

NO. 48206-1-II

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

REYMUNDO FELIPE,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

For seven decades the courts have required industrial insurance claimants seeking to reopen their claims to present medical testimony that objective findings show that their physical injuries have worsened. Reymundo Felipe struck his head and sustained a traumatic brain injury. When, as here, there are only physical conditions at issue in an “aggravation” case, it is proper to instruct the jury that the worker’s aggravation claim must be supported at least in part by objective findings.

Felipe appears to be arguing that the instruction should not be given because he believes a traumatic brain injury is like a psychological injury, with a contention that it “may” only have subjective symptoms. This theory is not supported by the case law: the objective evidence requirement uniformly applies to physical injuries. It is also not supported by the record: the evidence was that the injury was a physical one, with objective testing available and used. Even assuming there is a distinction in the law among different types of physical injuries, Felipe presented no evidence that a traumatic brain injury only produces subjective symptoms and thus, there is no reason the requirement that there be objective evidence of worsening should not apply to his claim. This Court should affirm.

II. STATEMENT OF THE ISSUES

1. Instruction No. 14 advised the jury that a worker must present objective evidence of worsening to support an application to reopen a claim. Did Instruction No. 14 contain a correct statement of the law when the only issue in this matter was whether a physical condition worsened?
2. May Felipe receive an award of attorney fees on appeal when RCW 51.52.130 provides for an award only if a decision of the Board is reversed and a fund managed by the Department is impacted by the litigation, and when Felipe should not prevail on appeal and, in any event, cannot receive any remedy beyond a remand even if this Court accepts his legal arguments?

III. STATEMENT OF THE CASE

In April 2011, Felipe applied for benefits for an industrial injury. BR 31.¹ The Department of Labor and Industries allowed the claim, provided benefits, and closed the claim on May 9, 2012. BR 31. The Department denied Felipe's attempt to reopen his claim on August 7, 2013. BR 32. He appealed to the Board of Industrial Insurance Appeals. At the Board, the issue was whether Felipe's condition worsened between May 9, 2012, and August 7, 2013.² BR 34.

¹ "BR" refers to the certified appeal board record. Witness testimony is referenced by last name.

² To reopen a claim, an injured worker must prove worsening between two specific dates, known as "terminal dates." RCW 51.32.160(1)(a). The first terminal date is the date of the last previous closure or denial of a reopening application. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). The second terminal date is the date of the most recent closure or denial of a reopening application; practically speaking, it is the date of the order currently on appeal. *Id.* Here, the first terminal date was May 9, 2012, because this was the date of claim closure. BR 31. The second terminal

A. After Felipe's Concussion Resolved, the Department Closed His Claim

Felipe was injured after working on drywall repair atop what he believed to be an eight-foot ladder in April 2011. BR Felipe 10-11. While Felipe does not remember exactly what happened next, he later awoke in a hospital. BR Felipe 12-13. He had scratches on his elbow and head pain. BR Felipe 14-15. Subsequently, two CAT scans were taken of Felipe's head, both of which were negative. BR Sukachevin 20, 33.

Dr. Jon Sukachevin is Felipe's attending physician and first saw Felipe in November 2011. BR Sukachevin 8. Felipe told Dr. Sukachevin that his headaches had been occurring since April 2011 and had been increasing in pain. BR Sukachevin 10. As a result, Dr. Sukachevin diagnosed Felipe with a concussion caused by the April 2011 injury. BR Sukachevin 11.

Dr. Sukachevin referred Felipe to a psychologist, who referred Felipe to a brain injury specialist due to suspicion of a traumatic brain injury. BR Sukachevin 19. According to Dr. Sukachevin, an unspecified neurologist thought that Felipe's headaches were consistent with post-concussive syndrome. BR Sukachevin 20. However, Dr. Sukachevin also

date was August 7, 2013, because this was the date the Department rejected the reopening application. BR 32.

noted that Felipe's headaches resolved at the end of 2011. BR Sukachevin 20. The Department closed the claim in the claim in May 2012. BR 31.

