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## **I. INTRODUCTION**

Comes now the appellant, Michael Henderson, Plaintiff below, by and through his attorney of record, Karla E. Rood of the Law Offices of David B. Vail and Jennifer Cross-Euteneier & Associates, and hereby offers this Brief in support of his appeal.

Michael Henderson was born on July 26, 1974, completed his GED, has the equivalent of a year of college and has taken training in truck driving and heavy equipment.

Mr. Henderson suffered an industrial injury on August 26, 2003 while employed as a cement truck driver for Glacier NW when he twisted his right ankle while he was walking, and felt his right knee pop when he stopped himself from falling. He had an immediate onset of pain followed by swelling. Mr. Henderson never regained full function of his right knee.

Mr. Henderson's claim must be remanded to Superior Court for a new trial with, with the testimony of Michael Barnard, M.D., stricken from the record in order to ensure proper application of the spirit behind the Industrial Insurance Act (Act).

## **II. ASSIGNMENTS OF ERROR**

A. SUPERIOR COURT AND THE BOARD ERRED IN ALLOWING THE TESTIMONY OF MICHAEL BARNARD, M.D.

1. The Court erred in denying the Plaintiff's Motion to Strike Testimony of Dr. Barnard on June 22, 2010.
2. The Board erred in allowing the testimony of Dr. Barnard insofar as it applied the incorrect standard in making the determination, i.e. "to make a full and complete record."

B. SUPERIOR COURT ERRED IN CONCLUDING NO JUROR IRREGULARITY HAD OCCURRED AND DENYING THE PLAINTIFF'S MOTION FOR A NEW TRIAL.

1. The Court erred in denying the Plaintiff's Motion for a New Trial on August 20, 2010.
2. The Court erred in finding that no juror irregularity existed in having two jurors who were related and resided at the same address serve on the same jury panel.

C. SUPERIOR COURT AND THE BOARD ERRED IN CONCLUDING THAT PLAINTIFF WAS NOT TEMPORARILY TOTALLY DISABLED BETWEEN DECEMBER 31, 2003 AND AUGUST 24, 2005 WHERE MEDICAL TESTIMONY WAS PRESENTED TO THE CONTRARY.

1. The Jury erred in entering Finding number 1 insofar as it affirms the Board of Industrial Insurance Appeals'

(Board) decision that Plaintiff was not temporarily totally disabled between December 31, 2003 and August 24, 2005.

D. SUPERIOR COURT AND THE BOARD ERRED IN CONCLUDING THAT PLAINTIFF'S CONDITION DID NOT RESULT IN ANY PERMANENT IMPAIRMENT AS OF AUGUST 24, 2005 WHERE CONCLUSIVE MEDICAL TESTIMONY WAS PRESENTED TO THE CONTRARY.

1. The Jury erred in entering Finding number 3 insofar as it affirms the Board's decision that Plaintiff's condition did not result in any permanent impairment, as of August 24, 2005.

### **III. ISSUES**

- A. Whether the Superior Court and the Board erred allowing the testimony of Michael Barnard, M.D.?
- B. Whether the Superior Court erred in concluding no juror irregularity had occurred and denying the Plaintiff's motion for a new trial?
- C. Whether the Superior Court and the Board erred in concluding that the Plaintiff was not temporarily totally disabled between December 31, 2003 and August 24, 2005?

D. Whether the Superior Court and the Board erred in concluding that the Plaintiff's condition did not result in any permanent impairment as of August 24, 2005?

#### **IV. STATEMENT OF THE CASE**

##### **A. FACTUAL AND PROCEDURAL HISTORY**

###### **1. Procedural History:**

Mr. Henderson injured his right knee while at work on August 26, 2003. (Certified Appeal Board Record, hereinafter CABR at p. 49). The Department of Labor and Industries (Department) allowed the claim and the Self-Insured Employer began paying Mr. Henderson time loss compensation. (CABR at p. 49). On April 8, 2005 the Department issued an order ending Mr. Henderson's time loss compensation effective December 30, 2003 and closing the claim without any permanent partial disability award. (CABR at p. 50). Mr. Henderson protested the Department's April 8, 2005 order on May 18, 2005, and the Department affirmed the order on August 24, 2005. (CABR at p. 50). On October 3, 2005, Mr. Henderson appealed this decision to the Board. (CABR at p. 50).

