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COURT OF APPEALS  
DIVISION II

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No. 40471-1-II

STATE OF WASHINGTON

BY     *JSW*      
DEPUTY

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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ROBERT D. TSCHABOLD,

Respondent,

v.

THE HOME DEPOT,

Appellant.

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RESPONDENT'S BRIEF

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CONTENTS

I. STATEMENT OF THE CASE ..... 1

    A. PROCEDURAL FACTS ..... 1

    B. FACTS OF INJURY ..... 1

    C. TREATMENT FOR BRAIN INJURY ..... 3

II. ARGUMENT ..... 11

    A. SUBSTANTIAL EVIDENCE SUPPORT  
    JUDGE McCARTHY’S FINDING THAT  
    MR. TSCHABOLD’S CURRENT  
    COGNITIVE AND PHYSICAL CONDITIONS  
    ARE CAUSALLY RELATED TO THIS  
    INDUSTRIAL INJURY ..... 12

    B. JUDGE McCARTHY PROPERLY GAVE  
    WEIGHT TO THE TESTIMONY OF THE  
    TREATING DOCTORS ..... 15

    C. SUBSTANTIAL EVIDENCE SUPPORTED  
    JUDGE McCARTHY’S FINDING THAT  
    MR. TSCHABOLD WAS TOTALLY AND  
    PERMANENTLY DISABLED UNDER THE  
    INDUSTRIAL INJURY LAWS OF THE  
    STATE OF WASHINGTON ..... 20

    D. MR. TSCHABOLD’S ATTORNEYS SHOULD  
    BE ENTITLED TO AN AWARD OF FEES  
    FOR WORK DONE AT SUPERIOR COURT  
    AS WELL AS WORK DONE AT THE  
    COURT OF APPEALS ..... 22

        i. Mr. Tschabold’s attorneys should  
        be entitled to attorneys’ fees for work  
        done at Superior Court ..... 22

ii. Mr. Tschabold’s attorneys should also  
be awarded fees for work done before  
the Court of Appeals ..... 23

III. CONCLUSION ..... 23

## TABLE OF AUTHORITIES

### CASES

<i>Clauson v. Dep't of Labor &amp; Indus.</i> , 130 Wn.2d 580, 925 P.2d 624 (1996) .....	11
<i>Kilpatrick v. Dep't of Labor &amp; Indus.</i> , 125 Wn.2d 222, 883 P.2d 1370 (1994) .....	11
<i>Dennis v. Dep't of Labor &amp; Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987) .....	11
<i>Cockle v. Dep't of Labor &amp; Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001) .....	11
<i>Kingery v. Dep't of Labor &amp; Indus.</i> , 132 Wn.2d 162, 937 P.2d 565 (1997) .....	12
<i>Hanquet v. Dep't of Labor &amp; Indus.</i> , 75 Wn. App. 657, 879 P.2d 326 (1994) .....	12
<i>Lewis v. Simpson Timber Co.</i> , 145 Wn.App. 302, 189 P.3d 178 (2008) .....	12
<i>Jenkins v. Dep't of Labor &amp; Indus.</i> , 85 Wn.App. 7, 931 P.2d 907 (1996) .....	12
<i>Young v. Dep't of Labor &amp; Indus.</i> , 81 Wn. App. 123, 913 P.2d 402, amended on denial of reconsideration, rev. denied 130 Wn.2d 1099, 928 P.2d 414 (1996) .....	12
<i>Chalmers v. Dep't of Labor &amp; Indus.</i> , 72 Wn.2d 595, 434 P.2d 720 (1967) .....	16
<i>Groff v. Dep't of Labor &amp; Indus.</i> , 65 Wn.2d 35, 395 P.2d 633 (1964) .....	16

<i>Spaulding v. Dep't of Labor &amp; Indus.</i> , 29 Wn.2d 115, 186 P.2d 76 (1947) .....	16
<i>Judd v. Dep't of Labor &amp; Indus.</i> , 63 Wn. App. 471, 820 P.2d 62 (1991) .....	16
<i>Allen v. Califano</i> , 613 F.2d 139, (6 <sup>th</sup> Cir. 1980) .....	16
<i>Lester v. Chater</i> , 81 F.3d 821 (9 <sup>th</sup> Cir. 1995) .....	16
<i>Pitzer v. Sullivan</i> , 908 F.2d 502, (9 <sup>th</sup> Cir. 1990) .....	16

**STATUTES**

RCW 51.12.010 .....	11
RCW 51.52.115 .....	12
RCW 51.52.130 .....	22, 23

**REGULATIONS AND RULES**

RAP 18.1 .....	23
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## **I. STATEMENT OF THE CASE**

### **A. PROCEDURAL FACTS.**

This matter is before the Court upon an appeal by a self-insured employer, Home Depot (hereinafter “employer”) of the February 24, 2010 Judgment on the Verdict entered in Pierce County Superior Court by Judge John A. McCarthy. (Clerk’s Papers, pp. 52 – 63). Judge McCarthy’s verdict reversed a June 16, 2008 Decision and Order issued by the Board of Industrial Insurance Appeals (hereinafter “Board”) and a March 16, 2007 order issued by the Department of Labor and Industries (hereinafter “Department”). Judge McCarthy remanded this case back to the Department with directions to allow the condition diagnosed as ganglion hemorrhage with the resulting impairments, to order the employer to pay for treatment related to this condition up to the date of March 16, 2007, to order the payment of temporary total disability benefits from November 20, 2006 through March 15, 2007, and to place Mr. Tschabold on a permanent total disability pension effective March 16, 2007. Attorney fees and costs were also awarded to Mr. Tschabold’s attorneys. (Clerk’s Papers, pp. 49 – 51).

