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No. 58454-5-I

Original

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KELLY L. SHAFER,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent.

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iii
A. INTRODUCTION	1
B. ARGUMENT IN REPLY	3
(1) <u>Applying the Attending Physician Doctrine,</u> <u>the Judgment in Favor of the Department</u> <u>Must Be Reversed</u>	3
(2) <u>The Closing Order Was Not Final Because</u> <u>the Department Failed to Communicate the</u> <u>Order to Dr. Shafer’s Treating Physician Who,</u> <u>By the Department’s Own Admission, Was</u> <u>Affected By the Closing Order under</u> <u>RCW 51.52.050</u>	7
(3) <u>Shafer Was Improperly Ordered to Undergo a</u> <u>CR 35 Mental Examination</u>	16
C. CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Belnap v. Boeing Co.</i> , 64 Wn. App. 212, 823 P.2d 528 (1992).....	8
<i>Clauson v. Dep't of Labor & Indus.</i> , 130 Wn.2d 580, 925 P.2d 624 (1996).....	16
<i>Eberle v. Sutor</i> , 3 Wn. App. 387, 475 P.2d 564 (1970).....	17
<i>Hamilton v. Dep't of Labor & Indus.</i> , 111 Wn.2d 569, 761 P.2d 618 (1988).....	3
<i>Intalco Aluminum v. Dep't of Labor & Indus.</i> , 66 Wn. App. 644, 833 P.2d 390 (1992), <i>review denied</i> , 120 Wn.2d 1031 (1993).....	3
<i>Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.</i> , 57 Wn. App. 886, 790 P.2d 1254 (1990).....	13
<i>Leson v. Dep't of Ecology</i> , 59 Wn. App. 407, 799 P.2d 268 (1990).....	13
<i>Pascua v. Heil</i> , 126 Wn. App. 520, 108 P.3d 1253 (2005).....	9
<i>Seattle v. PERC</i> , 116 Wn.2d 923, 809 P.2d 1377 (1991).....	10
<i>Simmerly v. McKee</i> , 120 Wn. App. 217, 84 P.3d 919, <i>review denied</i> , 152 Wn.2d 1033 (2004).....	11, 12, 13
<i>Simpson Timber Co. v. Wentworth</i> , 96 Wn. App. 731, 981 P.2d 878 (1999).....	3
<i>Tietjen v. Dep't of Labor & Indus.</i> , 13 Wn. App. 86, 534 P.2d 151 (1975).....	17
<i>Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.</i> , 127 Wn.2d 614, 902 P.2d 1247 (1996).....	10
<i>Wells v. Western Wash. Growth Mgmt. Hearings Bd.</i> , 100 Wn. App. 657, 997 P.2d 405 (2000).....	11, 12, 13
<i>Young v. Dep't of Labor & Indus.</i> , 81 Wn. App. 123, 913 P.2d 402, <i>review denied</i> , 130 Wn.2d 1009 (1996).....	6

Other Cases

Marroni v. Matey, 82 F.R.D. 371 (E.D. Pa. 1979)17
Storms v. Lowe's Home Ctrs., Inc.,
211 F.R.D. 296 (W.D. Va. 2002)..... 17-18

Statutes

RCW 7.06.050(1).....12
RCW 34.04.12014
RCW 34.04.130(2).....14
RCW 34.05.461(9).....12
RCW 34.05.473(1)(c)12
RCW 34.05.542(2)..... *passim*
RCW 51.52.050 *passim*
RCW 51.52.060(2).....14, 15
RCW 51.52.1047
RCW 51.52.13020

Rules and Regulations

CR 35 *passim*
CR 35(b).....18
MAR 6.212
MAR 7.1(a).....12
RAP 2.5(a)9
WAC 263-12-145(3).....16

A. INTRODUCTION

The Department of Labor and Industries (Department) closed appellant Kelly L. Shafer's claim for industrial insurance benefits but failed to send a copy of its closing order to Dr. Elizabeth Cook, Shafer's treating physician. In its brief on appeal, the Department concedes Dr. Cook was a person "affected by" the closing order and accordingly was entitled under RCW 51.52.050 to receive a copy of the order. Nevertheless, the Department argues its admitted failure to comply with the statute has no effect on the finality of the closing order, even though RCW 51.52.050 provides that the order does not become final until 60 days after it is communicated to all parties entitled to receive it. Because the Department failed to comply with RCW 51.52.050, the closing order did not become final and the Board of Industrial Insurance Appeals (BIIA) lacked jurisdiction over the appeal.