At the Board, Mr. Henderson presented his testimony on July 24, 2006 and again on July 26, 2006. On July 25, 2006, Mr. Henderson

presented the testimony of H. Richard Johnson, M.D., board certified orthopedic surgeon, and Carl Gann, vocational rehabilitation counselor. On July 26, 2006, Mr. Henderson presented the testimony of his wife, Dustie Henderson, and his employee, James Osier. On July 26, 2006 the employer presented the testimony of Ronnie Stabler at the Board, and the testimony of Romeo Puzon, M.D., general practitioner, through deposition. On November 20, 2006, the employer presented the testimony of Michael Barnard, M.D., orthopedist, and Merrill Cohen, vocational rehabilitation counselor.

On February 27, 2007, Industrial Appeals Judge (IAJ) Kathleen A. Stockman issued a proposed decision and order affirming the Department's decision to end time loss compensation benefits as of December 30, 2003 and close the claim without a permanent partial disability award. (CABR at pp. 23-34). On April 6, 2007, the Plaintiff filed a Petition for Review by the Board of IAJ Stockman's decision. (CABR at pp. 5-18). On April 25, 2007, the Board denied Mr. Henderson's Petition for Review and adopted IAJ Stockman's decision as the Decision and Order of the Board. (CABR at p. 2).

On May 22, 2007, Mr. Henderson appealed the Board's Decision and Order to Superior Court and requested the case be tried in front of a

jury of six jurors. (Clerk's Papers at pp. 2, 9). Mr. Henderson moved to Strike the Testimony of Dr. Barnard on June 17, 2010. (Clerk's Papers at pp. 93-99). Argument was heard and the motion denied on June 21, 2010, though the order was filed on June 22, 2010. (Clerk's Papers at p. 61). Trial began on June 21, 2010 with selection of a jury panel, and on June 24, 2010, the jury returned a verdict upholding the Decision and Order of the Board. (Clerk's Papers at pp. 59, 85-86). The Plaintiff moved for a New Trial on July 6, 2010. (Clerk's Papers at pp. 87-92). Argument was heard on the motion on August 20, 2010 at which Superior Court Judge Stephanie Arend denied the motion. (Clerk's Papers at p. 100). The Superior Court Judgment was entered on August 20, 2010. (Clerk's Papers at pp. 101-102). Mr. Henderson appealed the Judgment of the Superior Court, the denial of his Motion for a New Trial, and the denial of his Motion to Strike Testimony on September 16, 2010. (Clerk's Papers at pp. 105-111).

## 2. Testimony of Michael Barnard, M.D.:

On March 30, 2006, IAJ Stockman issued an Amended Interlocutory Order scheduling the Mr. Henderson's claim before the Board. (CABR at pp. 58-59). The order listed litigation occurring on July 24-26, 2006 and required the claimant to identify and provide written

confirmation of the witnesses he intended to call by May 8, 2006 as well as requiring that the Employer provide the same information regarding the witnesses it intended to call by May 15, 2006. (CABR at p. 58). Respondent, Defendant below, submitted a confirmation list of witnesses which it intended to call in hearings before the Board by letter dated May 26, 2006. (CABR at p. 63). On June 6, 2006, the Employer requested permission to add Michael Barnard, M.D., to its scheduled witnesses. (CABR at pp. 63-64).

Dr. Barnard performed an IME of Mr. Henderson on May 22, 2006 in order to evaluate a reopening application which Mr. Henderson had filed due to a low back condition related to his knee injury. (CABR at pp. 63, 71). The Department scheduled the IME in order to assist in comparing Mr. Henderson's physical status "at the time the reopening was filed to the status at claim closure." (CABR at p. 70). Mr. Henderson, through counsel, objected to the addition of a late and previously undisclosed expert witness whose basis for testifying was an exam conducted eight months after claim closure and for a different purpose than determining the matters at issue in the instant litigation. Counsel for Mr. Henderson raised the additional concern that the testimony of Dr. Barnard would be cumulative as the Employer had already scheduled the testimony of Dr. David Smith, also an orthopedist, to serve as an expert

witness in this case. (CABR at p. 61, CABR, 6/21/2006 at p. 7). In response to this concern, the Employer offered to waive the testimony of Dr. Smith in order to allow Dr. Barnard to testify. (CABR at p. 78).

