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COURT OF APPEALS  
DIVISION II  
2015 FEB 20 PM 2:09  
STATE OF WASHINGTON  
BY:                       
DEPUTY

NO. 46874-3-II

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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

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KRISTI FREEMAN,

Appellant,

v.

WILLAPA HARBOR HOSPITAL AND DEPARTMENT OF LABOR  
AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

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**BRIEF OF RESPONDENT WILLAPA HARBOR HOSPITAL**

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 ORIGINAL

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## **I. INTRODUCTION**

Respondent, Willapa Harbor Hospital,<sup>1</sup> provided good cause for its request for a Civil Rule 35 (CR 35) mental health evaluation. Therefore, the Superior Court did not abuse its discretion in granting Respondent's request for a CR 35 Mental Health Evaluation and this Court must affirm the Pacific County Superior Court's Order Granting CR 35 Motion for Mental Health Evaluation.

## **II. STATEMENT OF THE ISSUE**

Whether the Pacific County Superior Court abused its discretion in deciding that there was good cause for a CR 35 mental health examination.

## **III. STATEMENT OF THE CASE**

On March 11, 2011, while employed with Willapa Harbor Hospital as a registered nurse, Ms. Freeman sat down at a nurse's station to do some charting and as she sat down, the chair came out from underneath her and she fell down, injuring her right knee.<sup>2</sup>

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<sup>1</sup> Willapa Harbor Hospital is a Self-Insured Employer for purposes of workers' compensation.

<sup>2</sup> CBR 28 (Citations to the Certified Appeal Board Record from the Board of Industrial Insurance Appeals are noted as CBR).

Ms. Freeman filed a workers' compensation claim and during the course of the claim the issue of a possible mental condition being related to the knee claim arose.<sup>3</sup>

A mental health examination was performed at the request of the Self-Insured Employer on 7/31/12 by Richard Schneider, M.D.<sup>4</sup> Thereafter, Ms. Freeman was evaluated by Monty Meier, Ph.D on 9/25/12.<sup>5</sup> Among other conclusions, Dr. Meier offered the opinion (in a report) that Ms. Freeman suffered from a mental health condition causally related to the industrial injury.<sup>6</sup> This report was provided to the Self-Insured Employer by counsel for Ms. Freeman under a cover letter dated 10/9/12.<sup>7</sup> At that point in time (i.e. 10/9/12), there was a difference of opinion between Dr. Schneider and Dr. Meier.<sup>8</sup> Dr. Meier saw and evaluated Ms. Freeman on multiple occasions after his initial evaluation on 9/25/12.<sup>9</sup>

On 10/9/12, Ms. Freeman's attorney sought intervention (via a letter) from the Department of Labor and Industries (Department) requesting an order directing allowance of a mental health condition under

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<sup>3</sup> CBR 138 (page 1).

<sup>4</sup> CBR 138 (page 1).

<sup>5</sup> CBR 138 (page 2).

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

the claim.<sup>10</sup> In response to Ms. Freeman's attorney's letter, the attorney for the Self-Insured Employer wrote to the Department on 10/19/12 indicating that the Self-Insured Employer intended to schedule another evaluation with Dr. Schneider to evaluate the issue of possible worsening or change in condition alluded to by Dr. Meier.<sup>11</sup>

On 12/11/12, the Self-Insured Employer received a correspondence from Dr. Meier indicating that he had seen Ms. Freeman six times since 9/25/12 and recommended continued evaluation and treatment.<sup>12</sup>

On 12/19/12 the Self-Insured Employer notified Ms. Freeman that an evaluation with Dr. Schneider was scheduled for 12/26/12 in Olympia, Washington.<sup>13</sup> On 12/19/12, the Department entered an order indicating that the Self-Insured Employer is not responsible for the pre-existing condition diagnosed as pain disorder with a general medical condition.<sup>14</sup> On 12/21/12, Ms. Freeman's attorney notified the Self-Insured Employer that Ms. Freeman would not attend the 12/26/12 evaluation with Dr. Schneider.<sup>15</sup> On 1/23/13, Ms. Freeman filed her Notice of Appeal (to

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<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> CBR 139 (page 3).

<sup>14</sup> CBR 139 (page 3); CBR 107.

