

FILED

OCT 06 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 289591

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

WALLA WALLA SCHOOL DISTRICT,

Respondent,

v.

CYNTHIA O. TURNER,

Appellant.

**BRIEF OF RESPONDENT
(Amended)**

Craig A. Staples, WSBA #14708
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Vancouver, WA 98665
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Attorney for Walla Walla School District

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TABLE OF CONTENTS

	<u>Page</u>
I. RESPONSE TO ASSIGNMENT OF ERROR.....	1
A. <u>Response to Assignment of Error</u>	1
B. <u>Issues Pertaining to Assignment of Error</u>	1
II. STATEMENT Of THE CASE	3
A. <u>Procedural History</u>	3
B. <u>Factual History</u>	5
III. STANDARD OF REVIEW	13
IV. SUMMARY OF ARGUMENT	15
V. ARGUMENT	16
 <u>The Trial Court Correctly Reversed the Board’s Decision and Reinstated the Department Order That Closed This Claim Without Acceptance of a Mental Health Condition, Additional Time Loss Compensation or Pension Benefits</u>	
A. Claimant Has Not Properly Raised or Preserved for Review Any Reviewable Issue For This Court. Her Arguments are Unfounded and Inappropriate	17
B. Substantial Evidence Supports the Trial Court’s Findings on Each Issue	21
C. <i>Assuming</i> the Court Reverses the Trial Court’s Finding That the February 27, 1995 Injury Caused No Pain Disorder or Other Mental Health Condition, Substantial Evidence Supports the Trial Court’s Finding That Claimant Had Been Diagnosed With a Psychogenic Pain Disorder Before the 2000-2001 Proceeding. The Trial Court Correctly Concluded That Claim Preclusion Barred Claimant From Litigating a Psychogenic Pain Disorder in This Proceeding	33
VI. CONCLUSION	36

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>Allen v. Asbestos Corp., Ltd.</i> , 138 Wn.App. 564, 157 P.3d 406 (2007)	29, 33
<i>Bennett v. Department of Labor and Industries</i> , 95 Wn.2d 531, 627 P.2d 104 (1981)	21
<i>Chavez v. Department of Labor and Industries</i> , 129 Wn.App. 236, 118 P3d 392 (2005)	33, 34, 36
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992)	14
<i>In Re Detention of Twining</i> , 77 Wn.2d 882, 894 P.2d 1331 (1995)	26
<i>Ford v. Bellingham-Whatcom Cty. Dist. Bd. of Health</i> , 16 Wn. App. 709, 717, 558 P.2d 821 (1977)	18
<i>Groff v. Department of Labor and Industries</i> , 65 Wn.2d 35, 395 P.2d 633 (1964)	13
<i>Hansen v. Estell</i> , 100 Wn.App. 281, 997 P.2d 426 (2000) ...	14
<i>Hastings v. Department of Labor and Industries</i> , 24 Wn.2d 1, 163 Wn.2d 142 (1945)	15
<i>Inland Foundry Co. v. Department of Labor & Industries</i> , 106 Wn. App. 333, 340, 24 P.3d 424 (2001)	17, 18, 31
<i>Intalco Aluminum v. Department of Labor and Industries</i> , 66 Wn.App. 644, 833 P.2d 390 (1992), <i>rev den</i> , 120 Wn.2d 1031 (1993)	13
<i>Johnson v. Department of Licensing</i> , 71 Wn.App. 326, 858 P.2d 1112 (1993)	14
<i>Layrite Products v. Degenstein</i> , 74 Wn.App. 881, 880 P.2d 535 (1994)	13

	<u>Page</u>
<i>Loveridge v. Fred Meyer, Inc.</i> , 125 Wn.2d 759, 763, 887 P.2d 898 (1995)	33, 34
<i>McClelland v. ITT Rayonier</i> , 65 Wn.App. 386, 828 P.2d 1138 (1992)	26
<i>Miller v. Badgley</i> , 51 Wn.App. 285, 753 P.2d 530 (1988)	14
<i>Olympia Brewing Co. v. Department of Labor and Industries</i> , 34 Wn.2d 498, 208 P.2d 1181 (1949)	15, 21
<i>Romo v. Department of Labor and Industries</i> , 92 Wn. App. 348, 962 P.2d 844 (1998)	12
<i>Saylor v. Department of Labor and Industries</i> , 69 Wn.2d 893, 421 P.2d 362 (1986)	31
<i>Shoemaker v. City of Bremerton</i> , 109 Wn.2d 504, 745 P.2d 858 (1987)	36
<i>Spring v. Department of Labor and Industries</i> , 96 Wn.2d 914, 640 P.2d 1 (1982)	30
<i>In re Welfare of Sego</i> , 82 Wn.2d 736, 513 P.2d 931 (1973) ..	14
<i>Young v. Department of Labor and Industries</i> , 81 Wn.App. 123, 128, 913 P.2d 402 (1996)	13

STATUTES

RCW 51.08.160.	30
RCW 51.52.050	21
RCW 51.52.115	12

RULES

CR 52(a)	18
ER 703	31
RAP 2.5(a)	29, 32
RAP 10.3	17, 18

I. RESPONSE TO ASSIGNMENT OF ERROR

A. Response to Assignment of Error

1. Claimant has not complied with the procedures for separately identifying each alleged error or providing supporting argument.

2. The trial court correctly reversed the Board's decision and reinstated the Department order that closed this claim without acceptance of a mental health condition, additional time loss compensation or pension benefits.

3. Substantial evidence supports each of the trial court's findings of fact and its conclusions of law reasonably flow from the findings.

4. The trial court correctly concluded that claim preclusion principles bar claimant from litigating the compensability of a psychogenic pain disorder in this proceeding.

