

**FILED**

**JUN 22 2010**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**NO. 289591**

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

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Walla Walla School District

Respondent

v.

Cynthia D. Turner

Appellant

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**BRIEF OF APPELLANT**

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**APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON  
FOR WALLA WALLA COUNTY**

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**THE HONORABLE  
DONALD W. SCHACHT**

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**Robert D. Merriman  
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## **I. ASSIGNMENT OF ERROR**

The appellant, Ms. Turner, contends that the trial court erred in entering certain Findings and Fact, Conclusions of Law dated March 22, 2010, based upon a prior Memorandum Decision of December 1, 2009, which reversed the Decision and Order of the Board of Industrial Insurance Appeals dated April 16, 2009. It is believed that Findings of Fact 1, 2, 3, 4, 5, 6, 7, 9, and 10, as well as Conclusions of Law 2, 3, 4, 5, 6, 8, 9, and 10 are not supported by the substantial evidence contained in the Board record.

## **II. STATEMENT OF THE CASE**

### **A. INTRODUCTION**

This case involves an industrial injury sustained by Ms. Cynthia Turner

in 1995 while performing her duties as a school cook in Walla Walla, Washington. Ms. Turner's employer at the time of the industrial injury was Educational School District # 123 in Walla Walla, Washington. The school district is self-insured and will be identified as "Employer" for the remainder of the brief.

## **B. PROCEDURAL POSTURE**

As noted above, this case commenced in 1995. Because 15 years have elapsed, Ms. Turner presents this time line of relevant events for ease of reference.

- |          |  |
|----------|--|
| 02.27.95 | Ms. Turner suffered an on-the-job injury – IIA <sup>1</sup> benefits commenced (CABR 88)     |
| 03.09.99 | Department closed the claim with time loss (TL) benefits paid to 10.5.98 (CABR 88)           |
| 03.11.09 | Ms. Turner timely protested the order (CABR 88)  |
| 12.29.99 | Department <sup>2</sup> affirmed its 3.2.99 order (CABR 89)                                  |
| 01.26.00 | Ms. Turner filed notice of appeal to Board of Industrial Insurance Appeals (Board) (CABR 89) |
| 02.08.01 | Board filed PDO <sup>3</sup> reversing Department's 3.2.99 order (CABR Ex. 19)               |

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<sup>1</sup> Industrial Insurance Act – Title 51 RCW

<sup>2</sup> Department of Labor and Industries

<sup>3</sup> Proposed Decision and Order

- 04.06.01 D&O<sup>4</sup> adopted PDO
- 04.18.01 Department ordered to: (a) find Ms. Turner totally and Temporarily disabled; (b) pay TL from 10/5/98 through 12.12.29; and (c) reopen claim for medical treatment
- 01.31.07 Department again determined Ms. Turner is able to go back to work
- 01.18.08 Department closed claim but awarded TL benefits through 12.28.06 and awarded PPD<sup>5</sup> award of 10% for shoulder injury
- 03.06.08 Ms. Turner filed NOA<sup>6</sup> of Department order to Board (CABR 74-80)
- 10.27.08 Board hearing (Supplemental CABR)
- 02.23.09 PD&O<sup>7</sup> - Board reversed Department's 01.18.08 claim closure and ordered the Department to pay time loss benefits for period 12/29/06 through 01.17.08; additionally Board determined Ms. Taylor is permanently and totally disabled effective 01/18/08 & was entitled to appropriate benefits (CABR – 38-73)
- 04.06.09 Employer filed PFR<sup>8</sup> of Board decision (CABR 3-17)
- 04.16.09 D&O filed, denying Employer's PFR; adopts 2.23.09 PD&O (CABR 2)
- 05.14.09 Employer filed NOA with Walla Walla Superior Court
- 12.01.09 Superior Court filed memo decision reversing Board decision (CP 41-43)

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<sup>4</sup> Decision and Order

<sup>5</sup> Permanent Partial Disability

<sup>6</sup> Notice of Appeal

<sup>7</sup> Proposed Decision and Order

<sup>8</sup> Petition for Review

- 03.22.10 Court's FF/CL<sup>9</sup> & Judgment filed (CP 44-47, 48-49)
- 04.13.10 Ms. Turner filed NOA to Division III Court of Appeals (CP 50-59)

### **C. FACTS**

On February 27, 1995, Cynthia Turner injured her right shoulder while stirring an industrial-sized pot of hamburger meat weighing between 30 and 50 pounds. (CABR 64-67) Until that time she had been in excellent health. She had neither mental health issues nor arm, shoulder, neck or hand limitations. (10/27/08 Tr. at 56-57, 115-18) She continued to work her full-time schedule (even though she was in pain) until the end of the 1996 school year. She had to adapt her employment duties to avoid the pain in her right shoulder area. Accordingly, she relied heavily on co-workers to assist her with heavy lifting and overhead reaching. (10/27/08 Tr. at 67-70, 92-93, 116) Once she filed a claim with the Department she began to receive IIA benefits. (CABR 5, 88)

#### 1. Department claim closure/ Board decision 1999-2001

NOTE TO PANEL: Although this hearing occurred more than a decade ago, Ms. Turner briefly addresses the Department's claim closure of December 29,

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<sup>9</sup> Findings of Fact and Conclusions of Law

1999 and the Board's reversal of that decision on April 18, 2001. This is because the trial court erroneously insists that evidence from the Board's review in that matter is relevant in the current appeal. The Employer did not appeal the Board's 2001 decision making it res judicata in the current appeal.

In March 1999 the Department closed Ms. Turner's claim. No disability pension was awarded, just time loss benefits from the date of injury through October 5, 1998. Ms. Turner appealed the decision to the Board, which reversed the Department decision. The Board's 2001 order required the Department to continue to pay Ms. Turner time loss benefits and also ordered the Department to reopen her claim as it was determined her industrial injury was not yet fixed and stable.<sup>10</sup> (CABR 88-89; Ex. 19)

## 2. Department decision re: 2008 claim closure

In 2007, pursuant to an Employability Assessment Report, the Department once again concluded that Ms. Turner was able to return to the job she held on the date of her industrial injury. On January 18, 2008, the Department issued an order closing Ms. Turner's claim with TL benefits as had been paid through December 28, 2006. Additionally it awarded a

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<sup>10</sup> In the years since the 2001 order was finalized, Ms. Turner's industrial injury and its sequelae have become progressively more disabling. However, the parties agree that since 2008 her physical and psychological symptoms are fixed and stable.

permanent partial disability award of 10 percent right arm impairment based on Ms. Turner's shoulder impairment proximately caused by the industrial injury. Ms. Turner timely appealed that decision to the Board (CABR 90)

### 3. Board Proceeding

In response to the above appeal, the Board conducted a hearing on October 27, 2008. (CABR Transcripts) In addition to her own testimony (CABR Tr. at 53-133), Ms. Turner presented the oral testimony of: (a) Mr. Garza, a vocational rehabilitation specialist and licensed counselor; (CABR Tr. at 5-34) and (b) her husband. (CABR Tr. at 35-51). The Employer presented the testimony of Mr. Renz, another vocational rehabilitation counselor. (CABR Tr. at 136-177)

Other sources of medical evidence were presented by each party through perpetuation depositions. The PD&O filed February 23, 2009, fully sets forth the pertinent information stated by each expert. (CABR 38-70) That information need not be repeated here, although citations to the decision are provided as necessary.

On behalf of Ms. Turner, Dr. Early, an Independent Medical Evaluation (IME) psychiatric examiner, presented his testimony by deposition. (CABR 44-47) Because Ms. Turner has no treating psychiatrist,

the Board considered Dr. Early's medical opinion of great importance. However, it carefully weighed Dr. Early's medical diagnosis with that of Dr. Hamm, the Employer's IME psychiatrist. In comparing the two medical opinions, the Board agreed with Dr. Early's diagnosis of psychogenic pain disorder. It concluded that Dr. Hamm's medical conclusions were inconsistent and that they did not sufficiently challenge Dr. Early's medical diagnosis of a psychogenic pain disorder. (CABR 62-63)

Also testifying by deposition was Dr. French, an orthopedic physician. He has been Ms. Turner's *attending physician* since November 1999. Dr. French agreed with Dr. Early that there is a psychogenic basis for some of Ms. Turner's pain. He testified that the pain is not all physical nor is it all psychological. (French Depo. at 47-49)

The Employer presented the deposition testimony of several IME examiners. They included: (1) Dr. Dordevich, whose medical specialties include internal medicine and immunology; (2) Dr. Lipon, an osteopathic physician; (3) Dr. Hamm, another forensic psychiatrist; (4) Dr. Kellogg, a retired thoracic and vascular surgeon who now is exclusively an IME examiner; and (4) Dr. Marks, a neurologist. (CABR)

In its 33-page Memorandum Decision filed February 23, 2009, the Board carefully detailed its decision regarding the extent of Ms. Turner's industrial injury. (CABR 38-73) It took judicial notice of Ms. Turner's injuries that had already been litigated and decided by the Board in 2000-01. (CABR 38) Additionally, it found that the record supported a determination that as her physical symptoms deteriorated, Ms. Turner developed a psychogenic pain disorder condition that was proximately caused by the industrial injury. (CABR 62-64) It further concluded that substantial evidence supported her claim that two additional physical conditions – chronic pain and complex regional pain syndrome (CRPS) were proximately caused by the industrial injury. (CABR 64-65)

Regarding the disability pension, the Board determined Ms. Turner's claim was properly closed on January 18, 2008 and that she was not entitled to further medical benefits beyond what was awarded at that time. (CABR 65, 69) However, even though the Board determined she did not prove entitlement to an *increase* in the shoulder impairment award, it found she did prove entitlement to a Category IV (WAC 296-20-340) pension for the psychogenic pain disorder. (CABR 65, 69) It determined the evidence in the record supported a finding of total disability because: (a) her right shoulder

limitation precludes gainful employment on a reasonably continuous basis; and (b) her pain diagnoses – both physical and psychogenic – also precludes employability on a reasonably continuous basis due to pain related absenteeism. (CABR 65-66)

#### 4. Superior Court Proceedings

The Employer filed an appeal to the Walla Walla Superior Court, which filed its letter opinion on December 1, 2009. It reversed the Board decision of January 18, 2008 and ordered Ms. Turner’s claim closed effective December 26, 2006. Additionally, it determined that a permanent partial disability award of 10% right arm impairment based on the shoulder injury was effective as of that date. (CP 41-43)

The Superior Court’s 3-page opinion briefly describes the five reasons it relied on in its decision to reverse the Board’s decision. (CP 41-42) Notably, those concise descriptions match nearly word for word the arguments set forth in the “Employer’s Trial Memorandum.” (CP 32-39). Ms. Turner responds to the trial court’s decision, which coincidentally exactly matches the Employer’s position.

### **III. STANDARD OF REVIEW**

Because it becomes important to the analysis of the issues on appeal Ms. Turner briefly sets forth the standard of review the trial court was to follow in the proceeding below. It was to conduct a *de novo* review based purely on the Board record. RCW 51.52.115. In that review, the court was required to apply the tenet that the Board's findings and conclusions are prima facie correct. *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987). RCW 51.52.115.

After its careful *de novo* review of the record the Superior Court was allowed to substitute its own findings and conclusions for that of the Board, but *only* if it determined by a fair preponderance of credible evidence the Board's decision was incorrect. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). In making its decision it must keep in mind that Title 51 requires the statutory scheme of the Industrial Insurance Act be liberally interpreted with any doubt resolved in favor of the injured worker. RCW 51.04.010; RCW 51.12.010; *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

Judicial review in this Court is governed by RCW 51.52.140, which provides that an “[a]ppeal shall lie from the judgment of the superior court

as in other civil cases.” This statutory scheme results in a different role for the Court of Appeals than is typical for appeals from other administrative decisions. Rogers v. Dep’t of Labor & Indus., 151 Wn. App. 174, 180, 210 P.2d 355 (2009). Rather than sitting in the same position as the superior court, under Title 51, the Court of Appeals reviews the trial court’s findings of fact, to which error is assigned, to see if they are supported by substantial evidence in the record. *Id.* The conclusions of law must flow from the trial court’s findings. *Id.* Issues of law are reviewed de novo. *Id.* During the review process, the Court of Appeals looks at the record in the light most favorable to the party that prevailed at the Superior Court. Harrison Memorial Hospital v. Gagnon, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). It does not re-weigh or re-balance the competing evidence or apply anew the burden of persuasion. *Id.* Evidence is substantial if it is “sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” R & G Probst v. Dep’t of Labor & Indus., 121 Wn. App. 288, 293, 88 P.3d 413 (2004).

#### **IV. ARGUMENT**

The superior court filed its letter opinion on December 1, 2009. (CP 41-43) Its Findings of Fact/Conclusions of Law and the Judgment were filed

on March 22, 2010. (CP 44-50) In this appeal Ms. Turner assigns error to the court's Findings 1-7 and 9-10 and Conclusions 2-6 and 7-10. (CP 44-46). As will be seen below, the challenged findings are *not* supported by substantial evidence from the Board record. Accordingly, its conclusions are also erroneous.

In reviewing this record one immediately notices the trial court's 3-page opinion decision is in stark contrast to the size of the record and extremely detailed and well-written 33-page Board decision. However, once the court's opinion is read in tandem with the Employer's trial brief the reason becomes abundantly clear in a surprising and disturbing manner.

In a weak attempt to disguise its obvious failure to adequately review the evidence presented in the Board record, the trial court begins its analysis of each contested issue with "The District's (first, second, etc.) claim of error . . ." However, even a cursory comparison of the court's memorandum opinion with the Employer's trial brief reveals the court made no effort to present an independent assessment of the Board record – none. Instead, it adopted the Employer's position on *every* issue, using the Employer's arguments without even bothering to explain in detail how the Employer's

position on appeal overcomes the heavy burden of the presumption of the correctness of the Board's decision.

In making its arguments (as advocates sometimes do), the Employer's trial brief (on appeal to the superior court) contains a number of self-serving statements regarding the facts of the case that can not be substantiated in the record. This, of course lead to the incorrect analyses. Even so, the trial court's opinion repeated the Employer's erroneous factual statements and analyses making it abundantly clear the trial court either did not read or did not carefully consider the Board record. Each of the five issues "resolved" by the trial court will be discussed below, beginning with the quote from the trial court's memorandum decision.

1. "The District's first claim of error is that the Board gave too broad of a preclusive effect to the February 8, 2001, decision which found Ms. Turner's February 27, 1995, injury proximately caused a compression brachial plexus injury of the right shoulder." (CP 42)

This argument formulated by the Employer is apparently in response to the Board's Finding of Fact #4. (CABR 69)

In "resolving" this claimed error, the trial court, for some unknown reason, spent three paragraphs of its opinion discussing what it determined were evidentiary errors made by the Board. Ms. Turner is at a loss to

understand why the court found the Board's evidentiary decisions had any bearing on its de novo resolution of the Employer's appeal. Nevertheless, the trial court made factual statements on the issue in Findings of Fact #1, which states: "The school district has sustained its burden of proving by a preponderance of evidence that the Board's decision was incorrect on *each contested* issue. (CP 44)

Ms. Turner is not sure what is meant by this. However, as noted above, she will address in the Analysis section of this brief the five issues raised *only* by the Employer in its trial brief as that is the way in which the trial court wrote its letter opinion. She does not know how else to address the finding because it is so nebulous. As will be shown below, none of the trial court's challenged Findings are supported by substantial evidence.

In its opinion, the trial court determined the 1998 surveillance video and cryptic "earlier medical records" were relevant to its decision. Ms. Turner has no argument with that statement. It was entitled, and indeed had the duty to disagree with the Board as long as it could support its decision with substantial evidence in the record. But here, the court gave no indication which medical records it found relevant to its decision. There are *no* citations to the Board record. Instead it summarily concluded: "The bulk

of the medical testimony was against her claim.” (CP 42) This statement, by itself, in no way overcomes the presumption of the correctness of the Board’s decision and must be disregarded.

