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I. Assignment of Error

A. Assignment of Error

The trial court erred in entering the order of October 2, 2014, granting the Self-Insured Employer's CR 35 Motion for Mental Health Evaluation and Remand to the Board of Industrial Insurance Appeals. The order compels Ms. Freeman to attend another forensic mental health exam under Civil Rule 35 with the Self-Insured Employer's medical witness after already attending an earlier forensic exam by the same medical witness.

B. Issue Pertaining to Assignment of Error

Is it error for a trial court to compel a mental health exam under Civil Rule 35 when the Self-Insured Employer failed to provide good cause for repeated examination by its medical witness while the matter is before the trial court on an appeal based upon a closed Board of Industrial Insurance Appeal record?

II. Statement of the Case¹

The order on appeal, which granted the Self-Insured Employer's (SIE) motion for a court ordered mental health exam under Civil Rule 35, was entered in the context of the SIE's appeal from a Board of Industrial Insurance Appeals decision in regards to Ms. Freeman's industrial insurance claim under Title 51 RCW, the Industrial Insurance Act. The order compels Ms. Freeman to attend another forensic mental health

exam with the SIE's medical witness after already attending an earlier forensic exam by the same medical witness.

Ms. Freeman sustained an industrial injury while working for Willapa Harbor Hospital (Self-Insured Employer or SIE) as a registered nurse.² Ms. Freeman filed a timely claim and was provided care and benefits under her claim.³ The care she received included surgery to repair a meniscus tear in her right knee.⁴ During the course of the claim, her attending provider raised the issue of a possible mental health condition in relation to her recovery.⁵ Before Ms. Freeman was able to seek treatment in regards to her mental health condition, the SIE scheduled and directed Ms. Freeman to attend a mental health examination by Richard Schneider, MD.⁶ The purpose of the exam was for assessment purposes only and, not for the purpose of providing Ms. Freeman treatment.⁷

¹ Citations to the Certified Board Record from the Board of Industrial Insurance Appeals are noted as CBR. Citations to Clerks Papers from Pacific County Superior Court are noted as CP.

² CBR 87 (Self-Insured Accident Report).

³ CBR Sherfey Dep. 7:5-25, 8:1-15.

⁴ Id.

⁵ CBR Meier Dep. at 5:10-13; CBR Schneider Dep. 19:24-20:1.

⁶ CBR Schneider Dep. 15: 2-19.

⁷ Id.

Ms. Freeman attended the exam. Dr. Schneider interviewed Ms. Freeman and reviewed Ms. Freeman's related medical records.¹ Based on his interview of Ms. Freeman and his review of the records, Dr. Schneider opined that Ms. Freeman had a pain disorder, but that it did not qualify as a mental disorder.² He also agreed with Ms. Freeman's attending physician that it would be helpful for Ms. Freeman to seek some assistance from a pain psychologist.³

Ms. Freeman subsequently sought psychological treatment from Monty Meier, PhD, a pain psychologist, as prescribed by both her attending physician and Dr. Schneider.⁴ Dr. Meier performed an evaluation of Ms. Freeman and diagnosed her with a mental health condition identified as pain disorder with both psychological factors and a general medical condition.⁵ Dr. Meier's evaluation was provided to the SIE. The SIE, in turn, shared Dr. Meier's records with Dr. Schneider and requested Dr. Schneider to produce an addendum to his prior report.⁶

¹ CBR Schneider Dep. 15: 2-23.

² CBR Schneider Dep. 30:20-25, 31:23-25, and 32:1-13.

³ CBR Schneider Dep. 43:25 and 44:1-12.

⁴ CBR Meier Dep. 5:10-13.

⁵ CBR Meier Dep. 9:18-25 and 10:1-2.

⁶ CBR 130-31 (Dr. Schneider Addendum Report).