<sup>15</sup> CBR 139 (page 3);

the Board of Industrial Insurance Appeal) from the Department Order dated 12/19/12.<sup>16</sup>

On 3/8/13 the attorney for the Self-Insured Employer received a report from a psychiatrist by the name of Jeffrey Hart, M.D, indicating he performed a legal evaluation on 2/8/13 at the request of Ms. Freeman's attorney.<sup>17</sup> Dr. Hart indicated (in his report), among other things, that Ms. Freeman's (mental) condition had allegedly worsened since the evaluation performed by Dr. Schneider on 7/31/12.<sup>18</sup>

While Ms. Freeman's appeal to the Department's 12/19/12 order was pending before the Board of Industrial Insurance Appeals, the Self-Insured Employer filed a Motion for a CR 35 Examination on April 16, 2013.<sup>19</sup> An "Interlocutory Order Denying Employer's Motion For CR 35 Examination" was entered on May 7, 2013.<sup>20</sup>

The Self-Insured Employer filed a Petition for Interlocutory Review to the "Interlocutory Order Denying Employer's Motion For CR 35 Examination" on May 8, 2013.<sup>21</sup> On May 13, 2013 an "Order Declining Review Of Interlocutory Appeal" was issued.<sup>22</sup>

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<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> CBR 61-62.

<sup>20</sup> CBR 134-135.

<sup>21</sup> CBR 137-140.

<sup>22</sup> CBR 154.

On October 17, 2013, a Proposed Decision and Order was issued wherein it found Dr. Schneider not to be as persuasive as the Claimant's witnesses, reversed the 12/19/12 Department's Order, and directed the Department to issue a new order accepting, under the claim, pain disorder with a general medical condition and psychological factors.<sup>23</sup>

The Self-Insured Employer filed a Petition for Review on 12/3/13 to the 10/7/13 Proposed Decision and Order.<sup>24</sup> An "Order Denying Petition For Review" was entered on 12/18/13.<sup>25</sup> The Self-Insured Employer filed a Notice of Appeal to Pacific County Superior Court on 1/15/14 and then filed an Amended Notice of Appeal on 1/31/14.<sup>26</sup>

On 9/11/14, the Self-Insured Employer filed a Motion for CR 35 Examination in Pacific County Superior Court.<sup>27</sup> Ms. Freeman filed a Response to the Self-Insured Employer's Motion for CR 35 Examination.<sup>28</sup> After considering the substance of the motion, arguments of counsel, and being otherwise fully advised, an Order Granting CR 35 Motion For Mental Health Evaluation and Remand to the Board Of Industrial Insurance Appeals was entered by the Court on 10/3/14.<sup>29</sup>

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<sup>23</sup> CBR 27-43.

<sup>24</sup> CBR 4-20.

<sup>25</sup> CBR 2.

<sup>26</sup> CP 1.

<sup>27</sup> CP 2-3.

<sup>28</sup> CP 21-31.

<sup>29</sup> CP 32-33.

#### IV. ARGUMENT

**A. The Self-Insured Employer Satisfied the Requisite Elements of Civil Rule 35 (CR 35) and therefore the Order Granting the CR 35 Motion is Correct.**

The two fundamental requirements for a court to grant a CR 35 motion are 1) that the Claimant's physical or mental condition is in controversy and 2) good cause exists for the CR 35 examination. *See* CR 35. The first requirement has been met and is not seriously in dispute by any party in this matter.

Regarding good cause, the Self-Insured Employer has shown that it was not given a full and fair opportunity to evaluate Ms. Freeman, pursuant to its statutory right under RCW 51.32.110, and therefore has been substantially prejudiced to the point where it could not realistically defend itself against the new assertions of Ms. Freeman's witnesses. The Self-Insured Employer believes that the adverse Board of Industrial Appeal's Decision is primarily a result of the denial of the Employer's Motion for a CR 35 Examination at the Board of Industrial Insurance Appeals.

More specifically, subsequent to Dr. Schneider's 7/31/12 mental evaluation of Ms. Freeman, on or around 10/9/12, new, important information pertaining to Ms. Freeman's mental status was received by the Self-Insured Employer from Ms. Freeman's lawyer. The new information

indicated that Ms. Freeman had a mental condition that was causally related to the claim and there was information that led the Self-Insured Employer to believe that Ms. Freeman's mental status had worsened or changed since the 7/31/12 evaluation with Dr. Schneider. It was thought, that the worsening, through the manifestation of reportedly new symptoms, could point to facts that support allowance of a mental condition under the claim. In order to appropriately address this new information, the Self-Insured Employer commenced preparations, pursuant to its statutory right under RCW 51.32.110, to have Ms. Freeman attend a mental examination to address Dr. Meier's assertions.

At or around the time that Dr. Meier had generated his report, Ms. Freeman's attorney sought intervention from the Department requesting an order directing allowance of a mental condition under the claim. In response to Ms. Freeman's attorney's request, the Employer notified the Department that the Self-Insured Employer intended to schedule an updated evaluation with Dr. Schneider to evaluate the issue of possible worsening (or new symptoms) or change in condition alluded to by Dr. Meier.

