

ORIGINAL

No. 34499-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

MARVIN POINDEXTER,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF  
THE STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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## A. INTRODUCTION

Marvin Poindexter filed an application to reopen his claim for industrial insurance benefits on the ground that his conditions caused by his industrial injury worsened or became aggravated after the Department of Labor and Industries (the Department) closed his claim without an award of permanent partial disability. Although the Board of Industrial Insurance Appeals (BIIA) found Poindexter's conditions worsened and became aggravated, he was in need of further medical treatment, and he was a temporarily totally disabled worker as a result of his conditions, the BIIA concluded Poindexter did not develop chronic pain syndrome as a proximate result of his industrial injury. This appeal raises only the chronic pain syndrome issue.

Several physicians testified before the BIIA. Only one, however, was asked about Poindexter's chronic pain syndrome. That physician, Dr. H. Richard Johnson, unequivocally testified not only that Poindexter had chronic pain syndrome, but also that he developed it as a proximate result of his industrial injury. None of the other testifying physicians was asked to express an opinion as to whether Poindexter had chronic pain syndrome or whether he developed the condition as a result of his industrial injury. However, the physician who examined Poindexter at the Department's request, Dr. William Furrer, noted Poindexter's flagrant "pain behaviors,"

which are indicators of chronic pain syndrome. Notwithstanding Dr. Johnson's testimony, and the absence of evidence to refute it, the BIIA found Poindexter did not develop chronic pain syndrome as a proximate result of his industrial injury. The jury upheld this finding. Neither the BIIA's finding nor the jury's verdict is supported by substantial evidence. The only evidence in the record as to chronic pain syndrome establishes that Poindexter developed chronic pain syndrome as a proximate result of his industrial injury.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred by entering judgment against Poindexter and in favor of the Department.

2. The trial court erred by denying Poindexter's CR 50(b) motion for judgment as a matter of law or for a new trial.

(2) Issue Pertaining to Assignments of Error

Where a physician who examined the industrial insurance claimant diagnosed the claimant as suffering chronic pain syndrome secondary to shoulder and low back injuries sustained in the industrial injury, and where the Department presented no evidence to refute or call into question the validity of this diagnosis, and, in fact, the physician who performed an independent medical examination at the Department's request observed

the claimant's "pain behaviors," which are indicators of chronic pain syndrome, did the trial court err in entering judgment in favor of the Department and against the claimant on his claim for compensation for chronic pain syndrome and did the trial court err in denying his motion for judgment as a matter of law or for a new trial on this claim? (Assignments of Error Numbers 1, 2).

C. STATEMENT OF THE CASE

On September 16, 1997, Marvin Poindexter, while employed by the Clover Park Vocational School as a custodian, stepped out of his car and tripped on a railroad tie or a log and fell. Certified Appeal Board Record (CABR) 6, 7, 9.<sup>1</sup> He landed on his left shoulder and twisted his low back. Johnson (Oct. 18) at 17.

Poindexter had immediate onset of pain in his left shoulder and low back. *Id.* After about a week, as his pain increased, Poindexter felt he could no longer work and went to Group Health clinic for treatment. *Id.*; CABR 18.<sup>2</sup> Poindexter was diagnosed with a left shoulder strain and a

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<sup>1</sup> The CABR contains the transcript of the hearing before the BIIA, as well as perpetuation deposition testimony of Drs. Johnson, Wyman, and Furrer. References to testimony at the BIIA hearing is by page number of the transcript. Deposition testimony will be referenced by name of the deponent and page number. Dr. H. Richard Johnson's deposition was taken on two days, October 18 and 28, 2002. References to Dr. Johnson's testimony will also include the date of the deposition.

<sup>2</sup> This was the first time Poindexter sought treatment for low back pain. Johnson (Oct. 18) at 18. He had been treated about a year earlier for left shoulder pain

low back sprain. Johnson (Oct. 18) at 25. He was ordered to undergo physical therapy. CABR 18. Poindexter started therapy, but did not complete it because the therapy caused his pain to increase. CABR 18-19.

In November 1997, Poindexter was reevaluated at Group Health, again complaining of low back pain and left shoulder pain. Johnson (Oct. 18) at 26. Poindexter was released to work on November 11, 1997, and returned to work at the college as a custodian. *Id.*; CABR 36. He continued to work in this job until January 27, 1998, when he quit because he was no longer able to perform his job duties and no light duty work was available. *Id.*; CABR 36, 40.