### **B. FACTS OF INJURY.**

Mr. Tschabold was injured on April 9, 2005 while working for Home Depot. (Kellogg, 12/10/2007 TR, pp. 52-57). Mr. Tschabold and

Mickey Kellogg worked together in the garden department, and were delivering a garden tractor to a customer's home. (Kellogg, 12/10/2007 TR, p. 52). The tractor was transported on a flatbed Home Depot truck with 18-inch sides and an 18-inch back, so Mr. Tschabold and Mr. Kellogg placed two-by-six ramps on the back of the truck from the truck tail and prepared to unload the tractor. (Kellogg, 12/10/2007 TR, p. 52). Mr. Kellogg stood on the left-hand side of the ramp, Mr. Tschabold stood between the ramps, and another man stood on the right-hand side of the ramp. (Kellogg, 12/10/2007 TR, p. 52). As the three men were pulling the tractor and letting it roll back, the rear tires gained momentum on the ramp. (Kellogg, 12/10/2007 TR, p. 53). Though he could not see Mr. Tschabold, Mr. Kellogg yelled for Mr. Tschabold to get out from between the ramps as the tractor broke loose and sped down the ramp. (Kellogg, 12/10/2007 TR, p. 53). Mr. Tschabold tried to grab at the tractor, but it careened into him. (R. Tschabold, 12/4/07 TR, pp. 28-29). The last thing that Mr. Tschabold recalled was hitting his head on the ground. (R. Tschabold, 12/4/07 TR, p. 28). Mr. Kellogg turned around and saw that the tractor had slammed into Mr. Tschabold and pinned him at the knees. (Kellogg, 12/10/2007 TR, p. 53).

Mr. Tschabold lay staring at the sky with no expression. (Kellogg, 12/10/2007 TR, p. 53). Mr. Kellogg called 911 from his cell phone and

attempted to comfort Mr. Tschabold by cushioning his head with a coat; and, as he pulled his hand back from lifting Mr. Tschabold's head, Mr. Kellogg's hand was covered in blood. (12/10/2007 TR, p. 53). Mr. Tschabold suffered a brain hemorrhage at that accident site. (Sekhar, 11/28/2007 TR, pp. 8-9).

**C. TREATMENT FOR BRAIN INJURY.**

Mr. Tschabold was taken to the Emergency Room at St. Joseph's Hospital in Tacoma. (Y. Tschabold, 12/4/2007 TR, p. 6). At the hospital, doctors discovered a brain hemorrhage which involved a deep part of the brain, including the right thalamic area and the internal capsule. (Sekhar Dep. 11/28/2007 TR, p. 9). Mr. Tschabold gradually improved to some extent physically and returned home 20 days later on April 29, 2005, but he continued to suffer cognitive impairment and needed assistance to walk. (Y. Tschabold, 12/4/2007 TR, pp. 8-9). Mr. Tschabold's wife of 38 years, Yvonne Tschabold, testified that, after being released from the hospital, Mr. Tschabold had significant memory problems. (Y. Tschabold, 12/4/2007 TR, pp. 4, 9). She gave an example of him turning on the tea kettle and nearly burning down the kitchen when he forgot about it. (Y. Tschabold, 12/4/2007 TR, p. 9). Furthermore, Mr. Tschabold had trouble walking, would forget to eat, needed assistance to the restroom, and even needed reminders to use the restroom. (Y. Tschabold, 12/4/2007 TR, p.

9). Following Mr. Tschabold's release from the hospital on April 29, 2005, Mr. Tschabold's brother, Brian, stayed with him during the days that Mrs. Tschabold was at work. (Y. Tschabold, 12/4/2007 TR, pp. 8-9).

Prior to the brain hemorrhage, Mr. Tschabold was a voracious reader; after the brain hemorrhage, Mr. Tschabold could not concentrate long enough to read more than five pages. (Y. Tschabold, 12/4/2007 TR, p. 10).

On May 2, 2005, Mr. Tschabold visited his treating psychiatrist, Jessie Ang, M.D. (Ang, 11/21/07 TR, p. 8). Dr. Ang noted that Mr. Tschabold was having problems with direction and performance. (Ang, 11/21/07 TR, p. 9).