For the same reasons listed above, the trial court’s Conclusions of Law #2-3 (CP 46) also have no bearing on the issues being appealed. Ms. Turner understands why the trial court came to its conclusions but they just aren’t relevant. The Board made its decision and the trial court disagreed. Period. It has no relevance to the outcome of the issues this Court is reviewing.

Additionally, Finding of Fact #5 (CP 45), while arguably a factual statement, cannot be supported by the Board record. Frustratingly, as will be seen time and time again throughout this analysis, the trial court’s opinion does not provide any citations to the record. Accordingly, Ms. Turner respectfully requests that this court refuse to review for substantial evidence the court’s finding. If it must, the Board’s exhaustive and thorough PD&O provides excellent references to the record and need not be repeated here.

The three paragraphs the trial court devoted to the Employer’s first challenge are confusing (probably because it was lifted, nearly verbatim from the Employer’s trial brief – compare CP 42, para. 3 with CP 32 ll. 25-28 to

CP 33 ll. 1-3). This, by itself would tend to make one question whether the court actually conducted a de novo review of the record – especially when the trial court failed to set forth adequate facts, with citations, that would support its decision.

2. “The District’s second claim of error alleges that the Claimant is precluded from litigating the compensability of a psychogenic pain disorder in this current proceeding.” (CP 42)

This argument, like the one above, is probably the result of the Board’s Finding of Fact # 4 and Conclusion of Law # 2. (CABR 69)

The trial court’s Finding of Fact #2 states: “Claimant had been diagnosed with a psychogenic disorder well before the 2000-2001 proceeding on this claim. She could have, and should have, litigated whether the injury had caused that condition in that proceeding.” (CP 44) When one looks for guidance for the reasoning behind this alleged factual statement one finds the trial court failed to cite to the Board record. Ms. Turner found *one* place in the record where *one* of the Employer’s IME examiners testified that, in his review of Ms. Turner’s past medical history, he found a chart note from October 1996 that “recommended exploring psycho social factors.” (CABR Hamm depo. at 3-7) This is the only information in the record that supports

the trial court's finding. This is not substantial evidence. Accordingly, because the court's finding is not based on substantial evidence in the record it does not overcome the presumption of correctness of the Board's decision in Ms. Turner's favor.

The trial court's Conclusion of Law #4 states: "Claimant is barred by claim preclusion from litigating the compensability of a psychogenic pain disorder in this proceeding." (CP 46) This is an issue of law, which this court may review de novo.

Collateral estoppel, or issue preclusion applies solely to issues that have been actually litigated and decided. *Energy NW v. Hartje*, 148 Wn. App. 454, 465, 199 P.3d 1043 (2009). The elements are: "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied." *Id.* (quoting *Malland v. Dep't of Ret. Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985)) In the context of worker's compensation claims, the doctrine of res judicata or collateral estoppel only applies if the claimant is clearly advised that any relationship between his or her psychiatric problems and the injury is finally

determined. *King v. Department of Labor and Industries*, 12 Wn. App. 1, 4, 528 P. 2d 271 (1974).

The Board decision from the 2000-01 appeal is included in the record on appeal. (CABR Exhibit 19) There is no dispute that the 2001 Board decision was not appealed and became a final Department order on April 18, 2001.

The trial court's conclusion #4 is an incorrect statement of the law. Ms. Turner did not litigate the issue of a "psychogenic pain disorder" in 1999, when the Department first attempted to close her claim because the issue was not yet ripe for resolution. In 1999, it had been just over 4 years since the industrial injury and *at that time* Ms. Turner did not claim she suffered from a psychogenic pain disorder. Because the issue had not been raised, the 2000-01 Board decision contains no findings or conclusions regarding a psychogenic pain disorder. In fact, the *only* place Ms. Turner's mental health status is discussed at all is in a small paragraph located just beneath the three issues set forth on page 2 of Ex. 19. (CABR) There the Board noted, "The claimant stipulated that the medical evidence will not show that a *mental health condition, other than the pain consistent with the physical condition* described in the record, was sought to be allowed as related to the industrial

injury.” (CABR Ex. 19, page 2 lines 21-24) That stipulation does not constitute a final determination that clearly advises Ms. Turner that there is no relationship between any psychiatric condition and the industrial injury. Clearly, Ms. Turner was suffering from pain in 1999. At that time, the parties stipulated that, other than the pain consistent with her physical condition, Ms. Turner was not seeking treatment or benefits for a mental health condition in 1999. The current appeal lies from a Department decision handed down in 2008 where, *for the first time*, a psychogenic pain disorder was litigated. The trial court’s reference to claim preclusion is misplaced under the specific facts of this case. The trial court’s Conclusion of Law #4 is an improper statement of law.

3. “Next the District argues that alternatively, the Claimant failed to prove that the . . . injury proximately caused a psychogenic pain disorder.” (CP 43)

Because this argument is offered in the alternative, it is also taken from the Board’s Finding of Fact # 4 and Conclusion of Law # 2. (CABR 69)

The trial court’s Finding of Fact #3 states: “Alternatively, a substantial preponderance of the evidence demonstrates that the February 27, 1995 injury did not proximately cause a chronic pain condition, pain disorder associated with psychological factors or other psychiatric or mental health

condition, or any associated permanent impairment.” (CP 44-45)

Again, the court’s opinion does not provide *any* citations to the Board record. Instead, it jumped straight to its conclusion that “[t]he overwhelming, credible medical evidence is that the pain complaints are not genuine.” (CP 43) It then listed two substantive facts (without citation to the record) to support the above opinion: (1) that Ms. Turner’s pain complaints were excessive compared to what could be objectively substantiated; and (2) that the IME examiners did not document signs of muscle atrophy in her right arm. (CP 43) It then made a gigantic leap in logic to summarily conclude: “. . . the great weight of the medical evidence does not support a finding of a psychiatric disorder.” *Id.* This simplistic and incomplete explanation is not supported by the Board record and does not overcome the presumption of the correctness of the Board decision.

The trial court’s Conclusion of Law #5 states: “Alternatively, the alleged psychiatric or mental health conditions, including chronic pain condition and pain disorder associated with psychological factors, and any associated permanent impairment, are not a compensable consequence of the February 27, 1995 injury.” (CP 45) Because there is no proper finding on which to base this conclusion, this Court should find it inapplicable to this

appeal.

If this Court disagrees, a de novo review of the Board record will show the trial court's conclusion is not proper. In its memorandum decision, without citation to the record, the trial court made the bald assertion that it found "Dr. Hamm's testimony was most persuasive, while Dr. Early's testimony was at best speculative."<sup>11</sup> In resolving this battle of the experts, this Court should also review the testimony of Dr. French, Ms. Turner's attending physician, at least as far as he presents his medical opinion about Ms. Turner's psychogenic pain disorder. (CABR – French depo. at 48-49)

Ms. Turner agrees that the trial court, in making its determination regarding the psychogenic pain disorder, properly considered the testimonies of the two forensic psychiatrists. (CABR – Hamm depo; CABR – Early depo.) However, a longstanding rule of law in Title 51 cases is that special consideration should be given to the opinion of a claimant's attending physician. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). "This is because an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case." *Intalco Aluminum Corporation v. Department of Labor & Indus.*, 66

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<sup>11</sup> Dr. Hamm was a forensic psychiatric examiner for the Employer. Dr. Early was Ms. Turner's forensic psychiatric examiner.

Wn. App. 644, 654, 833 P.2d 390 (1992). More importantly, it makes sense that the physician who cared for the medical needs of their patient for a considerable period of time is much more qualified to give an opinion regarding the patient's disability than a doctor who saw and evaluated the patient for a limited period of time on only one occasion. Young v. Dep't of Labor & Indus., 81 Wn. App. 123, 128, 913 P.2d 402 (1996) (quoting Spalding v. Dep't of Labor & Indus., 29 Wn.2d 115, 128-29, 186 P.2d 76 (1947)).

Here, it is undisputed that Dr. French is Ms. Turner's attending physician. Thus, pursuant to Hamilton, his testimony was entitled to special consideration by the trial court. Dr. French found atrophy in her right shoulder muscle. (CABR French depo. at 21) He also explained psychological pain versus physical pain. He opined, on a more probable than not basis that her pain had a psychological component. (*Id.* at 48-49)

The Board's PD & O sets forth in amazing detail the differences of opinion between the two forensic psychiatrists. Included in the PD&O are citations to the record, which will not be repeated here. The Board record is clear that Ms. Turner suffers from psychogenic pain disorder caused as a direct result of the industrial injury. For that reason, the trial court's

Conclusion of Law #5 (CP 46), which purports to be a conclusion but it is actually a finding, is neither a finding of fact supported by substantial evidence nor a proper conclusion of law. What makes the trial court's determinations in this regard so breathtakingly erroneous is the fact that the Board's PD &O, after careful analysis of all of the medical witnesses, concludes that no one opined that Ms. Turner's chronic pain problems were a result of malingering and that "...by a virtual consensus, Ms. Turner has proved the existence of a psychogenic pain disorder." (PD &O at page 26).

4. "The District argues that the Claimant did not sustain her burden of proving that the . . . injury proximately caused Thoracic Outlet Syndrome, Complex Regional Pain Syndrome or a Chronic Pain Condition." (CP 43)

This argument is taken from portions of the Board's Findings of Fact # 3-4 and Conclusion of Law # 2. (CABR 69)

Parenthetically, it should be noted the injury to the brachial plexus was resolved by the prior Board Decision in 2001. It should also be noted that both parties, at the time, agreed that the issue of the brachial plexus injury and the thoracic outlet syndrome were "off the table".

"MR. MERRIMAN: Does counsel agree that the thoracic outlet syndrome surgery was authorized and paid for by the Department and self-insured employer in this case?"

MR. STAPLES: I'm not disputing that....

JUDGE MCDONALD: Well, are you going to — through your medical testimony, are you going to contest that?

MR. STAPLES. No.

JUDGE MCDONALD: All right, so that takes that—the brachial plexus whatever condition off the table, and it takes the thoracic outlet off the table...” (CABR 10/27/08 testimony of Cynthia Turner at page 103)

In resolving this issue the trial court, in its memorandum opinion, found the Employer's medical experts convincing enough to “overcome the presumption

In resolving this issue the trial court, in its memorandum opinion, found the Employer's medical experts convincing enough to “overcome the presumption of correctness of the Board's decision.” (CP 43) Apparently, in making its decision the court found most convincing the fact “that thoracic outlet surgery did not improve [Ms. Turner]'s condition.” *Id.* (Note: the surgery argument is paraphrased from the Employer's trial brief. (See CP 37, para. 1) The court then stated that the testimony of Ms. Turner's attending physician, Dr. French “. . . did not overcome or defeat all of the other medical evidence . . .” *Id.*

The full text of the Board's Findings is set forth below.

3. The industrial injury of February 27, 1995, proximately caused Ms. Turner to sustain a *right shoulder sprain*, thoracic outlet syndrome, a *compression brachial plexus injury to the right shoulder*, and complex regional pain syndrome. These diagnoses required physical therapy, pain medication, traction, and multiple surgeries.

4. The industrial injury of February 27, 1995, also proximately caused Ms. Turner to develop chronic pain and the psychiatric diagnosis described as *pain disorder associated with psychological factors and a general medical condition*. These diagnoses required pain medication.

(CABR 69) It is easily discernable that the trial court's decision did not address the *full* content of the Board's Findings and Conclusions; instead it, like the Employer in its brief, "cherry-picked" those portions of the Board Findings that were favorable to the Employer's position.

There is no dispute that the medical and psychological conditions italicized above are true. Even so, the trial court chose to make findings and conclusions only in relation to the medical and psychological conditions the Employer raised in its trial brief. A close comparison of the trial court's memorandum decision with the Employer's trial brief shows the trial court relied completely on the Employer's position rather than conducting an independent review of the Board record. If it had, it would have been more intellectually honest in preparing its Findings and Conclusions.

The trial court's Conclusion of Law #6 states: "The alleged chronic regional pain syndrome and thoracic outlet syndrome are not a compensable consequence of the February 27, 1995 injury." (CP 46) Ms. Turner admits that while this limited statement may be supported by substantial evidence in the record, it is not an accurate recitation of the law when compared to the record below. This Court should refuse to consider findings and conclusions that do not accurately reflect the evidence in the record below.

5. "Finally, the District argues Claimant failed to prove she was and is totally disabled." (CP 43)

This argument is taken from the Board's Finding of Fact # 9 and Conclusion of Law # 4-5. (CABR 69-70)

In its letter decision, the court stated its opinion that it considered the District's medical evidence and Mr. Renz's testimony convincing and that it "should have been given more weight by the Board." (CP 43) The terms "medical evidence" and "testimony" are not given any further definition nor is there, yet again, any citation to the record to guide Ms. Turner and this Court.

Regardless, Ms. Turner argues this is not the type of evidence that assists this Court in making a final determination of her appeal. It does not

*matter* what decision the Board made. The trial court was supposed to weigh the evidence anew and make its *own* decision!

Again with no citation to the record, the trial court, in its opinion, disposes of Ms. Turner's entire appeal in one sentence: "While the burden of proof is on the Claimant, the District provided more than enough evidence to defeat the claim of total disability." (CP 43) Incredibly, this is all Ms. Turner is given to appeal even though she has the heavy burden of convincing this Court that the trial court's decision is in error – just one sentence results in the complete dismissal of a two-volume Board record. Ms. Turner is left to tilt at windmills.

The trial court, apparently relying on the one paragraph it devoted to this issue in its opinion, summarized its decision in Findings of Fact #6-7, 9-10 and Conclusions of Law #8-10 to which Ms. Turner objects. (CP 45-46) With no citations to the record and no assistance from the letter opinion, Ms. Turner will attempt to discuss each of the findings and its resulting conclusion below.

Finding #6 states: "Mr. Renz's testimony is most persuasive that, all relevant times, claimant could have performed her job at the time of injury (cook) and other positions, such as cashiering." (CP 45) This "finding" is a

rewording of the argument set forth in the Employer's trial brief! (See, CP 39 para. 1) Additionally, the trial court failed to cite to any information in the record that would support its decision. Nor is there *any* mention of Ms. Turner's vocational expert's opinion. Because there is no citation in the record, Ms. Turner respectfully asks this Court to again review and compare the Board's completely fair and balanced recitation of facts regarding the testimonies of the two vocational experts. (CABR 49-51 – Garza and 59-61 – Renz)

The trial court's Findings of Fact #7 and 9 suggest the record would support its opinion that Ms. Turner's industrial injury and its sequelae did not preclude her from finding and maintaining "reasonably continuous gainful employment." (CP 45) Finding #10 is a conclusion of law and should be reviewed de novo by this Court. (CP 45)

In the decade since her industrial injury, Ms. Turner has endured countless medical treatments including multiple surgeries, physical therapy, narcotic pain relief and even a visit to a pain clinic in an attempt to be well enough to return to work. Throughout this claim period she has been through dozens of IME exams as the Department attempted to close her claim three times. Never once, until the trial court's review was Ms. Turner found to be

an able-bodied worker.

Over a twelve-year period of time the Department has approved and paid for her on-going various treatment regimes. Sadly, the sequelae of more than a decade of medical treatment has left Ms. Turner in more pain than when the injury first occurred. In this latest attempted claim closure, until the trial court's apparent half-hearted review, Ms. Turner has successfully proven that as a result of the industrial injury and the residuals from her various treatment and surgical procedures, she continues to suffer from disabling pain in her shoulder and right side that has rendered her physically and mentally unable to obtain and maintain gainful and continuous employment in the occupations for which she is qualified in her labor market. The Board record sets forth its reasons in great detail in a 33-page proposed decision. (CABR 62-70)

In Conclusions of Law #8-10 (CP 45) the trial court attempts to neatly wrap up this case and tie it with a bow. It merely refers to the statutes that must be considered by this court in determining whether Ms. Turner is totally disabled. This is entirely inappropriate and prejudicial to Ms. Turner's presentation of her case on appeal.