Poindexter returned to Group Health in February 1998, complaining of pins and needles in his left shoulder and persistent low back pain. Johnson (Oct. 18) at 26. After a reevaluation the following month, Poindexter was again released to return to work. *Id.*; CABR 37. He attempted to return to work at Clover Park, but his back pain returned and he was forced to stop working. Johnson (Oct. 18) at 27. Clover Park College fired Poindexter for absenteeism. *Id.*

Poindexter underwent an independent medical examination (IME) at the Department's request by Dr. William Furrer, an orthopedic surgeon,

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associated with repetitive heavy lifting on the job, but the pain went away after three or four days. *Id.*; CABR 17.

in January 1999. Furrer at 6, 16. Poindexter complained of constant left shoulder and low back pain. *Id.* at 17; Johnson (Oct. 18) at 29. Dr. Furrer diagnosed a contusion to the left shoulder with mild impingement and a lumbosacral strain and concluded both conditions were related to Poindexter's industrial injury. Furrer at 40, 41. Dr. Furrer also noted Poindexter exhibited "pain behaviors," such as clutching his low back when he bent over and superficial, nonphysiologic tenderness in the left shoulder. *Id.* at 41. Pain behaviors are indicators of chronic pain syndrome. Johnson (Oct. 18) at 78. Dr. Furrer was not, however, asked whether, in his opinion, Poindexter had chronic pain syndrome.

A few months later, Dr. Hwang of the Sea Mar Clinic recommended an orthopedic evaluation and physical therapy for Poindexter's ongoing left shoulder and low back pain. Johnson (Oct 18) at 30.<sup>3</sup> Dr. Hwang reevaluated Poindexter in January 2000 and again found ongoing left shoulder pain and low back pain. *Id.* at 31.

The same month, Dr. Kimpel, a neurologist, evaluated Poindexter and diagnosed chronic pain the left shoulder. *Id.*<sup>4</sup> In a reevaluation the

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<sup>3</sup> Dr. Hwang's testimony was not presented to the BIIA. Rather, Dr. Johnson reviewed and testified as to the contents of Dr. Hwang's report after his examination of Poindexter.

<sup>4</sup> Dr. Kimpel's testimony was not presented to the BIIA. Rather, Dr. Johnson reviewed and testified as to the contents of Dr. Kimpel's report after his examination of Poindexter.

following month, Dr. Kimpel again noted Poindexter's chronic left shoulder pain. *Id.*

Another orthopedic surgeon, Dr. James Wyman, evaluated Poindexter and recommended decompression surgery on Poindexter's left shoulder. *Id.* at 34-35; Wyman at 19. Dr. Wyman was not asked to testify whether, in his opinion, Poindexter had chronic pain syndrome.

Dr. Furrer conducted another IME in January 2002. Furrer at 53. Dr. Furrer noted Poindexter favored his left shoulder and did not move it when he walked. *Id.* at 54. Dr. Furrer performed maneuvers on Poindexter's left shoulder that, according to Dr. Furrer, should not cause anyone to have shoulder pain. However, when Dr. Furrer performed these maneuvers on Poindexter, they caused him serious shoulder pain. *Id.* Dr. Furrer also stated Poindexter had a significant pain response to Dr. Furrer's very light, superficial touching of his skin on his low back, touching so light it did not even dent the skin. *Id.* at 55-56. Poindexter had the same response to Dr. Furrer's very light, superficial touching of his left shoulder. *Id.* at 61. Dr. Furrer stated Poindexter "really withdrew" from his examining fingers, indicating the touching "really hurt him." *Id.* In fact, Poindexter's pain and his pain behaviors prevented Dr. Furrer from fully examining his left shoulder. *Id.* at 62. Poindexter's manifestations of pain behavior during the 2002 IME were the same as

those he exhibited during the 1999 IME. *Id.* at 64. Dr. Furrer diagnosed a right shoulder contusion, impingement, chronic bursitis and tendonitis, and a lumbosacral strain. *Id.* at 64. Dr. Furrer's diagnosis was the same as his diagnosis after the 1999 IME, except for the addition of chronic bursitis and tendonitis after the 2002 IME. *Id.*