Argument on the Employer's request to add Dr. Barnard as a witness occurred on June 21, 2006. (CABR, 6/21/2006 at pp.1-2). IAJ Stockman ruled that the Employer was to be allowed to call either Dr. Barnard or Dr. Smith as she wanted "a full and complete record." (CABR, 6/21/2006 at pp. 14-15). The testimony of Dr. Barnard was taken on November 20, 2006. (CABR, Barnard, 6/20/2006 at p. 3).

At Superior Court, Mr. Henderson moved to strike the testimony of Dr. Barnard from the record on June 10, 2010 due to the erroneous allowance. (Clerk's Papers at pp. 13-22). The Employer filed a response on June 17, 2010 and argument was heard on the motion on the first day of trial, June 21, 2010. (Verbatim Report of Proceedings, hereinafter VRP, 6/21/2010 at p. 3). Judge Arend denied the Plaintiff's motion, and an order was filed on June 22, 2010. (Clerk's Papers at p. 61).

### 3. Motion for a New Trial:

Jury selection occurred on June 21, 2010. (Clerk's Papers at 59). On June 22, 2010, the second day of trial, the Court informed the parties

that two of the seated jurors, Juror 2 and Juror 6, had the same last name and shared the same address. (VRP, 6/22/2010 at p. 74). When questioned, it was discovered that Juror 2 was the mother of Juror 6. (VRP, 6/22/2010 at p. 76). Both Juror 2 and Juror 6 stated that they would not discuss the case with each other and would have no difficulty remaining open and honest in their deliberation. (VRP, 6/22/2010 at pp. 77, 80).

Following the reading of the testimony contained in the CABR in Superior Court, the jury began deliberating on June 23, 2010. (Clerk's Papers at p. 89). That afternoon, the jury returned a verdict in favor of the Plaintiff on the issue of permanent partial disability, and determining that he should be awarded a 10% impairment award. (Clerk's Papers at p. 89). The jury found in favor of the Defendant on the issues of time loss compensation and need for treatment. (Clerk's Papers at p. 89). The Defendant requested that the jury be polled; only four of six jurors raised their hands as having voted in favor of the Plaintiff on the issue of permanent partial disability, Juror 2 and Juror 6 did not. (Clerk's Papers at p. 89). At this point, two jurors indicated that Juror 6 had also voted in favor of permanent partial disability, she replied that she did not think so and Judge Arend sent the jury to deliberate further. (Clerk's Papers at p. 89).

The jury continued to deliberate on June 24, 2010, and sent out one question asking for clarification regarding the question on permanent partial disability. (Clerk's Papers at p. 84). The jury was referred to jury instruction number ten. (Clerk's Papers at p. 84). Deliberation continued into that afternoon, at which point the jury returned a unanimous verdict on all three issues in favor of the Defendant. (Clerk's Papers at p. 89).

Mr. Henderson moved for a new trial due to juror irregularity on July 6, 2010. (Clerk's Papers at pp. 87-92). Argument was heard, and the motion denied on August 20, 2010. (Clerk's Papers at p. 100).

4. Facts relating to Mr. Henderson's injury:

Mr. Henderson, suffered an industrial injury on August 26, 2003 while employed as a cement truck driver for Glacier NW when he twisted his right ankle while he was walking, and felt his right knee pop when he stopped himself from falling. He had an immediate onset of pain followed by swelling. (CABR, Johnson, 7/25/2006 at p. 24). He had no previous problem of injury to his right knee. (CABR, Johnson, 7/25/2006 at p.24).

Dr. Thompson evaluated Mr. Henderson on September 26, 2003. (CABR, Johnson, 7/25/2006 at p. 27). He performed a right knee arthroscopy on Mr. Henderson on November 14, 2003 and did a partial

synovectomy for anterior impingement. (CABR, Johnson, 7/25/2006 at p. 28).