B. Issues Pertaining to Assignment of Error

1. Has claimant properly raised and preserved reviewable issues for this court?

2. Does substantial evidence support the trial court's finding that the February 27, 1995 injury did not proximately cause any

pain disorder or other mental health condition? (CP 44-45, #3).

3. Was the issue of claimant's alleged regional pain syndrome or thoracic outlet syndrome before the trial court? If so, must the trial court's finding that the February 27, 1995 injury caused no such condition be accepted as a verity on appeal because claimant has conceded substantial evidence supports the trial court's finding? (CP 45, #4).

4. Does substantial evidence support the trial court's finding that claimant's pain complaints and associated limitations are greatly exaggerated and not genuine? (CP 45, #5).

5. Does substantial evidence support the trial court's findings that claimant could work as a cook and in other positions, and that the February 27, 1995 injury did not proximately cause her to be totally unable to perform and obtain reasonably continuous employment, temporarily from December 29, 2006 through January 17, 2008 and permanently as of the latter date? (CP 45, #'s 6, 7 and 9).

6. Has claimant preserved a challenge to the trial court's affirmation of the award of 10 percent permanent partial disability for right upper extremity impairment granted by the Department and

Board? (CP 45, # 10).

7. *Assuming* the court reverses the trial court's finding that the February 27, 1995 injury caused no pain disorder or other mental health condition, does substantial evidence support the trial court's conclusion that claimant could have litigated such an issue in the 2000-2001 proceeding; and, did the trial court correctly conclude that claimant is barred by claim preclusion from litigating that issue in this proceeding? (CP 44, finding 2; CP 46 concl. 4).

II. STATEMENT OF THE CASE

A. Procedural History

This workers' compensation case arises under Washington's Industrial Insurance Act ("IIA"). The Appellant, Ms. Turner (claimant), filed a claim in March 1996 for a February 27, 1995 right shoulder injury. (CABR 88). Following closure of the claim on October 5, 1998, claimant initiated Board litigation regarding the closure, but declined to pursue any issue regarding the compensability of a mental health condition. (Ex. 19, p. 2, ll. 21-24).¹ The appeals judge found that claimant had sustained a compression injury to the brachial plexus and reversed closure of

¹ The exhibits are contained in the CARB and supplemental CARB and are cited by exhibit number.

the claim, but did not find an injury-related mental health condition. (Ex. 19, p. 8-9). The appeals judge concluded that claimant required further treatment and therefore ordered that the claim remain open. (*Id.*).

On April 11, 2007, the Director of the Department found claimant able to work in her regular job and therefore concluded she was ineligible for vocational assistance. (CABR 90).

On January 18, 2008, the Department issued an order that closed the claim with time loss benefits as paid through December 28, 2006 and a permanent partial disability award of 10 percent right arm impairment based on claimant's shoulder condition. (*Id.*). That is, the Department found that the compensable injury had not rendered claimant totally disabled, either temporarily or permanently, after December 28, 2006.

On claimant's appeal, the Board concluded that the February 1995 injury had caused: a right shoulder sprain, thoracic outlet syndrome and a compression brachial plexus injury of the right shoulder – resulting in 10 percent impairment of the right arm; and a psychiatric condition diagnosed as a pain disorder, which resulted in Category 4 mental health impairment. (CABR 69-70). The

Board also concluded that claimant was temporarily and totally disabled between December 29, 2006 and January 17, 2008, and permanently and totally disabled as of the latter date. (*Id.*).

The matter came on for a bench trial before the Honorable Donald W. Schacht on October 21, 2009, who issued a letter decision dated December 1, 2009. Judge Schacht determined that the employer had sustained its burden of proving the Board had erred in resolving the contested issues. (CP 41-43). The court thereafter entered the findings of fact and conclusions of law that are found in the Appendix and incorporated by reference. (CP 44-47). The court ultimately concluded that the Department had correctly resolved the contested issues and that its January 18, 2009 order should be reinstated. (CP 46). Claimant has appealed the trial court's decision to this court. (CP 50).

B. Factual History

Claimant testified that she developed right shoulder pain while stirring hamburger on February 24, 1995. (10/27/08 Tr. 66-67).² She stated the injury caused "horrid," "excruciating" and

² The hearing and deposition transcripts are in the CABR. Transcript references are to the hearing date and page number for hearing testimony, and to the witness' last name and page number for deposition testimony.

“overwhelming” pain that resolved. (10/27/08 Tr. 66, 89). Claimant reported that immediately following the injury, and from that point forward, she significantly changed the manner in which she performed her job so that she held her right arm at her side and did everything without moving her right shoulder. (10/27/08 Tr.68-70, 89-91). Aside from the job, claimant testified that from the outset the injury prevented her from using her right arm while engaging in virtually all activities and that she mostly carried her arm at her side. (10/27/08 Tr. 89, 91, 107, 109-10).

Claimant acknowledged, however, that she continued to perform her regular job after the injury through the end of the 1994-95 school year and throughout the 1995-96 school year until it ended in June 1996. (10/27/08 Tr. 70).

Claimant did not obtain treatment for her injury until January 25, 1996, nearly a full year after the reported injury. (10/27/08 Tr. 92-93). On that date, she noted right scapular and left hand complaints that had “been going off and on for 2 months.” (Ex. 1). Claimant noted she felt her condition “may be related to work,” but she reported no specific injury or trauma. (*Id.*). Four days later, she informed her physical therapist that she “does not recall any

injury or incident preceding her pain onset approx. 2 months ago,” but instead noted only a gradual of symptoms. (Ex. 2). She said that she “was not sure” whether her condition was work-related. (*Id.*). The examination revealed no indication of shoulder joint involvement. (*Id.*).