During a follow-up exam and MRI scan on May 10, 2005, Mr. Tschabold's neurologist, Peter Brown, M.D., discovered an unruptured brain aneurism and referred Mr. Tschabold to neurosurgeon Laligam N. Sekhar, M.D. (Sekhar, 11/28/2007 TR, pp. 8, 23). Dr. Sekhar has been a board certified neurosurgeon since 1986, was a professor of neurosurgery at the University of Pittsburgh, professor and chair of the neurosurgery department at George Washington University, the director of the Neurological Institute, and is currently a professor and Vice Chair of Neurosurgery at the University of Washington. He has published 230 peer-reviewed articles and written 100 book chapters and five (5) books.

(Sekhar, 11/28/2007 TR, pp. 6-7). Dr. Sekhar specializes in cerebral vascular surgery, which is surgery on brain aneurisms, and surgery for stroke. (Sekhar, 11/28/2007 TR, p. 7).

Dr. Sekhar examined Mr. Tschabold on May 18, 2005 and concluded that Mr. Tschabold's original brain hemorrhage was separate from the unruptured, incidental aneurism. (Sekhar, 11/28/2007 TR, p. 14). At that first meeting, Dr. Sekhar observed that Mr. Tschabold had memory problems, including very significant problems with recent memory, problems with thinking, left-sided hemiparesis causing arm, leg and facial weakness, and he could not walk independently. (Sekhar, 11/28/2007 TR, p. 15). Dr. Sekhar attributed those symptoms to the initial brain hemorrhage, explaining that the limitation for people who suffer that sort of condition becomes cognitive and further explained that the combination of the cognitive impairment and hemiparesis often makes them ineligible for physical and various types of mental activity. (Sekhar, 11/28/2007 TR, p. 33). Dr. Sekhar observed that the unruptured, incidental aneurism was asymptomatic. (Sekhar, 11/28/2007 TR, p. 39). Furthermore, he described a distinct difference between bleeding into the brain, as happened with the April 9, 2005 hemorrhage, and bleeding around the brain, as occurred later with the aneurism in late May 2005. (Sekhar, 11/28/2007 TR, p. 41). With bleeding around the brain, the blood clot

resolves and people make a good recovery; however, when bleeding into the brain, it is very rare for people to have a complete recovery, as there are always some residual deficits. (Sekhar, 11/28/2007 TR, pp. 39, 41).

On May 24, 2005, Dr. Sekhar performed a right-sided craniotomy, opening the skull on the right side of the head, followed by an orbitotomy where a portion of the bone around the eyebrow is removed. (Sekhar, 11/28/2007 TR, p. 16; Jung, 12/10/2007 TR, p.12). Once the bone was removed, the vessels feeding the unruptured aneurism were clipped to relieve pressure and the aneurism was dissected. (Sekhar, 11/28/2007 TR, p. 16). As this was done, Mr. Tschabold's aneurism ruptured and leaked a bit; not an uncommon occurrence during aneurism surgery. (Sekhar, 11/28/2007 TR, p. 17). The surgeons were able to quickly get control of the leakage using a temporary clip on one of the other vessels emanating from the aneurism. (Sekhar, 11/28/2007 TR, p. 17). During the surgery, Mr. Tschabold was heavily medicated with barbiturates to protect his brain during the surgery and his brain's electrical activity was monitored throughout the surgery. (Sekhar, 11/28/2007 TR, p. 17). Dr. Sekhar noticed that this electrical activity became slightly depressed during the operation, but recovered completely at the end of the operation. (Sekhar, 11/28/2007 TR, p. 17). There was no permanent increase in Mr. Tschabold's physical function deficits or cognitive deficits as a result of

the May 2005 surgery. (Sekhar, 11/28/2007 TR, p. 41).

Mr. Tschabold was in intensive care for several days and a post-operative angiogram indicated a residual “neck” from the aneurism remained. (Sekhar, 11/28/2007 TR, p. 17). This required placement of platinum coils inside the aneurism and sealing it off completely. (Sekhar, 11/28/2007 TR, p. 17). Post-operative CT scans showed some bleeding from the operation between the lobes of the brain, but not inside the brain. (Sekhar, 11/28/2007 TR, p. 18).

Dr. Sekhar continued to evaluate Mr. Tschabold in follow up examinations throughout 2005 into 2006, with the last appointment in early 2007. (Sekhar, 11/28/2007 TR, p. 20). Throughout the course of treatment and follow up with Mr. Tschabold, Dr. Sekhar kept in contact with Mr. Tschabold’s other doctors, including the referring neurosurgeon, Peter Brown, M.D., and the family doctor, Steven Hillis, M.D. (Sekhar, 11/28/2007 TR, p. 23). Even at the August 16, 2006 appointment, Dr. Sekhar noticed that Mr. Tschabold had the same problems that he had had before the unrelated aneurism surgery, which were cognitive difficulties and mild left-sided paralysis. (Sekhar, 11/28/2007 TR, p. 19).