Dr. Patrick Bays, Orthopedic Surgeon conducted an Independent Medical Examination (IME) on October 18, 2003. His physical examination of Mr. Henderson revealed an effusion, pain with patellar compression, and tenderness over the patellar tendon and infrapatellar fat pad. (CABR, Johnson, 7/25/2006 at p. 28). He did not release him to return to work as a truck driver and restricted him to sedentary employment. (CABR, Johnson, 7/25/2006 at p. 280).

On November 14, 2003, Dr. Thompson performed a right knee arthroscopy and partial synovectomy for anterior impingement. (CABR, Johnson, 7/25/2006 at p. 28). On December 17, 2003, he was released to return to work at light duty. (CABR, Johnson, 7/25/2006 at p. 29). On December 31, 2003, he was released to work without restriction. (CABR, Johnson, 7/25/2006 at p. 29).

On March 1, 2004, Mr. Henderson reported that he was still having occasional giving way while carrying shoots for the cement mixer. (CABR, Johnson, 7/25/2006 at p. 29). Nevertheless, Dr. Thompson recommended closure of the claim, which occurred on March 5, 2004 without any permanent partial disability award. (CABR, Johnson, 7/25/2006 at p. 30).

On April 7, 2004, Dr. Jerome Zechman, Orthopedic Surgeon, saw Mr. Henderson for a second opinion. Mr. Henderson was working full time, but if he was very active during the day, he paid for it with swelling, crepitus, and discomfort at the end of the day. (CABR, Johnson, 7/25/2006 at p. 30). He also experienced instability, stiffness, catching, grinding, and pain at night. (CABR, Johnson, 7/25/2006 at p. 30). Physical examination of the right knee revealed significant crepitus and pain with extension of the knee. (CABR, Johnson, 7/25/2006 at p. 30). Dr. Zechman agreed that his knee was not at 100% and recommended an IME to determine his level of disability. (CABR, Johnson, 7/25/2006 at p. 30).

June 5, 2004, Dr. Chester McLaughlin conducted an IME and noted that Mr. Henderson complained of swelling, pain, instability. (CABR, Johnson, 7/25/2006 at p. 30). Certain activities increased his right knee pain, including walking in wet cement, going up or down stairs, kneeling, squatting, or prolonged weight bearing. (CABR, Johnson, 7/25/2006 at p. 30). Examination of the right knee revealed evidence of an effusion, limited squat, a 10 degree flexion contracture, retropatellar crepitus, mildly positive patellar apprehensions test with lateral translation, medial tenderness and stable ligaments. (CABR, Johnson, 7/25/2006 at p. 31). X-rays revealed some medial joint space narrowing.

(CABR, Johnson, 7/25/2006 at p. 31). Dr. McLaughlin recommended a brace and also restricted Mr. Henderson from returning to work as a cement truck driver or working in cement. (CABR, Johnson, 7/25/2006 at p. 31).

On July 20, 2004, Dr. Thompson re-evaluated him and concluded that Mr. Henderson had pre-existing patellofemoral disease even though Mr. Henderson had no problems with his knee prior to the industrial injury. (CABR, Johnson, 7/25/2006 at p. 31). Dr. Thompson concurred with Dr. McLaughlin that Mr. Henderson was not capable of returning to his job of injury. (CABR, Johnson, 7/25/2006 at pp. 31, 32).

On August 9, 2004, Dr. Roy Broman evaluated Mr. Henderson for complaints of constant right knee pain following the industrial injury of August 26, 2003. (CABR, Johnson, 7/25/2006 at p. 31). Dr. Broman reported complaints of sharp, piercing, aching pain about the right knee that increases as the day progresses, as well as muscle spasms, popping, grinding, stiffness, giving way, disturbed sleep and being constantly tired. (CABR, Johnson, 7/25/2006 at p. 32). He reported that Mr. Henderson's knee pain was increased with prolonged sitting, standing, or walking, going up or down stairs or ladders, squatting, kneeling, crawling, running, or jumping. His right knee exam of Mr. Henderson revealed tenderness anterolateral and posterior, 20 degrees active and 5 degrees passive flexion

contracture, knee extension weakness, and pain with patellar compression. (CABR, Johnson, 7/25/2006 at p. 32).