B. The Medical Witnesses Disputed Whether Felipe's Physical Condition Worsened After Claim Closure

In October 2012, Dr. Sukachevin helped Felipe fill out a reopening application, where he noted that Felipe had symptoms of headache, dizziness, memory problems, fatigue, and depression. BR Sukachevin 24-25. An MRI was performed on Felipe on November 17, 2012. BR Sukachevin 26. According to Dr. Sukachevin, a radiologist reviewing the MRI indicated that the images showed "punctate blooming artifacts, subcortical white matter, white frontal lobe, suspicious for an area of remote small hemorrhage." BR Sukachevin 39. However, Dr. Sukachevin did not review the actual MRI scan itself. BR Sukachevin 39.

At his deposition, Dr. Sukachevin was asked whether Felipe's closed head injury had worsened between May 9, 2012, and August 7, 2013. BR Sukachevin 25-26. Dr. Sukachevin responded that a fainting session for Felipe was striking, that Felipe's headaches had worsened, and that an MRI report showed a possible hemorrhage in the brain. BR Sukachevin 26. Dr. Sukachevin diagnosed Felipe with a traumatic brain injury secondary to the April 2011 injury, which he based on the MRI report of November 2012. BR Sukachevin 27. Dr. Sukachevin did not,

however, opine as to whether Felipe's postconcussive syndrome worsened, or that it was present after claim closure. BR Sukachevin 20.

Dr. Sukachevin did not testify that a traumatic brain injury was a psychological condition, or similar to a psychological condition. BR Sukachevin 19, 22, 25, 27. He did not testify that a traumatic brain injury does not have objective findings. BR Sukachevin 19, 22, 25, 27. Nor did he testify that postconcussive syndrome does not have objective findings. BR Sukachevin 20. Instead, he pointed to the MRI as objective evidence that he felt supported his opinion of worsening. BR Sukachevin 26.

Dr. William Stump is a neurologist who performed an independent medical examination of Felipe in January 2013. BR Stump 6, 10. Dr. Stump reviewed Felipe's medical records, including the records of Dr. Sukachevin, and the actual images from an MRI taken in November 2012. BR Stump 14-15. In addition, he performed a neurological examination, and found Felipe's cranial nerves, motor function, and coordination to be normal. BR Stump 19. Dr. Stump concluded that Felipe had a closed head injury as a result of the industrial injury, which had resolved, and that Felipe most likely had a concussive syndrome as a result of the injury, but that had resolved. BR Stump 20.

Dr. Stump concluded that the report of a "punctate blooming artifact subcortical white matter right frontal lobe suspicious for an area of

remote small hemorrhage,” on the MRI was small and unclear as to what it was, but it was not a hemorrhage. BR Stump 26-27, 29. Dr. Stump had reviewed the actual DVD imaging of the MRI and did not rely on the report of the radiologist. BR Stump 15. Dr. Stump concluded that, between the dates of May 9, 2012, and August 7, 2013, Felipe’s condition had not measurably worsened or continued. BR Stump 32.

The industrial appeals judge issued a proposed decision and order that affirmed the Department order denying the reopening application. BR 19. Felipe petitioned for review of the proposed decision. BR 5-13. The Board adopted the proposed decision and order. BR 1.

C. At Superior Court, the Court Gave the Objective Findings Instruction Because The Injury Was a Physical One, Not a Psychological One

The superior court instructed the jury that the law required objective findings in part to prove aggravation:

Aggravation of Reymundo Felipe’s industrially related condition and the extent of Reymundo Felipe’s increased disability on the date of claimed aggravation must be supported by medical testimony based at least in part upon one or more objective findings.

Statements of complaints by the worker made to a physician are called subjective complaints. Findings of disability that can be seen, felt, or measured by an examining physician are called objective findings.

In determining whether aggravation has occurred and the extent of any resulting increased disability, a

physician cannot rely solely upon complaints, but must have some objective basis for his or her opinion. On the other hand, a physician need not rely solely upon objective findings. If there are objective findings, then the physician may also consider subjective complaints.