Dr. Sekhar explained that the important parts of the brain activity, such as motor functions and speech are routed through a deep portion of the brain and that the thalamus is a very important relay nucleus located in

the deep portion of the brain. (Sekhar, 11/28/2007 TR, p. 10). Mr. Tschabold's industrial injury hemorrhage was located in the thalamic region and the internal capsule, so it involved the areas concerning sensation, level of consciousness and control of the left side of the body; whereas, the unrelated aneurism occurred in a common site for formation and rupture of aneurisms, the anterior communicating artery. (Sekhar, 11/28/2007 TR, pp. 10-11). **Dr. Sekhar concluded that, as a result of the April 9, 2005 industrial injury, Mr. Tschabold had the following permanent impairments: memory problems, cognitive problems and mild left-sided weakness or paralysis.** (Sekhar, 11/28/2007 TR, p. 20). Dr. Sekhar indicated that Mr. Tschabold would not be able to work on either a full-time or even a part-time basis due to both the physical and mental impairments from the industrial injury. (Sekhar, 11/28/2007 TR, pp. 20-21). In fact, based upon his last visit with Mr. Tschabold, Dr. Sekhar did not believe that Mr. Tschabold could perform any employment at all. (Sekhar, 11/28/2007 TR, p. 22). Unfortunately, those limitations more likely than not will be permanent. (Sekhar, 11/28/2007 TR, p. 23).

Mrs. Tschabold testified that her husband's mental capacity remained constant from the time that he came home from St. Joseph's Hospital after the hemorrhage to the present; the aneurysm surgery did not improve, nor did it worsen his mental capacity. (Y. Tschabold, 12/4/2007

TR, p. 11). Mrs. Tschabold testified that, since the April 9, 2005 industrial injury, Mr. Tschabold continued to have impaired memory just like it was before the aneurysm surgery, difficulty with balance and frustration with his physical and mental limitations. (Y. Tschabold, 12/4/2007 TR, pp. 11-12).

Mr. Tschabold's treating psychiatrist testified by deposition on November 21, 2007. (Ang, 11/21/2007 TR, p. 11). Dr. Ang received his medical training in the Philippines, a substantial portion of which was in neurology, and worked as a neurologist prior to coming to the United States. (Ang, 11/21/2007 TR, p. 19). Dr. Ang treated Mr. Tschabold from April 26, 2004 to November 14, 2007. (Ang, 11/21/2007 TR, p. 7). Dr. Ang testified that Mr. Tschabold's memory, attention and functioning abilities were particular deficits as of March 14, 2007 and that that is consistent with Mr. Tschabold's history of intracerebral hemorrhage and anterior communication aneurism clipping. (Ang, 11/21/2007 TR, p. 11). However, Dr. Ang pointed out that the extent and severity of Mr. Tschabold's neuropsychological deficit meets the diagnostic criteria for dementia due to intracerebral hemorrhage (which was industrially related). (Ang, 11/21/2007 TR, p. 12).

On September 6, 2007, vocational rehabilitation counselor and case manager, Merrill Cohen, M.C., C.R.C., C.C.M., interviewed Mr.

Tschabold and his wife. (Cohen, 12/4/2007 TR, pp. 46, 66). Ms. Cohen had reviewed Mr. Tschabold's medical records and claim file. (Cohen, 12/4/2007 TR, pp. 46, 66). Of particular note, Ms. Cohen found that the medical records subsequent to the industrial injury and prior to the aneurism very clearly address function both physical and cognitive and layout deficits that clearly impact employment. (Cohen, 12/4/2007 TR, p. 80). Based upon her interview of Mr. Tschabold and review of his medical records and claim file, Ms. Cohen concluded that Mr. Tschabold was clearly unable to work in April 2005. (Cohen, 12/4/2007 TR, p. 58). Furthermore, Ms. Cohen determined, on a more probable than not basis, that Mr. Tschabold was not able to work between November 20, 2006 and March 16, 2007. (Cohen, 12/4/2007 TR, pp. 63, 65). Ms. Cohen testified that Mr. Tschabold would not come across favorably in an employment interview setting because he does not maintain good eye contact and his answers to questions are not correct. (Cohen, 12/4/2007 TR, p. 78).

The self-insured employer presented the testimony of one-time examiner, Linda Wray, M.D., records reviewer Lily Jung, M.D., and vocational consultant, Evelyn Takei, M.A. Dr. Wray has performed medical evaluations at the request of insurance companies, employers and the Department of Labor and Industries since 1981 and cannot recall ever being asked to perform an exam by an injured worker. (Wray, 12/10/2007

TR, pp. 5, 46). Dr. Jung is a neurologist who specializes in the central and peripheral nervous system and her primary field of interest is multiple sclerosis. (Jung, 12/10/2007 TR, pp. 8, 41). Dr. Jung does not engage nor participate in neurological surgeries and she based her opinions solely from reading Mr. Tschabold's medical records; she never examined Mr. Tschabold. (Jung, 12/10/2007 TR, pp. 38, 41).

## II. ARGUMENT

The Industrial Insurance Act (hereinafter "Act") is to "be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. To that end, "all doubts as to the meaning of the Act are to be resolved in favor of the injured worker." *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996); Citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 883 P.2d 1370 (1994); *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987). This means that "where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker..." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

In this case, in keeping with the purpose of the Act, it is important

to note that Mr. Tschabold's cognitive and physical conditions are recognized as causally related to the April 9, 2005 industrial injury.