Following review of Dr. Meier's notes, Dr. Schneider authored an addendum.¹ In his addendum, Dr. Schneider affirmed his prior opinion that Ms. Freeman's pain disorder was not a mental disorder and that Ms. Freeman's emotions were neither causing nor worsening her pain experience.²

The Department of Labor & Industries (Department) evaluated Dr. Schneider's report and addendum as well as Dr. Meier's records. Based upon the review, the Department issued an order denying coverage of Ms. Freeman's pain disorder.³

Ms. Freeman filed an appeal of the Department's decision with the Board of Industrial Insurance Appeals (Board).⁴ The appeal was accepted and the matter was assigned to a hearings judge.⁵ Ms. Freeman also obtained a review from a psychiatrist, Jeffery Hart, MD.⁶ The results of the review were provided to the SIE in a timely manner. The process and materials available to Dr. Hart were no different from the

¹ CBR 130-31 (Dr. Schneider Addendum Report).

² Id.

³ CBR 107-08 (Department of Labor and Industries Order dated 12/19/12).

⁴ CBR 110-13 (Notice of Appeal).

⁵ CBR 53 (Order Granting Appeal) and AR 56-60 (Interlocutory Order Establishing Litigation Schedule).

⁶ CBR Hart Dep. 6:15-24.

process and materials that were made available to the SIE and Dr. Schneider. That is, both Dr. Schneider and Dr. Hart had an opportunity to review the relevant medical records and examine Ms. Freeman.¹

While the matter was at the Board, the SIE filed a motion with the hearing's judge for an order compelling Ms. Freeman to attend and cooperate with a second exam with Dr. Schneider.² In their motion, the SIE alleged that it expected Ms. Freeman to argue her condition worsened after she was examined by Dr. Schneider the first time.³ The hearing's judge denied the SIE's motion as the issue before the Board was not whether Ms. Freeman's pain disorder worsened after seeing Dr. Schneider.⁴ Rather the issue in contention was whether Ms. Freeman's pain disorder should be accepted under the claim.⁵

The SIE filed an interlocutory appeal with the Board.⁶ The Board considered the SIE's appeal and denied review which effectively affirmed

¹ CBR Hart Dep. 7:9-25, 8:1-15, and 9:1-17; CBR Schneider Dep. 21:10-15.

² CBR 61-67 (Motion for CR 35 Examination).

³ Id.

⁴ CBR 151-53 (Interlocutory Order Denying Employer's Motion For CR35 Examination).

⁵ Id.

⁶ CBR 145-150. (Self-Insured Employer's Affidavit in Support of Petition for Interlocutory Review Pursuant to WAC 263-12-115(6)(a)).

the hearing's judge's ruling.¹ The matter proceeded forward through hearing.

Ms. Freeman presented her testimony along with her husband, and Drs. Meier and Hart. The SIE presented the testimony of three medical witnesses, including Dr. Schneider.² Through all the testimony in the record, no evidence or argument was raised regarding Ms. Freeman's pain disorder worsening after she was examined by Dr. Schneider. Nor are there any supplements to the record after the testimony of the medical and psychological or psychiatric witnesses that allege a worsening or other change of Ms. Freeman's pain disorder after she was examined by Dr. Schneider.

Based upon the testimony submitted on the record, the hearing's judge issued an order finding Ms. Freeman did have a mental health condition diagnosed as pain disorder that was proximately caused by her industrial injury covered by her claim.³ The judge's order was affirmed and adopted as the decision and order of the Board.⁴ The SIE appealed

¹ CBR 154 (Order Declining Review of Interlocutory Appeal).

² CBR R 27-44 (Proposed Decision and Order).

³ CBR 27-44 (Proposed Decision and Order) and AR 2 (Order Denying Petition for Review).

⁴ CBR 2. (Order Denying Petition for Review).

the Board's decision to Pacific County Superior Court pursuant to RCW 51.52.110.¹

The matter was set for trial to present the Board record to a jury.² Just prior to proceeding to trial, the SIE filed a motion under Civil Rule 35 for a court order compelling Ms. Freeman to attend another psychiatric exam with Dr. Schneider which was scheduled to be performed ten (10) days prior to the matter proceeding to trial.³ The motion was accompanied by an affidavit by the SIE's attorney that included the SIE's previous motion and argument from the Board level. Ms. Freeman filed a timely response arguing for denial of the SIE's motion. The trial court provided an opportunity for oral arguments and subsequently issued an order dated October 2, 2014, granting the SIE's CR 35 Motion for Mental Health Evaluation and Remand to the Board of Industrial Insurance

¹ Through this process, the courts have no original jurisdiction in the administration of the Act. Shufeldt v. Dep't of Labor & Indus., 57 Wn.2d 758, 359 P.2d 495 (1961) (citing Land v. Dep't of Labor & Indus., 34 Wn.2d 692, 698, 209 P.2d 380, 383 (1949) (citing DeStoop v. Dep't of Labor & Indus., 1 Wn.2d 340, 95 P.2d 1026 (1939))).