Dr. H. Richard Johnson, an orthopedic surgeon, evaluated Poindexter in October 2002. Johnson (Oct. 18) at 7, 13. At the evaluation, Poindexter complained of constant pain in his left shoulder radiating into his left hand. *Id.* at 38. Poindexter had a limited range of motion, and any attempt to reach above shoulder level or behind him resulted in increased pain in his shoulder. *Id.* Poindexter also complained of constant numbness and tingling in his left shoulder. *Id.* Poindexter told Dr. Johnson his left hand was progressively losing strength and he was unable to sleep on his left side because the pain would awaken him immediately. *Id.* at 39. Poindexter said his low back pain was constant, radiated into his left buttock and left calf, and increased with nearly every activity. *Id.* at 39, 40.

In examining Poindexter's left shoulder, Dr. Johnson, consistent with Dr. Furrer's observations, noted Poindexter held it lower than his right shoulder. *Id.* at 49. Dr. Johnson explained this behavior is commonly seen in patients who have been favoring one shoulder for an

extended period, that is, when the shoulder pain is chronic, meaning it has lasted for six months or more. *Id.* at 49, 76. By contrast, when the pain is recent in onset, that is, acute pain, patients will typically carry the affected shoulder higher than the other one. *Id.* at 49. After examining Poindexter, Dr. Johnson diagnosed a contusion to the left shoulder, chronic impingement syndrome, tendonitis, and bursitis. *Id.* at 59, 60.

Dr. Johnson also diagnosed chronic pain syndrome secondary to Poindexter's ongoing problems with his left shoulder and low back. *Id.* at 75. Chronic pain syndrome is a recognized pain disorder and is described in the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition (DSM-IV) at 458-62. Patients with chronic pain syndrome experience chronic pain with insufficient or no organic explanation. *The Merck Manual of Diagnosis and Therapy*, ch. 167, § 14, viewed at [www.merck.com](http://www.merck.com), last visited June 6, 2006. These patients develop abnormal illness behavior to cope with this pain. *Id.*; Johnson at 77. Dr. Johnson stated the pain behaviors he as well as Dr. Furrer observed were Poindexter's reaction to his ongoing chronic pain. *Id.* at 76. Patients with chronic pain syndrome truly experience pain and are not malingering. *The Merck Manual*, ch. 167, § 14. However, patients who present with chronic pain syndrome are often discredited because medical providers are unable to find a specific organic problem to explain the patient's pain.

Johnson at 78. With regard to Poindexter, Dr. Johnson opined: “I believe that he clearly demonstrates pain disorders that when understood can be treated appropriately with a chronic pain management program.” *Id.* at 79. The pain management program would not, however, be effective to allow Poindexter to return to work. *Id.* at 79. Dr. Johnson opined that Poindexter’s chronic pain syndrome is, on a more probable than not basis, directly related to his September 1997 industrial injury. *Id.* at 76.

The Department allowed Poindexter’s claim for industrial insurance benefits in 1997 and closed the claim in 1998 without an award of permanent partial disability. Proposed Decision and Order at 3. Poindexter filed an application to reopen his claim, and the Department denied the application. *Id.* at 1. Poindexter appealed the denial of his application to reopen to the BIIA. A hearing was held before Industrial Appeals Judge (IAJ) Greg J. Duras on October 15, 2002. The IAJ issued a proposed decision and order finding Poindexter’s conditions caused by his industrial injury worsened and became aggravated after the Department closed his claim. The IAJ also found that Poindexter was in need of further treatment, including surgery on his left shoulder. The IAJ ruled, however, that Poindexter did not develop chronic pain syndrome as a proximate result of the industrial injury. *Id.* at 10. The IAJ recommended reversing the Department’s order denying Poindexter’s application to

reopen and remanding the claim to the Department to reopen, provide Poindexter further treatment, and pay time-loss benefits for a specified period. *Id.* at 11.

Poindexter filed a petition for review of the adverse ruling on the chronic pain syndrome issue. The BIIA denied the petition for review, and the IAJ's proposed decision and order became the final order of the BIIA. CP 2. Poindexter appealed the order denying his petition for review to the superior court. CP 1.