## V. CONCLUSION

Ms. Turner asks this Court to consider: (a) the lack of specific information in the trial court's opinion; (b) its failure to cite to the record; and (c) its improper findings and conclusions (as argued above) and then reverse the trial court decision. The tenor of the trial court's decision, together with its Findings and Conclusions, gives Ms. Turner the uneasy sense that the trial court did not read the Board transcript, or if it did, selectively chose to ignore or mis-characterized the substantial evidence that supported the Board's decision. The Board's well-reasoned and communicated PD&O is the best indication of the information contained in the record. (CABR 38-70)

The Board decision provides ample evidence, both medically and psychologically that the industrial injury and its sequelae have prevented, and will continue to prevent Ms. Turner from obtaining and maintaining gainful employment. With rare exception, the *dozens* of physicians examining Ms. Turner over the past decade (including those testifying for the Employer) concluded she was not *consciously* feigning symptoms of pain. The trial court's challenged findings are not supported by substantial evidence in the record necessarily resulting in erroneous conclusions.

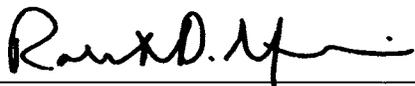
Based upon the foregoing arguments and relevant case law, Ms.

Turner respectfully requests this court reverse the Superior Court judgment and order.

DATED this 21 day of June, 2010.

Respectfully submitted,

FLYNN MERRIMAN McKENNON, P.S.

By   
Robert D. Merriman, WSBA#10846

STATE OF WASHINGTON

FEB 25 2009

IN RE: CYNTHIA O. TURNER )

DOCKET NO. 08 12039

FLYNN MERRIMAN, PS.

CLAIM NO. T-852350 )

PROPOSED DECISION AND ORDER

INDUSTRIAL APPEALS JUDGE: A. Craig McDonald

APPEARANCES:

Claimant, Cynthia O. Turner, by  
Office of Flynn Merriman, per  
Robert D. Merriman

Self-Insured Employer, SE Washington Workers Compensation Trust ESD No.123, by  
Law Office of Craig A Staples  
Kevin G. Staples

Department of Labor and Industries  
None

The claimant, Cynthia O. Turner, filed an appeal with the Board of Industrial Insurance Appeals on March 6, 2008, from an order of the Department of Labor and Industries dated January 18, 2008. In this order, the Department closed the claim with time-loss compensation benefits as paid through December 28, 2006, and awarded permanent partial disability equal to 10 percent of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder. The Department order is **REVERSED AND REMANDED**.

**PROCEDURAL AND EVIDENTIARY MATTERS**

On May 5, 2008, the parties agreed to include the Jurisdictional History in the Board's record. The parties further agreed to an additional amendment. See, 10/27/08 Tr. at 123, lines 9-26. That history, as amended, establishes the Board's jurisdiction in this appeal.

In Docket No. 00 10207, a previous Proposed Decision and Order (PD&O) was adopted by Board order of April 6, 2001. This order became final. I am taking judicial notice of portions of the PD&O as more fully described under "EVIDENCE PRESENTED" below. For ease of reference, a hard copy of the PD&O is added to this record as Exhibit No. 19.

At the October 27, 2008, hearing Ms. Turner's counsel made a relevance objection that was discussed and overruled. 10/27/08 Tr. at 98-104. Having reviewed Dr. French's deposition testimony, the objection remains overruled.

Also, at the October 27, 2008 hearing, the parties agreed to the admission of two DVDs into evidence—Exhibit Nos. 16 and 17. Although the DVDs were initially offered by SE Washington

Workers Compensation Trust and ESD No.123 (ESD 123) (10/2708 Tr. at 134), by subsequent agreement confirmed by an e-mail message of November 13, 2008, Exhibit No. 16 will be considered offered by ESD 123 and Exhibit No. 17 will be considered offered by Ms. Turner.

Finally, at this hearing, during the testimony of Stephen D. Renz, a discovery-related objection was made by Ms. Turner's counsel. See, 10/27/08 Tr. at 149-156. I provisionally sustained the objection and placed the testimony in colloquy. That ruling is now affirmed. Mr. Renz's testimony concerning jobs other than the job of injury, school cook, identified in response to Ms. Turner's interrogatory, found at 10/27/08 Tr. at 149, lines 12-15, and page 156, line 5, through page 157, line 16, the testimony regarding cook positions beyond "commercial cook," is not admissible and is stricken. Note that the testimony prior to page 149 was not objected to and remains in the record.

Ms. Turner is required, as part of a prima facie case for total disability, whether temporary or permanent, to prove that she is not capable of obtaining or performing gainful employment on a reasonably continuous basis. ESD 123's defense may respond with proof across a broad spectrum beginning from proving her employability at a single, but available odd lot position, to proving her capable of gainful employment on a reasonably continuous basis generally. However, Ms. Turner is entitled to prepare to respond to the defense wherever on that spectrum it may reside. ESD 123 is, therefore, limited to proof along the spectrum at the locations it has disclosed in response to discovery. Neither counsel responded to my invitation to further clarify or argue the discovery issue. See, 10/27/08 Tr. at 177-78. Based on the record I have, ESD 123 must be limited in its total disability related proof as described above.<sup>1</sup>

The October 10, 2008 deposition of Ronald G. Early, M.D., is hereby published and becomes a part of the Board record.

The October 22, 2008 deposition of H. Graeme French, M.D., is hereby published and becomes a part of the Board record. Two hearsay objections are partially sustained in that Dr. French's references to the reports or materials of others are not received to prove their truth; they are, however, admitted pursuant to ERs 703 and 705 to provide the basis for Dr. French's opinions. See, the objections at pages 78 and 97. Deposition Exhibit No. 1 is relabeled Exhibit No. 18 and is admitted.

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<sup>1</sup> On further consideration, my comments found at 10/27/08 Tr. at 152, line 23, through 153, line 1, are incorrect. The discovery responses, not the scope of Mr. Garza's testimony, govern the scope of the defense's employability testimony.

2 The October 30, 2008 deposition of Dejan Dordevich, M.D., is hereby published and  
3 becomes a part of the Board record. Several hearsay objections are partially sustained in that  
4 Dr. Dordevich's references to the reports or materials of others are not received to prove their truth;  
5 they are, however, admitted pursuant to ERs 703 and 705 to provide the basis for Dr. Dordevich's  
6 opinions. See, the objections at pages 25-26 and 31.

7 The November 6, 2008 deposition of John L. Lipon, D.O., is hereby published and becomes  
8 a part of the Board record.

9 The November 6, 2008 deposition of John E. Hamm, M.D., is hereby published and  
10 becomes a part of the Board record.

11 The November 7, 2008 deposition of Howard B. Kellogg, M.D., is hereby published and  
12 becomes a part of the Board record. The objections on pages 19 and 23 are overruled.  
13 Dr. Kellogg's testimony challenging the presence of a TOS and/or a brachial plexus diagnosis  
14 normally would have been stricken because these conditions have been, as confirmed by  
15 ESD 123's counsel (10/27/08 Tr. at 108) or the earlier PD&O (Exhibit No. 19), accepted under the  
16 claim. However, Ms. Turner's counsel waived this objection by his question at page 36, lines 1-5.

17 The November 10, 2008 deposition of Richard E. Marks, M.D., is hereby published and  
18 becomes a part of the Board record. The objections on pages 13-14 and 29 concerning Dr. Marks'  
19 testimony disputing the acceptance of the thoracic outlet syndrome and brachial plexus conditions,  
20 or characterizing them as "administratively accepted," and regarding the treatment of them, are  
21 overruled because the objections were waived by Ms. Turner's counsel at, e.g., pages 41-42 and  
22 59-61. The objections on page 52 are sustained; lines 8-22 are stricken.

23 All other objections within the depositions are overruled and motions relating to them are  
24 denied.

### 25 ISSUES

- 26 1. Did the claimant sustain a psychiatric condition proximately caused or  
27 aggravated by the industrial injury of February 27, 1995?
- 28 2. As of January 18, 2008, was the claimant in need of further medical  
29 treatment for the conditions proximately caused by the industrial injury of  
30 February 27, 1995?
- 31 3. Was the claimant totally and temporarily disabled for the period  
32 December 29, 2006, through January 18, 2008, as a direct and  
proximate result of the industrial injury of February 27, 1995?

4. What was the extent of claimant's permanent partial disability, proximately caused by the industrial injury of February 27, 1995, as of January 18, 2008?
5. Was the claimant a totally and permanently disabled worker as defined by RCW 51.08.160 as of January 18, 2008?

### PARTIES' CONTENTIONS

**Ms. Turner contends** the industrial injury that caused initial right shoulder strain, later resulted in several more serious conditions. Two of those—thoracic outlet syndrome and right shoulder brachial plexus injury—have been preclusively accepted under the claim. Two more are also caused by the industrial injury—chronic pain and complex regional pain syndrome (CRPS). These alone prevent her from physically performing gainful employment.

Moreover, the injury and its residuals, including the conditions and treatments, promoted the development of a proximately caused psychiatric diagnosis—a type of pain disorder. This severe condition has resulted in permanent partial disability and also, and independently, prevents her from engaging in gainful employment.

**ESD 123<sup>2</sup> contends** CRPS is not proved. Moreover, the extreme nature of Ms. Turner's pain complaints and the absence of objective findings preclude a finding of a physically based chronic pain diagnosis. Ms. Turner's psychogenic pain is a manifestation of, and proximately caused by, pre-existing personality traits that were unaffected by the intervention of the industrial injury other than to provide the opportunity for them to be expressed.

### EVIDENCE PRESENTED

**Judicial notice of the Proposed Decision and Order in Docket No. 00 10207.**

In a prior docket—No. 00 10207—the parties litigated Ms. Turner's appeal of an order that closed her claim in December 1999. I am taking judicial notice of the Findings of Fact and Conclusions of Law to the extent they are relevant to the current appeal. They resulted in the acceptance of a condition described as "right shoulder, a compression brachial plexus injury," award of total temporary disability, and reopening of the claim for further treatment. The parties are precluded from challenging these determinations.

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<sup>2</sup> The employer is variously described as "SE Washington Workers Compensation ESD No. 123" and "SW Washington Workers Compensation Trust."

2 The body of the PD&O (Exhibit No. 19), page 2, also contains this stipulation following the  
3 designation of the issues:

4           The claimant stipulated that the medical evidence will not show that a  
5           mental health condition, other than the pain consistent with the physical  
6           condition described in the record, was sought to be allowed as related to  
7           the industrial injury.

8 This language and concept were not placed in the findings of fact or conclusions of law. Therefore,  
9 the stipulation has no relevance or preclusive effect in this appeal.

10 **Ms. Turner's case-in-chief.**

11           The claimant, Cynthia G. Turner,<sup>3</sup> is a 45 year old resident of Salem, Oregon. She  
12 discontinued working at the close of the school year in the spring of 1996. She is right-handed.  
13 Ms. Turner graduated from high school and took one basic computer course at junior college. Prior  
14 to February 1995, Ms. Turner's described her health as "excellent." She had some modest back  
15 pain, but no chronic pain that prevented her from working. She had no mental health difficulties or  
16 arm, shoulder, neck, or hands limitations. 10/27/08 Tr. at 53-57; see, also, 10/27/08 Tr. at 115-118.

17           Ms. Turner was working in food service for the Walla Walla School District in February 1995.  
18 She had previously substituted in cook-manager positions for three years (approximately 1983 to  
19 1986), before becoming full-time. She described the permanent, 35-hour per week cook position  
20 she held in February 1995, including its physical requirements. 10/27/08 Tr. at 57-64. Ms. Turner  
21 next described her industrial injury that occurred on February 27th. She was engaged in a difficult  
22 stirring motion with both hands, at shoulder level, when she felt a severe pain in her right shoulder.  
23 10/27/08 Tr. at 64-67.

24           Ms. Turner described the adjustments she made to be able to continue working until June  
25 with her ongoing symptoms. She first sought treatment in February 1997 when she saw  
26 Dr. Kellogg. Over the next 13 years, she has seen numerous physicians. In 1999 Dr. H. Graeme  
27 French became her attending physician on referral from Dr. Breland of St. Mary's Hospital.  
28 Ms. Turner described the various treatments she has received since leaving work in mid-1996,  
29 beginning with Dr. French in 1999. These treatments included thoracic outlet surgery in 1998 that  
30 was unsuccessful. 10/27/08 Tr. at 68-75.

31  
32 <sup>3</sup> The witnesses testifying on October 27, 2008, did so in this order: Mr. Garza; Mr. Turner; Ms. Turner; and, Mr. Renz. However, I have summarized their testimony here in this order: Ms. Turner, followed by Mr. Turner and Mr. Garza. Mr. Renz is a witness called by ESD 123 and, therefore, his testimony is summarized later at the close of ESD 123's responding case.

2 Dr. French performed surgeries in December 1999 and June 2000. These provided some  
3 relief, but Ms. Turner described subsequent and ongoing pain, other symptoms, and limitations on  
4 movements and activities. 10/27/08 Tr. at 75-83. She is currently<sup>4</sup> taking prescribed pain  
5 medication. Ms. Turner described a motor vehicle accident (MVA) in February 1997; it did not  
6 result in or increase her symptoms. She tied her descriptions to the time-loss compensation period  
7 at issue. She discussed a video in which she is shown walking her dogs. 10/27/08 Tr. at 83-86.  
8 Ms. Turner described a "devastating" visit to a pain clinic in the late 1990s and IMEs in 2006. She  
9 described the emotional effects of the injury and of the chronic pain. 10/27/08 Tr. at 86-88.

10 On cross-examination, Ms. Turner acknowledged the nature, location, and duration of the  
11 pain from her injury. Ms. Turner did not continue working during the school year's summer, but her  
12 symptoms continued. 10/27/08 Tr. at 88-93.<sup>5</sup> She discussed Exhibit No. 1, a chart note from  
13 Dr. Kellogg from January 1996. She discussed Exhibit No. 2, a chart note from physical therapist  
14 Robert C. Thompson dated January 29, 1996.<sup>6</sup> Ms. Turner also discussed chart notes from  
15 Dr. Kellogg in March and April 1996. 10/27/08 Tr. at 93-98; 105.

16 Ms. Turner discussed the subluxing/dislocating of her shoulder at her second visit to  
17 Dr. French. She treated with Dr. Camp early on and he released her to work with restrictions.  
18 Extended walking makes her arm worse; she discontinued a walking program because of this.  
19 10/27/08 Tr. at 105-109. Dr. French's two surgeries were shoulder stabilization, followed by  
20 brachial plexopathy. Dr. French referred her to a brachial plexus expert in Texas. She does not  
21 fully understand Dr. French's diagnosis of "cervical dystonia." She has had difficulty turning her  
22 head from the outset. Ms. Turner described her neck symptoms and the right-sided nature of her  
23 symptoms. Showering (vibration) and tightness (of clothing) causes pain. 10/27/08 Tr. at 109-113.

24 Ms. Turner discussed a video she reviewed showing her walking her dogs. Her condition is  
25 the same "now" as then. 10/27/08 Tr. at 113-115. She discussed Exhibit No. 7 and the  
26 February 1997 MVA. She has had some training as a manager. Ms. Turner has seen Drs. Hutson,  
27 Matson,<sup>7</sup> Thomas, and Lapierre. Her prior back injuries make it painful to wear tight-fitting pants.  
28 10/27/08 Tr. at 118-124.

29 <sup>4</sup> Ms. Turner testified in October 2008.

30 <sup>5</sup> Counsel's questions initially incorrectly refer to the year of the injury as "2005." 10/27/08 Tr. at 89; 91-93. He  
returned to the correct time frame with the question at page 93, lines 25-26. The parties stipulated to correcting the  
date at 10/27/08 Tr. 104, lines 16-24.