In an appeal of a Board order to Superior Court, the trial is de novo, but is based upon the evidence presented before the Board. RCW 51.52.115; *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 937 P.2d 565 (1997); *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 879 P.2d 326 (1994). At Superior Court, the trier of fact may disregard the Board's findings and conclusions even though there is substantial evidence to support them, if it believes that other substantial evidence is more persuasive. *Lewis v. Simpson Timber Co.*, 145 Wn.App. 302, 189 P.3d 178 (2008); *Jenkins v. Dep't of Labor & Indus.*, 85 Wn.App. 7, 931 P.2d 907 (1996).

On an appeal from a Superior Court judgment, "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, amended on denial of reconsideration, rev. denied 130 Wn.2d 1099, 928 P.2d 414 (1996).

A. **SUBSTANTIAL EVIDENCE SUPPORT JUDGE McCARTHY'S FINDING THAT MR. TSCHABOLD'S CURRENT COGNITIVE AND PHYSICAL CONDITIONS ARE CAUSALLY RELATED TO HIS INDUSTRIAL INJURY.**

The testimony of Yvonne Tschabold, Dr. Sekhar, and Dr. Ang supports a finding that Mr. Tschabold's cognitive and physical conditions and profound limitations are causally related to his industrial injury. (Y. Tschabold, 12/4/2007 TR, p. 25; Sekhar, 11/28/2007 TR, p. 19).

Mrs. Tschabold testified that, prior to the April 9, 2005 industrial injury, Mr. Tschabold was independent, was in the process of getting his master's degree and enjoyed reading. (Y. Tschabold, 12/4/2007 TR, pp. 4-5). Mrs. Tschabold testified that Mr. Tschabold's poor memory and function are the same now as they were prior to the aneurism surgery. (Y. Tschabold, 12/4/2007 TR, p. 25).

Dr. Sekhar is a neurosurgeon who actually looked inside Mr. Tschabold's brain, and he specializes in brain hemorrhage and aneurism repair. (Sekhar, 11/28/2007 TR, pp. 7, 19-20). Dr. Sekhar explicitly testified that Mr. Tschabold's continued cognitive and physical deficits are directly attributable to the April 9, 2005 brain hemorrhage. (Sekhar, 11/28/2007 TR, pp. 19-20). Dr. Sekhar explained that he based his opinion on the location of Mr. Tschabold's brain hemorrhage which was consistent with the functions of the area in which the hemorrhage occurred and, therefore, the continuing cognitive deficits were attributable to the industrial brain hemorrhage, as opposed to the later aneurism. (Sekhar,

11/28/2007 TR, p. 10). Dr. Sekhar also based his opinion on his examination of Mr. Tschabold prior to surgery and the identical nature of his current day cognitive and physical conditions to the pre-surgery conditions. (Sekhar, 11/28/2007 TR, p. 19).

Additionally, Dr. Sekhar testified that the brain hemorrhage was causally related, on a more probable than not basis, to the April 9, 2005 industrial activity involving the tractor. (Sekhar, 11/27/2007 TR, p. 14). Dr. Sekhar clarified that it did not appear to have been caused by hypertension because hemorrhages caused by hypertension present with high blood pressure, whereas Mr. Tschabold's blood pressure following the hemorrhage was low and his blood pressure was always in the low range while treating with Dr. Sekhar. (Sekhar, 11/27/2007 TR, p. 29).

Dr. Ang testified that over the course of time after the April 9, 2005 incident, Mr. Tschabold's psychiatric status as well as behavioral and cognitive performance gradually declined. (Ang, 11/21/2007 TR, p. 12). Dr. Ang further testified that, prior to the April 9, 2005 incident, Mr. Tschabold was stable and in remission from any psychological problems, but after the incident, Mr. Tschabold suffered from a form of dementia. (Ang, 11/21/2007 TR, p. 13). Furthermore, Dr. Ang testified that he understood Mr. Tschabold's baseline blood pressure was normal prior to the April 9, 2005 incident. (Ang, 11/21/2007 TR, p. 13).

None of the employer's witnesses testified to any direct contact with Mr. Tschabold between April 9, 2005 and May 24, 2005. Only one of the employer's witnesses testified to having seen Mr. Tschabold since April 9, 2005 and that was only for a one-time, brief defense medical examination. (Wray, 12/10/2007 TR, p. 40). The employer's witnesses insisted that the April 9, 2005 simultaneous brain hemorrhage and 400-pound tractor landing on Mr. Tschabold were nothing more than a coincidence.

The evidence in the record clearly supports that Mr. Tschabold's mental and cognitive condition remained consistently deficient from April 9, 2005, after the industrially induced brain hemorrhage, to the present. Dr. Sekhar saw Mr. Tschabold prior to the aneurism surgery, performed brain surgery on Mr. Tschabold, and continued treating Mr. Tschabold for a long period after the surgery, and it was his opinion that Mr. Tschabold's mental and cognitive condition was unchanged. Mrs. Tschabold lived with Mr. Tschabold day-in and day-out during all of the relevant periods, and she observed and testified that Mr. Tschabold's mental and cognitive condition was unchanged by the aneurism surgery.