A jury trial was held November 14, 2005 through November 17, 2005 before the Honorable Linda Lee.<sup>5</sup> At the close of testimony, Poindexter moved for judgment as a matter of law pursuant to CR 50(a). CP 77-85. The court denied Poindexter's motion. RP 77. The jury returned a verdict finding the BIIA was correct in deciding Poindexter's chronic pain syndrome was not proximately caused by his September 1997 industrial injury. CP 135. The court entered judgment on the jury verdict in favor of the Department. CP 143-45. Poindexter filed a post-trial motion for judgment as a matter of law pursuant to CR 50(b) or a new

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<sup>5</sup> Whether Poindexter developed chronic pain syndrome as a result of the industrial injury was but one of several issues addressed during the proceeding before the BIIA. However, it was the only issue the jury in the superior court was required to determine. But, the jury heard the entire transcript of the proceedings before the BIIA, including testimony on issues not before it for determination, issues on which the IAJ ruled in Poindexter's favor.

trial, and a supplement thereto. CP 146-69, 170-73. The court denied Poindexter's motion. CP 174. Poindexter timely appealed the judgment and the order denying his motion for judgment as a matter of law or a new trial. CP 175-79.

D. SUMMARY OF ARGUMENT

Only one of the physicians who testified before the BIIA, Dr. Johnson, was asked whether Poindexter had chronic pain syndrome and whether he developed it as a proximate result of his industrial injury. Dr. Johnson opined, to a reasonable degree of medical certainty, that Poindexter had chronic pain syndrome and developed it as a proximate result of his industrial injury. The Department's examining physician, Dr. Furrer, noted Poindexter's pain behaviors, which are indicators of chronic pain syndrome. The Department presented no evidence to refute Dr. Johnson's diagnosis and testimony as to causation. The only evidence in the record as to chronic pain syndrome unequivocally establishes that Poindexter not only has chronic pain syndrome, but also developed it as a proximate result of his industrial injury. The BIIA's finding to the contrary, and the jury's determination that the BIIA was correct in this finding, are not supported by substantial evidence and should be reversed.

E. ARGUMENT

(1) The Trial Court Erred in Denying Poindexter's Motion for Judgment As a Matter of Law

(a) Standard of Review

In an appeal of a decision of the BIIA, the BIIA's findings and conclusions are presumed correct. *Intako Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 653, 833 P.2d 390 (1992), *review denied*, 120 Wn.2d 1031 (1993). The superior court holds a de novo hearing, but does not hear any evidence or testimony other than that contained in the BIIA record. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560, 897 P.2d 431 (1995); RCW 51.52.115. This 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." *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402, *review denied*, 130 Wn.2d 1009 (1996). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000), *review denied*, 142 Wn.2d 1018 (2001). The jury's verdict upholding the BIIA's findings and decision is presumed correct. *Intako Aluminum*, 66 Wn. App. at 653.

This Court reviews a ruling on a CR 50 motion for judgment as a matter of law de novo. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 187, 23 P.3d 440 (2001). Granting a motion for judgment as a matter of law is proper when the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). In ruling on a motion for judgment as a matter of law, the court views the evidence in the light most favorable to the nonmoving party. *Id.*

Courts must liberally construe the Industrial Insurance Act in favor of the injured worker:

“[T]he guiding principle in construing the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.”

*Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001) (quoting *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)).

(b) The Jury's Verdict that the BIIA Was Correct in Deciding Poindexter's Chronic Pain Syndrome Was Not Proximately Caused by His Industrial Injury Is Not Supported By Substantial Evidence

Under the Industrial Insurance Act, an injury is compensable if it occurs in the course of employment and a causal relationship between the

injury and the condition for which compensation is sought is established. *Goyne v. Quincy-Columbia Basin Irrigation Dist.*, 80 Wn. App. 676, 682, 910 P.2d 1321 (1996). The causal connection between the claimant's condition and his or her employment must be established by medical testimony. *Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981).

Special consideration should be given the treating physician. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). In this case, however, Poindexter's treating physicians, Drs. Wyman, Hwan, and Kimpel, did not examine Poindexter to determine the cause of or to diagnose Poindexter's pain behaviors. Accordingly, none of their reports reference chronic pain syndrome. Further, Dr. Wyman, the only one of the three treating physicians to testify before the BIIA, did not testify at all as to Poindexter's pain behaviors and did not render an opinion, to a reasonable degree of medical certainty, on Poindexter's chronic pain syndrome or its cause. Dr. Wyman did, however, concur in Dr. Furrer's report following his January 2002 examination of Poindexter in which Dr. Furrer noted Poindexter's pain behaviors. Wyman at 27.