31 <sup>6</sup> Counsel incorrectly described the year of this exhibit as "2006." 10/27/08 Tr. at 95, line 18. Also corrected by  
32 stipulation at 10/27/08 Tr. at 104, lines 16-24.

<sup>7</sup> It is believed that this is the same physician referred to elsewhere in the record as "Matsen" and "Madsen."

2 On re-direct examinations, Ms. Turner clarified that her involvement with Dr. Camp and the  
3 walking program recommended by her therapist, was before Dr. Thomas's surgery. She was  
4 already in physical therapy for her right shoulder at the time of the MVA. She made no personal  
5 injury claim arising out of the MVA. Ms. Turner discussed her unsuccessful attempts to return to  
6 work as a cook, teacher's aide, and playground supervisor. She discussed problems with muscle  
7 spasms and Exhibit No. 1. 10/27/08 Tr. at 124-127.

8 Lonnie C. Turner has been married to Ms. Turner for 26 years; the couple has two adult  
9 children. The Turners moved to Salem, Oregon, in August 2007 after residing in Walla Walla,  
10 Washington, prior to that. Mr. Turner drives bus for the Salem, Oregon, school district; he  
11 previously worked for the county road department in Walla Walla. Prior to her industrial injury,  
12 Ms. Turner was "a very confident, happy, energetic person" without physical or mental health  
13 problems. She loved cooking at work and at home. 10/27/08 Tr. at 35-39. Subsequent to the  
14 injury, Ms. Turner's life involves pain as he described, particularly on "her right side." It has  
15 reduced her activities and severely limited the use of her right upper extremity. He described "good  
16 and bad days." 10/27/08 Tr. at 39-44. The pain has also affected Ms. Turner emotionally.  
17 Mr. Turner has attended several independent medical examinations (IMEs) with Ms. Turner. He  
18 described two occurring in Seattle in 2006. 10/27/08 Tr. at 44-49. His description of Ms. Turner  
19 applies to the time-loss compensation period at issue.

20 Ronald G. Early, M.D., is a peer-certified psychiatrist licensed by and practicing in  
21 Washington State since 1977. Dr. Early evaluated Ms. Turner at her attorney's request in January  
22 2008. He explained the DSM-IV and its utilization of five axes, and the MMPI. Early Dep. at 5-10.  
23 He described pertinent records he reviewed and the summary of Ms. Turner's history he developed  
24 from them. Dr. Early defined "hypochondriacal thinking" and "chronic pain syndrome." The records  
25 included no indication of faking or malingering, or of pre-injury psychological or psychiatric issues.  
26 Early Dep. at 10-19.

27 Dr. Early discussed Ms. Turner's interview with him, including her symptoms, status,  
28 medications, and past medical and psychosocial histories. Early Dep. At 19-22. He next related  
29 the findings on mental status examination. He reached three Axis I diagnoses, each causally  
30 related to the industrial injury:

- 31 1) Pain disorder associated with psychological factors, including personality factors,  
32 depression and anxiety and a general medical condition (the right shoulder injury and its  
residuals);
- 2) Depressive disorder, in partial remission; and,

3) Anxiety disorder, in partial remission.

2 He provided these other four axis-related diagnostic conclusions:

- 3 Axis II No personality disorder diagnosis, but elevation of the histrionic and  
4 hypochondriacal MMPI scales.
- 5 Axis III Right shoulder and sequelae.
- 6 Axis IV Psychosocial stressors caused by the industrial injury and its residuals of loss  
7 or diminished ability to engage in recreational, social, family and public  
8 activities; no stressors unrelated to the injury.
- 8 Axis V General function level of 45—moderately severe to severe impairment.

9 Early Dep. at 22-25.

10 Dr. Early defined and discussed "personality traits" and "personality disorder." He and other  
11 examiners have not diagnosed a personality disorder. Absent the industrial injury and its sequelae,  
12 Ms. Turner would not have developed the pain disorder for reasons he explained. Early Dep.  
13 at 25-28; 34. Dr. Early discussed and explained the "somatoform pain disorder" diagnosis,  
14 including as made by Dr. Hamm, and his disagreement with it. Moreover, individuals generally  
15 often suffer psychosocial conflict in response to industrial injuries. Early Dep. at 28-32. The  
16 psychosocial stressors related to the industrial injury also contributed to the three Axis I diagnoses.

17 Dr. Early commented on Dr. Glass's opinions as follows:

- 18 • There is a distinction between Dr. Glass's diagnosis ("pain disorder with psychological  
19 factors") and Dr. Early's ("pain disorder with psychological factors and a general medical  
20 condition").
- 21 • Although some somatoform disorders are not associated with tissue pathology, his pain  
22 disorder diagnosis is; it requires objective evidence of tissue pathology.
- 23 • He does not know what Dr. Glass's terminology "constitutional and developmental"  
24 means.

24 Early Dep. at 32-34.

25 Dr. Early explained how the pain disorder diagnosis would impact Ms. Turner's employability.  
26 Early Dep. at 34-37. Treatment could "improve her quality of her life but not to a significant  
27 degree." Early Dep. at 38. It would not improve her ability to return to work. Per Department  
28 criteria, she is psychiatrically fixed and stable and a Category IV permanent partial disability  
29 impairment level. He has reviewed the 1998 surveillance video and it does not change his  
30 opinions. He tied those opinions to the time-loss compensation period at issue and to claim  
31 closure. Early Dep. at 38-40.

2 On cross-examination, Dr. Early acknowledged there are no objective physical findings to  
3 account for all of Ms. Turner's pain. Others have found her pain complaints to be out of proportion  
4 to her physical findings. His causation opinion depends on the completeness and accuracy of the  
5 histories provided by Ms. Turner and the medical records. He is unaware of her MVA. Early Dep.  
6 at 41-44. The first medical record he reviewed was from September 1997. Dr. Camp's pain  
7 behavior notation indicates pain in excess of what would be expected from the physical findings.  
8 The pain management staff would be in a better position to judge consistency between a video  
9 taken at that time and Ms. Turner's presentation. He did not diagnose "reflex sympathetic  
10 dystrophy" because it would be outside his area of expertise. Early Dep. at 44-48.

11 Two prior IMEs, one in 2002, the other undated, found pain behavior. Hypersensitivity to  
12 touch is typically associated with a neuropathic pain syndrome; reflex sympathetic dystrophy is one  
13 type. "Hypochondriacal" thinking and "hysteroid coping mechanism" imply an overreaction to  
14 perceived pain. Drs. Kamasani and Lipon indicated significant pain behavior, symptom  
15 magnification, and nonphysiologic and inconsistent findings. He explained why, during his mental  
16 status examination, he found no pain behavior—an outcome consistent with the psychiatric  
17 component of Dr. Hamm's examinations. Early Dep. at 48-51.

18 Ms. Turner did not acknowledge severe depression symptoms. Her opioid use was  
19 iatrogenic—per physicians' instructions. He further discussed "malingering" and pain complaints in  
20 excess of objective findings. He has not spoken to other medical providers. Dr. Early's  
21 unemployability opinion is solely from a psychiatric standpoint; it is because she believes she has  
22 pain. He does "almost exclusively plaintiff work for the State of Washington, and in California it's  
23 defense work, and independent for the Board in Alaska." Early Dep. at 52-55.

24 On re-direct examination, Dr. Early, further discussed the subjectivity of pain complaints as  
25 expressed by the patient and observed by the examiner. A "pain disorder with generally medical  
26 condition" is not a DSM-IV recognized disorder. There was an indication of the 1997 MVA in the  
27 2006 IME by Drs. Hamm and Ricketts that he reviewed. There is no indication that the MVA  
28 changed Ms. Turner's course of treatment. He further discussed his conclusions drawn from  
29 reviewing the videotapes for 20 seconds and the concepts of "functional overlay" and "marked pain  
30 behavior." Early Dep. at 56-61. The diagnosis "pain disorder associated with psychological  
31 disorders or general medical condition" is common when people have pain behavior. He explained  
32 why that pain behavior is more likely to be demonstrated in a physical examination. The chronic

experience of pain, reinforces the fear of pain, prompting a reduction in functioning. Early Dep. at 61-63.

H. Graeme French, M.D. is a peer-certified orthopedic surgeon licensed by and practicing in Washington State for over 20 years. His general orthopedic practice has an upper extremity/shoulder emphasis, which he described. French Dep. at 4-8. Dr. French defined these terms: "thoracic outlet syndrome"; "brachioplexus<sup>8</sup> injury"; "compression brachioplexus injury"; and, "multidirectional instability of the shoulder". Shoulder instability can accompany a brachial plexus injury. Traction, subluxation, and direct trauma are the most common causes of brachial plexus injury; they are typically transection, not compression, injuries. French Dep. at 8-17.

Dr. French has been seeing Ms. Turner and treating her for her February 1997 industrial injury since November 1999 every four to twelve weeks. He related the November 1999 history of injury and subsequent treatment by Drs. Thomas, Camp, Madsen, and the Washington Pain Clinic. Cervical MRIs showed three ruptured discs at the mid-neck level. Dr. Thomas performed an anterior scalenotomy, explained as a surgical procedure for thoracic outlet syndrome. French Dep. at 17-21. Dr. French provided his examination findings. He diagnosed:

- Cervical stenosis at C5-6 identified by MRI;
- Residual compression brachioplexopathy following scalenotomy; and,
- Right trigger thumb (treated with injection).

French Dep. at 21-25.

In December 1999, a repeat MRI's findings indicated the injury was not in her neck. Grade 3 multidirectional instability in the shoulder led Dr. French to recommend and perform arthroscopy and reconstructive shoulder surgery. He described his pre- and post-operative diagnoses and findings during surgery—ones consistent with recurrent subluxation of the shoulder. French Dep. at 25-28. At that time, he indicated "that if she's not showing significant recovery at four months, [he] would recommend neurolysis of her brachioplexus following an isolated anterior scalenotomy," for reasons he explained. Although Ms. Turner experienced some improvement, this surgery was, nevertheless, necessary and was performed in June 2000. French Dep. at 28-31.

Dr. French again provided the pre- and post-operative diagnoses and a description of the surgery, its findings, and outcome. He explained why his diagnoses and surgeries were related to the industrial injury. He also explained why Dr. Thomas's surgery was unsuccessful. French Dep.

<sup>8</sup> This term, used throughout the deposition is not found in *Dorland's Illustrated Medical Dictionary*, page 245 (30th ed. 2003). It may have been mistyped instead of the term also used elsewhere in the deposition—"brachial plexus."

at 32-42. After the June 2000 surgery, numbness and function improved, but "severe nerve pain" that he detailed continued. He referred her to a pain specialist, Dr. Monsivais, based on a diagnostic conclusion of "a type I complex regional pain syndrome (CRPS)<sup>9</sup> rather than a nerve injury problem," a diagnosis he explained. CRPS and the cervical dystonia and spasms were caused by the industrial injury. Hypersensitivity is typical for CRPS patients. French Dep. at 42-47.

Dr. French explained why "there's absolutely nothing that supports that [Ms. Turner's severe pain and hypersensitivity is] purely a psychological problem . . . There is [in Ms. Turner's case] a significant psychological component," testing properly done can "separate psychiatric pain from physiologic pain." For CRPS patients, "the symptoms are real, and . . . psychiatric changes are secondary to being in chronic pain." French Dep. at 47-49. He explained the treatment to control Ms. Turner's pain since the June 2000 surgery—a multi-faceted medications regimen. French Dep. at 49-51.

Dr. French explained, in detail, why he has never released Ms. Turner to work, including to jobs described in provided job analyses, particularly because "she will never be a two-armed worker." He provided specific physical limitations and tied his opinions to the time-loss compensation period at issue and the closure date. French Dep. at 51-57. He described the videotapes and why they do not indicate inconsistency. Assumed facts regarding the 1998 MVA do not change his opinion. Ms. Turner has "[m]ore or less" reached maximum medical improvement because no further healing of her nerve injury is obtainable; some pain treatment modalities could be tried. He would rate her permanent partial disability per the *AMA Guides to the Evaluation of Permanent Impairment, 5th ed.*, as "between 75 and 90 percent impairment of the right arm." French Dep. at 58-61.

On cross-examination, Dr. French clarified that pre-injury lifting weakened Ms. Turner's shoulder ligaments; the industrial injury then caused instability. Making this "two-part diagnosis" requires specific steps. Instability started with the industrial injury. He discussed when motor sensory loss may first have occurred. French Dep. at 63-66. He has not seen Dr. Isaacs' April 1997 report. The industrial injury caused CRPS, first appearing two years after the second brachioplexus neuropathy. Ms. Turner probably had a bulged or ruptured disc at C5-6 that resolved prior to his first appointment; it was not caused by the industrial injury. French Dep. at 66-70.

<sup>9</sup> The unchallenged consensus from the testifying physicians is that "reflex sympathetic dystrophy" is an earlier term for the condition now more commonly denoted "complex regional pain syndrome" (CRPS). In this decision, I use "CRPS" exclusively whenever either term is used by a physician.

2 Dr. French further discussed his early examination findings. The surgery findings were  
3 present for at least three to four years; they were in a "chronic phase." French Dep. at 70-73. The  
4 initial burning in the shoulder blade at the time of injury "gradually strengthened into cervical  
5 brachial syndrome over the next 12 to 18 months, and progressively got worse over the next  
6 several years." In a December 2001 report, he said the industrial injury resulted in the ruptured  
7 cervical discs. He also thought she had a brachioplexus injury. A February 2007 MRI of the  
8 brachioplexus is reported to be normal. Dr. French discussed the *AMA Guides'* reference to rating  
9 CRPS as applied to Ms. Turner. He disagrees with some of the criteria, some of which have been  
10 discredited. French Dep. at 75-83.

11 Dr. French confirmed Dr. Monsivais' September 2004 findings. He further discussed his own  
12 chart note entries August 2005 to June 2007. French Dep. at 83-89. Ms. Turner's cervical dystonia  
13 began in the 1990s. No other physicians have diagnosed it. He has disagreed with several of  
14 Ms. Turner's IME examiners; he does so based on the quality of their work. French Dep. at 89-92.

15 On redirect examination, Dr. French described how Dr. Isaacs' April 1997 report was  
16 consistent with his conclusions on the etiology of Ms. Turner's brachioplexopathy. French Dep.  
17 at 92-95. He reviewed the 2002 brachioplexus MRI. It indicated a right brachioplexus problem and  
18 the absence of the anterior scalene. His conclusion is supported by another radiologist. French  
19 Dep. at 95-98. Dr. Monsivais is a microvascular plastic surgeon who performs peripheral nerve  
20 surgery. The depression he references is a consequence of a physical (nerve) injury. Dr. French  
21 commented further on motor versus sensory problems, including dystonia, and Ms. Turner's right  
22 thumb problem. He discussed the November 2006 arthrogram; an October one had to be aborted  
23 due to pain. French Dep. at 98-103.

24 Dr. French described the validity of Ms. Turner's situation. He gave his view of IMEs:

25 I think for the most part you could change the names on the first one  
26 and they all said basically the same thing and none of it was real. They  
27 frequently ignore data, they don't look at the raw data, they leave things  
28 out, they do partial exams; so, no, I don't think that they're a fair shake  
29 usually.

30 French Dep. at 104, lines 1-6.

31 Maurilio Garza is a nationally certified vocational rehabilitation counselor (VRC) and a mental  
32 health counselor licensed by the state of Washington. He has been a VRC since 1993, a position  
he described. He is certified by, and an authorized provider of vocational services for, the  
Department of Labor and Industries, including for forensic review of cases. 10/27/08 Tr. at 4-10.

1 Mr. Garza has been involved with Ms. Turner's vocational issues on two occasions. First, ESD 123  
2 referred Ms. Turner to him in March 2002. At that time, he met with Ms. Turner and with her  
3 attending physician, Dr. French, and developed job analyses for the positions of cashier and school  
4 cook. 10/27/08 Tr. at 11-12.