² While the parties to the appeal in superior court are entitled to a trial by jury, the decision on appeal is limited to only evidence or testimony that was provided on the record at the Board level. RCW 51.52.115. The appeal at the superior court level is heard *de novo*. However, the question before the court is limited to whether the Board acted within its power and has correctly construed the law and found the facts. *Id.* Based upon the Board record, the superior court is to either confirm the Board decision or reverse or remand the decision. *Id.*

³ CP 2-3 (SIE's Motion for CR 35 Exam at Pacific County Superior Court).

Appeals. Ms. Freeman's appeal before this court is to the October 2, 2014, order.

III. Summary of Argument

The SIE failed to provide good cause to support its motion for a court ordered mental health exam under Civil Rule 35 (CR 35) while the Board decision was on appeal at the superior court level, below. There is no evidence from Dr. Schneider or affidavit from any other source providing a medical basis for the SIE's need to attain a CR 35 exam at this late juncture. The SIE's assertion that the prior denial of their CR 35 exam at the Board level prejudiced its case is not supported by the record. An order granting a CR 35 exam without establishing good cause is an abuse of discretion and should be reversed.

IV. Argument

A court ordered mental health exam under Civil Rule 35 is not a mere discovery device subject only to the limits of the rules of discovery pursuant to Civil Rule 26 and 30 (Provisions related to discovery and depositions, respectively). Schlagenhauf v. Holder, 379 U.S. 104, 117-18, 13 L.Ed.2d 152, 85 S.Ct. 234 (1964) (quoting Bank of Greensboro v.

Shouther Ry. Co., 297 F.2d 921, 924 (C.A.4th Cir.)). Such a mental health exam requires the additional requirement of showing “good cause.” Id. As Justice Frankfurter noted in a dissenting opinion regarding the validity of the federal version of CR 35, the allowance of such court ordered exams serve as “a drastic change in public policy in a matter deeply touching the sensibilities of people even their prejudices as to privacy[.]” Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 18, 85 L.Ed. 479, 61 S.Ct. 422 (1941), Such an invasion of a person “stand[s] on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure and other devices for the expeditious, economic, and fair conduct of litigation.” Id.

To be granted a court ordered mental health exam under Civil Rule 35, the Self-Insured Employer (SIE) must show that the claimant’s mental or physical condition is (1) “in controversy” and (2) “good cause” exists for the evaluation.¹ The required showing that Ms. Freeman’s mental health is “in controversy” and the SIE has “good cause” for such an exam are:

- 1) not mere formalities, but must be affirmatively satisfied by the movant;
- 2) will not ordinarily be, but may be established by the pleadings alone; and

¹ CR 35(a).

- 3) repose discretion in the trial judge to decide whether they have been met in a particular case.

In re: Green, 14 Wn. App. 939, 546 P.2d 1230 (1976) (citing Schlagenhauf v. Holder, 379 U.S. 104, 13 L.Ed.2d 152, 85 S.Ct. 234 (1964) and finding the language of Civil Rule 35(a) substantially similar to Federal Rule of Civil Procedure 35(a)).

The Washington State Supreme Court has held that where the plaintiff had previously been examined at the request of the defendant, it was not an abuse of discretion to deny the motion without some additional showing of changed circumstances. Shumway v. Marion, 155 Wash. 60, 283 P. 444 (1929). Nor is it an abuse of discretion for a trial judge to refuse to order a psychiatric examination after trial has begun. Tietjen v. Department of Labor and Industries, 13 Wash.App. 86, at 91, 534 P.2d 151 (1975). In this case, Ms. Freeman respectfully notes that, much like in Tietjen, the parties already fully litigated the allowance of Ms. Freeman's mental health condition before the Board. The order from which Ms. Freeman appeals compels her to attend a forensic exam that was granted as part of the SIE's appeal of the Board's decision before Pacific County Superior Court.