CP 38 (Ins. No. 14). Felipe objected to this instruction. RP 8. Felipe argued that, “I think that a closed head injury is comparable to another mental condition as well as other bodily conditions that cannot be—cannot be measured in terms of having the—being supported by objective findings.” RP 9. Felipe also noted that, “We do have a MRI in this case which does show something, but is—is arguably inconclusive. And that’s the closest thing we have to an objective finding.” RP 9. Felipe did not argue that a psychological condition was at issue. Indeed, the Department acknowledged that it would be inappropriate to give Instruction No. 14 to the jury if a psychological condition was at issue, but explained that it was appropriate in this case because the case involved only physical conditions. RP 10-11.

Felipe did not rebut the Department’s statement that the case did not involve any psychological conditions at superior court. Acknowledging the psychological exception but finding it not pertinent in this case because no psychological conditions were at issue in the case, the court gave Instruction No. 14. RP 12-14. In his closing arguments to the jury, Felipe never argued that a psychological condition was at issue.

IV. STANDARD OF REVIEW

At superior court, the Board's decision is presumed correct, and the party challenging that decision, here Felipe, carries the burden on appeal to the superior court. RCW 51.52.115; *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36, 357 P.3d 625 (2015). The trial court considers de novo whether the Board's order is correct and a jury may consider the matter. RCW 51.52.115.

In an appeal from a superior court's decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *Raum v. City of Bellevue*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012). This Court reviews the decision of the trial court rather than the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140.³

The appellate court reviews de novo questions of law in jury instructions. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). However, the trial court has broad discretion when deciding how to word jury instructions. *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985). Similarly, the decision whether to give a particular instruction is also within the discretion of the trial court.

³ The Washington Administrative Procedure Act, RCW 34.05, does not apply to workers' compensation cases under RCW Title 51. RCW 34.05.030(2)(a)(b); *see Rogers*, 151 Wn. App. at 180.

Seattle W. Indus., Inc. v. Mowat Co., 110 Wn.2d 1, 9, 750 P.2d 245 (1988). In reviewing the trial court's decision to give an instruction, the reviewing court will not find an abuse of discretion unless the trial court's exercise of discretion is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998).

V. ARGUMENT

The trial court properly instructed the jury that Felipe needed to present objective evidence supporting his appeal because the only condition that he claimed had become aggravated was his closed head injury, which is a physical condition. An objective findings jury instruction is appropriate in cases involving the aggravation of a physical condition. Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury, and when taken as a whole, properly inform the jury of the law to be applied. *Hue*, 127 Wn.2d at 92. To reopen a claim in an aggravation case, a claimant must prove by medical testimony, based on some objective symptoms, that the aggravation caused increased disability or a need for treatment. RCW 51.32.160; *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 432, 858 P.2d 503 (1993); *Lewis v. ITT Cont'l Baking Co.*, 93 Wn.2d 1, 3, 603 P.2d 1262 (1979); *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197,

298 P.2d 1117 (1956).⁴ The objective findings requirement is not applicable if the condition that the worker contends to have worsened is a psychological one. *Price v. Dep't of Labor & Indus.*, 101 Wn.2d 520, 529, 682 P.2d 307 (1984); *see also Tollycraft Yachts Corp.*, 122 Wn.2d at 432 n.3.

After *Price*, the courts have maintained that when only physical disabilities are contended, it is proper to instruct the jury that testimony must be based at least partially on objective findings. *McClure v. Dep't of Labor & Indus.*, 61 Wn. App. 185, 187, 810 P.2d 25 (1991) (“In cases where a worker claims only an aggravation of physical disability it is proper to instruct the jury that medical testimony must be at least partially based on objective findings.”).