Claimant filed this claim on March 15, 1996, alleging the occurrence of the incident to which she testified. (CABR 88). On July 17, 1996, she reported having no instability in her right shoulder and testing for instability was negative. (Ex. 3: Lipon 16). In December 1996 and thereafter, claimant participated in physical therapy exercises (e.g., wall pushups) that were inconsistent with any shoulder instability. (Lipon 19).

In January and early February 1997, claimant repeatedly reported to her physical therapist that her condition was improved and that she was doing well. (Exs. 5, 6, 7). She returned to part-time work, four hours a day. (Ex. 7). On February 7 and 10, 1997, she stated she was tolerating work well. (*Id.*). On February 18, 1997, she noted she had stirred large pots of food without increased shoulder pain. (*Id.*).

Dr. Camp examined claimant in June 1997 and reported

substantial pain behavior that interfered with his assessment. (Early 45). Dr. Isaacs conducted electrodiagnostic studies in July 1997 and found no abnormalities. Claimant saw Dr. Matsen, a recognized shoulder expert, in November 1997 and he found no instability. (Lipon 23, 37; Dordevich 12-13). Claimant also received ganglion blocks in November 2007, which provided no relief. (Lipon 13, 53).

Dr. Thomas later diagnosed neurogenic thoracic outlet syndrome (TOS), notwithstanding the normal electrodiagnostic studies and the absence of hand atrophy that is typical of that condition. (Kellogg 19-20). He performed TOS surgery in February 1998, which provided claimant no relief. (Lipon 23-24; Claimant 75).

Beginning in June 1998, claimant participated in an extended multi-disciplinary pain clinic evaluation with physical and mental health specialists. (Dordevich 8). She reported considerable pain in her shoulder and right arm and associated "extreme" and "severe" pain behavior that the evaluators noted. (Dordevich 15, 19). Claimant's representation of pain interfered with her ability to participate in therapy to the extent she claimed

she could not walk on a treadmill because she could not step lightly enough to avoid movement of her right arm. (Dordevich 19). The examining psychologist diagnosed a pain disorder associated with psychological factors, mild, and a general medical condition. (Dordevich 43). Surveillance video taken in June 1998 demonstrated claimant walking her dog, occasionally using her right hand to hold the leash (although mostly using the left) and swinging the arm as she walked without apparent limitation or pain. (Ex. 17; Dordevich 19-20). The pain center evaluators thereafter reviewed the videotape and found a substantial discrepancy between claimant's representations and behavior in the clinic regarding right arm usage and the abilities she demonstrated on the videotape. (Dordevich 20-22). The evaluators concluded that claimant had no organic basis for her pain and that there was significant psychological overlay. (Dordevich 58). In the discharge summary, after reviewing the surveillance videotape, they concluded that claimant had consciously embellished her pain symptoms. (Dordevich 59).

In March 1999 and December 1999, the Department issued orders that closed the claim. (CABR 88). Claimant appealed the

latter order to the Board and a hearing was held in October 2000. (See Ex. 19, the February 8, 2001 Proposed Decision and Order). The issues raised in that proceeding included: "What conditions were proximately caused by the industrial injury of February 27, 1995?" (Ex. 19, p. 2, l. 10). Claimant expressly declined to pursue any issue regarding the compensability of a mental health condition. (Ex. 19, p. 2, ll. 21-24). The appeals judge did not find that the injury had caused a psychogenic pain disorder or any other mental health condition. (Ex. 19, p. 8-9).

In the meantime, claimant had come under the care of Dr. French in November 1999. On his first examination, he noted that claimant guarded her right shoulder, but otherwise had normal range of shoulder motion with good stability. (Lipon 24, 37; French 71-72). Dr. French diagnosed C5-6 stenosis due to a ruptured disc and ordered a cervical MRI scan, which revealed no nerve root involvement. (French 69; Lipon 24).

At the next examination, approximately one month later, Dr. French reported having found Grade 3 multidirectional instability of the right shoulder. (Lipon 24). No other physician had made the diagnosis before. (Lipon 25). Nevertheless, Dr. French quickly

(before the diagnosis could be addressed) proceeded to surgery to repair the reported instability. (Lipon 24). Claimant experienced no relief from the surgery. (Claimant 75).

Dr. French then diagnosed brachioplexus neuropathy and performed surgery for that presumed condition in June 2000. (French 32-42). Claimant thereafter reported no improvement with that procedure; at hearing she said it helped her breathe easier, but did not help her pain. (Marks 32-33; Claimant 75).

Dr. French has since diagnosed multiple other conditions – e.g., cervical brachial syndrome, cervical radiculopathy, cervical dystonia and chronic regional pain syndrome – a total of at least 8 divergent diagnoses, for which he has recommended various other modalities, including a spinal cord stimulator for an alleged spinal condition and Botox for the alleged dystonia. (Marks 12, 17; Lipon 30). He has seen claimant every 4 to 12 weeks since November 1999 and claimant has stated her condition is worse, not better. (French 17; Claimant 107).

Over the years, multiple examiners noted that claimant presented on examination with extreme pain behavior, no ability to use her right arm, and extreme hypersensitivity to any perceived

touch. (See, e.g., Kellogg 9; Marks 20, 24; Lipon 32-34). They consistently found no objective findings to substantiate claimant's pain complaints. (Lipon 35; Marks 17, 19; Kellogg 27). Claimant herself testified that since the injury she has had overwhelming right shoulder and arm pain that has forced her to leave her arm at her side and prevented her from using it for virtually all activities. (Claimant 89, 91, 107, 109-10). Yet, despite claimant's reported inability to use her right arm for 15 to 20 years, all these examiners have noted she has no atrophy in her right upper extremity. (See, e.g., Kellogg 12-14; Marks 20; Lipon 31-32). Drs. Kellogg, Marks and Lipon all testified that the absence of atrophy is of major importance because if, as claimant represented, she had used the arm very little over many years, she most certainly would have significant atrophy from disuse. (Kellogg 28-29; Marks 20; Lipon 31-32).