A. Standard of review

The standard of review for discretionary decisions is whether there is a clear showing of an abuse of discretion through arbitrary and capricious action. Tietjen v. Department of Labor and Industries, 13 Wash.App. 86, 91, 534 P.2d 151 (1975). Ms. Freeman, as the appellant, asserts that in light of the substance of the SIE's motion and the administrative record, no reasonable person would find good cause to order Ms. Freeman to attend a second mental health exam by the SIE's medical witness in the matter below.

B. The SIE failed to establish good cause for a CR 35 exam.

The order under appeal compels Ms. Freeman to attend a second mental health exam by Dr. Schneider, the SIE's testifying medical witness. The basis of the SIE's motion, below, alleged (1) the SIE was not provided an opportunity to update the claimant's mental health condition prior to the Department issuing an order denying Ms. Freeman's mental health condition and (2) that they were denied due process when the Board did not allow its expert witness, Dr. Schneider, the opportunity to expand his knowledge base for the formation of his professional opinions regarding claimant's mental health condition. Here, the record fails to support the

SIE's assertions or establish a basis for finding good cause for ordering Ms. Freeman to attend a repeated psychiatric exam with Dr. Schneider.

First, there is no medical opinion or request from Dr. Schneider or any other medical provider that articulates a need for Dr. Schneider to examine Ms. Freeman again. Secondly, the SIE's assertions regarding being prejudiced by the Board's prior denial of the SIE's motion is not supported by the record. Furthermore, the SIE failed to show a change in circumstances between the time that they first filed their motion before the Board and the time that they filed their motion in their appeal before the trial court that would warrant the trial court's order compelling Ms. Freeman to attend a mental health exam at this late juncture.

a. The Board Record fails to support SIE's need for a repeat exam by Dr. Schnieder.

Ms. Freeman respectfully notes that the issue that was litigated at the Board was whether Ms. Freeman had a mental health condition diagnosed as pain disorder as caused by her industrial injury while working for the SIE. The issue was not whether Ms. Freeman's mental health condition progressed after seeing Dr. Schieder, as the SIE

contends. As to the issue that was litigated at the Board, the SIE already had the information it needed to present its case.

The Board record shows that Dr. Schneider was provided an opportunity to examine Ms. Freeman at the SIE's request. In addition to performing an in-person exam of Ms. Freeman, Dr. Schneider was provided with Ms. Freeman's medical records and the written opinions of all of Ms. Freeman's medical witnesses. Furthermore, Dr. Schneider also had the opportunity to review the testimony of Ms. Freeman and her witnesses, including her medical witnesses.

While the SIE asserted a need to update the claimant's mental health condition, they provide no medical opinion or request from Dr. Schneider or any other medical opinion that supports such a need. The lack of any affirmative showing by the SIE for a need to update Ms. Freeman's mental health condition supports a finding that such an update is irrelevant to the question that was litigated – that is, whether Ms. Freeman had a mental health condition diagnosed as pain disorder as caused by her industrial injury while working for the SIE. Without a supportive affidavit from Dr. Schneider indicating a basis for a medical need to reexamine Ms. Freeman, the SIE's assertion is merely a conclusory allegation. A conclusory allegation falls short of an affirmative

showing of good cause by the SIE. In re: Green, 14 Wn. App. 939, 942, 546 P.2d 1230 (1976).

b. The Board Record supports a finding that the SIE was provided due process in that it was provided ample opportunities to present an argument in support of a repeated exam by Dr. Schneider

The SIE also asserts that it was denied due process while the matter was before the Board. However, the record shows the SIE was provided several opportunities to present argument to articulate a need for an additional or updated medical exam by Dr. Schneider at the Board level when the time was ripe for such an issue to be raised.

