disarticulation at the shoulder, and segregated as unrelated to the industrial injury the conditions of

cervical disc disease, headaches, thoracic outlet syndrome, bilateral carpal tunnel syndrome, low back strain, and a pain disorder with agoraphobia. (CABR at pp. 220 – 221) Ms. Scott appealed these orders to the Board on October 5, 2009. (CABR at p. 219) With regard to both claims, the Department's determination that Ms. Scott was not entitled to time loss benefits was based solely on those conditions the Department considered related to her industrial injuries – shoulder strains - and did not consider those conditions – cervical disc disease, headaches, thoracic outlet syndrome, bilateral carpal tunnel syndrome, low back strain, and a pain disorder – it concluded were not caused or aggravated by the industrial injuries.

Following a trial before the Honorable Michael Trickey of the King County Superior Court that began on January 15, 2013, a six-person jury found that (1) Ms. Scott suffered from pain and anxiety disorders proximately caused by her March 22, 2003 industrial injury, (2) suffered from TOS and headaches caused or aggravated by her March 22, 2003 industrial injury, but (3) she was gainfully employable between March 3, 2007 and September 30, 2009 and not entitled to time loss benefits for that time period. (Judgment and Order, CP 227 – 237.)

On February 11, 2013, Ms. Scott filed Plaintiff's Memorandum for Attorney Fees and Costs and Presentation of Judgment as well as proposed Judgment and Order. Judge Trickey signed the Judgment and Order on February 26, 2013. (CP 227 – 237.) Judge Trickey ordered that the Amended Decision and Order of the Board of Industrial Insurance Appeals dated September 22, 2011 was reversed and the Department was directed to issue an order relative to claim W-580146 finding that Ms. Scott was gainfully employable between March 3, 2007 and September 30, 2009 relative to her March 22, 2003 industrial injury. (CP 227 – 237.)

Significantly, in light of the jury's decision to reverse the September 22, 2011 Board Order – specifically, to accept panic and anxiety disorders, TOS, and headaches as proximately caused or aggravated by the 2003 industrial injury - and by implication the September 25, 2009 Department closing order, with direction to the Department to now consider Ms. Scott's entitlement to benefits - which includes time loss compensation upon which the Department had not yet passed **when considering the newly-accepted TOS and headaches conditions coupled with panic and anxiety**

disorders – the trial court did not have jurisdiction to consider Ms. Scott's entitlement to time loss between March 3, 2007 and September 30, 2009 and, as such, the entire claim including all attendant issues had to be remanded to the Department to exercise original jurisdiction.

On March 8, 2013, Ms. Scott moved the trial court to reconsider the February 26, 2013 Judgment and Order and conclude as a matter of law that the September 22, 2011 Amended Board Decision and Order affirming the September 30, 2009 Department order was incorrect and must be reversed and the matter remanded to the Department with direction to adjudicate Ms. Scott's entitlement to temporary total disability benefits when considering her newly-accepted panic and anxiety disorders, TOS, and headaches conditions deemed related to her industrial injury in addition to issuing an order consistent with the other conclusions of law contained in the February 26, 2013 Judgment and Order. (Plaintiff's Motion for Reconsideration of Judgment and Order, CP 238 – 243.)

On March 28, 2013, Judge Trickey signed the Amended Judgment and Order. (CP 259 – 269.) The Department issued an

order on October 4, 2013, directing the self-insured employer to pay time loss benefits for the period March 3, 2007 through September 30, 2009 and, on February 11, 2014, issued an order affirming the October 4, 2013 order.

The March 28, 2013 Amended Judgment and Order awarded Ms. Scott \$51,994.00 in attorney fees and \$21,868.00 in costs for a total of \$73,862.00. The attorney fees and costs award was based on the jury's decision to reverse or modify and otherwise grant additional relief relative to the 2003 industrial injury by agreeing with the Board that Ms. Scott's panic and anxiety disorders were caused or aggravated by her industrial injury and were in need of further medical treatment as of September 25, 2009, and also finding that Ms. Scott suffered from either vascular or neurogenic thoracic outlet syndrome as well as headaches proximately caused or aggravated by the March 22, 2003 industrial injury. (CP 259 – 269.)