**B. JUDGE McCARTHY PROPERLY GAVE WEIGHT TO THE TESTIMONY OF THE TREATING DOCTORS.**

It is a well-settled law in Washington that special consideration

should be given to the opinion of a treating doctor. *Chalmers v. Dep't of Labor & Indus.*, 72 Wn.2d 595, 599, 434 P.2d 720 (1967); *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 395 P.2d 633 (1964); *Spaulding v. Dep't of Labor & Indus.*, 29 Wn.2d 115, 186 P.2d 76 (1947). This is because a doctor who has seen a patient for treatment purposes, “and who has treated the patient, is better qualified to give an opinion as to the patient’s disability than a doctor who has seen and examined the patient once.” *Judd v. Dep't of Labor & Indus.*, 63 Wn. App. 471, 474-475, 820 P.2d 62 (1991). Especially when the one-time evaluator is “employed by the [opposing party] for the purpose of defending against a disability claim.” *Allen v. Califano*, 613 F.2d 139, 145 (6<sup>th</sup> Cir. 1980). A treating psychologist is accorded the same special consideration as is given a treating physician. *Judd* at 476-477. Whereas here, the treating mental health specialist is a psychiatrist, it stands to reason that he be accorded the same special consideration as a treating physician. Clear and convincing reasons are required to reject the treating doctor’s ultimate conclusions. *Lester v. Chater*, 81 F.3d 821 at 830 (9<sup>th</sup> Cir. 1995).

Similarly, the opinion of an examining physician is entitled to greater weight than the opinion of a non-examining physician. *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9<sup>th</sup> Cir. 1990).

In this case, special consideration should be given to Drs. Sekhar

and Ang, Mr. Tschabold's attending neurosurgeon and attending psychiatrist, respectively.

Dr. Sekhar, Mr. Tschabold's attending neurosurgeon, testified that the cognitive impairment and left-sided weakness, on a more probable than not basis, were causally related to the April 9, 2005 industrial injury. (Sekhar, 11/28/2007 TR, pp. 10, 14-15, 19, 30). As the treating neurologist, Dr. Sekhar actually operated upon Mr. Tschabold's brain and provided ongoing treatment to Mr. Tschabold from before the May 24, 2005 aneurism surgery into the early part of 2007. (Sekhar, 11/28/2007 TR, pp. 16, 20).

Since the April 9, 2005 industrial injury, Dr. Sekhar continued treating Mr. Tschabold and was the most direct, experienced and knowledgeable witness to Mr. Tschabold's brain condition.

As Mr. Tschabold's attending psychiatrist, *before and after* the industrial injury, Dr. Ang was and still is well acquainted with Mr. Tschabold's mental condition and was in the best position to diagnose Mr. Tschabold's mental conditions. Dr. Ang had been treating Mr. Tschabold for nearly a year prior to the April 9, 2005 industrial injury, so he had substantial opportunity to observe Mr. Tschabold prior to the brain injury. (Ang, 11/21/2007 TR, p. 7).

Dr. Wray, on the other hand, testifying for the self-insured

employer, testified that Mr. Tschabold's April 9, 2005 brain hemorrhage was a complete coincidence although it occurred simultaneously with straining against a 400-pound tractor and having the tractor land on him. (Wray, 12/10/2007 TR, p. 39). At the self-insured employer's request, Dr. Wray performed a brief, one-time examination of Mr. Tschabold on November 27, 2006. (Wray, 12/10/2007 TR, p. 10). Rather, Dr. Wray alleged that the spontaneous brain hemorrhage was attributable to Mr. Tschabold's history of hypertension, testifying that she based this opinion on having seen two or three of Mr. Tschabold's blood pressure readings between 2001 and 2005. (Wray, 12/10/2007 TR, p. 40). Dr. Wray has been performing one-time medical exams for insurance companies and employers for 26 years and has never done an exam for an injured worker. (Wray, 12/10/2007 TR, p. 44).

Dr. Wray testified that heavy lifting can cause high blood pressure, but it is unlikely that it would cause a hemorrhage without an underlying vessel that was abnormal already and she concluded that Mr. Tschabold's blood vessels at the deep level of his brain were "probably already weak." (Wray, 12/10/2007 TR, p. 50).

Dr. Wray admitted that the thalamic bleed of April 9, 2005 caused permanent facial hemiparalysis and some motor problems. (Wray, 12/10/2007 TR, p. 43).