On September 23, 2004, Dr. Broman rated Mr. Henderson as having a permanent partial impairment of 12 percent of the right lower extremity. (CABR, Johnson, 7/25/2006 at p. 33).

On November 4, 2004, Dr. Smith, Orthopedic Surgeon conducted an IME and noted complaints of right knee pain that was like aching and/or burning, numbness, giving way, and swelling. (CABR, Johnson, 7/25/2006 at p. 33). Dr. Smith's physical examination revealed a limp, question of mild right quad atrophy, full motion, mild patellofemoral compression test, patellar tendon tenderness, no instability, negative apprehension and no effusion. (CABR, Johnson, 7/25/2006 at p. 33). Dr. Smith felt that Mr. Henderson had reached maximum medical improvement and released him to light-medium work. He found no ratable impairment. (CABR, Johnson, 7/25/2006 at p. 33).

Dr. Johnson noted that Mr. Henderson last worked on a regular basis in August 2004 and that was as an observer. (CABR, Johnson, 7/25/2006 at p. 35). He further noted that Mr. Henderson had purchased a dump truck and Bobcat in October 2004 because he had to do something to meet his family's financial needs. (CABR, Johnson, 7/25/2006 at p. 35). Mr. Henderson delivered bark, topsoil and gravel and hired a helper

to drive anything other than short distances. (CABR, Johnson, 7/25/2006 at p. 35).

Upon examination of Mr. Henderson, Dr. Johnson noted a limp and that his right foot was in an exaggerated externally rotated position when he walks. (CABR, Johnson, 7/25/2006 at p. 44). He diagnosed Mr. Henderson as having the following: (1) grade I medial collateral ligament sprain, right knee; (2) post-traumatic synovitis of right knee; (3) aggravation of asymptomatic pre-existing patellofemoral disease, right knee; (4) status post op right knee arthroscopy and partial synovectomy on 11/14/03; (5) flexion contracture of the right knee; (6) right ankle sprain, mild, resolved; (7) deconditioning of right knee extensors. (CABR, Johnson, 7/25/2006 at pp. 46, 47).

Based upon his review of medical records and his physical examination of Mr. Henderson, Dr. Johnson concluded that Mr. Henderson had a 10 percent impairment of the right lower extremity due to his flexion contracture and an additional percent for his chondromalacia patella with a total right upper extremity impairment at 15 percent. (CABR, Johnson, 7/25/2006 at pp. 48, 49).

Carl Gann, rehabilitation counselor, testified that he felt that Mr. Henderson would be employable following November 4, 2004 in lighter occupations. (CABR, Gann, 7/25/2006 at p. 82).

Dr. Michael Barnard, Orthopedic surgeon, examined the claimant on May 22, 2006, at the employer's request. He diagnosed Mr. Henderson with the following conditions: (1) severe exogenous obesity that was the primary cause of his ongoing complaints; (2) history of right knee strain with no evidence of internal derangements; (3) degenerative arthritis of the right knee unrelated to the industrial claim; (4) mechanical low back pain unrelated to the industrial claim, but related to his exogenous obesity; (5) smoking habituation with a very high rate of two packs a day smoking habit; (6) severe general deconditioning; and (7) probable sleep apnea contributing to a chronic pain syndrome. (CABR, Barnard, 11/20/2006 at p. 31).

Dr. Romeo Puzon saw Michael Henderson on May 11, 2005 for a Department of Transportation (DOT) evaluation for his commercial driver's license. (CABR, Puzon, 7/26/2006 at p. 6). Dr. Puzon noted no perceptible limp, atrophy, lack of mobility or strength in the lower limb and passed Mr. Henderson for his DOT certification. (CABR, Puzon, 7/26/2006 at p. 10). He saw Mr. Henderson again on September 7, 2005 for right anterior thigh pain, but found moderate tenderness with no edema, discoloration or skin break. (CABR, Puzon, 7/26/2006 at pp. 10, 11). Dr. Puzon stated that when he examined Mr. Henderson for his DOT evaluation he was aware that Mr. Henderson had knee surgery, but did not

examine his knee because he didn't complain of any pain at that time. (CABR, Puzon, 7/26/2006 at pp. 15, 16).