5 Mr. Garza next saw Ms. Turner at her counsel's request in 2008. He met with Ms. Turner for  
6 almost two hours on May 9th. He reviewed medical and vocational records provided originally by  
7 ESD 123 in 2002, and supplemented by Mr. Merriman in 2008, related to her 1995 industrial injury.  
8 10/27/08 Tr. at 12-13. These records included a December 2006 employability assessment by  
9 VRC Stephen Renz, job analyses (JAs) for food service worker, paraeducator, and cashier,  
10 Dr. French's office notes, and independent medical examination (IME) reports. 10/27/08 Tr.  
11 at 12-14.

12 Mr. Garza described vocationally relevant information regarding Ms. Turner gleaned from the  
13 records and interview, including age, education, relevant work history, pattern, and developed skills,  
14 and the industrial injury of 1995. 10/27/08 Tr. at 14-18. He next described her post-injury,  
15 unsuccessful attempts to return to work. 10/27/08 Tr. at 18-19. He reviewed JAs prepared by other  
16 VRCs for positions he is familiar with in terms of their requirements and labor markets. Physicians  
17 approving JAs for Ms. Turner, including IME examiners, did so only with restrictions on overhead  
18 use of her right arm. 10/27/08 Tr. at 19-20.

19 Mr. Garza opined that Ms. Turner could not perform the job of food service worker primarily  
20 because the job requires frequent and repetitive lifting above shoulder height. This requirement is  
21 contained in the job analyses prepared by ESD 123's vocational provider; it often requires bimanual  
22 reaching. 10/27/08 Tr. at 21-23. Ms. Turner also could not perform the jobs of cashier or cashier II,  
23 as analyzed by Mr. Renz, in the general labor market because: (1) upper extremity requirements,  
24 reaching overhead on a repetitive basis; and, (2) some variations (parking lot attendant and casino  
25 cashier) are not available in Ms. Turner's Walla Walla labor market. 10/27/09 Tr. at 23-26.  
26 Ms. Turner could not perform the job of paraeducator (also called "teaching assistant" or  
27 "instructional assistant") because she lacks: (1) educational/experience requirements; and,  
28 (2) standard vocational preparation or transferable skills. Her prior experience with this position in  
29 2000 of less than two weeks does not cure these deficits. 10/27/08 Tr. at 26-27.

30 Mr. Garza further opined, based on assumed facts, that Ms. Turner would not be capable of  
obtaining or performing gainful employment on a reasonably continuous basis generally and also  
32 the jobs contained in ESD 123's job analyses for reasons he further explained. Primary reasons

1 include her lack of more than a high school education and of the transferable skills required of  
2 lighter than manual work. 10/27/0-8 Tr. at 26-32. Two videos taken of Ms. Turner in 1998 and 2006  
3 do not change his opinions for reasons he explained. He tied his opinions to the time-loss  
4 compensation period at issue. 10/27/08 Tr. at 32-34.

5 **ESD 123's responding case.**

6 Dejan Dordevich, M.D., is a physician licensed in the states of Washington, Oregon, and  
7 Alaska with 30 years of private practice experience. Dr. Dordevich is peer-certified in internal  
8 medicine and immunology. His experience over the last ten years includes running and being a  
9 consultant for an inpatient treatment facility—Northwest Occupational Medical Center. The clinic  
10 takes a multi-disciplinary approach to pain issues; patients typically were injured workers. He  
11 described the typical treatment protocol. Dordevich Dep. at 3-7.

12 Dr. Dordevich did the initial evaluation of Ms. Turner in 1998 that resulted in her admission to  
13 the clinic. He described his initial assessment report from June 1998, including references to  
14 records reviewed. This included the injury and treatment histories. Early on, Dr. Scranton felt she  
15 had functional overlay and Dr. Almaraz (1997) found no organic explanation for her ongoing  
16 problems. Although two physicians felt she did not have thoracic outlet syndrome (TOS),  
17 Dr. Thomas diagnosed neurogenic TOS. Dr. Matson, "the premier world authority on the  
18 shoulder . . . felt that this was a pain case, so he referred her to the pain clinic rather than do the  
19 surgery. But, on 2-10-98, Mrs. Turner underwent surgery for her thoracic outlet." Dordevich Dep.  
20 at 8-12.

21 After "she had a classical surgery for thoracic outlet," Ms. Turner reported no benefits and  
22 was referred to Dr. Dordevich's clinic. Dr. Dordevich described his findings on physical examination  
23 and the team's ultimate clinical impression. His conclusions included "the diagnosis of chronic pain  
24 right shoulder in the scapular area . . . [with] an emotional so-called overlay to her complaints,  
25 and . . . she would benefit from the pain program. He explained the finding of "extreme pain  
26 behavior . . . [that is] irrational [and] . . . not justifiable." Dordevich Dep. at 13-18.

27 Dr. Dordevich related the status at the clinic's five-day report and at discharge. It was  
28 concluded that further treatment for extreme pain behavior was futile based on observations of her  
29 and a comparison to a videotape in which she was walking her dogs. It was also concluded,  
30 following review of job analyses, that there was "no disease based reason to limit Ms. Turner's  
31 ability to return to work in any capacity." She had no residual impairment due to the industrial

32

injury. She was guarding/self-limiting, an example of extreme pain behavior. Dordevich Dep. at 18-27; 31.

Dr. Dordevich discussed CRPS and its diagnostic criteria per the *AMA Guides*, and his conclusion that it did not apply to Ms. Turner. He did not find "any of the findings to support that diagnosis." Dordevich Dep. at 27-33.

On cross-examination, Dr. Dordevich further discussed the preparation and additional contents of the initial assessment report, particularly an expanded post-injury history. Dr. Matson considered the diagnosis of Reflex Sympathetic Dystrophy (CRPS). Dordevich Dep. at 33-39. Dr. Dordevich has reviewed records beyond his 1998 evaluation, but not from Dr. Matson. Upon review of those, he listed symptoms of CRPS Dr. Matson found and his recommended treatment. Dordevich Dep. at 39-42.

Dr. Dordevich concurred with this diagnosis made by the clinic: "pain disorder associated with psychological factors (mild) and a general medical condition related." This is a psychologist's DSM-IV diagnosis that "reflects [his]...diagnosis 2, which is significant functional overlay." He read from the DSM-IV concerning the diagnosis. He explained "malingering" and concluded it did not apply to Ms. Turner. Dordevich Dep. at 42-49. Dr. Dordevich next explained the "general medical condition" portion of the diagnosis, again per the DSM-IV. This is the diagnostic number—307.89—used in his Axis I diagnosis. The clinic's diagnoses were made after the videotape had been viewed. The "medical condition" contained in the third (pain disorder) diagnosis was a shoulder strain. Dordevich Dep. at 49-53.

Ms. Turner described her typical day to the clinic's psychologist, which included walking one to 1 1/2 hours per day. The MMPI results indicated:

Her responses were consistent with someone who was having medical problems with which they are showing some concern but otherwise the pattern was not consistent with those who tend to have significant embellishment or exaggeration and pain behaviors.

...

And her profile was similar to those who may be struggling with some mood difficulties such as: sadness, pessimism, and a sense of demoralization[.]

Dordevich Dep. at 53-56. The MMPI said that she was not malingering; her chronic pain complaints exceeded physical findings. Ms. Turner's guarding was consistent with pain behavior and the diagnosed pain disorder. He was aware of, but did not call to discuss, Dr. French's post-surgical findings of nerve root scarring. Dordevich Dep. at 56-59.

2 On redirect examination, Dr. Dordevich clarified that Dr. Matson did not have enough  
3 symptoms to diagnose CRPS. The video observed behavior "suggests a conscious embellishment  
4 of pain symptoms and behaviors." Dordevich Dep. at 59-60.

5 John L. Lipon, D.O., is an osteopathic physician, peer-certified in orthopedic surgery and in  
6 IMEs, and is licensed to practice in six states, including Washington. Dr. Lipon teaches at the  
7 University of Washington Medical School. After discontinuing his 20 years in private practice in  
8 1997, he has performed IMEs, a practice, concept, and protocol he described. Dr. Lipon has  
9 performed approximately 500 shoulder surgeries in his career. He saw Ms. Turner at ESD 123's  
10 request in conjunction with a neurologist, Dr. Khamasani, on an initially undisclosed date.<sup>10</sup>  
11 Subsequent to the examination, he reviewed additional, unidentified records. Lipon Dep. at 3-11.

12 Dr. Lipon provided the current complaints and history of injury provided by Ms. Turner. He  
13 next described the highlights from records he reviewed at the time of the examination covering the  
14 period beginning at least in mid-July 1996 through at least 2002, adding some explanatory  
15 comments. Lipon Dep. at 11-30. These included criticism of and disagreement with Dr. French's  
16 findings related to his December 1999 surgery (pages 24-30). The findings would not result from a  
17 brachial plexus injury or surgery, or from the stirring-the-pot injury description.

18 Dr. Lipon next provided his examination findings. There was no atrophy of the right forearm,  
19 back, or shoulder blade. Ms. Turner exhibited abnormal pain behavior and symptom magnification,  
20 including hypersensitivity, which he described in detail. The hypersensitivity could possibly be  
21 caused by CRPS. Lipon Dep. at 30-36. He provided and explained two shoulder diagnoses  
22 vis-à-vis the industrial injury:

- 23 • Mild right shoulder sprain/strain related; and,
- 24 • Right shoulder surgery for multidirectional instability unrelated.

25 The strain would cause "some limitations as regards to overhead work with that arm, but other than  
26 that she would have been able to return to her job of injury." Lipon Dep. at 36-40.

27 On cross-examination, Dr. Lipon clarified that Ms. Turner should avoid overhead repetitive  
28 use of the right arm, but he approved three job analyses including for job of injury. Some of these  
29 limitations are residuals of the surgeries performed. There was no pre-injury history of right arm  
30 problems or chronic pain. He is unclear about the extent of her employment from the 1995 injury to  
31 1997. He was unaware of some other details of her early, post-injury history. Lipon Dep. at 40-45.  
32 Dr. Camp, a neurosurgeon, found positive TOS testing in June 1997. In October 1997 Dr. Thomas

<sup>10</sup> The date of the examination—July 12, 2006—was provided later. Lipon Dep. at 30, lines 11.

found "a significant element of right TOS, neurogenic in type." Dr. Thomas found the injury to be  
2 "not an unusual situation to produce neurogenic TOS secondary to scalene spasm and entrapment  
3 of the brachial plexus." The TOS and its surgery<sup>11</sup> are accepted under the claim. Lipon Dep.  
4 at 45-48.

5 Dr. Lipon discussed Dr. Matsen's November 1997 report, including his findings. Dr. Matsen  
6 indicated that he respected "Dr. Thomas's opinion that these symptoms may be related to the  
7 thoracic outlet" and "this situation could be complicated by CRPS." Hypersensitivity can be a  
8 symptom of CRPS. Dr. Matsen thought Ms. Turner's post-TOS surgery symptoms were consistent  
9 with CRPS. Lipon Dep. at 48-52. After TOS surgery, Ms. Turner had at least four stellate ganglion  
10 blocks, a procedure to relieve pain, that were unsuccessful. The torn ligaments and avulsions  
11 shown in Dr. French's December 1999 surgery "would be the result of a significant force that  
12 caused the instability." Lipon Dep. at 53-55.

13 Dr. Lipon was aware of the acceptance of a right shoulder "brachial plexopathy," but not of a  
14 "right shoulder compression brachial plexopathy" because he does not "know how they got that  
15 right shoulder compression component in there."<sup>12</sup> The June 2000 surgery, likely a neurolysis of  
the brachial plexus, could possibly be to repair a right shoulder compression brachial plexus injury.  
17 In his practice, Dr. Lipon would refer out brachial plexus and TOS surgeries to other specialties. He  
18 has not seen the June 2000 surgery's operative report; he does not otherwise know of Dr. French's  
19 findings from that surgery. Shoulder instability can result from a brachial plexus injury; the brachial  
20 plexus problems could have come from the TOS surgery. This surgery can also result in chronic  
21 pain, dyesthesias, and altered hypersensitivity. Lipon Dep. at 55-59.

22 On re-direct examination, Dr. Lipon acknowledged that IME examiners, Drs. Roberson and  
23 McDermott, concluded in October 2001 that Ms. Turner's "pain problem was due to an underlying  
24 psychiatric or psychological issue." On re-cross examination, Dr. Lipon testified that providing an  
25 explanation for the excessive pain behavior is beyond his expertise. Dr. Khamasani provided a  
26 23 percent impairment rating. Lipon Dep. at 59-62.

27 John E. Hamm, M.D., has been a peer-certified psychiatrist since 1979, presumably licensed  
28 to practice by the state of Washington. Dr. Hamm conducted psychiatric IMEs of Ms. Turner on two  
29 occasions in conjunction with physical examinations by other physicians. He sat through the  
30 history-taking and physical examination portions before conducting his own examination. At the

32 <sup>11</sup> The year of this surgery is 1998, not 2008. Compare, Lipon Dep. at 48, lines 1-3 with 8.

<sup>12</sup> See, Finding of Fact No. 2, PD&O in Docket No. 00 10207 (Exhibit No. 19); it reads: "On February 27, 1995, the claimant sustained an industrial injury to her right shoulder, a compression brachial plexus injury . . ."

1 first examination, in April 2006, the records review indicated a long history of pain behaviors. As  
2 early as October 1996, Dr. Scranton "recommended exploring psychosocial factors at that time  
3 before anything else was done to her in terms of treatment." Hamm Dep. at 3-7.

4 Through a variety of procedures, Ms. Turner's symptoms have returned and increased  
5 resulting in a "conviction that she's disabled and can't work." Dr. Hamm's review was of unspecified  
6 records. He related Ms. Turner's report of her present status, including current symptoms. She  
7 denied prior health, psychiatric, or interpersonal difficulties. Hamm Dep. at 7-11. Dr. Hamm  
8 provided his findings on mental status examination. Dramatic pain behavior occurred during  
9 physical examination, but not prior to it or during the subsequent psychiatric interview he  
10 conducted. His conclusions included:

- 11 • The general category of somatoform pain disorder where there is a psychological basis  
12 for expressions of emotional stress or pain;
- 13 • Hypochondriacal thinking, a focus on pain; and,
- 14 • Subjective symptoms in excess of objective findings.

15 Hamm Dep. at 11-16.

Dr. Hamm concluded the industrial injury did not cause the pain disorder because:

- 17 • It was a minor injury without physical trauma; and,
- 18 • The pain behavior is usually related to a combination of personality factors for which the  
19 injury has been substituted for other interpersonal issues or internal psychological issues.

20 It is possible that the surgeries aggravated the disorder. He did not "find anything that would—from  
21 before her on-the-job injury that would account for her diagnosis." With the personality disorders,  
22 persons "tend to idealize their pre-injury functioning and then exaggerate their post injury disability .  
23 . . [a]nd whether that's conscious or unconscious, we could speculate on that." The post-injury  
24 occurrence of the psychiatric conditions makes it possible, but not probable, that Ms. Turner's injury  
25 contributed to their development. There is some secondary gain. Hamm Dep. at 16-20.

26 Ms. Turner's choice to be an invalid is a combination of conscious and unconscious  
27 determinations. Dr. Hamm agrees with Dr. Early's diagnosis of pain disorder, but not of depression.  
28 He also disagrees with Dr. Early's conclusion that Ms. Turner does not have a personality disorder  
29 and that "this has been something caused by this injury and the treatment of it." The MMPIs are  
30 unhelpful. Dr. Hamm saw Ms. Turner a second time in August 2007 with similar outcomes. He  
31 does not believe Ms. Turner has psychiatric conditions or limitations related to the industrial injury;  
32 her limitations are "self-imposed." Hamm Dep. at 21-25.