Additional testimony is discussed below.

III. STANDARD OF REVIEW

The trial court had *de novo* review over the decision of the Board. RCW 51.52.115; *Romo v. Department of Labor and Industries*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998). The

Board's decision was considered *prima facie* correct and the employer had the burden of proving the Board's decision was incorrect. *Intalco Aluminum v. Department of Labor and Industries*, 66 Wn.App. 644, 833 P.2d 390 (1992), *rev den*, 120 Wn.2d 1031 (1993); *Romo*, 92 Wn. App. at 353. However, this presumption could be overcome by a simple preponderance of the evidence; that is, it controlled the court's disposition of the matter only if the court had found "itself unable to make a determination on the facts because the evidence [was] evenly balanced." *Layrite Products v. Degenstein*, 74 Wn.App. 881, 887, 880 P.2d 535 (1994). The superior court was therefore free to substitute its findings for those of the Board if it determined a simple preponderance of the evidence supported the employer's position on any contested issue. RCW 51.52.115; *Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 43, 395 P.2d 633 (1964).

Upon appeal from the superior court's decision, review in this court is limited to whether substantial evidence supports the superior court's findings and whether the court's conclusions flow from the findings. *Groff*, 65 Wn.2d at 41; *Young v. Department of Labor and Industries*, 81 Wn.App. 123, 128, 913 P.2d 402 (1996).

That is, this court reviews the superior court's findings; it does not weigh the relative merits of the superior court's and Board's decisions, as claimant urges the court to do. "Substantial evidence" is that quantum of evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise; it need not be the most persuasive evidence. *Hansen v. Estell*, 100 Wn.App. 281, 286, 997 P.2d 426 (2000). Findings of fact supported by substantial evidence are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

It is the trial court, sitting as the finder of fact, that "must determine disputed facts by weighing the credibility of the witnesses." *Johnson v. Department of Licensing*, 71 Wn.App. 326, 332, 858 P.2d 1112 (1993). The appellate court is "not entitled to weigh either the evidence or the credibility of witnesses even though [the court] may disagree with the trial court in either regard." *In re Welfare of Sego*, 82 Wn.2d 736, 839-40, 513 P.2d 931 (1973). "Even where the evidence is conflicting, [the court] need determine only whether the evidence most favorable to the respondent supports the challenged findings." *Miller v. Badgley*, 51 Wn.App. 285, 290, 753 P.2d 530 (1988).

The liberal construction doctrine applies only to matters of statutory construction; it does not apply to issues of fact. *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1, 13, 163 Wn.2d 142 (1945). On factual issues, claimants must be held to strict proof of their right to receive benefits. *Id.*; *Olympia Brewing Co. v. Department of Labor and Industries*, 34 Wn.2d 498, 208 P.2d 1181 (1949). The liberal construction doctrine may not be applied to determine whether substantial evidence exists to support the trial court's factual findings. *Hastings, supra*. Claimant's contrary argument is incorrect. (AB 10).

IV. SUMMARY OF ARGUMENT

Claimant needed to properly raise reviewable issues, with a separate statement of each alleged error and argument explaining why the record does not support the contested findings of fact. She has not done so. Instead, she has attacked Judge Schacht's effort and veracity, and disregarded the testimony of the employer's witnesses, which supports the trial court findings. Claimant has not properly raised any reviewable issue.

Assuming claimant has done so, for her to prevail on this appeal she needed to demonstrate that virtually none of the trial

court's findings have substantial evidentiary support. In particular, she needed to prove the absence of such support for the trial court's finding that her pain complaints and associated limitations are greatly exaggerated and largely not genuine, and its finding that she has no injury-related pain disorder or similar mental health condition. This is because the testimony of claimant's witnesses, and her case as a whole on the time loss and pension issues, necessarily rests on the legitimacy of her complaints and her having an injury-related mental health condition that would explain her acknowledged non-organic complaints and associated claims of limitation. The record amply supports the trial court's findings that claimant has no injury-related mental health condition and that her reported complaints and limitations are neither genuine nor reliable. In addition, the testimony of the employer's expert witnesses independently supports the trial court's findings that the injury did not render claimant totally unable to work during the disputed periods. This court should affirm the trial court's decision.

V. ARGUMENT

The Trial Court Correctly Reversed the Board's Decision and Reinstated the Department Order That Closed This Claim Without Acceptance of a Mental Health Condition, Additional Time Loss Compensation or Pension Benefits.

A. Claimant Has Not Properly Raised or Preserved for Review Any Reviewable Issue For This Court. Her Arguments are Unfounded and Inappropriate.

On substantial evidence review, the appellant must present a separate statement that identifies each assigned error, with argument explaining why specific findings of fact are not supported by the evidence, and citations to the record to support such argument. RAP 10.3; *Inland Foundry Co. v. Department of Labor & Industries*, 106 Wn. App. 333, 340, 24 P.3d 424 (2001). Claimant has failed to do so. Her argument on review consists largely of expressing her opinion that the Board's written analysis was superior to the trial court's and touting the opinions of her own witnesses. *Claimant's 30-page brief virtually ignores the testimony of the employer's witnesses and makes no attempt to explain why such evidence does not provide substantial support for the trial court's findings. Her arguments are not sufficient to present any reviewable issue to this court.* RAP 10.3; *Inland Foundry, supra*.