On 12/11/12, the Self-Insured Employer received information from Dr. Meier indicating that he had seen Ms. Freeman six times since 9/25/12 and recommended continued evaluation and treatment.

On 12/19/12, the Self-Insured Employer notified Ms. Freeman that an evaluation with Dr. Schneider was scheduled for 12/26/12 in Olympia, Washington. Unfortunately, on the same day (12/19/12), before the Employer had a chance to have Ms. Freeman evaluated, the Department issued an order denying responsibility for the pain disorder.

On 12/21/12, Ms. Freeman's attorney notified the Self-Insured Employer that Ms. Freeman would not attend the evaluation with Dr. Schneider on 12/26/12. Moreover, Ms. Freeman's lawyer retained a psychiatrist by the name of Jeffrey Hart, M.D. who performed a medical/legal evaluation on 2/8/13. In the medical/legal evaluation, Dr. Hart indicated that Ms. Freeman's mental condition had allegedly worsened since the evaluation performed by Dr. Schneider on 7/31/12.

While Ms. Freeman's appeal to the Department's 12/19/12 order was pending before the Board of Industrial Insurance Appeals, the Self-Insured Employer filed a Motion for a CR 35 Examination on April 16, 2013<sup>30</sup> because it believed that in order for Dr. Schneider to render a well-informed opinion, he would have to assess the new symptoms himself. An "Interlocutory Order Denying Employer's Motion For CR 35 Examination" was entered on May 7, 2013.<sup>31</sup>

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<sup>30</sup> CBR 61-62.

<sup>31</sup> CBR 134-135.

On October 17, 2013, a Proposed Decision and Order was issued wherein it found Dr. Schneider not to be as persuasive as the Claimant's witnesses, reversed the 12/19/12 Department's Order, and directed the Department to issue a new order accepting, under the claim, pain disorder with a general medical condition and psychological factors.

In summary, good cause exists because the Self-Insured Employer was not given a fair and reasonable opportunity to have an appropriate provider evaluate the new information generated by Drs. Meier and Hart. Without actually interviewing Ms. Freeman, to assess whether or not her conditions have changed, the testimony of a one-time examiner who is not entitled to special consideration is of little value and practically renders a Self-Insured Employer defenseless to claims for benefits pertaining to the mental condition alleged. Here, the Employer's concerns manifested in the form of an adverse Board decision.

**B. The Board Record Supports the Self-Insured Employer's Need for an Updated Examination with Dr. Schneider.**

First, in an attempt to show that the Board Record does not support the Self-Insured Employer's need for a CR 35 exam, Ms. Freeman argues that the issue before the Board was not whether Ms. Freeman's mental health condition progressed after seeing Dr. Schneider but rather whether she had a mental condition at all. However, what Ms. Freeman fails to appreciate

is that Dr. Schneider's ability to provide a persuasive opinion must be based on the most accurate information. And since Ms. Freeman did not allow herself to be examined by Dr. Schneider after the manifestation of the new symptoms, it calls into question the persuasiveness of Dr. Schneider's opinion regarding whether or not Ms. Freeman has a mental condition related to this claim. Ultimately, Ms. Freeman's conduct creates an unfair advantage and renders the Employer more susceptible to adverse decisions, such as the one received in this case by the Board.

Ms. Freeman incorrectly asserts in her brief that "the Board record fails to support the Self-Insured Employer's need for a repeat exam by Dr. Schneider."<sup>32</sup> A careful review of the Board record elucidates the fact that the presentation of Ms. Freeman's mental symptoms appear to have deteriorated between Dr. Schneider's examination and Dr. Meier's examination.

Specifically, Dr. Schneider notes that when he examined Ms. Freeman (on 7/31/12) she did not have any *suicidal ideations* and she was still motivated to try to get better and to work.<sup>33</sup> Additionally, Dr. Schneider notes that when he examined her "[s]he did not have *agitation* or retardation of her activities. Her *concentration* had not slipped. She did not have short-term *memory difficulties*, psychological *sleep disruption*

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<sup>32</sup> App. Br. At 14.

<sup>33</sup> Schneider Tr. at 23.

like nightmares or *panic attacks*, racing thoughts, *no guilt feelings* or any other neuro-vegetated signs . . . .”<sup>34</sup> (Emphasis added).