On cross-examination, Dr. Hamm acknowledged that there are no pre-injury indications of chronic pain, significant psychosocial problems, including marital or familial, or mental health treatment. He did not diagnose an Axis II personality disorder. He diagnosed a series of pre-existing, longstanding "mixed personality traits." There is no pre-injury manifestation of these, "but she would not be able to report that about herself." Hamm Dep. at 25-28. There is no indication of poor work performance or absenteeism pre-injury. He did not know of her return to work post-injury. Hamm Dep. at 28-29.

Dr. Hamm further discussed the MMPIs. He acknowledged the diagnoses from the pain clinic in 1998. The clinic did not, and he has not, diagnosed malingering. Pain disorders are a subset of somatoform disorder. He clarified that: "she doesn't really have a somatization disorder so that diagnosis wouldn't apply. I mean, it would be a pain disorder that would apply in this case." He discussed the pain disorder diagnostic criteria. The individual is not intentionally feigning; the pain is psychologically real to them. Hamm Dep. at 29-35.

The GAF score of 50 is based on non-physical—psychological or behavioral—problems and indicates serious impairment; Ms. Turner perceives the impairment as related to the industrial injury. The GAF score improved to 60 at his 2007 examination—a moderate impairment level. The industrial injury did not aggravate the pre-existing personality traits. They do make it more likely that Ms. Turner, as compared to others, will have a maladaptive response to injury. Hamm Dep. at 36-40. Dr. Hamm acknowledges that TOS and brachial plexus surgeries are accepted under the claim. The chronic pain began with the industrial injury. Ms. Turner's "perception of the degree of pain is excessive and it's psychologically based." He explained why her pain disorder does not prevent employability. Ms. Turner's use of opiate medication was under the supervision of her attending physician; there is no indication of abuse. Hamm Dep. at 42-47.

Howard B. Kellogg, M.D., is a peer-certified thoracic and vascular surgeon, licensed by the state of Washington with a private practice from 1957 to 1987, which he discontinued at that time due to health reasons. Since 1987, Dr. Kellogg's practice has consisted of performing IMEs. He is experienced with brachioplexus, TOS, and CRPS conditions. He has taught in his field. Dr. Kellogg described the concept and protocol of IMEs, including Ms. Turner's. Kellogg Dep. at 3-8.

Dr. Kellogg apparently examined Ms. Turner in March or April 2006.<sup>13</sup> On examination, Ms. Turner demonstrated right-sided "marked pain behavior" he further described. These

<sup>13</sup> The dates of three reports only are provided. Kellogg Dep. at 8, line 22 to 9, line 1.

1 symptoms could not be accounted for by TOS, the brachial plexus, or CRPS. He related his  
2 remaining findings. There was no right arm atrophy. Pain prevented range of motion, muscle  
3 strength, and Doppler testing. Kellogg Dep. at 9-15. Dr. Kellogg explained CRPS. Because it  
4 affects only the area injured, if Ms. Turner had it, it would not explain many of her other-located pain  
5 complaints. He saw no indication that she has this condition and found no objective findings  
6 justifying the diagnosis in the records of others. Kellogg Dep. at 15-17.

7 Dr. Kellogg described stellate ganglion blocks as a treatment for CRPS. The outcome from  
8 Ms. Turner's blocks did not support the presence of the diagnosis. He concludes she did not have  
9 CRPS. He next discussed TOS and explained why he also concludes Ms. Turner did not have this  
10 diagnosis. Residual impairment or limitations do not necessarily follow TOS surgery and  
11 Ms. Turner had none. Neither the TOS nor its surgery could account for her symptoms. Kellogg  
12 Dep. at 17-22. Dr. Kellogg next discussed the brachial plexus and again explained why he also  
13 does not believe she has this diagnosis. However, he did not have Dr. French's operative notes.  
14 Kellogg Dep. at 22-25.

15 Ms. Turner did not have limitations from Dr. Thomas's surgery. The unsuccessful outcomes  
16 from her surgeries suggest she did not have the conditions for which they were performed. The  
17 degree to which Ms. Turner's marked pain complaints are out of proportion to objective clinical  
18 findings is the most severe he has ever seen. Her complaints do not make anatomic sense, even  
19 when all conditions are considered. Dr. Kellogg explained the critical significance of the absence of  
20 atrophy. Kellogg Dep. at 26-29.

21 On cross-examination, Dr. Kellogg acknowledged that of the 5,000 to 6,000 surgeries he has  
22 performed, five involved TOS or brachial plexus. Since 1987, he has seen 4,000 individuals with a  
23 suggested TOS diagnosis; only five or six had objective findings of the diagnosis, i.e., actually had  
24 TOS. Kellogg Dep. at 29-34. When he saw Ms. Turner, it was eight years after her TOS surgery  
25 and six years since a Dr. French surgery. Because he did not have Dr. French's post-operative  
26 reports, he is unaware of those findings.

27 Dr. Kellogg's ultimate conclusions are based on his belief that Ms. Turner never had TOS or  
28 a brachial plexus injury. He described her TOS surgery and the relationship between the thoracic  
29 outlet and the brachial plexus. An unstable shoulder can develop concomitantly with a brachial  
30 plexus injury, but on this point he would defer to an orthopedist. Kellogg Dep. at 35-39. Atrophy is  
31 the end stage of a brachial plexus injury. This injury can cause numbness and tingling down the  
32 arm. Dr. Kellogg recommends Ms. Turner not work above shoulder level. Kellogg Dep. at 39-42.

Richard E. Marks, M.D., is a peer-certified neurologist licensed by and practicing in Washington State since 1978. He saw Ms. Turner for IME examinations on two occasions.<sup>14</sup> He described his IME protocol generally and in Ms. Turner's case. He discussed 1997 nerve conduction studies that were normal. Marks Dep. at 3-9. The radiologist that described the February 2002 MRI as normal, later modified that conclusion. Dr. Marks discussed an undated brachial plexus neurogram. Dr. Kliot is a neurosurgeon specializing in peripheral nerve compressive disorders, which includes brachial plexus injury. At an undisclosed date, Dr. Kliot did not substantiate that diagnosis for Ms. Turner. After Ms. Turner had unsuccessful stellate ganglion blocks in 1997, Dr. Hutson opined that CRPS was not a likely diagnosis. Marks Dep. at 9-11.

From a review of unidentified, but "voluminous" medical records, Dr. Marks summarized the "very complex" history in which "various doctors that examined her were really unable to arrive at a unified explanation for her disorder." Some of her diagnoses lacked objective findings. He believed the TOS and brachial plexus injury diagnoses were not present and their treatment was, in any event, not related to the industrial injury. Marks Dep. at 11-15; 28-30. During his examination, Ms. Turner held her right arm in a dependent, sensitive-to-touch manner. During a September 1997 IME, the examiners noted no objective neurological findings and no basis for CRPS diagnosis. Dr. Marks described the current symptoms—expression of severe, global pain; no one diagnosis could account for these complaints. There were no objective findings on neurological examination to support any of eight unnamed diagnoses. Marks Dep. at 15-20.

The absence of atrophy was quite significant for reasons he explained. Some of her pain complaints did not make sense anatomically. Ms. Turner indicated that her exam day pain complaints were typical for her. Even light axial pressure caused severe pain. "Dramatic pain behavior" describes Ms. Turner historically and at his examination. This was the most extreme situation in his experience. Marks Dep. at 20-24. Ms. Turner's hands were warm to the touch and several other CRPS findings were absent. Two-point discrimination testing resulted in a nonanatomic finding. Other findings were described. Marks Dep. at 24-28.

Dr. Marks provided some of his diagnostic conclusions; he discussed neurogenic TOS. There were neither objective findings to support Ms. Turner's subjective complaints, nor objective findings to support an impairment rating, except for Dr. Ricketts' 10 percent right upper extremity rating. Dr. Marks provided the findings from his second (mid-2007) neurological examination, which

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<sup>14</sup> No date was provided for the first examination. The second apparently occurred in or near August 2007. Marks Dep. at 31, lines 10-11.

1 "remained normal" and not indicative of CRPS. Marks Dep. at 28-32. Ms. Turner had no dystonia  
2 and her surgical procedures had not produced long-term benefits. The only limitation was no  
3 "forceful, repetitive use of the right upper extremity." Marks Dep. at 32-33.

4 On cross-examination, Dr. Marks acknowledged he was not provided Dr. French's operative  
5 reports. His specialty, neurology, does not include surgery. He did not review actual imaging  
6 studies, only reports of them, including the MRI of the right brachial plexus. His ultimate  
7 conclusions are based on the belief that the only injury Ms. Turner sustained was right shoulder  
8 strain; she did not sustain TOS or brachial plexus. Marks Dep. at 38-43. Dr. Thomas is a TOS  
9 specialist. Ms. Turner had no pre-injury right shoulder or pain problems, or other injuries except  
10 two work-related back injuries that she did not report and kept working. Ms. Turner tried to return to  
11 work with pain, but was unsuccessful. Marks Dep. at 43-47.

12 Dr. Marks did not have Dr. Kellogg's records. Ms. Turner's pain reports to Dr. Scranton  
13 20 months post-injury constitutes "chronic pain." She had two years of conservative shoulder  
14 treatment before her 1998 TOS surgery. Dr. Hutson continued to see Ms. Turner after her  
15 dismissal from the pain clinic and recommended psychological help. Marks Dep. at 47-52.

16 Although Dr. Marks concludes Ms. Turner had chronic pain complaints, he defers a pain disorder  
17 diagnosis to the psychiatrist and to others regarding employability conclusions. He did prohibit  
18 heavy lifting and use of the right arm at or above shoulder height. Marks Dep. at 47-55.

19 On re-direct examination, Dr. Marks clarified that Dr. Kellogg was part of his panel.  
20 Moreover, he did review records of a family practitioner, Dr. Barry Kellogg. Dr. Scranton's  
21 examination in October 1996 included these comments: "significant functional overlay," "possibly  
22 unrelated to the shoulder," "normal [ranges of motion]," "TOS highly unlikely," "recommended  
23 conservative treatment as well as a psychiatric evaluation."

24 Marks Dep. at 55-58.

25 On re-cross examination, Dr. Marks clarified that Dr. Scranton was a non-treating IME  
26 examiner. After Dr. Scranton's examination, treating physicians diagnosed TOS. However, some  
27 non-IME physicians found no support for the TOS diagnosis. Dr. Camp felt she had positive TOS  
28 tests with atypical symptoms. Marks Dep. at 58-61.

29 Stephen D. Renz is a VRC who has worked in the vocational rehabilitation field since 1982.  
30 He described his experience and responsibilities as a VRC, including his certification as a disability  
31 management specialist. 10/27/08 Tr. at 136-140. In September 2005 he was asked to evaluate  
32 Ms. Turner's ability to work, including a return to employment with the Walla Walla School District.

1 Mr. Renz met with Ms. Turner in October 2005 and concluded that she had "no work options,"  
2 including three jobs from her work history: instructional assistant; secretary; and, cafeteria worker.  
3 After obtaining medical information from four IMEs (including two psychiatric IMEs) and her treating  
4 physician, Dr. H. Graeme French, Mr. Renz concluded that, "based on the preponderate medical  
5 opinion," Ms. Turner could perform the job of injury. He provided a closing report in December  
6 2006. 10/27/08 Tr. at 140-42.

7 Since closing the claim, he has reviewed additional, but unspecified, medical records  
8 including from Dr. French. By "medical preponderance," he means "the majority medical opinion."  
9 Based solely on Dr. French's opinions, Ms. Turner would not be capable of gainful employment on  
10 a reasonably continuous basis. Mr. Renz has, however, relied upon the IMEs (nine medical and  
11 three psychiatric) and 1998 pain clinic records. 10/27/08 Tr. at 142-144. From them, he concludes  
12 Ms. Turner can perform her job of injury with one restriction—working overhead. Ms. Turner's  
13 relevant work history was limited to the "cook" position, one Mr. Renz is familiar with in several  
14 settings. 10/27/08 Tr. at 144-46.

15 Regarding the job of injury, Mr. Renz concluded that it "did not require above shoulder level  
work on a repetitive basis" and, therefore, was within the IME-based restriction. This was also true  
17 of "commercial cook" positions generally. Ms. Turner could perform and obtain such employment in  
18 her labor market—Walla Walla. 10/27/08 Tr. at 146-48. Mr. Renz concludes Ms. Turner could  
19 obtain and perform cashier positions. He further indicated that determining the preponderating  
20 medical opinion is simply a matter of adding up the number of opinions on one side of the issue and  
21 going with the majority; however, he also looks for trends and consistency over time. He tied his  
22 opinions to the time-loss compensation period at issue and closure date. 10/27/08 Tr. at 158-162.

23 On cross-examination, Mr. Renz acknowledged that the Cashier II job analysis was general  
24 in nature and he did not do a labor market survey for it. That job requires occasional-to-frequent  
25 overhead reaching; he did not further define the frequency. The job analysis for the job of injury  
26 submitted to the IMEs was one drafted in 1992. It is "confusing" and difficult to determine the  
27 frequency of overhead reaching intended to be indicated as further discussed. However, it does  
28 indicate "reaching above shoulder height frequently." His conclusion, "that overhead reaching and  
29 lifting rarely occurs and is not considered an essential function" of the job, "is at odds" with this job  
30 analysis. 10/27/08 Tr. at 162-67.

The IMEs he has relied upon (Drs. Ricketts, Marks, Zucker, Kellogg, and Hamm) approved  
32 the job of injury with this restriction: "No overhead use of right arm." Two other IME physicians

1 (Drs. Lipon and Khamasani) indicated "no limited overhead use of the right arm"; Mr. Renz did not  
2 inquire further regarding the term "limited." He did not submit other job analyses to IME examiners.  
3 Dr. French was the attending physician and felt "she could not work in any capacity." 10/27/08 Tr.  
4 at 168-70.

5 On re-direct examination, Mr. Renz clarified the actual wording of Drs. Marks, Zucker,  
6 Ricketts, and Kellogg regarding the restriction to be: the claimant would be unable to perform  
7 repetitive overhead work using the right upper extremity. This would be a permanent impairment  
8 related to the industrial exposure in question. Not all IME examiners used the same language. He  
9 is familiar with the labor market for commercial cooking positions in the Walla Walla area 10/27/08  
10 Tr. at 170-74.

11 On re-cross examination, Mr. Renz clarified that "frequently reach overhead" is not  
12 necessarily the equivalent of "reaching overhead on a repetitive basis." However, performing the  
13 motion two-thirds or 50 percent of a day would be "repetitive." 10/27/08 Tr. at 174-75.

14 On further re-direct examination, Mr. Renz believed that one-third of the day was typical for  
15 school cooks to perform overhead reaching—an "occasional" frequency. 10/27/08 Tr. at 176.

**The videotapes.**

17 These were essentially offered by agreement of the parties. Exhibit No. 16, taped July 9 and  
18 July 10, 2006, indicates that Ms. Turner drove to a medical appointment in Pendleton, Oregon, from  
19 her home in Walla Walla, Washington. However, the arm motion used in the driving is not  
20 observable. Ms. Turner's purse is hung over her left shoulder and has a long strap that places the  
21 purse itself below her waist, adjacent to her left hip. All of the significant upper extremity  
22 movements are taken with her left arm, including smoking a cigarette, holding a bottled drink, and  
23 pushing open the door to a public bathroom. She occasionally bends her right arm at the elbow to,  
24 for example, light a cigarette. No-at-the-shoulder or above-the-shoulder use of the right arm is  
25 observed.

26 Exhibit No. 17, taped June 8 through 10, 1998, shows Ms. Turner walking her dogs. She  
27 primarily, but not always, holds the leash in her left hand. When the right arm is always extended  
28 downward; when free, it sometimes swings slightly on walking, but often is held immobile. She  
29 occasionally bends the right arm at the elbow, but only for a quick task. Again, no activity at or  
30 above shoulder level is observed. While driving occurs, the arm motions cannot be observed.