The Department also claims there is nothing wrong in the failure of the BIIA and the jury to give any consideration, let alone special consideration, to the testimony of Dr. Cook, Shafer's treating physician. Under the attending physician doctrine, however, the fact finder is required to give special consideration to the opinion of the claimant's treating physician because, unlike the Department's physician, Dr. Cook was not hired by a party to give an opinion consistent with that party's

position in the case, but rather is an independent physician. Dr. Cook unequivocally testified that Shafer's condition objectively worsened after the Department closed her claim. Dr. Schuster agreed with Dr. Cook and testified as to further evidence of objective worsening, namely atrophy in Shafer's calf. (Dr. Cook did not have occasion to measure Shafer's calf and therefore had no reason to note the atrophy.) Only Dr. Briggs, who was hired by the Department to examine Shafer, found no objective worsening of Shafer's condition following closure of her claim. The substantiality of the evidence weighs in favor of a finding of objective worsening.

Finally, the Department claims no error in the BILA's ordering a CR 35 mental examination of Shafer to take place only 15 days before the start of the hearing on Shafer's application to reopen her claim. The Department had notice several months before it asked for the CR 35 mental examination that Shafer's mental condition was at issue, yet the Department delayed its request for an examination so that the examination occurred only 15 days before the hearing, while CR 35 contemplates, in most cases, at least 30 days between the examination and the hearing. The Department also failed to make any attempt to obtain the information it sought from other sources, such as Shafer's readily available mental health

records. Under these circumstances, the BIIA abused its discretion in granting the Department's request for a CR 35 mental examination.

B. ARGUMENT IN REPLY

(1) Applying the Attending Physician Doctrine, the Judgment in Favor of the Department Must Be Reversed

In a worker compensation case, the finder of fact must give special consideration to the opinion of the injured worker's attending physician. *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731, 739, 981 P.2d 878 (1999); *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 v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 653, 833 P.2d 390 (1992), *review denied*, 120 Wn.2d 1031 (1993). Special consideration of the attending physician's testimony supports the purpose of the Industrial Insurance Act to compensate all covered persons injured in their employment and ensures protection of workers. *Hamilton*, 111 Wn.2d at 572-73. Although the jury was instructed to give special consideration to the testimony of Dr. Cook, Shafer's treating physician, CP 178, it is patently clear the jury failed to do so in contravention of this explicit instruction.¹

¹ The Department insinuates that only its physician, Dr. Briggs, is qualified and board certified and that the jury and the BIIA, for this reason, correctly ignored Dr.

Contrary to the Department's characterization, Dr. Cook's testimony establishes that Shafer's condition objectively worsened following closure of her claim. For instance, Dr. Cook testified:

Q. So, Doctor, just to clarify would you say . . . would it be your medical opinion on a more probable than not basis that the mild neural foraminal narrowing at L5/S1 is an objective finding of worsening?

A. Yes.

Q. And, in your opinion, on a more probable than not medical basis is that, at least in part, causally related to the spondylolytic problems that you identified in 1999?

A. I believe that it is on a more probable than not basis.

Q. Doctor, you also noted . . . well, Doctor, is a T2 signal reduction indicative of an objective change?

A. It is indicative of an objective change from normal. . . . So reduced T2 signal in a disk is consistent with what we call disk degeneration, disk desiccation, or disk drying.

Tr. Apr. 14, 2004 at 76-77.

Dr. Schuster's testimony fully supports Dr. Cook's finding of objective worsening. Dr. Cook noted Dr. Schuster's finding of atrophy in Shafer's calf, which both Drs. Cook and Schuster testified is an objective indicator of worsening. *Id.* at 79; Schuster dep. at 36. The Department makes much of Dr. Cook's testimony that she did not observe atrophy. However, this is simply because Dr. Cook did not measure Shafer's calf in order to determine whether atrophy was present. Tr. Apr. 14, 2004 at 79.

Cook's testimony and relied wholly on that of Dr. Briggs. Br. of Resp't at 44. The Department fails to note, however, that Dr. Cook is board certified in physical medicine and rehabilitation and a fellow of the American Academy of Physical Medicine and Rehabilitation. Tr. Apr. 14, 2004 at 62-63.

The important fact is that Dr. Cook agreed with Dr. Schuster that atrophy, such as the atrophy Dr. Schuster observed in Shafer's calf, is an objective indicator of the worsening of Shafer's condition.