The only physician who did testify about whether Poindexter suffers chronic pain and chronic pain syndrome as a proximate result of his industrial injury was Dr. Johnson. Dr. Johnson unequivocally testified

that he diagnosed Poindexter as suffering from chronic pain syndrome. *Id.* at 75. In Dr. Johnson's opinion, Poindexter's pain behaviors, which he as well as Drs. Kimpel and Furrer observed, were a direct result of his reaction to his ongoing chronic pain. *Id.* at 76. Further, Dr. Johnson observed Poindexter was carrying his left shoulder lower than his right shoulder. Johnson at 49. Dr. Johnson explained this behavior is typical of persons suffering chronic, as opposed to acute, shoulder pain. *Id.* He testified Poindexter's pain, as of Dr. Johnson's October 2002 examination, was no longer episodic, but rather had become constant, or chronic, and affected his overall function. *Id.* at 66. Dr. Johnson also testified, on a medically more probable than not basis, that Poindexter's chronic pain syndrome was directly related to his September 1997 industrial injury. *Id.*

Dr. Furrer's testimony supports Dr. Johnson's diagnosis and conclusions. Dr. Furrer observed Poindexter's pain behaviors at both the January 1999 and January 2002 IMEs. Furrer at 41, 62, 64. Dr. Furrer also observed, as did Dr. Johnson, that Poindexter favored his left shoulder and carried it lower than his right shoulder. *Id.* at 29, 54. Dr. Furrer was not, however, asked whether he diagnosed Poindexter as suffering chronic pain syndrome. Accordingly, Dr. Furrer had no occasion to testify about whether Poindexter's chronic pain syndrome was proximately caused by his industrial injury. His testimony cannot reasonably be read to refute Dr.

Johnson's testimony that Poindexter developed chronic pain syndrome as a result of his industrial injury. Dr. Furrer simply did not address this issue in his testimony.

The Department is likely to rely on Dr. Furrer's testimony that, after the 2002 IME, he was unable to conclude, on a more probable than not basis, that Poindexter's left shoulder and low back conditions were secondary to the industrial injury because of the length of time the symptoms persisted and because of the pain behavior he observed. *Id.* at 65. This testimony does not, however, constitute substantial evidence that Poindexter's chronic pain syndrome was not secondary to his industrial injury. In testifying that Poindexter's shoulder and low back problems were not secondary to his industrial injury, Dr. Furrer was referring to his "new diagnosis" of chronic bursitis and tendonitis, which he diagnosed in the 2002 IME, but not the 1999 IME. The testimony indicates Dr. Furrer's opinion that the chronic bursitis and tendonitis he diagnosed in 2002 were not related to the 1997 industrial injury. Dr. Furrer did not express an opinion about whether Poindexter's chronic pain syndrome was related to his industrial injury; indeed, he was not even asked whether he diagnosed chronic pain syndrome. Notably, Dr. Furrer observed the same manifestations of pain behavior during both the 1999 and the 2002 IMEs. *Id.* at 64. He was not asked whether Poindexter's 1999 manifestations of

pain behavior were related to his industrial injury. In short, Dr. Furrer's testimony does not establish either that Poindexter does or does not have chronic pain syndrome or, if he has it, whether it is or is not related to Poindexter's industrial injury.

In denying Poindexter's motion for a directed verdict, the trial court acknowledged Dr. Johnson's diagnosis of chronic pain syndrome. RP 77. The court, however, determined that the evidence could have led a reasonable jury to conclude that Poindexter did *not* have chronic pain syndrome. *Id.*<sup>6</sup> The court's reasoning makes little sense, given that the only physician to diagnose whether Poindexter did or did not suffer chronic pain syndrome was Dr. Johnson, and given he unequivocally testified that yes, Poindexter did suffer chronic pain syndrome. No other physician was asked whether he diagnosed Poindexter with this condition, so no other physician testified one way or the other on the issue. The only way a jury could conclude Poindexter did not suffer chronic pain syndrome is if it entirely ignored Dr. Johnson's testimony and relied

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<sup>6</sup> The trial court denied Poindexter's post-trial motion for judgment as a matter of law for the same reasons it denied his motion for a directed verdict. RP Feb. 3, 2006 at 11.