32

## DECISION

### **Burden of proof.**

Ms. Turner bears the burden of proof to establish her right to receive benefits under the Industrial Insurance Act. *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498 (1949); *Stafford v. Department of Labor & Indus.*, 33 Wn. App. 231 (1982), *review denied*, 99 Wn.2d 1020 (1983). When resolution of issues requires weighing the competing opinions of physicians, there are at least four criteria for doing so: qualifications, foundation, consistency, and attending physician status.

### **Ms. Turner sustained a psychogenic pain disorder proximately caused by her industrial injury.**

Ms. Turner has a psychogenic pain disorder condition. Despite the volume of the record, resolution of this initial and critically important issue is uncomplicated. There are no treating psychiatric witnesses, although Dr. French, the treating orthopedist, does agree that there is a psychogenic basis for some of Ms. Turner's pain. Ms. Turner's forensic psychiatrist, Dr. Early, provides this diagnosis related to the industrial injury: "pain disorder associated with psychological factors which would include personality factors, depression and anxiety and a general medical condition." Early Dep. at 24, lines 5-8. This was also the diagnosis reached by the pain clinic. See, Dordevich Dep. at 43, lines 5-8.

The inconsistencies in Dr. Hamm's conclusions, at best insufficiently challenge this diagnosis, if not in fact, confirming it. He first provides a more general diagnosis for her, "somatoform pain disorder." Hamm Dep. at 15, lines 20-24. However, he agrees with Dr. Early "to the extent that he did diagnose a pain disorder." Hamm Dep. at 21, lines 22-24. Regarding the personality disorder, he first disagrees with Dr. Early's diagnostic conclusion that Ms. Turner does not have one. Hamm Dep. at 22, lines 9-12. However, he also expressly does not diagnose one. Hamm Dep. at 27, lines 1-9.

The hallmark of this diagnosis is pain behavior, generally speaking a substantial disconnect between the objective findings that could be causing pain and the level and location of the patient's expression of pain complaints. Every medical or mental health witness, including most particularly the five called by ESD 123, consistently and exhaustively confirmed the extreme presence of this concept from shortly after the industrial injury, using a variety of terminology, e.g.:

- Pain complaints in excess of objective findings;
- Non-anatomic findings;
- Overreaction to perceived pain;

- Symptom magnification;
- Non-physiological findings;
- Functional overlay;
- Excessive guarding;
- Emotional overlay to pain complaints;
- Pain behavior that is irrational and non-justifiable; and,
- A perception of pain that is excessive and psychologically based.

These findings, of course, invite a determination of malingering or factitious presentation. Such a conclusion would find support in the absence of atrophy in Ms. Turner's right upper extremity. If she is in such pain that the arm cannot be used, why is there no atrophy? The videotapes do not support volitional pain behavior. Instead, they confirm no above shoulder usage of the right arm and only an occasional bending of the right arm at the elbow to, e.g., use in conjunction with the other arm, to light a cigarette, adjust headphones, etc. Guarding of the right arm, more moderate than observed by several IME physicians, is nevertheless demonstrated. Primary heavy-duty use is performed by the left arm.

Finally, Exhibit No. 17 was available for the litigation in Docket No. 00 10207 (see Exhibit No. 19), but was not utilized even though employability, time-loss compensation eligibility, was at issue. It is now so remote in time—ten years prior to the closing order at issue here—as to have little relevance.

In any event, not only did none of ESD 123's experts opine malingering, there was no such opinion reached by the dozens of physicians whose records were referenced in the course of the testimony. Thus, by a virtual consensus, Ms. Turner has proved the existence of a psychogenic pain disorder.

Ms. Turner's psychogenic pain disorder was proximately caused by the industrial injury. The record also provides a consensus, again most frequently substantiated by ESD 123's experts, that early on Ms. Turner was demonstrating a psychogenic basis for her pain and psychological/psychiatric intervention was being recommended. For example, Dr. Scranton made this recommendation as early as October 1996. This temporal connection between the injury and the pain behavior is significant because despite two prior back injuries and reports of chronic back pain, Ms. Turner, in 13 years on the job as a cook, never developed pain behavior until the industrial injury.

The only explanation for the development of this established diagnosis offered by ESD 123 comes from Dr. Hamm. Although expressly not diagnosing personality *disorder*, he nevertheless identifies pre-existing personality *traits* as the cause of Ms. Turner's development of pain behavior.

1 The industrial injury was only the opportunity for them to be expressed. There are several reasons  
2 why this analysis is not persuasive.

3 First, it is challenged by Dr. Early. A personality *trait* does not create impairment until it  
4 reaches a level that causes a personality *disorder*. Early Dep. at 26, lines 8-11. As indicated  
5 above, Dr. Hamm did not diagnose a personality disorder. Moreover, the physical component of  
6 Dr. Hamm's diagnosis is a systemic condition, not an acute injury. Early Dep. at 29, line 16  
7 through 30, line 16.

8 Second, the Industrial Insurance Act takes the worker as it finds her, with all pre-existing  
9 frailties and bodily infirmities. *Dennis v. Department of Labor & Indus.*, 109 Wn.2d. 467, 471  
10 (1987), *citing*, *Wendt v. Department of Labor & Indus.*, 18 Wn. App. 674 (1977).

11 Third, Dr. Early provides a persuasive analysis that, but for the intervention of the industrial  
12 injury, the pain disorder would not have developed. Dr. Hamm's opinion requires the conclusion  
13 that the industrial injury was purely coincidental to the development of the pain disorder. However,  
14 he offers no explanation as to why, despite prior back injuries and chronic back pain, and a  
15 consistent 13-year work history, the personality traits did not manifest into pain behavior before the  
16 industrial injury. In fact, these traits did not, pre-injury, lead to any work-related or interpersonal  
17 (marital and family) dysfunction. ESD 123 called no witnesses to contest this testimony from  
18 Mr. and Ms. Turner.

19 In my view, for Dr. Hamm's analysis to overcome the temporal relationship between the  
20 industrial injury and the pain behavior, the personality traits would have had to have developed to  
21 the level of a personality disorder prior to the industrial injury. The testimony is that even 13 years  
22 post-injury, in 2008, this elevation had not occurred.

23 **Ms. Turner has proved that two additional physical conditions—chronic pain and complex  
24 regional pain syndrome (CRPS)—were proximately caused by the industrial injury.**

25 Dr. French diagnoses and causally connects these two conditions to the industrial injury. He  
26 is a long time attending physician entitling his opinion to special consideration per *Hamilton v.*  
27 *Department of Labor & Indus.*, 111 Wn.2d 569 (1988). There are additional reasons for rejecting  
28 the contrary opinions of ESD 123's IME physicians. First, although present early on, ESD 123  
29 apparently never pursued segregation of these conditions, including, for example, at the time of  
30 Ms. Turner's appeal of the December 1999 closing order. See, Exhibit No. 19. Nevertheless, now,  
31 in this record, ESD 123 presents information from dozens of physicians, both treating and forensic,

32

who have been involved with Ms. Turner's case over the thirteen years since her injury. There is substantial emphasis on the 1996 to 2002 period.

Second, ESD 123's physicians do not articulate a non-industrial cause for Ms. Turner's shoulder instability, including providing no explanation for the absence of shoulder symptoms pre-injury.

Third, Dr. French frequently references medical literature in support of his conclusions. ESD 123's testifying physicians provided no rejoinder to those supporting references.

Fourth, while ESD 123's testifying physicians frequently commented upon Dr. French's records, this reference was, overall, significantly selective in that several of them had not reviewed his operative notes.

Finally, for the most part, ESD 123's physicians relied upon the reports of imaging studies. Dr. French had reviewed the films themselves and articulated, when present, his differences with the reporting radiologists' interpretation. Because the ESD 123's physicians did not review the films, they are unable to resolve a disputed interpretation of a study.

**Ms. Turner has not proved an entitlement to treatment; her claim was properly closed.**

There is no testimony that any meaningful treatment is available for either Ms. Turner's physical diagnoses or for her psychogenic pain disorder. The Department's determination that she has reached maximum medical and psychiatric improvement and, therefore, that the claim should be closed, must remain undisturbed.

**Ms. Turner has proved entitlement to mental health based permanent partial disability, but not to an increase in her right shoulder impairment award.**

Dr. Early's impairment rating for Ms. Turner's psychogenic pain disorder—Category IV—is unchallenged in the record. Dr. French's testimony concerning the level of impairment for the right shoulder is insufficient to be persuasive:

I think in terms of her right—I can't remember. I think I've done an impairment, I can't remember exactly what it was, but generally a plexus impairment would—like this would be between 75 and 90 percent impairment of the right arm.

French Dep. at 61, lines 13-17. It is speculative, provides no supporting findings or analysis, and is not expressed in terms of RCW 51.32.080(1)(a).

Thus, the mental health permanent partial disability should be established, but the previously awarded right shoulder permanent partial disability should be unchanged.

**Ms. Turner has proved total disability, both temporary and permanent.**

2 Ms. Turner's right shoulder limitations preclude her from gainful employment on a reasonably  
3 continuous basis. A keen review of the competing vocational testimony narrows the outcome of the  
4 employability issue to this consideration: The frequency and nature of the need to reach overhead  
5 in Ms. Turner's job of injury. This is because:

- 6 • All of the testifying physicians, even those opining Ms. Turner's employability, place a  
7 restriction on this overhead work; and,
- 8 • The persuasive preponderance of the testimony of the two VRCs is that this restriction  
9 prevents performance of the other job for which Ms. Turner was otherwise qualified—  
10 cashier.

11 Mr. Garza's testimony on this job task is more compelling for several reasons. First, it is  
12 more consistent with Ms. Turner's description of the job requirements. Second, Mr. Renz's  
13 conclusions regarding this task, he acknowledges, do not jive with the actual job analysis. Third,  
14 Mr. Renz ultimately acknowledges that, in any event, the job requires overhead reaching one-third  
15 of the day.

16 Ms. Turner's pain diagnoses—the physically-based chronic pain and the psychogenic pain,  
17 also preclude her employability. Mr. Garza considers the role the consequence of Ms. Turner's  
18 pain—frequently missing work—in his employability analysis. Mr. Renz ignores this factor despite  
19 its abundant reference in the IMEs he relied upon. It does not, however, require vocational  
20 expertise to determine that when those dual-based, industrially caused pain limitations are  
21 considered, Ms. Turner is unemployable.

22 There are other reasons for rejecting Mr. Renz's opinion in favor of Mr. Garza's. First,  
23 despite Mr. Renz's claimed experience in the workers compensation related vocational field, he  
24 adopts the extraordinary principle that the preponderating medical opinion to be used in a  
25 vocational analysis is that which is most frequently expressed. This is, of course, not only an  
26 unsophisticated method for resolving the issue of competing medical opinions, but disregards the  
27 emphasis the law requires be given to the views of the attending physician. See, *Hamilton v.*  
28 *Department of Labor & Indus.*, 111 Wn.2d 569 (1988). It must be remembered that, under this  
29 approach, a long-serving attending physician's opinion that the worker is employable would not  
30 prevail against a contrary opinion expressed by two or more forensic examiners hired by the  
31 worker.

32 Second, and related, Mr. Renz acknowledges that if he in fact applies Dr. French's opinions,  
Ms. Turner is unemployable.

2 Third, Mr. Renz applies the role of "consistency" in his weighing of the medical opinions in an  
3 inconsistent manner. When there was consistency among the IME examiners, this factor was  
4 valued. See, e.g., 10/27/08 Tr. at 144, lines 24-26; at 145, line 7; and, at 142, lines 3-5. However,  
5 the consistency of Dr. French's long held opinion that Ms. Turner was not employable was precisely  
6 the reason his opinion was disregarded. See, 10/27/08 Tr. at 5-9.

7 Fourth, Mr. Renz did not have Dr. Early's report; it is not listed among the records he  
8 references so it was apparently not provided to him. Thus, it is unknown the role this forensic  
9 examiner's opinion would have played as opposed to those of the forensic-founded IME  
10 psychiatrists. Mr. Garza had and considered Dr. Early's' report. See, e.g., 10/27/08 Tr. 32,  
11 lines 16-17.

12 Finally, as introduced above, Mr. Renz entirely disregards the role of pain—whether  
13 physically or psychogenically based—in his employability assessment despite its documented  
14 presence in all of the IMEs he relied upon. Because it is not mentioned at all, I cannot know the  
15 reason for its omission. Perhaps Mr. Renz adopted Dr. Hamm's conclusion that the pain  
16 complaints, at least the psychogenic ones, were not caused by the industrial injury. But even if this  
17 is the case, Mr. Renz is required to consider non-industrial vocational limitations. The presence of  
18 the pain factor and diagnoses is well-documented in the IMEs he relied upon as described above.  
19 Mr. Garza considered pain-caused absenteeism in arriving at his assessment; he is also a licensed  
20 mental health provider.

#### 21 **Summary.**

22 Extreme pain behavior can be volitionally and fraudulently produced for the purpose of  
23 secondary gain—a conscious feigning of the symptoms. However, it can also be the result of a  
24 psychiatric condition that arises in response to an injury and its sequelae. In this record, there is  
25 virtually no factual evidence of the former. None of the dozens of physicians who have seen  
26 Ms. Turner in the 13 years since her injury, including those testifying for ESD 123, have concluded  
27 in support of the former. Even if Ms. Turner's right shoulder limitations would allow her to return to  
28 her job of injury—school cook—her physically and psychologically based pain would prevent a  
29 successful outcome. Thus, although the Department correctly determined that after the eight years  
30 since the claim was unsuccessfully closed in December 1999, it should be closed, it incorrectly  
31 found that Ms. Turner had not been left totally disabled by the residuals of her industrial injury.

32 Accordingly, the order of the Department of Labor and Industries issued January 18, 2008,  
should be reversed and remanded to award of temporary and permanent total disability. Because

permanent total disability is being awarded, although permanent partial disability has been found, it will not be awarded.

### FINDINGS OF FACT

1. The claimant filed an Application for Benefits with the Department of Labor and Industries on February 27, 1995, alleging she sustained an industrial injury on that date during the course of her employment with SE Washington Workers Compensation Trust ESD No. 123, Walla Walla School District. The claim was allowed and benefits were paid.

On March 2, 1999, the Department issued an order that closed the claim with time-loss compensation benefits as paid to October 5, 1998, and without further award. On March 11, 1999, the claimant protested this order.

On December 29, 1999, the Department issued an order affirming its prior order of March 2, 1999. The claimant filed a Notice of Appeal from this order on January 26, 2000. On February 11, 2000, this Board granted the appeal under Docket No. 00 10207, and agreed to hear the appeal.

Following litigation before this Board, on February 8, 2001, a Proposed Decision and Order was issued in Docket No. 00 10207. No petition for review of this Proposed Decision was filed. Accordingly, on April 6, 2001, this Board issued an order adopting the Proposed Decision and Order. No appeal to the Board Order Adopting Proposed Decision and Order was taken.

On April 18, 2001, the Department issued an order reversing the order of December 29, 1999, found the claimant to be totally and temporarily disabled and paid time-loss compensation benefits for the period October 5, 1998, through December 29, 1999, and reopened the claim for proper and necessary medical treatment.

On January 18, 2008, the Department issued an order closing the claim with time-loss compensation benefits as paid through December 28, 2006, and with a permanent partial disability award equal to 10 percent amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder.

The claimant filed a Notice of Appeal from this order on March 6, 2008. On March 17, 2008, this Board granted the appeal under Docket No. 08 12039, and agreed to hear the appeal.

2. On February 27, 1995, the claimant, Cynthia O. Turner, sustained an industrial injury while acting in the course of her employment with SE Washington Workers Compensation Trust ESD No. 123, Walla Walla School District when she was stirring a large pot of hamburger with two arms held at shoulder length, and experienced a popping sensation and severe pain in her right shoulder.