Dr. Jung also testified, based on a records review, at the request of the self-insured employer in anticipation of litigation. (Jung, 12/10/2007 TR, p. 39). Dr. Jung specializes in multiple sclerosis and does not perform surgeries let alone brain surgery. (Jung, 12/10/2007 TR, p. 41). By contrast, Dr. Jung never met or examined Mr. Tschabold, but based her opinions exclusively upon having reviewed medical records provided to her by the self-insured employer. (Jung, 12/10/2007 TR, p. 38). Dr. Jung opined that Mr. Tschabold's brain hemorrhage was attributable to "hypertension." She arrived at that conclusion by tracking twenty of Mr. Tschabold's blood pressure readings between 2002 to 2003 and found hypertension in two out of the twenty points. (Jung, 12/10/2007 TR, pp. 22, 39, 40). Dr. Jung concluded that the April 9, 2005 brain hemorrhage coincidentally occurred at the same time that Mr. Tschabold strained against and then was pinned by the 400-pound tractor. (Jung, 12/10/2007 TR, p. 31). At the same time, Dr. Jung did acknowledge that lifting and exertion do increase blood pressure. (Jung 12/10/2007 TR, p. 41).

Dr. Jung also acknowledged that, from her review of medical records between April 9, 2005 and May 24, 2005, Mr. Tschabold had slowed speech, weakness and was able to walk, but required assistance in ambulation and stairs. (Jung, 12/10/2007 TR, p. 35). Dr. Jung attributed Mr. Tschabold's current condition to complications from the aneurism

surgery. (Jung, 12/10/2007 TR, p 36). However, Dr. Jung had a significant disadvantage to make such a judgment having never had any contact with Mr. Tschabold, certainly not in between the hemorrhage and the surgery and not specializing in stroke and aneurism conditions. Ultimately, Dr. Jung opined that Mr. Tschabold remained significantly impaired. (Jung, 12/10/2007 TR, p. 36).

The case law is clear and based on common sense, treating doctors have a better opportunity to evaluate their patients than a one-time examiner, are less biased and have an infinitely better opportunity to evaluate their patients than a non-examining evaluator. In this case, Dr. Sekhar has a lengthy career specializing in exactly these types of brain conditions, he has directly witnessed Mr. Tschabold's condition during the relevant time periods, and he continued treating Mr. Tschabold for a substantial period following the surgery. Clearly, Dr. Sekhar is in the best position to give insight into the causal relationship of Mr. Tschabold's condition to the April 9, 2005 industrial injury.

C. **SUBSTANTIAL EVIDENCE SUPPORTED JUDGE McCARTHY'S FINDING THAT MR. TSCHABOLD WAS TOTALLY AND PERMANENTLY DISABLED UNDER THE INDUSTRIAL INSURANCE LAWS OF THE STATE OF WASHINGTON**

No witnesses opined that Mr. Tschabold is capable of employment. Both Drs. Sekhar and Ang testified that Mr. Tschabold is permanently

unable to work. Dr. Sekhar testified that Mr. Tschabold is permanently impaired with regard to memory problems, cognitive problems and mild left-sided weakness or paralysis as a result of the April 9, 2005 industrial injury. (Sekhar, 11/28/2007 TR, p. 20). Dr. Ang testified that Mr. Tschabold's mental condition after his April 9, 2005 industrial injury renders him unable to work in any meaningful capacity. (Ang, 11/21/2007 TR, p. 17). Dr. Ang explained that, since that time, Mr. Tschabold had had episodes of emotional liability, including angry outbursts, inability to respond to questions appropriately, problems with attention and difficulty ambulating. (Ang, 11/21/2007 TR, pp. 17-19).

Vocational expert Merrill Cohen testified that, based upon her interview of Mr. Tschabold and her review of his medical records, including from between the April 9, 2005 industrial injury and the May 24, 2005 surgery, Mr. Tschabold was precluded from gainful employment due to his cognitive and physical impairments. (Cohen, 12/4/2007 TR, pp. 51, 53). Furthermore, Ms. Cohen testified that Mr. Tschabold was clearly unable to work in April 2005. (Cohen, 12/4/2007 TR, p. 58). Ms. Cohen testified that Mr. Tschabold would not have been able to work between November 20, 2006 and March 16, 2007 and that he would not even be competitive in the interview process due to his inability to maintain eye contact and respond to questions appropriately. (Cohen, 12/4/2007 TR,

pp. 63, 78).

As both Dr. Sekhar and Yvonne Tschabold testified, Mr. Tschabold manifested those deficiencies following the April 9, 2005 brain hemorrhage and prior to the May 24, 2005 aneurism surgery.

Clearly, the conditions that make Mr. Tschabold unable to perform full-time gainful employment today, made him unable to perform full-time gainful employment following the April 9, 2005 brain hemorrhage.

**D. MR. TSCHABOLD'S ATTORNEYS SHOULD BE ENTITLED TO AN AWARD OF FEES FOR WORK DONE AT SUPERIOR COURT AS WELL AS WORK DONE AT THE COURT OF APPEALS.**

RCW 51.52.130 provides that “[I]f, on appeal to Superior Court or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary... a reasonable fee for the services of the worker’s or beneficiary’s attorney shall be fixed by the court.”

**i. Mr. Tschabold’s attorneys should be entitled to attorneys’ fees for work done at Superior Court.**

Because the Superior Court found for Mr. Tschabold in reversing the Board and Department orders, the court awarded fees for Mr. Tschabold’s attorneys for their work at Superior Court. (CP, pp. 49 – 51). If the Superior Court’s decision is affirmed, Mr. Tschabold’s attorneys

should be entitled to fees pursuant to RCW 51.52.130 for their work at Superior Court as found by the Superior Court.