instead upon the complete absence of testimony on the issue.<sup>7</sup> This not how a reasonable jury would resolve this issue.<sup>8</sup>

The trial court also determined the evidence could have led a reasonable jury to conclude that, if Poindexter suffered chronic pain syndrome, it was not proximately caused by his industrial injury. The court based this determination on the testimony of Dr. Wyman as to statements he made to Poindexter during a November 2001 examination, which was the third time Dr. Wyman examined Poindexter's complaints of shoulder pain. Specifically, Dr. Wyman testified that Poindexter returned for the third examination complaining of the same pain he had complained of in the two earlier examinations. Dr. Wyman concluded conservative treatment measures were not effective in treating the pain and surgery was the only remaining option. Wyman at 11-12. During this discussion, Poindexter asked Dr. Wyman whether he thought his shoulder pain could be due to his repetitive use of his arms. Dr. Wyman told Poindexter he "thought it could have been due to that." *Id.* at 12. Dr. Wyman appears to be referring to Poindexter's tendonopathy, not his pain

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<sup>7</sup> There is absolutely no evidence in the record, direct or inferential, that Poindexter was faking his pain.

<sup>8</sup> It is entirely possible that the jury was unable to focus solely on the issue of chronic pain syndrome and was distracted by the testimony regarding the several other issues included in the BIIA record read to the jury on appeal. These other issues were not before the jury for determination, as Poindexter appealed only the adverse ruling on the chronic pain syndrome issue.

behaviors.<sup>9</sup> Even if he was referring to the pain behaviors, however, Dr. Wyman's speculative, equivocal testimony is not sufficient to lead a reasonable jury to reach a finding contrary to Dr. Johnson's unequivocal, specific, and unambiguous diagnosis of chronic pain syndrome causally related to the industrial injury.

(2) The Trial Court Abused Its Discretion in Denying Poindexter's Motion for a New Trial

(a) Standard of Review

This Court reviews an order denying a motion for a new trial for abuse of discretion where the trial court's basis for denying the motion for a new trial is based on questions of fact. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). The grounds for a new trial are set out in CR 59(a). Here, a new trial is warranted because "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision," CR 59(a)(7), and substantial justice was not done, CR 59(a)(9).

(b) CR 59(a)(7)

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<sup>9</sup> Dr. Wyman explained tendonopathy:  
[Y]ou get an inflammatory process that's occurring at a site, and those chronic inflammatory processes lead to changes in the surrounding soft tissues. And they can cause soft tissue to change, to become – to form granulation tissue. And it can form some permanent changes in the muscle and tendon being affected.

Wyman at 11.

A new trial may be granted where “there is no evidence or reasonable inference from the evidence to justify the verdict or the decision.” CR 59(a)(7). It is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence. *Palmer v. Jensen*, 132 Wn.2d 193, 198, 93 P.2d 597 (1997). When the party moving for a new trial asserts CR 59(a)(7) as the ground, this Court reviews the record to determine whether there was sufficient evidence to support the verdict. *Id.*, 132 Wn.2d. at 197-98. “Sufficient evidence” for purposes of this rule is “substantial evidence,” meaning evidence of a character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *Sommer v. Dep’t of Soc. & Health Servs.*, 104 Wn. App. 160, 172, 15 P.3d 664, *review denied*, 144 Wn.2d 1007 (2001). A verdict is not supported by mere theory or speculation. *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980).

The jury determined the BIIA was correct in deciding Poindexter’s chronic pain syndrome was not proximately caused by his industrial injury. For the reasons discussed above, this verdict is not supported by substantial evidence. Dr. Johnson testified, on a medically more probable than not basis, that Poindexter had chronic pain syndrome which was causally connected to his industrial injury. Johnson (Oct. 18) at 75-79. The Department’s physician, Dr. Furrer, was not asked whether

Poindexter had chronic pain syndrome and, in fact, did not discuss chronic pain syndrome at all. Dr. Furrer did, however, note Poindexter's pain behaviors, which are indicators of chronic pain syndrome. Furrer at 41, 64, 68, 77; Johnson (Oct. 18) at 78. The Department presented no evidence to refute Dr. Johnson's opinions that Poindexter has chronic pain syndrome causally related to his industrial injury.