A. The Instructions Properly Advised the Jury that Felipe, Who Was Contending That His Physical Condition Had Worsened, Needed To Provide Objective Evidence of Worsening

⁴ *See also Dinnis v. Dep't of Labor & Indus.*, 67 Wn.2d 654, 656, 409 P.2d 477 (1965); *Venezelos v. Dep't of Labor & Indus.*, 67 Wn.2d 71, 76-77, 406 P.2d 603 (1965); *Hyde v. Dep't of Labor & Indus.*, 46 Wn.2d 31, 34-35, 278 P.2d 390 (1955); *Johnson v. Dep't of Labor & Indus.*, 45 Wn.2d 71, 73, 273 P.2d 510 (1954); *Moses v. Dep't of Labor & Indus.*, 44 Wn.2d 511, 517, 268 P.2d 665 (1954); *Kresoya v. Dep't of Labor & Indus.*, 40 Wn.2d 40, 45-46, 240 P.2d 257 (1952); *Larson v. Dep't of Labor & Indus.*, 24 Wn.2d 461, 471, 166 P.2d 159 (1946); *Cooper v. Dep't of Labor & Indus.*, 20 Wn.2d 429, 433, 147 P.2d 522 (1944); *Stevich v. Dep't of Labor & Indus.*, 182 Wash. 401, 404-05, 47 P.2d 32 (1935); *Cooper v. State Dep't of Labor & Indus.*, 188 Wn. App. 641, 648, 352 P.3d 189, 192 (2015); *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 20, 277 P.3d 685 (2012); *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657, 219 P.3d 711 (2009); *Grimes*, 78 Wn. App. at 562.

1. The Undisputed Evidence Is that Felipe Suffered a Physical Injury

For physical conditions in aggravation cases, the law is unambiguous: a jury instruction requiring an objective finding is appropriate. *Tollycraft Yachts Corp.*, 122 Wn.2d at 432; *Lewis*, 93 Wn.2d at 3; *Phillips*, 49 Wn.2d at 197; WPI 155.09. The reason for this rule is to ensure that claims are only reopened when the medical testimony justifies it, which protects the industrial insurance funds:

The rule that an expert medical witness may not base his opinion upon subjective symptoms alone is designed to protect the industrial insurance fund against unfounded claims of aggravation. If such claims could be established by the testimony of a physician who based his opinion entirely upon what the claimant told him, it would open the door to fraudulent claims, as well as those mistakenly made in good faith. A claimant might honestly believe his subsequent condition arose out of his original injury, but this is a medical question and an opinion thereon must be derived from sources other than the claimant's statement. These protective rules, however, must not be applied to situations where there is a combination of subjective and objective symptoms, which an expert may be able to tie together, and we think this is made very clear by a careful reading of the cases we have cited. The physician must of necessity obtain some history from the claimant, and has a right to make proper use of it in connection with objective findings which he as an expert may make by an examination, the making of tests, the use of X-ray pictures and other proper data.

Kresoya v. Dep't of Labor & Indus., 40 Wn.2d 40, 45-46, 240 P.2d 257 (1952).

Here, as Dr. Stump explained, a closed head injury is, “a blow or injury to the head that is nonpenetrating, which means that there isn’t anything that breaks the skull or goes through the skull.” BR Stump 20. A closed head injury is a physical injury, and necessitates the giving of an objective finding jury instruction. *See McClure*, 61 Wn. App. at 187 (after *Price*, it is appropriate to instruct jury about need for objective findings instruction for physical conditions). Despite his current arguments that his injury was a “pure psychological injury,” Felipe did not put on testimony that a closed head injury or a traumatic brain injury was not a physical injury and was a “purely psychological injury.” App’s Br. at 11.

Moreover, Felipe did not argue at the Board or at superior court that he had a “purely psychological injury,” which he would need to in order to contest the jury instructions on this ground, nor did he assert that his appeal involved a combination of physiological and psychological conditions. RCW 51.52.104 (party must raise issue in petition for review or it is waived); CR 51(f) (party must object with particularity); *Moore v. Mayfair Tavern, Inc.*, 75 Wn.2d 401, 406-07, 451 P.2d 669 (1969) (party needs to make a specific objection to preserve issue).⁵