Claimant's arguments are notable primarily for their tone and her improper attempt to impugn the effort and integrity of Judge Schacht. Her criticism of the judge is based in part on the belief that the trial court could not properly endorse the employer's

position in resolving any of the issues. (See AB 12-13). It should go without saying that a judge usually must endorse the position of one of the parties in resolving any given issue. Judges commonly do so by adopting the arguments of the prevailing party. Judge Schacht did nothing unusual or inappropriate in endorsing the employer's arguments.

Claimant's criticism of Judge Schacht also rests on the erroneous premise that a trial court judge must issue an exhaustive written analysis of the evidence, with citation to the record, to support any and all findings of fact. (See *e.g.* AB 14-15). Claimant cites no authority for this proposition. Such an exhaustive analysis of the evidence is neither required nor common. Following a bench trial, the trial judge need only "find the facts specially and separately state its conclusions of law." CR 52(a). This rule does not require that the court's findings take any particular form, much less extensively analyze the evidence. The court's findings need only identify what issues were addressed and state the court's findings on those issues. *Ford v. Bellingham-Whatcom Cty. Dist. Bd. of Health*, 16 Wn. App. 709, 717, 558 P.2d 821 (1977). Judge Schacht's findings and conclusions satisfy these standards.

Although not required, his memorandum opinion provides further detail that explains the basic reasoning for his findings. (CP 41-43).

Claimant's foundational argument is that Judge Schacht did not conduct any meaningful review of this matter. For instance, she asserts that "the court made no effort to present an independent assessment of the Board record – none," and that the court's analysis in its memorandum opinion represented a "weak attempt to disguise its obvious failure to adequately review the evidence . . ." (AB 12). Similarly, she questions "whether the court actually conducted de novo review of the record" and characterizes the court's statement regarding the weight of medical evidence as "simplistic and incomplete." (AB 15-16, 20). She also asserts that the court was not "intellectually honest in preparing its Findings and Conclusions." (AB 25). And, claimant concludes that Judge Schacht's decision gave her "the uneasy sense that [he] did not read the Board transcript, or if [he] did, selectively chose to ignore or mischaracterized" the evidence supporting the Board's decision. (AB 30).

Judge Schacht stated that he had "reviewed the entire record and the memorandums of counsel." (CP 41). He also heard

extensive oral arguments and deliberated for several weeks before issuing his decision. Given these facts, it is highly inappropriate and unfounded for claimant to baldly charge Judge Schacht with not reviewing this record or conducting any meaningful review. Claimant's tone and statements reflect the belief that no one reasonably could disagree with her assessment of the issues and her entitlement to the benefits she seeks. This belief appears to be the primary driving force behind claimant's appeal and her criticisms of the manner in which Judge Schacht resolved this matter. Whether based on a decided lack of objectivity or the belief that her perceptions necessarily are correct, claimant's charges and conclusions lack both merit and propriety.³

The opportunity for appellate review does not exist to provide a party with a forum merely for expressing displeasure or pique with decisions or persons. The resources of the court and parties should be expended only where the appealing party has

³ Claimant asserts, "Never once, until the trial court's review was [she] found to be an able-bodied worker." (AB 28). This assertion is demonstrably incorrect. The Director of the Department found claimant able to work in her regular job as of April 11, 2007. (CABR 90). The Department later found claimant not entitled to either time loss or pension benefits after December 28, 2006, which necessarily reflects the Department's conclusion that the compensable injury had not rendered claimant unable to work on and after that date. (CABR 68, 90).

properly identified arguable error. *Claimant has not complied with the procedures, substantive standards or decorum applicable to raising such issues in this court. The court should summarily affirm the trial court's decision.* In the event the court finds claimant has properly raised and preserved issues for review, the employer offers the following.

B. Substantial Evidence Supports the Trial Court's Findings on Each Issue.

1. Chronic Pain Disorder/Mental Health Condition

Claimant had the burden of proving her entitlement to benefits. RCW 51.52.050; *Olympia Brewing Co. v. Department of Labor and Industries*, 34 Wn.2d 498, 208 P.2d 1181 (1949). This required her to prove, through persuasive expert medical testimony, that the February 27, 1995 injury was a proximate cause of the conditions on which she based her claim for benefits. *Bennett v. Department of Labor and Industries*, 95 Wn.2d 531, 627 P.2d 104 (1981). Ample evidence supports the trial court's finding that claimant failed to sustain her burden of proving, through persuasive medical testimony, that the February 27, 1995 injury was a proximate cause of any pain disorder or other mental health condition. (CP 44-45).

This record does not persuasively establish that claimant has a psychiatric disorder. The diagnosis of a psychiatric disorder has been made because virtually every examiner has agreed that claimant's pain complaints substantially exceed the objectively substantiated pain complaints (they differ only as to the degree of that discrepancy). (CABR 62, ll. 28 to p. 63, l. 5). The diagnosis of pain disorder is one explanation for that discrepancy. However, the persuasive evidence demonstrates, as the trial court found, that claimant's pain complaints and associated claimed limitations are greatly exaggerated and largely not genuine. (CP 45, #5).

As noted above, claimant consistently has claimed from at least the late 1990s that she had so much "overwhelming," "excruciating" right shoulder and arm pain that she has been forced to leave her arm at her side and has not used the arm for any significant activity. (Claimant 89, 91, 107, 109-10). The employer's medical experts testified, consistent with common knowledge and without contradiction, that if claimant had not been using her arm all these years she would have a substantial level of disuse atrophy. (Kellogg 28-29; Marks 20; Lipon 31-32). Yet none of these multiplied examiners found any atrophy involving her right upper

extremity. (See, e.g., Kellogg 12-14; Marks 20; Lipon 31-32).