Mr. Henderson's wife, Dustie, testified on his behalf at the Board. Ms. Henderson testified that ever since she met her husband (after his industrial injury) she noticed a constant limp. (CABR, Dustie Henderson, 7/26/2006, at p. 67). She further testified that she observed his leg go out from under him about every other day; three of those times he was holding their infant son. (CABR, Dustie Henderson, 7/26/2006, at p. 67). Further, she observed that he was in pain, that his knee would swell up and his leg would have spasms. (CABR, Dustie Henderson, 7/26/2006, at pp. 67, 70, 71).

James Osier testified that Michael Henderson was his employer and directed his daily activities. (CABR, Osier, 7/26/2006, at p. 75). He further testified that he saw Mr. Henderson limp more and more everyday and has seen his knee buckle. (CABR, Osier, 7/26/2006, at p. 77). Mr. Osier finally testified that he has heard Mr. Henderson yell out in pain, once or twice in a day's travel. (CABR, Osier, 7/26/2006, at p. 78).

## **V. ARGUMENT**

Mr. Henderson has not been afforded a fair trial, either at the Board or at Superior Court. First, the testimony of Dr. Barnard was improperly allowed as it allowed the Employer to receive the benefits of having Mr.

Henderson examined by a new medical expert of its choice without having met the requirement of a CR 35 motion. Second, Mr. Henderson's Superior Court trial was tainted due to irregularity resulting from have two jurors share a close familial relationship. Finally, the jury reached an inadequate verdict based upon the evidence that was presented.

A. STANDARD OF REVIEW.

Jurisdiction of superior court on review of a decision of the Board is appellate only, and it can only decide matters decided by the administrative tribunal. *Shufeldt v. Department of Labor and Industries*, 57 Wash.2d 758, 359 P.2d 495 (1961). Review by the Court of Appeals 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. *Rogers v. Department of Labor and Industries*, 151 Wash.App. 174, 210 P.3d 355 (2009).

Relief from a decision of the Board is proper when it has erroneously interpreted or applied the law, the order is not supported by substantial evidence, or it is arbitrary or capricious. *Mt. Baker Roofing, Inc. v. Washington State Dept. of Labor and Industries*, 146 Wash.App. 429, 191 P.3d 65 (2008), amended on reconsideration.

The Department is charged with administration of the Workers' Compensation Act, so the Court of Appeals accords substantial weight to the Department's interpretation of the Act but the Court of Appeals may nonetheless substitute its judgment for the Department's because its review of the Act is de novo. *McIndoe v. Department of Labor and Industries of State of Wash.*, 100 Wash.App. 64, 995 P.2d 616 (2000), review granted 141 Wash.2d 1025, 11 P.3d 826, affirmed 144 Wash.2d 252, 26 P.3d 903.

The Court of Appeals may reverse an administrative order if it: (1) is based on an error of law; (2) is unsupported by substantial evidence; (3) is arbitrary or capricious; (4) violates the constitution; (5) is beyond statutory authority; or (6) when the agency employs improper procedure. *Brown v. State, Dept. of Health, Dental Disciplinary Bd.*, 94 Wash.App. 7, 972 P.2d 101 (1999), reconsideration denied, review denied 138 Wash.2d 1010, 989 P.2d 1136.

**B. THE ACT WAS CREATED TO PROTECT AND PROVIDE BENEFITS FOR INJURED WORKERS AND THEIR BENEFICIARIES.**

The Act was established to protect and provide benefits for injured workers, not the Department or Self-Insured Employers. It must be emphasized that it has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and the

beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Department of Labor and Industries*, 61 Wn.2d 439, 446 (1963); *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1; *Nelson v. Department of Labor and Industries*, 9, Wn.2d 621; and *Hilding v. Department of Labor and Industries*, 162 Wash. 168. Furthermore, as noted by the Washington Supreme Court in *Clauson v. Department of Labor and Industries*, 130 Wn. 2d 580 (1996) it is mandated that any doubt as to the meaning of the workers' compensation law be resolved in favor of the worker. *Id.*, at 586.

Mr. Henderson has not been afforded the full protection of the Act. By allowing the testimony of Dr. Barnard, a late disclosed expert whose opinions and conclusions were not the basis of the Department's decision to close his claim, the Board did not act in the best interests of Mr. Henderson.