⁵ One of Felipe’s symptoms was depression. Felipe did not argue below that the instruction was improper because of depression, nor did he argue below his depression worsened or that it was proximately caused by the industrial injury. He may not now bring it up. RCW 51.52.104; CR 51(f); *Moore*, 75 Wn.2d at 406-07. In any event, the law contemplates that physical injuries often involve a mixture of objective and subjective

2. The Case Law Does Not Establish That Conditions Other Than Psychological Ones Do Not Require Objective Findings; nor Does the Record Support Any Assertion That a Traumatic Brain Injury Is Like a Psychological Injury

There is no case law establishing an exception to the requirement of objective findings for non-psychological conditions. Felipe notes that Washington Pattern Instruction 155.09 has a note that indicates that the objective finding instruction is not appropriate for post-concussion syndrome. App's Br. at 12. This is a red herring. No doctor acknowledged a worsening of the condition post-concussion syndrome. Dr. Sukachevin claimed that the claimant's "traumatic brain injury" worsened during the relevant time periods, not his post-concussion syndrome. BR Sukachevin 27.

Furthermore, even if the court construed the conditions "traumatic brain injury" or "closed head injury" as synonymous to post-concussion syndrome, the comment is simply wrong that the instruction should not be given.⁶ The comment to the pattern instruction states that, "This instruction should be given in cases of physical disability but should not be given in cases involving mental or emotional disability, loss of hearing

symptoms, and it is still necessary to provide objective evidence of worsening in such cases. *Kresoya*, 40 Wn.2d at 46.

⁶ Such a conclusion that they are the same would be contrary to the evidence here. See BR Sukachevin 20, 25-26.

or sight, or postconcussion syndrome.” WPI 155.09. Thus, it may provide an implied factual assertion that post-concussion syndrome is like a psychological condition. This is belied by the law and by the record. The comment cannot substitute for both.

There is no case law supporting an exception to the objective finding requirement for anything other than a psychological condition.⁷ Just because an instruction is approved by the Washington Pattern Instruction Committee does not mean it is approved by the Washington Supreme Court. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). The court does not follow incorrect pattern instructions. *State v. LeFaber*, 128 Wn.2d 896, 901, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009).

⁷ At superior court, Felipe cited to the Board case *In re Lewis*, No. 07 16483 (Wash. Bd. Indus. Ins. Appeals Oct. 10, 2008). RP 8-9. He cited this case, which involved erectile dysfunction, as an example of where a physical condition did not need objective findings. In that case, the Board indicated that some conditions “cannot be measured by the independent observation of a physician and where that is the case, it is error to make reopening dependent on the presence of objective findings.” *Id.* This is inconsistent with *Price*, which only excepts psychological conditions from the objective finding requirement and it is inconsistent with the legion of cases that require objective findings for physical conditions. *Price*, 101 Wn.2d at 529; cases cited at *supra* 10-11. This Court should not defer to the Board as the court looks to the Department for expertise when there is a conflict of position. *Dep’t of Labor & Indus. v. Slauch*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013), *review denied*, 180 Wn.2d 1007 (2014). In addition, although the Department disagrees with the Board’s assertion that erectile dysfunction may not have objective findings, as the Board appears to rely upon a single doctor for the determination that erectile dysfunction does not have objective findings, *Lewis* is easily distinguishable from the present case, as the records shows there are objective measurements available for a traumatic brain injury.

The *Price* Court reasoned that the exclusion of psychological conditions from an objective finding requirement is because psychiatric examinations are primarily based on “*conversations* with the patient” and psychiatric injuries are necessarily subjective in nature. *Price*, 101 Wn.2d at 528 (emphasis added). This contrasts with physical conditions, which can, and usually do, have objective findings and other measures of tests. BR Sukachevin 26 (MRI test used); BR Stump 18-19 (neurological exam given).