Claimant's witnesses provided no explanation for her lack of atrophy. There is no plausible explanation for this other than the fact claimant has used her arm normally and has misrepresented her condition.

Claimant concedes that the trial court properly considered the 1998 surveillance videos in addressing the genuineness of her presentation. (AB 14).⁴ Dr. Dordevich testified that the physical and mental health specialists who participated in claimant's 1998 multidisciplinary evaluation concluded that the videos demonstrated substantial discrepancies between claimant's behavior in clinic and on the videos, and that they concluded she had consciously embellished her pain complaints. (Dordevich 20, 59).

Dr. Hamm testified that claimant presented with extreme pain behavior during the physical portion of her IME (which he

⁴ This concession contradicts and refutes her assertion that trial court improperly considered evidence generated before the 2000-2001 litigation. (AB 5). The prior litigation established only, based on the operative facts in the former record, that the February 27, 1995 injury proximately caused a brachial plexus injury. Claimant cites no authority for her assertion (or the Board's reasoning) that the finding on that specific issue renders irrelevant any previously available evidence that impeached claimant's presentation of her injury. The testimony in this proceeding, based on a new record and operative facts, stands on its own. The trial court properly considered such evidence. Claimant now concedes, at least in part, that the court properly did so. (AB 14).

observed) and then showed none during his evaluation of her immediately thereafter. (Hamm 13, 21, 44). He stated this ability to turn her pain complaints on and off was consistent with conscious control of those complaints. (*Id.*). This, too, undermines the genuineness of claimant's pain complaints. Dr. Hamm concluded the reported workplace injury was not a likely cause of a pain disorder or psychiatric condition in part because it involved little trauma and produced no significant objective findings. (Hamm 16, 22, 24). These factors, together with the evidence of claimant's misrepresentation, provide very substantial support for the trial court's findings that claimant has no injury-related psychogenic pain disorder and that her representations of pain and limitations are largely not genuine.

Claimant does not attempt to explain why such evidence does not support the trial court's findings regarding her exaggerated pain complaints and the absence of an injury-related pain or mental health disorder. Instead, she merely argues the testimony of Dr. Early and Dr. French was more persuasive. (BA 21). That argument provides no basis for reversal on substantial evidence review.

Moreover, the trial court had reasonable grounds for finding Dr. Early's testimony unpersuasive. Dr. Early was a forensic witness, not a treating physician. He works almost exclusively for claimants in this state and evaluated claimant at the request of counsel in anticipation of litigation. (Early 8, 44). Dr. Early acknowledged that claimant had no objective findings to account for her considerable pain complaints (or to otherwise demonstrate a physical condition that could lead to a pain disorder). (Early 41). He also conceded he had not reviewed any of the medical records generated prior to September 1997, during the period when the alleged pain disorder developed. Dr. Early had reviewed the surveillance video tapes only on the eve of his deposition – after he had formed his opinion and committed to testify on claimant's behalf. (Early 47). He testified that he concluded the injury had caused a pain disorder because claimant did not have one before. (Early 28). Dr. Early's analysis assumed, first, that claimant's pain complaints are genuine and, second, that claimant would or could accurately report her pre-injury mental condition or predispositions. Dr. Hamm testified that claimant had preexisting mixed personality traits that explained her development of pain complaints (assuming

they are valid) and rendered her without insight into her pre-injury condition. (Hamm 17, 22, 27-28). Claimant's denial of any previous psychiatric issues is therefore of limited relevance. Dr. Early's failure to consider pertinent information and his faulty assumptions, together with the evidence of claimant's misrepresentation of her condition, provided the trial court ample reason to find his opinion unpersuasive.

Claimant's reliance on Dr. French's opinion is even more misplaced. The record does not establish Dr. French's competence to address mental health issues. *In Re Detention of Twining*, 77 Wn.2d 882, 894 P.2d 1331 (1995) (expert psychiatric or psychological testimony is essential to the issue of whether an individual suffers from a mental health disorder). Dr. French's mere status as "attending physician" does not require that more weight be given his opinion, particularly regarding a subject on which he has no demonstrated expertise. *McClelland v. ITT Rayonier*, 65 Wn. App. 386, 828 P.2d 1138 (1992).

Moreover, the record provided the trial court persuasive reasons for discounting Dr. French's opinions. The evidence demonstrates that Dr. French routinely provides diagnoses that no

other examiners have reported or corroborated, specifically including those involved here – multidirectional instability, brachial plexopathy and cervical dystonia. (Marks 34-35). Dr. French even acknowledged that a peer review company (engaged by the Department of Labor and Industries) concluded that of the 11 sample cases it reviewed Dr. French consistently disagreed with the interpretation of diagnostic studies and diagnoses of the other examiners. (French 91). Further, this record shows that Dr. French provided a succession of diagnoses – a total of at least 8, involving different body parts – almost all of which have not been corroborated by any other physician (including by his chosen Texas referral partner, Dr. Monsivais). He abruptly abandoned some when irrefutable evidence contradicted them, and proceeded to surgery with others, without any improvement in claimant's condition. Dr. French's diagnoses, rendered in the face of near unanimous contrary opinions, and claimant's failure to improve with his surgeries and care, raise legitimate questions about the validity of those diagnoses, and about his reliability generally. Dr. French's lack of psychiatric expertise, coupled with his questionable practices and objectivity, provided ample reason for the trial court

not to find his opinion sufficient to establish an injury-related mental health condition.