The SIE was provided an opportunity to note and be heard regarding its motion for a CR 35 exam at the Board level. The SIE had access to Ms. Freeman's medical records, which included her related psychological progress notes. The SIE was also provided the written report from Ms. Freeman's own forensic psychiatric review. The SIE filed an affidavit with exhibits and written argument to the Board. The SIE was also provided time for oral arguments on its motion before a hearing's judge. After having its motion denied, the SIE was provided an opportunity to file an interlocutory appeal to the Board. The SIE filed

additional argument in support of their appeal.¹ Since the SIE had multiple opportunities to have their arguments considered, it cannot be said that SIE was denied due process. The SIE fails to provide any evidence that it was denied the opportunity to be heard. Therefore, its allegations regarding denial of due process are unfounded and cannot support a finding of good cause which would be sufficient to require Ms. Freeman to be subjected to another mental health exam by Dr. Schneider. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 143 P.3d 571 (2006) (Procedural Due Process requires notice and an opportunity to be heard to guard against erroneous deprivation.).

While the SIE lost at the Board level, it cannot be said that it was not provided notice and opportunity to be heard regarding its motion to attain a repeat examination of Ms. Freeman by Dr. Schneider. As noted above, the SIE also had the advantage of presenting its case after Ms. Freeman. The benefit of following Ms. Freeman's case included the opportunity to share the testimony of Ms. Freeman and Ms. Freeman's medical witnesses with Dr. Schneider. This advantage was used by SIE

¹ CBR 145-150. (Self-Insured Employer's Affidavit in Support of Petition for Interlocutory Review Pursuant to WAC 263-12-115(6)(a)).

when it chose to share the testimony of Ms. Freeman's medical witnesses with Dr. Schneider in preparation of his testimony before the Board.¹

c. The SIE failed to establish a change in circumstances that warrants allowance for a CR 35 exam at this time.

While the parties to the appeal in superior court are entitled to a trial by jury, the decision on appeal is limited to only evidence or testimony that was provided on the record at the Board level. RCW 51.52.115. The appeal at the superior court level is heard *de novo*. However, the question before the court is limited to whether the Board acted within its power and correctly construed the law and found the facts. *Id.*

The SIE's motion for a CR 35 exam before Pacific County Superior Court was, in effect, a refiling of its prior motion for a court ordered exam at the Board level. While a court ordered exam may be warranted when the movant is able to show a change in circumstances, a review of the SIE's renewed motion and affidavit shows the SIE failed to show any change of circumstances since the Board issued its final order in the matter, below. Shumway v. Marion, 155 Wash. 60, 283 P. 444 (1929). Without any such showing, the SIE's motion for a mental health exam

¹ Schneider Dep. 11:11-24; 12:1.

after the matter had proceeded through a full hearing at the Board should have also been denied.

The underlying issue on appeal is still whether Ms. Freeman had a mental health condition diagnosed as pain disorder as caused by her industrial injury while working for the SIE. No new evidence was offered nor has come to light that speaks to the issue that was litigated below. Nor, is it conceivable that any change in Ms. Freeman's mental health condition would be relevant to the issue that was litigated below.

Furthermore, the record that was under review by Pacific County Superior Court undermines the SIE's allegations that Ms. Freeman argued her condition worsened, or changed in any way, after seeing Dr. Schneider. As such, the SIE's assertion regarding a change in circumstances is not supported by the record and was merely a conclusory allegation. As noted earlier, a conclusory allegation falls short of an affirmative showing of good cause by the SIE. In re: Green, 14 Wn. App. 939, 546 P.2d 1230 (1976).

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V. Conclusion

The issue in contention at the superior court level was whether the Board correctly found Ms. Freeman's mental health condition, diagnosed as a pain disorder, was proximately caused or aggravated by the industrial injury. The SIE failed to establish that the Board abused its discretion when it denied the SIE's earlier motion for a CR 35 exam as the SIE already had a mental health exam preformed at its request. As to the SIE's motion in Superior Court for a CR 35 exam, the SIE failed to establish any evidence of a change of circumstances warranting a court ordered exam. For these reasons, the order granting the SIE's motion for CR 35 examination must be reversed. This matter should be remanded back to Pacific County Superior Court with instruction to proceed forward with the SIE's appeal pursuant to RCW 51.52.115.

Dated this 20th day of January, 2015.

Respectfully submitted,
Atlas Law, P.S.

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I, Michelle L. Roe, hereby certify that I mailed the foregoing Court of Appeals Appellant Opening Brief to the following individual(s) on the date shown by causing to be mailed to said individual(s) the original, certified by me as such, contained in a sealed envelope, with postage prepaid, addressed to said individual(s) at the address below, to wit:

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