It is true that in the case of a closed head injury, there may not be objective findings present, as Dr. Stump concluded was true in this particular case, but it is also possible that such findings would be present. The law recognizes that workers who have had any of a wide variety of physical injuries may have subjective reports of increased problems, but such is not enough because of the importance of only reopening a claim when worsening can be objectively verified. *Kresoya*, 40 Wn.2d at 45-46. Felipe acknowledges this as he says that “these conditions [including postconcussive syndrome] *may* not have objective findings present.” App. Br. at 12. Felipe’s argument proves too much: in any case involving a physical injury, such as a back injury, a worker may be convinced that his or her condition worsened but be unable to produce objective evidence that substantiates the aggravation claim. That closed head injuries are not

always accompanied by objective evidence does not distinguish them from other physiological claims and does not bring such claims within the reach of *Price*, which involved psychological claims that necessarily lack any objective findings. Thus, as with all physical injury claims, a worker claiming that a closed head injury has become aggravated must produce objective evidence that corroborates that assertion.

As noted above, the comment makes an implied factual assertion about the type of evidence present in a different kind of condition than directly at issue here, post-concussive syndrome. Namely, there is the implication that this syndrome is subjective only in nature. A comment that is based on a factual assertion cannot substitute for a factual record. *Cf. State v. Levy*, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006) (comments on the evidence prohibited). A party must have evidence to support his or her theories about a jury instruction. *See Cooper v. Dep't of Labor & Indus.*, 188 Wn. App. 641, 647-48, 352 P.3d 189 (2015). Here the Department presented evidence that a closed head injury causes trauma to the head, and thus is a physical injury. There was also evidence that the trauma could show on a MRI and evidence of a neurological examination. And Felipe did not put on evidence that the physical trauma was only psychological in nature. He did not put on evidence that a traumatic brain injury or closed head injury only produces subjective symptoms.

The status quo is that for a physical injury, the claimant must present proof of objective findings showing worsening. *See Phillips*, 49 Wn.2d at 197; *see also Tollycraft Yachts Corp.*, 122 Wn.2d at 432; *Lewis*, 93 Wn.2d at 3. To depart from this black letter law, there must be both a legal reason and a factual record to support such a change. Neither is present here.

In the present case, Dr. Sukachevin relied upon an MRI report that indicated that Felipe may have had a hemorrhage in his brain—an objective finding if the hemorrhage existed—which establishes that objective findings can exist for a traumatic brain injury. Dr. Stump looked to the same test and also performed a neurological examination. There are objective findings that could exist for a closed head injury or traumatic brain injury, and that differentiates such conditions from a psychological condition where objective findings necessarily do not exist. Since closed head injuries, unlike psychological conditions, do not categorically lack objective findings, *Price* does not apply, and the general rule, that an aggravation claim must be supported by objective evidence, remains in effect.

3. Instruction No. 14 Allowed the Parties to Argue Their Theory of the Case and Was a Correct Statement of the Law

As noted above, jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. *Hue*, 127 Wn.2d at 92. Here, the Department relied on evidence that there was physical trauma resulting in a physical injury, that there was evidence beyond the “conversations” in *Price*, namely there was MRI testing available and neurological examinations. Because evidence supported giving the instruction, the court properly did so. *See Allison v. Dep’t of Labor & Indus.*, 66 Wn.2d. 263, 267, 401 P.2d 982 (1965) (“The jury should be instructed in accordance with the facts.”).

Significantly, Felipe did not present any evidence that supported a different result. Felipe did not argue a “purely psychological injury” theory, nor did he present any evidence that a closed head injury was a “purely psychological injury” or evidence that it was “like” a psychological injury. Indeed, the evidence showed the opposite, that a closed head injury is caused by trauma to the head, and that the results can be viewed objectively in testing. Felipe is incorrect that evidence of headache pain, depression, and memory loss was excluded before the jury. App’s Br. at 14. Instruction No. 14 instructed the jury that “If there are objective findings, then the physician may also consider subjective complaints.” This allowed Felipe to argue that his headaches, depression,

and memory loss supported his claim that his closed head injury had become aggravated, while properly informing the jury that they cannot enter a verdict in Felipe's favor based on this evidence alone, because Felipe also needed to present objective evidence supporting his assertion that his closed head injury had worsened.