C. THE TESTIMONY OF MICHAEL BARNARD, M.D., WAS IMPROPERLY ALLOWED AND SHOULD BE STRICKEN FROM THE RECORD.

The rules of civil practice apply to industrial insurance appeals unless otherwise provided in Title 51 of the Revised Code of Washington. RCW § 51.52.140. In a civil case, and after a claim is appealed from an order of the Department, an opposing party may seek an examination of the Plaintiff pursuant to Civil Rule 35. Good cause must be shown for the

examination to be allowed. Dr. Barnard was not the proper witness to testify regarding the issues on appeal to the Board, i.e. temporary total disability, need for treatment, and/or permanent partial disability of the right knee as his opinions and conclusions were not part of the basis of the Department's decision to close Mr. Henderson's claim and should only have been allowed pursuant to a showing of good cause under CR 35.

In a Worker's Compensation claim, the Department and/or Self-Insured Employer have the duty to administer a claim at the Department level. However, once an issue is appealed from an order of the Department, the Department or the Employer lose the ability to continue administering the claim. Thus, "when employers or the Department seek expert medical opinions during the pendency of an appeal, they may do so either through a record review, or an examination under CR 35." *In Re: Virginia W. Ayers*, BIIA 2009.

A Defendant has no absolute right to compel a Plaintiff to submit to a CR 35 examination." *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234 (1964), *In re Green*, 14 Wn.App. 939, 546 P.2d 1230 (1976). Therefore, Rule 35 "...requires discriminating application by the trial judge who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination has adequately

demonstrated the existence of the rule requirements of ‘*in controversy*’ and ‘*good cause*.’” *Id.* It is within the discretion of the tribunal to determine whether or not a party seeking a court-ordered mental or physical examination under CR 35(a) has met the “good cause” requirement. *In re Green*, 14 Wn. App. 989, 546 P.2d 1230 (1976).

CR 35 (a) applies in workers’ compensation cases. *Tietjen v. Department of Labor and Industries*, 13 Wn.App. 86, 534 P.2d 151 (1975). Moreover, in order for the Board to grant a CR 35 motion, the moving party must show that: 1) the Claimant’s mental health conditions are in controversy; 2) the moving party has a good cause for the motion; and 3) the Claimant and attorney have notice of the examination. *Id.*

In Workers’ Compensation cases the Self-Insured Employer has an affirmative duty to administer and process injured workers’ claims. This is clearly distinguishable from Personal Injury cases, wherein defendant insurance companies have no duty to investigate/develop or administer claims and typically are not made aware of claimed health conditions and associated damages until the filing of a lawsuit, thus giving rise to the need for CR 35 examinations. There is certainly a clear difference in circumstances between a civil lawsuit in which pleadings alone may give rise to “good cause” and a Labor & Industries claim where the Self-

Insured Employer has had access to medical records and the authority to order physical or mental examinations pursuant to RCW 51.36.070 during adjudication of the claim.

In this case, allowing the testimony of Dr. Barnard was akin to allowing a CR 35 examination to have taken place without the appropriate motion and without the appropriate evidentiary showing by the Employer to satisfy the statutory requirements. The IME by Dr. Barnard was agreed to by Mr. Henderson and the Employer for the limited purpose of comparing Mr. Henderson's status at the time of the reopening application to his status at the time of claim closure. (CABR at pp. 70, 71). Both parties agreed that the issue of reopening Mr. Henderson's claim did not fall under the Board's jurisdiction and thus, was not at issue in the pending appeal. (CABR at p. 71). The IME occurred on May 22, 2006, well after Mr. Henderson had appealed his case to the Board on October 3, 2005. (CABR at p. 50).

If the Employer wished to obtain new medical evidence through an IME to present at trial, the Employer should have been required to make a motion pursuant to CR 35. Instead, the Employer sought to use the testimony of an expert who evaluated Mr. Henderson after the Department's order had been appealed, even though it had been agreed

that Dr. Barnard was only evaluating Mr. Henderson in order to provide evidence and assessments regarding issues that were not at the Board. The Employer should not have been allowed to benefit from the Department's administration of a separate issue when it would not have been able to obtain the evidence any other way.