**ii. Mr. Tschabold's attorneys should also be awarded fees for work done before the Court of Appeals.**

Rule 18.1 of the Rules of Appellate Procedure provides that "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses provided in this rule, unless a statute specifies that the request is to be directed to the trial court." RAP 18.1.

RCW 51.52.130 provides that in workers' compensation cases, if in an employer appeals to an appellate court, the worker's right to relief is sustained, the worker is entitled to attorneys' fees for the work done before that court as well as fees for medical witnesses and costs.

Mr. Tschabold's attorneys, therefore, request that should the Court affirm the Superior Court's decision, they be awarded reasonable fees for work done on this appeal before this Court.

### **III. CONCLUSION**

Substantial evidence supported Judge McCarthy's findings that Mr. Tschabold's brain hemorrhage was proximately caused by the April 9, 2005 industrial injury, and that the industrial injury caused permanent cognitive and physical impairment. The testimony of the treating

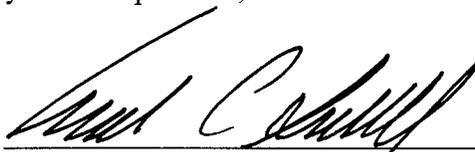
neurosurgeon who evaluated Mr. Tschabold following the April 9, 2005 brain hemorrhage and prior to the May 24, 2005 aneurism surgery and who is a recognized expert in the field of brain hemorrhage and aneurism clearly supported these findings. These findings were also supported by the testimony of Mrs. Tschabold who directly witnessed Mr. Tschabold's condition following the April 9, 2005 brain hemorrhage and prior to the May 24, 2005 aneurism surgery and continues to live with and provide care for Mr. Tschabold's condition.

Based on the fact that the brain hemorrhage and resulting permanent cognitive and physical impairments were a result of Mr. Tschabold's industrial injury, Judge McCarthy also properly concluded that Mr. Tschabold was unable to work and should be entitled to time loss and pension benefits.

DATED this 3rd day of September, 2010.

SMALL, SNELL, WEISS & COMFORT, P.S.  
Attorneys for Respondent, Robert D. Tschabold

By:

  
\_\_\_\_\_  
David C. Snell, WSBA #20173

FILED  
COURT OF APPEALS  
DIVISION II

10 SEP -3 PM 1:43

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

ROBERT D. TSCHABOLD, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 THE HOME DEPOT )  
 )  
 Appellant. )  
 \_\_\_\_\_ )

No. 40471-1-II

CERTIFICATE  
OF SERVICE

STATE OF WASHINGTON )  
 : ss.  
 County of Pierce )

DAVID W. LAUMAN, being first duly sworn on oath, deposes and says:

1. That I am now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness therein.
2. That on September 3, 2010, I personally filed the original and one copy of the Respondent's Brief, Certificate of Service, and Certificate of Service by Mailing in the above-captioned matter with the Court of Appeals, Division II, at 950 Broadway, Suite 300, Tacoma, Washington, 98402.

*David W. Lauman*

DAVID W. LAUMAN

SIGNED AND SWORN TO before me this 3rd day of September,  
2010.

*Kelly Lee Lake*

NOTARY PUBLIC in and for

the State of Washington,

residing at *Tacoma, WA*

My appointment expires: *6/16/13*



10 SEP -3 PM 1:43

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

ROBERT D. TSCHABOLD, )  
 )  
 Respondent, )  
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 v. )  
 )  
 THE HOME DEPOT )  
 )  
 Appellant. )  
 \_\_\_\_\_ )

No. 40471-1-II

CERTIFICATE  
OF SERVICE  
BY MAILING

STATE OF WASHINGTON )  
 : ss.  
County of Pierce )

PATRICIA KLEIN, being first duly sworn on oath, deposes and says:

1. That I am now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness therein.
2. That on September 3, 2010, I sent a copy of Respondent's Brief, Certificate of Service, and Certificate of Service by Mailing in the above-captioned matter by facsimile to 1-503-452-8066 and by United States Mail, first-class postage prepaid, properly addressed envelopes addressed as follows:

Jerald P. Keene  
Reinisch Mackenzie, P.C.  
10260 SW Greenburg Rd. Suite 1250  
Portland, OR 97223-5522

3. That on September 3, 2010, I sent a copy of Respondent's Brief, Certificate of Service, and Certificate of Service by Mailing in the above-captioned matter by United States Mail, first-class postage prepaid, properly addressed envelopes addressed as follows:

Penny L. Allen  
Office of the Attorney General  
PO Box 40121  
Olympia, WA 98504-0121

*Patricia Klein*

PATRICIA KLEIN

SIGNED AND SWORN TO before me this 3rd day of September, 2010.

*Kelly Lee Lake*

NOTARY PUBLIC in and for  
the State of Washington,  
residing at Tacoma, WA  
My appointment expires: 6/6/13