IV. ARUGMENT AND AUTHORITIES

A. The Superior Court's Amended Judgment Should Not Be Reversed because Substantial Evidence Supports Thoracic Outlet Syndrome, Headaches, and Panic and Anxiety Disorders Were Proximately Caused or Aggravated by the 2003 Industrial Injury

In *Raum v. City of Bellevue*, 171 Wn. App. 124, 151, 286 P.3d 695, 710 (2012), *review denied* 176 Wn.2d 1024 (2013), determined that the court's "review 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." (quoting *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 97 P.2d 570 (1999))(quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). "[E]ven if the [appellate] court were convinced that a wrong verdict had been rendered, it should not substitute its judgment for that of the jury so long as there was evidence which, if believed, would support the verdict rendered." *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 943, 640 P.2d 1051 (1982). This Court further concluded in *Raum* that more extensive appellate review of facts found in the superior court abridges the right to jury trial provided by RCW 51.52.115:

Our function is to review for sufficient or substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court. We are not to reweigh or rebalance the competing testimony and inferences, or to apply anew the burden of persuasion, for doing that would abridge the right to trial by jury.

Harrison Mem'l Hosp. v. Gagnon, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002)

In *Raum*, this Court refused to overturn the jury's verdict that Mr. Raum's cardiovascular disease was unrelated to his occupational exposures, but instead a variety of non-employment-related factors contributed to his cardiovascular disease. The court concluded that even though the Department's witness, Dr. Yan, never physically examined Mr. Raum, his opinion was sufficient as he was a qualified cardiologist and reviewed Mr. Raum's medical records before offering an opinion in terms of medical probability. *Raum v. City of Bellevue*, 171 Wn. App. at 154. "His testimony was sufficient to persuade a fair-minded, rational person to agree with his conclusion." *Id.*

1. TOS Condition

Here, the sole expert in the field of TOS called by either side was treating surgeon Dr. Ombrellaro. Fifteen percent of his practice is dedicated to treating patients with TOS. (Ombrellaro test. at p. 6) A majority of his patients improved after TOS surgery. (Ombrellaro test. at p. 8) He testified that TOS is a constellation of symptoms, and not any single test indicates a person has the condition. Instead, an

expert in the field like himself must look at the patient's medical history, symptoms, complaints, physical exam findings, and laboratory test results to identify the diagnosis. (Ombrellaro test. at pp. 11 – 12) According to Dr. Ombrellaro, Ms. Scott's history, complaints, symptoms, and test results in 2004, 2008, and 2010, were consistent with the diagnosis of TOS on a more-probable-than-not medical basis.

Sears Roebuck & Company (Sears) called defense medical expert Dr. William Kellogg. It became quite apparent very early in his testimony that his opinions were not credible. He was no longer allowed to perform forensic evaluations because he was not board certified in his field. He performed over 4,000 TOS examinations and only diagnosed TOS in six cases. Moreover, he only performed five TOS surgeries in his entire career and none in over 23 years. (*Kellogg test.* at pp. 70 - 74) Here, there is sufficient evidence to support the trier-of-fact's determination that her 2003 industrial injury caused or aggravated her TOS condition.

2. Anxiety and Panic Disorders

Ms. Scott also presented more than sufficient, credible testimony/evidence relative to her claim-related anxiety and pain

disorders. A majority of the medical providers agreed she had panic attacks and anxiety proximately caused by the industrial injuries. They also all agreed chronic pain caused depression. Dr. Hyman, the attending physician, concluded that Ms. Scott had reactive depression and anxiety, while her treating psychiatrist, Dr. Holliday, opined she had panic attacks and anxiety. Even Dr. Robinson, who testified on behalf of the employer, agreed that Ms. Scott's diagnoses included panic attacks with agoraphobia. The ultimate problem with Dr. Robinson's opinion was his failure to offer a cause for her condition. Drs. Hyman and Holliday concurred that the injuries, whether TOS or just a shoulder strain, resulted in significant psychiatric conditions that needed treatment. While pain is subjective, subjective complaints are sufficient to support conclusions regarding mental health conditions. Washington courts have expressly held that objective medical findings are **not** necessary when addressing mental health conditions. *Price v. Dep't of Labor & Indus.*, 101 Wn.2d 520, 682 P.2d 307 (1984).

Pain is a constant reminder of a person's injuries - - an opinion supported by all the medical experts and, as Dr. Holliday explained, muscle spasms or just pain alone triggered Ms. Scott's panic attacks.

This by itself is sufficient to support the acceptance of panic disorder in her claim. Ms. Scott did not have any unrelated stressors in her life. It is absurd to conclude that the effects of the industrial injury had absolutely no impact on Scott's mental health status. Moreover, if one is to assume Ms. Scott had non-claim-related stressors in her life, to be deemed causally related, an industrial injury need only be a proximate cause, not the sole or even primary cause of a resulting mental health disorder. In *Clayton v. Dep't of Labor & Indus.*, 36 Wn.2d 325, 217 P.2d 783 (1950), the court discussed multiple proximate causes in the context of the combined effects of an industrial injury and the worker's age (unrelated to the industrial injury but nonetheless a factor to consider in determining the extent of a worker's disability). The worker sought an instruction that expressly provided that, if there were several causes proximately contributing to his disability and the industrial injury was one of the contributing causes, then the jury should disregard the other causes because the injury need not be the sole cause of the resulting disability. The court held that such instruction permitted the jury to find for the worker even if his age was also found to be a proximate cause of his condition so

long as the jury also found that the accident was a proximate cause of his condition. Here, there is sufficient evidence demonstrating that the resulting mental health condition was at least proximately caused by the industrial injuries. See also *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 682, 571 P.2d 229 (1977).