Most important, weighing competing medical opinions is the province of the trial court, not this court. Claimant presents no genuine substantial evidence challenge to the trial court's finding that the injury did not cause a chronic pain or mental health condition and that her complaints of pain and limitations are exaggerated.

2. Regional Pain/Thoracic Outlet Syndromes

Claimant suggests ("parenthetically") that the issue of a thoracic outlet syndrome was not before the trial court. (AB 23-24). This argument is untimely and erroneous. The Board found that the compensable injury had caused a thoracic outlet syndrome and a brachial plexus injury. (CABR 69). In its trial brief, the employer expressly challenged the finding of a thoracic outlet syndrome, but not of a brachial plexus injury.⁵ (CP 25). Claimant did not argue

⁵ Claimant argues that the Board's prior decision in 2001 resolved the brachial plexus issue and also asserts that the employer and trial court "cherry-picked" from the Board's findings by not addressing that condition. (AB 23, 25). These arguments are internally inconsistent. Further, the employer was not obligated to challenge *all* the Board's findings in order to dispute *any* of them. Claimant's similar assertion that the employer and trial court did not address the Board's finding regarding a pain disorder associated with psychological factors is demonstrably incorrect, and inconsistent with the trial court's finding 3. (AB 25; CP 44-45, #3).

that the thoracic outlet issue was not before the court. (See Claimant's Trial Memo., CP 1-22). She is precluded from raising that argument for the first time on appellate review. RAP 2.5(a); *Allen v. Asbestos Corp., Ltd.*, 138 Wn.App. 564, 578, 157 P.3d 406 (2007).

Further, claimant fails to distinguish between a brachial plexus injury and thoracic outlet syndrome. Her witness, Dr. French, testified these are related, but distinct, pathologies. (French 8-12). The employer did not agree that the issue whether claimant *currently* has a thoracic outlet syndrome was "off the table." Counsel stated only that the employer was not disputing that it had paid for a thoracic outlet surgery in 1998. (10/27/08 Tr. 103). *Assuming* such payment established that claimant had an injury-related thoracic outlet syndrome in 1998, it does not establish that as of January 27, 2008 (the date of claim closure) claimant still had such a condition or that the employer was precluded from arguing it was not *then* related to the 1995 injury. Employer's counsel did not agree with the appeals judge's belief that payment for a surgery in 1998 conclusively established the compensability of a current thoracic outlet syndrome. (See 10/27/08 Tr. 103). In fact, the

employer expressly challenged the appeals judge's finding on that issue in its petition for Board review. (CABR 4, 14-15). The trial court properly considered the employer's challenge to the same finding on review.

Claimant concedes that substantial evidence in the record supports the trial court's finding that "the alleged regional pain syndrome and thoracic outlet syndrome are not compensable consequences of the February 27, 1995 injury." (AB 26). The record amply supports that conclusion. (See Employer's Trial Memo., CP 37-39). There is, therefore, no basis for reversing this finding on review.

3. Temporary and Permanent Total Disability

To establish entitlement to temporary total (time loss) and/or permanent total (pension) benefits, claimant needed to prove, through persuasive medical and/or vocational testimony, that the February 27, 1995 injury proximately caused an inability to perform and obtain regularly gainful employment, including light or sedentary work, from December 29, 2006 to January 17, 2008 and permanently thereafter. RCW 51.08.160; *Spring v. Department of Labor and Industries*, 96 Wn.2d 914, 640 P.2d 1 (1982). The

record amply supports the trial court's findings that the injury did not preclude claimant from such employment at the relevant times. (CP 45, #'s 7, 9).

Claimant's assertion of entitlement to such benefits rests primarily on the assumption she has an injury-related pain disorder or similar mental health condition that substantially affects her ability to work. As discussed, the record supports the trial court's findings that the injury did not cause such a mental health condition, and that claimant's pain complaint's and associated alleged limitations are greatly exaggerated and largely not genuine. (CP 44-45). These findings must be accepted as verities on appeal. *Inland Foundry, supra*. They substantially undermine the opinions on which claimant relies in support of her claim to time loss and pension benefits. ER 703; *Saylor v. Department of Labor and Industries*, 69 Wn.2d 893, 421 P.2d 362 (1986) (opinions based on materially inaccurate information should be discounted). Claimant fails to address why these findings do not support the trial court's findings that the injury did not preclude her from working during the periods in question.

The employer's medical experts testified that, at most,

claimant was limited only from repetitive overhead reaching and lifting with her right arm. (Lipon 39; Marks 33, 53). Dr. Hamm stated claimant had no psychiatric work limitations. (Hamm 24, 42). Mr. Renz testified that claimant's job at injury and other, similar cooking positions did not require repetitive overhead use of the right arm, and that claimant could perform such work. (Renz 142, 144-45, 147-48). He also stated there are cashiering positions that claimant could obtain and perform. (Renz 159). Claimant does not explain why this evidence does not provide substantial evidentiary support for the trial court's findings that the injury did not render claimant unable to work during the relevant periods.

4. Permanent Partial Disability

The trial court found that claimant's injury-related physical impairment does not exceed 10 percent of the right upper extremity. (CP 45, # 10). Claimant challenges this finding, but does not address the nature of the challenge or explain why the finding has no substantial evidentiary support. The Board granted claimant the same 10 percent disability rating. Claimant did not raise the issue of a greater award in the trial court. She is precluded from doing so now. RAP 2.5(a); *Allen, supra*. Claimant also presented

no evidence that could support a greater rating. The trial court's finding should be affirmed.

C. Assuming the Court Reverses the Trial Court's Finding That the February 27, 1995 Injury Caused No Pain Disorder or Other Mental Health Condition, Substantial Evidence Supports the Trial Court's Finding That Claimant Had Been Diagnosed With a Psychogenic Pain Disorder Before the 2000-2001 Proceeding. The Trial Court Correctly Concluded That Claim Preclusion Barred Claimant From Litigating a Psychogenic Pain Disorder in This Proceeding.