To the extent the jury's verdict was based on testimony other than Dr. Johnson's, the verdict is based on pure speculation and cannot stand. Dr. Furrer's testimony as to his observations of pain behaviors can only be read as affirming Dr. Johnson's diagnosis. Dr. Wyman concurred with Dr. Furrer's conclusions in Dr. Furrer's January 2002 IME, including Dr. Furrer's observation of pain behaviors. Wyman at 27-28. Dr. Wyman's testimony that Poindexter's shoulder pain "could have been" attributable to Poindexter's repetitive use of his arms, Wyman at 11-12, is mere speculation and, moreover, appears to be in reference to Poindexter's tendonopathy, not his chronic pain syndrome. *Id.* The only evidence the jury heard with regard to Poindexter's chronic pain syndrome established that he had chronic pain syndrome and that he developed it as a result of his industrial injury. The jury's verdict to the contrary is not supported by substantial evidence. The superior court abused its discretion in denying Poindexter's motion for a new trial pursuant to CR 59(a)(7).

(c) CR 59(a)(9)

A court may grant a new trial when important rights of the moving party are materially affected because substantial justice has not been done. *Ramey v. Knorr*, 130 Wn. App. 672, 686, 124 P.3d 314 (2005); CR 59(a)(9). Entering judgment in favor of one party despite a lack of evidence or reasonable inference to support the decision to enter judgment constitutes a denial of substantial justice to the other party. *Barefield v. Barefield*, 69 Wn.2d 158, 162, 417 P.2d 608 (1966) (affirming the grant of a new trial on the ground that substantial justice had not been done where the father was awarded custody of the parties' children despite a lack of evidence or reasonable inference from the evidence as to the father's fitness to be the custodial parent).

As discussed, the only evidence in the record regarding chronic pain syndrome is Dr. Johnson's testimony. This testimony unequivocally establishes that Poindexter has chronic pain syndrome and he developed it as a result of his industrial injury. The Department presented no evidence to refute Dr. Johnson's diagnosis. Poindexter was denied compensation for chronic pain syndrome despite the complete lack of evidence to support this decision to deny compensation. Substantial justice was not done. The trial court abused its discretion in denying his motion for a new trial under CR 59(a)(9).

(3) Poindexter Is Entitled to an Award of Attorney Fees at Trial and On Appeal

If the BIIA's decision and order are reversed or modified on appeal to the superior court or this Court and additional relief is granted to a worker, the court must fix a reasonable attorney fee for the worker's attorney. RCW 51.52.130. This statute encompasses fees in both the superior and appellate courts when both courts review the matter. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999); *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 363-64, 115 P.3d 1031 (2005). For the reasons set forth above, Poindexter is entitled to compensation for the chronic pain syndrome he developed as a proximate result of his industrial injury. The BIIA's decision and order denying Poindexter's claim, and the judgment entered on the jury's verdict, should be reversed. Poindexter is entitled to an award of attorney fees in both this Court and the superior court pursuant to RCW 51.16.130 and RAP 18.1.

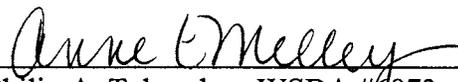
F. CONCLUSION

The evidence before the BIIA and the jury established Poindexter's chronic pain syndrome and its causal connection to his industrial injury. The Department presented no evidence to refute this evidence. The BIIA's determination that Poindexter did not develop chronic pain syndrome as a proximate result of his industrial injury is without

substantial evidence to support it. The trial court erred in entering judgment on the jury's verdict and denying Poindexter's motion for judgment as a matter of law or for a new trial. This Court should reverse the order denying Poindexter's motion for judgment as a matter of law and the judgment in favor of the Department and remand with directions to enter judgment in favor of Poindexter. Alternatively, this Court should reverse the order denying Poindexter's motion for a new trial and the judgment in favor of the Department and remand for a new trial. Poindexter is entitled to an award of fees at trial. Costs on appeal, including reasonable attorney fees, should be awarded to Poindexter.

DATED this 8<sup>th</sup> day of June, 2006.

Respectfully submitted,

  
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DECLARATION OF SERVICE

On said day below ABC Legal Messenger delivered a true and accurate copy of the following document: Brief of Appellant, Court of Appeals, Division II, Cause No. 34499-8-II, to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 9, 2006, at Tukwila, Washington.

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