- 2 3. The industrial injury of February 27, 1995, proximately caused  
3 Ms. Turner to sustain a right shoulder sprain, thoracic outlet syndrome,  
4 a compression brachial plexus injury to the right shoulder, and complex  
5 regional pain syndrome. These diagnoses required physical therapy,  
6 pain medications, traction, and multiple surgeries.
- 7 4. The industrial injury of February 27, 1995, also proximately caused  
8 Ms. Turner to develop chronic pain and the psychiatric diagnosis  
9 described as pain disorder associated with psychological factors and a  
10 general medical condition. These diagnoses required pain medication.
- 11 5. Ms. Turner's conditions, proximately caused by the industrial injury of  
12 February 27, 1995, were fixed and had reached maximum medical and  
13 psychiatric improvement as of January 18, 2008.
- 14 6. During the period December 29, 2006, through January 17, 2008, the  
15 residuals, proximately caused by the industrial injury, precluded  
16 Ms. Turner from obtaining or performing reasonably continuous, gainful  
17 employment in the competitive labor market, when considered in  
18 conjunction with her age, education, training, work history, transferable  
19 skills, and pre-existing disabling medical conditions.
- 20 7. As of January 18, 2008, Ms. Turner's permanent partial disability to her  
21 right shoulder, proximately caused by her industrial injury, was equal to  
22 10 percent amputation value of the right arm at or above the deltoid  
23 insertion or by disarticulation at the shoulder.
- 24 8. As of January 18, 2008, Ms. Turner's permanent partial disability,  
25 related to her psychiatric condition and proximately caused by her  
26 industrial injury, was most consistent with Category IV of  
27 WAC 296-20-340, permanent mental health impairments.
- 28 9. As of January 18, 2008, when considering the disabilities and physical  
29 limitations, proximately caused by the industrial injury of February 27,  
30 1995, Ms. Turner was permanently unable to obtain and perform gainful  
31 employment on a reasonably continuous basis, in light of her age,  
32 training, education, work experience, and pre-existing disabilities.

#### CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. Ms. Turner's right shoulder sprain and brachial plexus injury, thoracic outlet syndrome, complex regional pain syndrome, chronic pain, and pain disorder associated with psychological factors and a general medical condition, are conditions compensable under RCW Title 51.
3. As of January 18, 2008, Ms. Turner's conditions, proximately caused by the industrial injury of February 27, 1995, were not in need of further necessary and proper medical or psychiatric treatment as contemplated by RCW 51.36.010.

4. Between December 29, 2006, and January 17, 2008, Ms. Turner was a totally and temporarily disabled worker within the meaning of RCW 51.32.090.
5. As of January 18, 2008, Ms. Turner was a permanently totally disabled worker within the meaning of the Industrial Insurance Act and RCW 51.08.160.
6. The order of the Department of Labor and Industries dated January 18, 2008, is incorrect and should be reversed. The claim is remanded to the Department with directions to pay Ms. Turner time-loss compensation benefits for the period December 29, 2006, through January 17, 2008, inclusive, and to determine that, effective January 18, 2008, Ms. Turner was permanently totally disabled worker within the provisions of RCW 51.32.060 and entitled to benefits consistent with that status.

DATED: FEB 23 2009



A. Craig McDonald  
Industrial Appeals Judge  
Board of Industrial Insurance Appeals

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF WALLA WALLA

CHAMBERS OF  
THE HONORABLE  
JUDGE DONALD W. SCHACHT  
DEPARTMENT NO. II

P.O. BOX 836

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DEC - 3 2009

FLYNN MERRIMAN, P.S.

December 1, 2009

Mr. Craig A. Staples  
Attorney at Law  
P.O. Box 70061  
Vancouver, WA 98665

Mr. Robert Merriman  
Flynn Merriman  
8203 W. Quinault Avenue, #600  
Kennewick, WA 99336

Re: Walla Walla School District v. Turner  
Walla Walla County Cause Number 09-2-00436-7

Dear Counsel:

This matter is an appeal by the Walla Walla School District of a decision by the Board of Industrial Insurance Appeals, which concluded that Cynthia Turner, as a result of a February, 1995, injury was temporarily and totally disabled between December 29, 2006, and January 17, 2008, and permanently and totally disabled as of that latter date.

The factual history of the case, the procedural flow of the case and the applicable law and procedure to be applied and followed by this Court acting in its appellate capacity is as set forth in counsel's memorandums. These matters will not be repeated here, except as applicable to this Court's memorandum opinion.

RCW 51.52 provides for de novo review of the Board's decision. The burden is on the School District to show that the Board's decision was improper. The review is based solely on the record developed before the Board and the Board's decision is considered prima facie correct. This presumption can be overcome by a preponderance of the evidence.

The Court has reviewed the entire record and the memorandums of counsel. The Court finds that the employer has carried their burden of proof by a preponderance of the evidence that the Board erred in finding for the Claimant. The decision of the Board is reversed, the prior decision and order of the Department on January 18, 2008, closing this claim is reinstated. Said award found the Claimant's time loss benefits should be paid

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through December 26, 2006, and that she has a permanent partial disability award of 10 percent right arm impairment based on Claimant's shoulder condition.

The district has taken exception to all adverse evidentiary rulings entered by the Board. Since this is a de novo review, this Court will not address every such ruling. Only those rulings which are pertinent to this opinion will be discussed.

The District also objects to Findings of Fact 2, 3, 4, 5 (to the extent it finds a related psychiatric condition), 6, 7, 8 and 9, and Conclusions of Law 2, 3 (to the extent it implies a related psychiatric condition), 4, 5 and 6.

The District's first claim of error is that the Board gave too broad of a preclusive effect to the February 8, 2001, decision which found Ms. Turner's February 27, 1995, injury proximately caused a compression brachial plexus injury of the right shoulder. ~~There is no case law~~ authority to support the Board's restrictive ruling that found other evidence available at that time (2000-2001) was irrelevant at the most recent hearing. This Court finds the June, 1998, surveillance video was relevant. The same is true with the earlier medical records.

The Claimant has the burden of proving her entitlement to benefits. She had to prove through her medical experts that the February 27, 1995, injury was a proximate cause of the conditions upon which she based her claim for benefits. The bulk of the medical testimony was against her claim. The surveillance video contradicted her claims.

There is no authority to support the Board's failure to consider previously available evidence that would impeach the Claimant's assertions of disability as of the October, 2008, hearing. The previously mentioned medical evidence and video tape were (are) relevant to the worker's claim. Even if the previously available evidence is not available as substantive evidence (which the Court does not find), it is available for impeachment purposes. The Board erred in limiting its availability to the employer.

The District's second claim of error alleges that the Claimant is precluded from litigating the compensability of a psychogenic pain disorder in this current proceeding. As stated in the District's memorandum, the Claimant could have litigated the issue of whether the February 27, 1995, injury caused her alleged psychogenic pain disorder in the 2000-2001 Board proceeding. She did not do so. Under the doctrine of claim preclusion, she cannot do so now.

Claimant appealed the Department's order closing her claim in the 2000-2001 hearing. Since Claimant had the opportunity to raise that issue and she expressly did not, she cannot do so now. See *Chavez v. Department of Labor and Industries*, 129 Wn.App. 236 (2005).

Next, the District argues that alternatively, the Claimant failed to prove that the February 27, 1995, injury proximately caused a psychogenic pain disorder. Review of the record leads this Court to the conclusion that the great weight of the medical evidence does not support a finding of a psychiatric disorder. The fact that the Claimant's pain complaints, in almost all examinations and evaluations, substantially exceed the objectively substantiated pain complaints, does not reasonably lead to the diagnosis of a psychiatric disorder. The overwhelming, credible medical evidence is that the pain complaints are not genuine. The evidence, or lack of evidence, of disuse muscle atrophy illustrates the point.

This Court does not find the "lack of a malingering diagnosis" is fatal to the District's argument. Embellishment and malingering are relative terms. The overwhelming medical evidence is that the Claimant did not prove her claim of injury. Dr. Hamtn's testimony was most persuasive, while Dr. Early's testimony was at best speculative.

The District argues that the Claimant did not sustain her burden of proving that the February 25, 1995, injury proximately caused Thoracic Outlet Syndrome, Complex Regional Pain Syndrome or a Chronic Pain Condition. The burden is on the Claimant. The District's medical experts were convincing. The numerous medical diagnoses and physical examinations are supportive of a conclusion that the Claimant does not suffer from these conditions. They at least defeat a preponderance of the evidence burden and overcome the presumption of correctness of the Board's decision. Possibly most telling is the evidence that the thoracic outlet surgery did not improve the Claimant's condition. Dr. French's testimony did not overcome or defeat all of the other medical evidence, even though he was Claimant's attending physician.

Finally, the District argues Claimant failed to prove she was and is totally disabled. The District's medical evidence and Mr. Renz's testimony regarding limited overhead use of the right arm and other available work positions was convincing and should have been given more weight by the Board. While the burden of proof is on the Claimant, the District provided more than enough evidence to defeat the claim of total disability.

Claimant suffered an injury. She has been compensated for time loss benefits, had her claim closed and assigned a permanent partial disability award of 10 percent. She has not proven she is entitled to more.

Very truly yours,

  
DONALD W. SCHACHT

DWS/tmd

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FLYNN MERRIMAN, RS.

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WALLA COUNTY  
WASHINGTON  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WALLA WALLA

WALLA WALLA SCHOOL DISTRICT,

Plaintiff,

v.

CYNTHIA O. TURNER.

Defendant.

Cause No. 09-00436-7<sup>2</sup>

FINDINGS OF FACT AND  
AND CONCLUSIONS OF LAW

This matter came on for trial before The Honorable Donald W. Schacht on October 21, 2009. Craig A. Staples represented the Plaintiff, Walla Walla School District. Robert D. Merriman represented the Defendant, Cynthia O. Turner. The court reviewed and considered the certified appeal board record and the memoranda and arguments of counsel. By letter dated December 1, 2009, the court reached its decision, which is formalized as follows:

FINDINGS OF FACT

1. The school district has sustained its burden of proving by a preponderance of evidence that the Board's decision was incorrect on each contested issue.
2. Claimant had been diagnosed with a psychogenic pain disorder well before the 2000-2001 proceeding on this claim. She could have, and should have, litigated whether the injury had caused that condition in that proceeding.
3. Alternatively, a substantial preponderance of the evidence demonstrates that

Page 1 – FINDINGS OF FACT AND CONCLUSIONS OF LAW

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1 the February 27, 1995 injury did not proximately cause a chronic pain condition, pain  
2 disorder associated with psychological factors or other psychiatric or mental health  
3 condition, or any associated permanent impairment.

4 4. A substantial preponderance of the evidence demonstrates that claimant  
5 does not have a chronic regional pain syndrome or thoracic outlet syndrome  
6 proximately caused by the February 27, 1995 injury.

7 5. A substantial preponderance of the evidence shows that claimant's pain  
8 complaints, and the associated limitations she claims, are greatly exaggerated and  
9 largely not genuine.

10 6. Mr. Renz's testimony is most persuasive that, at all relevant times, claimant  
11 could have performed her job at the time of injury (cook) and other positions, such as  
12 cashiering.

13 7. A substantial preponderance of the evidence demonstrates from that  
14 December 29, 2006 through January 17, 2008, claimant was not precluded from  
15 performing or obtaining reasonably continuous gainful employment as a proximate  
16 result of the February 27, 1995 injury and its residuals.

17 8. A substantial preponderance of the evidence shows that claimant's injury-  
18 related condition is fixed and stable and not in need of further medical treatment.

19 9. A substantial preponderance of the evidence demonstrates that as of  
20 January 18, 2008, claimant was not permanently precluded from performing or  
21 obtaining reasonably continuous gainful employment as a proximate result of the  
22 February 27, 1995 injury and its residuals.

23 10. A substantial preponderance of the evidences establishes that claimant's  
24 injury-related physical impairment does not exceed 10 percent of the right arm for her  
25 shoulder condition.

#### 26 CONCLUSION OF LAW

27 1. This court has appellate jurisdiction to review the Board's April 16, 2009  
28 order.

Page 2 – FINDINGS OF FACT AND CONCLUSIONS OF LAW

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2. The Board erred in excluding Mr. Renz's testimony regarding cooking positions beyond that of commercial cook.

3. The Board erred in concluding that the evidence existing at the time of the 2000-2001 proceeding had "little" or "minimal" relevance in this proceeding.

4. Claimant is barred by claim preclusion from litigating the compensability of a psychogenic pain disorder in this proceeding.

5. Alternatively, the alleged psychiatric or mental health conditions, including chronic pain condition and pain disorder associated with psychological factors, and any associated permanent impairment, are not a compensable consequence of the February 27, 1995 injury.

6. The alleged chronic regional pain syndrome and thoracic outlet syndrome are not a compensable consequence of the February 27, 1995 injury.

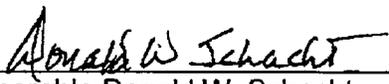
7. As of January 18, 2008, claimant was not in need of further medical care for the residuals of her February 27, 1995 injury.

8. From December 29, 2006 through January 17, 2008, claimant was not a temporarily and totally disabled worker within the meaning of RCW 51.32.090.

9. As of January 18, 2008, claimant was not a permanently and totally disabled worker within the meaning of RCW 51.32.160.

10. The Board's April 16, 2009 order is incorrect and is reversed. The Department's January 18, 2008 order is correct and is reinstated.

DATED this 22~~nd~~ day of March, 2010.

  
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Honorable Donald W. Schacht

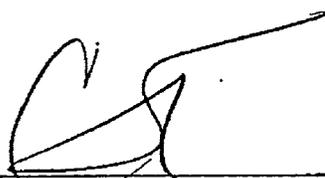
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Craig A. Staples, WSBA #14708  
Attorney for Walla Walla School District

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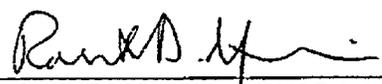
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Robert D. Merriman, WSBA #10846  
Attorney for Cynthia Turner.

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WALLA COUNTY  
WASHINGTON  
BY Roemer

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WALLA WALLA

WALLA WALLA SCHOOL DISTRICT,

Plaintiff,

v.

CYNTHIA O. TURNER.

Defendant.

Cause No. 09-00436-7

JUDGMENT # 10 9 00293 2

JUDGMENT SUMMARY (RCW 4.64.030)

- 1. Judgment Creditor: Walla Walla School District
- 2. Judgment Debtor: Cynthia O. Turner
- 3. Principal Amount of Judgment: - 0 -
- 4. Interest to Date of Judgment: - 0 -
- 5. Statutory Attorney Fees (RCW 4.84.080) \$200.00
- 6. Costs: - 0 -
- 7. Other Recovery Amounts: - 0 -
- 8. Principal Judgment shall bear interest at the rate of 0% per annum.
- 9. Attorney Fees shall bear interest at the rate of 12% per annum (RCW 4.56.110).
- 10. Attorney for Judgment Creditor: Craig A. Staples

Page 1 - JUDGMENT

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11. Attorney for Judgment Debtor: Robert D. Merriman

**JUDGMENT ORDER**

This matter came on for trial on October 21, 2009 before The Honorable Donald W. Schacht. Being fully advised, and having entered its Findings of Fact and Conclusions of Law, which are attached,

It is ordered, adjudged and decreed that:

1. The April 16, 2009 order of the Board of Industrial Insurance Appeals is incorrect and is hereby reversed.

2. The January 18, 2008 order of the Department of Labor and Industries is correct and is reinstated.

3. The Walla Walla School District is awarded, and claimant is ordered to pay, a statutory attorney fee of \$200.00.

4. The Walla Walla School District is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110. However, no interest will be payable if payment is made within 30 days of entry of this judgment.

DATED this 22<sup>nd</sup> day of March, 2010.

Donald W Schacht  
Honorable Donald W. Schacht

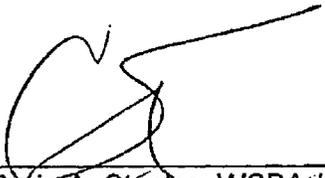
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Attorney for Walla Walla School District

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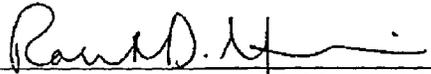
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