B. Felipe Is Not Entitled to Attorney Fees

Felipe is not entitled to attorney fees even if he should prevail, contrary to his claims. App's Br. at 14. Felipe cannot receive attorney fees under RCW 51.52.130(1) because the funds managed by the Department will not be affected even if Felipe prevails in his argument that he should receive a new jury trial. Fees are awarded against the Department only if the worker requesting fees prevails in the action *and* if the accident fund or medical aid fund is affected by the litigation. RCW 51.52.130; *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). Here, the accident fund or medical aid fund will not be directly affected. The only relief that Felipe may obtain is a remand for a new trial. A remand does not affect the accident or medical aid fund.

The Industrial Insurance Act provides for the worker's attorney to collect an award of reasonable attorney fees when an appeal in superior court reverses or modifies a decision of the Board of Industrial

Insurance Appeals such that additional relief is granted to the worker. RCW 51.52.130. The fourth sentence of RCW 51.52.130(1) makes clear that an award of fees requires both that the worker prevail in the action and that the accident fund or medical aid fund be affected. RCW 51.52.130; *Pearson*, 164 Wn. App. at 445.

Because a remand does not affect the medical aid or accident fund, a worker's attorney cannot receive attorney fees when remand is the only relief that the worker obtains on appeal. *Dep't of Labor & Indus. v. Rowley*, 185 Wn. App. 154, 170, 340 P.3d 929 (2014), *review granted on different grounds*, 183 Wn.2d 1007 (2015); *Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 27, 288 P.3d 675 (2012). This is true even if, on remand, the worker ultimately obtains benefits that affect the accident or medical aid fund. What is necessary is a direct and immediate impact on the funds, not the hypothetical possibility of future benefits. This is shown by two cases: *Knapp* and *Rowley*. In *Knapp*, the court declined to award attorney fees under RCW 51.52.130(1) when it remanded to the Department to determine whether the worker would need additional vocational services. *Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. at 27.

Similarly, in *Rowley*, the Court denied the worker's attorney fee request because a remand to the trial court was necessary for an

additional legal determination. *Dep't of Labor & Indus. v. Rowley*, 185 Wn. App. at 170. The issue on remand was whether the Department had presented sufficient evidence in the record to prove that the worker was committing a felony when he was injured at work, a fact that precludes the allowance of a workers' compensation claim. *Id.* In *Rowley*, it was therefore possible on remand that the worker's claim would be allowed (which would entitle him to medical treatment under the medical aid fund) because there was insufficient evidence of a felony. Nevertheless, the court held that the worker's attorney could not receive attorney fees under RCW 51.52.130(1).

The same is true here. Felipe cannot receive attorney fees in this appeal under RCW 51.52.130(1) if he gets a new trial. *Rowley* precludes the award of attorney fees in such cases. Notably, the court denied fees in *Rowley* where the Board record was complete, and all that remained to do on remand was to evaluate the sufficiency of the evidence about whether the worker was committing a felony at the time he was injured. The cases are the same, and under *Rowley* and *Knapp* he cannot receive fees.

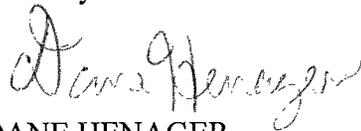
Felipe is not entitled to attorney fees because he should not prevail in this matter, but even if he does RCW 51.52.130 does not authorize the award of fees here.

VI. CONCLUSION

When only physical conditions are at issue in an aggravation case, it is proper to give a jury instruction requiring objective findings. Here, the only evidence is that this was a physical injury that could be measured by objective findings. This Court should, therefore, affirm the superior court's decision.

Respectfully submitted this 14th day of March, 2016.

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NO. 48206-1-II

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

REYMUNDO FELIPE

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR
AND INDUSTRIES,

Respondent.

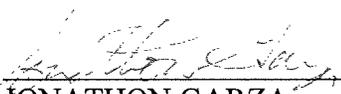
DECLARATION
OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Respondent Department of Labor and Industries and Declaration of Service to all parties on the record as follows:

Via Email and First Class U.S. Mail, Postage Prepaid to:

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March 14, 2016 - 3:01 PM

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Court of Appeals Case Number: 48206-1

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