3. Headaches

Ms. Scott complained of headaches soon after she experienced her second work injury. After a period of time, she had to stop working due in part to her headaches, which caused nausea and vomiting. She would get muscle spasms that triggered headaches and migraines. She would hide in a dark room to help herself get rid of them. Her attending physicians, Drs. Hyman, Ombrellaro, and Holliday all concluded the headaches were the result of her claim-related physical problems. The Washington Supreme Court has established that opinions of a worker's treating physicians shall be afforded special consideration. *Hamilton v. Dep't of Labor & Indus.*, 49 Wn. App. 495, 743 P.2d 1259 (1987). Furthermore, Ms. Scott's attending physicians all agreed she needed medical treatment for her physical and mental health conditions proximately caused by

her industrial injuries.

B. The Superior Court Was Correct to Direct the Department of Labor and Industries to Adjudicate Ms. Scott's Entitlement to Temporary Total Disability Benefits When Considering Her Newly-Accepted Panic and Anxiety Disorders, TOS, and Headaches Conditions Causally Related to Her Industrial Injury

The Board's and appellate courts' jurisdiction is limited to issues which the Department of Labor and Industries previously decided. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) ("the Board's appellate authority is strictly limited to reviewing the specific Department action"); *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 478 P.2d 761 (1970) ("the Board cannot consider matters not included within the notice of appeal and the notice cannot enlarge the scope of inquiry before the Board beyond the matters considered and passed upon by the department, as ***indicated by the order appealed from***" [emphasis added]); see also *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 879 P.2d 326 (1994), wherein this firm successfully argued strict interpretation of jurisdiction authority whereby ***the Department order on appeal limits the appellate courts' jurisdiction.*** "[F]or the board and the trial court to consider matters not first determined by the department

would usurp the prerogatives of the department, the agency vested by statute with **original jurisdiction.**" *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761, 764 (1970) (emphasis added).

The *Lenk* court relied upon *Cole v. Dep't of Labor and Indus.*, 137 Wash. 538, 243 P. 7 (1926), which involved a question as to whether an event resulted in an industrial injury. The Department found it had not. Upon appeal, the trial court not only concluded that the event caused an industrial injury, it proceeded to also determine the extent of disability resulting from the injury. *The Cole Court* held that, because the Department determined the worker did not have an injury, "the Department had no occasion to examine into the nature and extent of those injuries, or to determine what, if any, award should be made therefore . . ." As such, the trial court erred in proceeding to adjudicate the extent of disability for a condition the Department had not determined caused by the industrial event.

In the September 25, 2009 closing order, the Department concluded that Ms. Scott's TOS, headaches, and mental health conditions were not caused or aggravated by her industrial injury. In finding that they were not related or aggravated, and further

determining that her upper extremity condition had reached maximum medical improvement, the Department also adjudicated whether Ms. Scott was able to obtain and perform gainful employment on a reasonably continuous basis. The Department did **not** adjudicate benefits stemming from Plaintiff's now-accepted mental health conditions, TOS, and headache conditions, which only through subsequent litigation were determined to be causally related to the industrial injury. Specifically, the Department had not passed upon whether Ms. Scott's mental health conditions and TOS and headache conditions caused Ms. Scott to be able or unable to perform and obtain reasonably continuous and gainful employment. While all conditions are to be considered in determining whether an injured worker is totally disabled, **the acceptance of Ms. Scott's TOS, anxiety and panic disorder, and headaches expands the conditions that could establish temporary total disability as a proximate result of her industrial injury.** Nevertheless, the Board partially *affirmed* and partially *reversed* the September 30, 2009 closing order, thereby inappropriately exercising original jurisdiction over these issues. By allowing the jury to conclude whether Ms. Scott

was entitled to time loss benefits between March 3, 2007 and September 30, 2009 based on both her physical and mental health conditions, the trial court too was asserting original jurisdiction over the issue, which is inconsistent with prevailing law. Original jurisdiction rests with the Department as a matter of law.