In contrast, Dr. Meier conceded on cross-examination that on September 20, 2012, Ms. Freeman reported “anger, anxiety and nervousness, . . . career concerns, confusion, depression, emptiness, failure, low energy, fears, phobias, money troubles, *guilt*, headaches and pains, health, illness and medical, interpersonal conflicts, impulsiveness and outbursts . . . loneliness, marital conflict, *memory problems* . . . *panic/anxiety attacks*, relationship problems, *sleep problems*, stress/tension, suspiciousness, *suicidal thoughts*, *temper problems*, weight and diet issues, withdrawal/isolating and work problems.”<sup>35</sup> (Emphasis added). Dr. Meier’s subsequent findings clearly are materially different and ostensibly worse than Dr. Schneider’s findings.

Ultimately, without being able to have the abovementioned new symptoms directly assessed by Dr. Schneider, his opinion is clearly at a disadvantage to providers that subsequently were given access to Ms. Freeman herself.

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<sup>34</sup> Id.

<sup>35</sup> Meier Tr. at 25-26.

**C. The Self-Insured Employer Was Denied Due Process.**

Ms. Freeman incorrectly alleges that the Self-Insured Employer was not denied due process. The Self-Insured Employer has a legal right pursuant to RCW 51.52.110 to examinations from time to time. Here, the Self-Insured Employer exercised its right by scheduling Dr. Schneider's 12/26/12 examination with Ms. Freeman. However, before the Self-Insured Employer was able to obtain that examination, the Department of Labor and Industries issue an order that helped preclude the Self-Insured Employer from obtaining the examination. The inability to obtain the 12/26/12 examination has ultimately led to an opinion from Dr. Schneider that was unpersuasive to the Board and an entitlement to benefits to which the Self-Insured Employer is responsible.

**D. A Change in Circumstances is Not Required Under CR 35.**

Ms. Freeman argues that because she believes that the Self-Insured Employer failed to show a change in circumstances, therefore the Self-Insured Employer is not entitled to a CR 35 Examination. First, a CR 35 examination does not require a change of circumstance. And even assuming *arguendo* that it did, the facts here do show a change in circumstances.<sup>36</sup> Specifically, the symptoms reported between the time

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<sup>36</sup> See Schneider Tr. at 23; Meier Tr. at 25-26.

that Dr. Schneider saw the Claimant and the time that Dr. Meier saw the Claimant are materially different.

Additionally, the case that Ms. Freeman cites to support her arguments on this point, *Shumway v. Marion*, 155 Wash. 60, 283 Pac. 444 (1929) is factually distinguishable from this case in that *Shumway* involved a personal injury case. Moreover, *Shumway* does not stand for the principle that a change in circumstance is required.

Regarding Ms. Freeman's references to *In re Welfare of Green*, 14 Wn. App. 939, 546 P.2d 1230 (1976) and her corresponding assertion that the Self-Insured Employer's allegations regarding change in circumstance are conclusory and therefore fall short of an affirmative showing, again, as noted above, the record demonstrates that the Self-Insured Employer's assertions are not conclusory.<sup>37</sup> Moreover, even if the Self-Insured Employer's allegations were conclusory on this point, the Court *In re Welfare of Green*, 14 Wn. App. 939, 942-943, 546 P.2d 1230 (1976), stated (regarding conclusory statements), "[t]his does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be

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<sup>37</sup> *Schneider Tr. at 23; Meier Tr. at 25-26.*

necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing.”

Ultimately, Ms. Freeman’s arguments on this point are without merit.

**E. The Trial Court Did Not Abuse its Discretion in Granting the Motion for a CR 35 Examination.**

The standard of review for discretionary decisions, such as the granting of a motion for a CR 35 examination, is whether there is a clear showing of an abuse of discretion through arbitrary and capricious action. *Tietjen v. Department of Labor and Indus.*, 13 Wn. App. 86, 91, 534 P.2d 151 (1975).

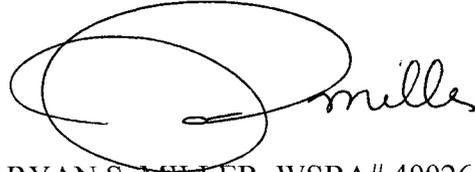
Here, Ms. Freeman has simply failed to provide a clear showing of arbitrary and capricious action by the Superior Court. It cannot seriously be argued, that in light of the facts of this case, that no reasonable person would find good cause to grant the CR 35 motion.

**V. CONCLUSION**

For the reasons articulated above, the Self-Insured Employer respectfully requests that this Court find that the Superior Court did not abuse its discretion and thereby affirm the Pacific County Superior Court’s Order Granting CR 35 Motion for Mental Health Evaluation.

RESPECTFULLY SUBMITTED this 19 day of February,

2015.

A handwritten signature in black ink, consisting of a large, stylized loop followed by the name "Miller" written in a cursive script.

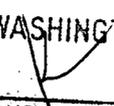
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CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served Brief of Respondent Willapa Harbor and this Certificate of Service in the below described manner:

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