If the court concludes that substantial evidence supports the trial court's finding that the injury did not cause a pain disorder, then the court need not address the trial court's finding and conclusion regarding claim preclusion. *Assuming* the court reaches the claim preclusion issue, the employer offers the following.

The doctrine of claim preclusion prevents a party from litigating a claim or issue that could have been litigated in a prior proceeding. *Chavez v. Department of Labor and Industries*, 129 Wn.App. 236, 118 P3d 392 (2005); *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Claimant could have litigated the issue whether the February 27, 1995 injury caused her alleged psychogenic pain disorder in the 2000-2001 proceeding before the Board. She failed to do so. Therefore, the trial court

correctly concluded claimant is precluded from litigating that issue in this proceeding. (CP 46, # 4). *Chavez, supra; Loveridge, supra.*

The 2000-2001 Board proceeding stemmed from claimant's appeal of a Department order that closed her claim. The appeals judge in that proceeding explicitly identified the contested issues as including, "What conditions were proximately caused by the industrial injury of February 27, 1995?" (Ex. 19, p. 2, l. 10). The evidence in the present matter demonstrates that claimant's alleged pain disorder was diagnosed long before the 2000-2001 litigation, including by the June 1998 pain clinic evaluators. *See supra* at 8-9. Dr. Dordevich's extensive testimony regarding claimant's multidisciplinary evaluation in 1998 demonstrated that the evaluators repeatedly referenced claimant's psychological, "functional" and "emotional" overlay (Dordevich 11, 15, 45, 49); and that they formally diagnosed a pain disorder associated with psychological factors (Dordevich 43-44). Claimant could have, and should have, litigated the issue of whether the injury caused a pain disorder in the former proceeding. She expressly declined to do so. (Ex. 19, p. 2, ll. 21-24). Further, the former appeals judge clearly did not find the February 27, 1995 injury had caused a pain

disorder. (Ex. 19, p. 8). Claimant is therefore precluded from now contending that the February 27, 1995 injury caused a pain disorder.

Claimant erroneously asserts there is only one place in the record that references her as having a psychogenic pain disorder or the like before the 2000-2001 Board proceeding. (AB 16). She flatly disregards Dr. Dordevich's testimony, discussed above, regarding the 1998 multidisciplinary evaluation. This evidence refutes claimant's assertion and amply supports the trial court's finding that claimant had been diagnosed with a psychogenic pain disorder before the 2000-2001 litigation and, therefore, could have and should have litigated that issue then if she felt such a condition was compensable.

Claimant otherwise attacks the trial court's conclusion that she is precluded from now litigating the compensability of a psychogenic pain disorder on the basis that issue was not actually decided in the former proceeding. (AB 17-18). This argument flows solely from claimant's failure to distinguish between claim preclusion (formerly *Res Judicata*) and issue preclusion (formerly Collateral Estoppel). These are facially similar, but legal distinct

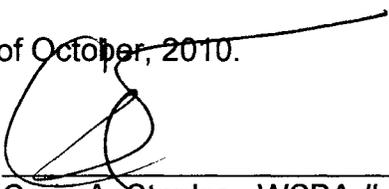
legal doctrines, the elements of which are not the same.

Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507-08, 745 P.2d 858 (1987). The trial court relied on claim preclusion in finding claimant barred from litigating the issue of a psychogenic condition. (CP 46, # 4). That doctrine does not require actual litigation of the issue; only that the party could have litigated it in the former proceeding. *Chavez v. Department of Labor and Industries*, *supra*. Because claimant clearly could have litigated the issue of a psychogenic condition in the 2000-2001 proceeding – and expressly declined to do so – the trial court correctly found claimant barred from doing so in this proceeding.

VI. CONCLUSION

Claimant's arguments on review fail to properly raise and preserve a significant issue for review. Her arguments effectively disregard the scope of review in this court and the evidence supporting the trial court findings. They provide no proper basis for reversal. The court should affirm the trial court's decision.

DATED this 4th day of October, 2010.



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

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APPENDIX

APR - 9 2010

FLYNN MERRIMAN, PS.

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WALLA COUNTY
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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. 09-00436-7²

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

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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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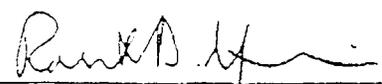
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1 Presented by:

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

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8 Approved as to form: notice of
9 presentation waived:

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

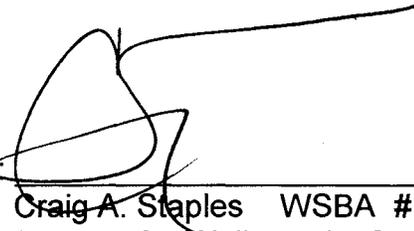
CERTIFICATE OF MAILING

I certify that on October 4, 2010, I served the foregoing amended Brief of Respondent on the following person by mailing him a true copy by first class mail with the U.S. Postal Service at Vancouver, Washington in a sealed envelope, with postage prepaid, and addressed to the following:

Robert D. Merriman
Flynn Merriman McKennon, P.S.
8203 W Quinault Ave., Ste 600
Kennewick, WA 99336-7128

I further certify that I filed the original and a true copy of the same document by mailing it on the above date by first class mail with the U.S. Postal Service in a sealed envelope, with postage prepaid, and addressed to the following:

Renee S. Townsley
Clerk/Administrator
Court of Appeals, Div. III
500 N. Cedar St.
Spokane, WA 99201-1905

By 

Craig A. Staples WSBA #14708
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