Despite the fact that Ms. Scott raised this issue only after the jury came to the conclusion Ms. Scott was not entitled to time loss benefits, matters of subject matter jurisdiction can be raised at any time by either party. Jurisdiction “describe[s] the fundamental power of courts to act.” *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Commission*, 173 Wn.2d 608, 268 P.3d 929 (2012) (emphasis added). Article IV of the Washington Constitution vests Washington State’s superior courts with “original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.” *Id.* (quoting *Sharp v. Kittitas County*, 149 Wn.2d 29, 37, 65 P.3d.1194 (2003)). Jurisdiction is a matter of law. *Id.* at 617.

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C. Attorney Fees Awarded in the Amended Judgment and Order Are Reasonable and Should Not Be Reduced

Sears contends that Ms. Scott's attorney fees should be reduced in proportion to the number of issues upon which she prevailed. Sears' reliance on *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999), is misplaced.

In *Brand*, the court held Ms. Brand's attorney was entitled to reasonable fees based on a lodestar calculation **not to be discounted according to the amount of benefits recovered**. The court adhered to the underlying purpose of an award of attorney fees in workers' compensation cases, which is to "ensure adequate representation for injured workers who were denied justice by the Department." The court stated:

The very purpose of allowing an attorney's fee in industrial accident cases primarily was designed to guarantee the injured workman adequate legal representation in presenting his claim on appeal without the incurring of legal expense or the diminution of his award if ultimately granted for the purpose of paying his counsel.

Brand v. Dep't of Labor & Indus., 139 Wn.2d at 667, (citing *Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wash.2d 553, 559, 295 P.2d 310 (1956) (quoting *Boeing Aircraft Co. v. Department*

of Labor & Indus., 26 Wn.2d 51, 173 P.2d 164, 167 (1946)). In fact, the court noted that our Legislature had specifically “amended RCW 51.52.130 to strengthen the purpose of providing representation for injured workers by allowing attorney fee awards at the appellate court as well as the superior court, and allowing fees when the worker successfully defends the order on appeal.” *Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d at 667-668, (citing Laws of 1993, ch. 122, s 1.) (emphasis added)

In *Brand*, the court awarded substantial attorney fees based on a lodestar despite the fact that the attorney successfully obtained only a lumbo-sacral Category 2 permanent partial disability award when in fact she sought, but did not win, a pension for Mr. Brand. Consistent with the fee shifting statute and legislative intent, Ms. Scott is entitled to an award for all reasonable attorney fees and costs, not discounted according to the benefits received, but rather one that takes into account the considerable difficulty and undesirability of her appeal.

D. Attorney Fees on Appeal before the Court of Appeals

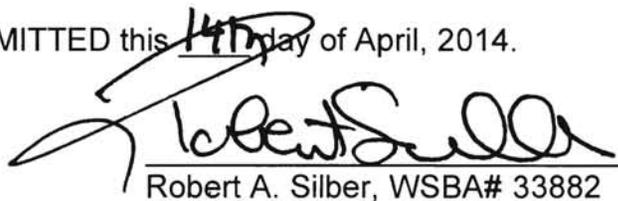
Ms. Scott is entitled to an award of attorney fees and expenses on appeal pursuant to RCW 51.52.130. See also RAP 18.1. This statute

provides that "a reasonable fee for the services of the worker's or beneficiary's attorney" shall be awarded "in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained." RCW 51.52.130. Here, Sears seeks to reverse the trial court's decision. Should this Court sustain Ms. Scott's right to benefits awarded in the March 28, 2013 Amended Judgment and Order, she will request an award of attorney fees and expenses for her attorney's work on the matter before this Court. See *Brand v. Dept. of Labor and Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999).

V. CONCLUSION

Based on the foregoing, Ms. Scott respectfully requests this Court to affirm in full the March 28, 2013 Amended Judgment and Order.

RESPECTFULLY SUBMITTED this 14th day of April, 2014.



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CERTIFICATE OF DELIVERY

SIGNED at Seattle, Washington.

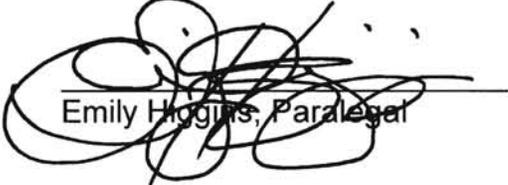
The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 14th day of April 2014, the document to which this certificate is attached, Amended Response Brief of Respondent, was served upon the following parties in the manner stated below:

Via ABC Legal Messenger:
Richard D. Johnson, Court Administrator/Clerk
Court of Appeals, Division I
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DATED this 14 day of April, 2014.

FOSTER | STATON, P.C.


Emily Higgins, Paralegal