No good cause existed for the Employer to use evidence gained pursuant to an IME conducted after the claim had been appealed that would satisfy the CR 35 requirement. The Employer had previously scheduled the testimony of Dr. Smith, orthopedic surgeon, to testify. The Employer did not assert that it had insufficient evidence regarding Mr. Henderson's condition such that an additional evaluation would be required. Accordingly, the Employer should not have been allowed to use the evidence obtained by Dr. Barnard for the purpose of bolstering its case during litigation, when sufficient evidence existed at the time the Department closed the claim.

**D. THE PLAINTIFF'S MOTION FOR A NEW TRIAL SHOULD  
HAVE BEEN GRANTED DUE TO JUROR IRREGULARITY.**

A new trial should have been granted based on juror irregularity. Having a mother and daughter serving on the same 6-person jury resulted in irregularity in the jury proceedings. A new should be granted when "the conduct or irregularity described establishes a reasonable doubt that

the plaintiff received a fair trial.” *Spratt v. Davidson*, 1 Wash.App. 523, 525 (1969). *Gardner v. Malone*, 60 Wash.2d 836 (1962), states that if it is reasonably doubtful whether improper conduct affected the verdict, the verdict should be set aside. *Gardner v. Malone*, 60 Wash.2d, 836 at 846.

When the jury returned the first time, they submitted a verdict that not only found Mr. Henderson entitled to a permanent partial disability award, but established an amount of what the award should be. Only after polling the jury did it become known that Juror 6 did not agree with that verdict, and instead agreed with her mother, Juror 2. Two other jurors indicated that in the jury room Juror 6 had voted in favor of the award. The fact that not only Juror 6 changed her opinion as to whether Mr. Henderson was entitled to a permanent partial disability award, but four other people did as well, provides reasonable doubt that the irregularity inherent in having two jurors who have a parent-child relationship serve on the same panel affected the verdict. This irregularity prevented Mr. Henderson from receiving a fair trial.

#### E. THE JURY’S VERDICT WAS NOT BASED ON SUFFICIENT EVIDENCE.

Considering the evidence at hand, Mr. Henderson should have been considered temporarily totally disabled for at least part of the time period at hand. On July 20, 2004, Dr. Thompson concluded that

Mr. Henderson was not capable of returning to his job of injury. (CABR, Johnson, 7/25/2006 at pp. 31-32). Mr. Henderson was recommended to undergo vocational retraining due to difficulty meeting the requirements of other jobs identified. (CABR, Johnson, 7/25/2006 at p. 32). Mr. Henderson was found to be employable only after November 4, 2004, and thus, should have been considered temporarily totally disabled until that time. (CABR, Gann, 7/25/2006 at p. 82). Mr. Henderson should also have been found permanently partially disabled with an impairment award up to 15%. Dr. Johnson did an exhaustive records review and thorough examination of Mr. Henderson and opined that Mr. Henderson had a 10% impairment due to his flexion contracture and an additional 5% for his chondromalacia patella, indicating a total right lower extremity impairment of 15%. (CABR, Johnson, 7/25/2006 at pp. 48-49).

## **VI. CONCLUSION**

In conclusion, Mr. Henderson's case should be remanded to Superior Court so that he may receive a new trial in front of a jury with the testimony of Dr. Barnard stricken from the record. Mr. Henderson has not been afforded a fair adjudication of his case at any lower level, due to the erroneous decision of the Board to allow the testimony of Dr. Barnard, an improper witnesses; an error which was compounded by the Superior

Court in denying Mr. Henderson's motion to strike. Mr. Henderson's rights were further affected at Superior Court due to the irregularity that resulted from two jurors sharing a close familial relationship. In order that the Act may be construed in favor of the injured worker, Mr. Henderson's case must be remanded so that a proper trial may take place.

Dated this 4<sup>th</sup> day of April, 2011.

Respectfully submitted,

VAIL, CROSS & ASSOCIATES

By:



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**CERTIFICATE OF MAILING**

11 APR -4 PM 2:51  
STATE OF WASHINGTON  
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SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 4th day of April, 2011, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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DATED this 4<sup>th</sup> day of April, 2011.

  
LYNN M. VENEGAS, Secretary