Dr. Cook further testified that decreases in ranges of motion are objective indicators of worsening. *Id.* at 80-81. Dr. Schuster found decreases in Shafer's ranges of motion. Schuster Dep. at 44-45. Even Dr. Briggs, whom the Department hired to examine Shafer, testified that three out of four measurements of Shafer's range of motion showed a decrease from 25 to 30 percent following claim closure. Tr. Apr. 29, 2004 at 46. As to this indicator of objective worsening, then, all of the physicians, including the Department's physician, agreed that the indicator was present in Shafer's case.

In sum, Dr. Cook, Shafer's treating physician, and Dr. Schuster both testified that Shafer's condition objectively worsened after the Department closed her claim. Dr. Briggs, the Department's hired physician, disagreed. The weight of the evidence clearly supports the conclusion that Shafer's condition objectively worsened. To uphold the jury's verdict and the BIIA's and the Department's conclusion to the contrary would be tantamount to reducing the requisite amount of evidence to a mere scintilla. An examination of the relative weight of the evidence as to objective worsening is necessary. Here, such an

examination shows that the substantiality of the evidence weighs in favor of a finding of objective worsening.

Moreover, even if the record contains evidence to support both the jury's findings as well as a finding of objective worsening, the special consideration that must be afforded Dr. Cook's opinion should have weighed in Shafer's favor. *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 127, 913 P.2d 402, *review denied*, 130 Wn.2d 1009 (1996). Further, as did this Court in *Young*, this Court should take into consideration that Dr. Briggs' practice consisted solely of performing independent medical examinations for the Department, while Dr. Cook did not examine patients for the Department, but rather was an independent physician who saw Shafer regularly during her treatment. Tr. Apr. 29, 2004 at 7; *Young*, 81 Wn. App. at 129 (in affirming a disability award based on the testimony of the claimant's treating physician, the Court noted, as a factor weighing against consideration of the testimony of other testifying physicians, the fact that these physicians "regularly conducted examinations for L & I, self-insured employers and insurance companies.").

Neither the BIIA nor the jury gave the requisite special consideration to Dr. Cook's opinion. Given that Dr. Cook's testimony was consistent with and fully supported by Dr. Schuster's testimony, while

Dr. Briggs' opinion stood alone, the substantiality of the evidence weighs in favor of a finding of objective worsening. The superior court's judgment upholding the jury's verdict to the contrary should be reversed.

(2) The Closing Order Was Not Final Because the Department Failed to Communicate the Order to Dr. Shafer's Treating Physician Who, By the Department's Own Admission, Was Affected By the Closing Order under RCW 51.52.050

The Department is required, when it makes an order, decision, or award, to promptly serve the worker, beneficiary, employer, and "other person affected thereby," with a copy thereof by mail. RCW 51.52.050. Under the statute, the order, decision, or award does not become final until it is communicated to those persons or entities. *Id.* The Department concedes that Dr. Cook, Shafer's treating physician, is a "person affected by" the Department's closing order. Br. of Resp't at 30. Accordingly, Dr. Cook was entitled to receive a copy of the closing order. She did not, however, receive a copy of it. CP 78. Under RCW 51.52.050, the Department's closing order did not become a final order, and the BIIA was without jurisdiction over the appeal.

The Department argues Shafer is precluded from raising the issue of whether the closing order became final because she waived it by not raising it in her petition for review to the BIIA as required by RCW 51.52.104. That statute provides that a party is deemed to have waived

objections or irregularities not brought to the BIIA's attention in the petition for review. Here, although she did not raise it in her petition for review, the record shows that Shafer did raise the issue before the BIIA. Specifically, Shafer raised this issue during a telephone conference with Industrial Appeals Judge (IAJ) Kathleen Stockman. Certified Appeal Board Record (CABR) 100. The IAJ ruled in an interlocutory order that the Department's closing order was final. *Id.* Shafer filed an interlocutory appeal to the BIIA. CABR 70-76. The BIIA, Assistant Chief Industrial Appeals Judge Calvin C. Jackson, issued an order affirming the IAJ's determination. CABR 105. Given Shafer's interlocutory appeal to the BIIA in which the finality of the Department's closing order was the sole issue, Shafer cannot be said to have waived this issue by not raising it before the BIIA.²

The Department also argues Shafer failed to raise the issue of the Department's failure to comply with RCW 51.52.050 before the superior court. Even the most cursory examination of Shafer's trial brief and reply brief reveals that Shafer not only raised the issue before the superior court, but fully briefed it as well. CP 21-56, 74-80. The Department also

² Even if Shafer had not raised this issue before the BIIA, this Court can and should review it under its inherent power to address issues which are crucial to the case and necessary to a proper decision. *Belnap v. Boeing Co.*, 64 Wn. App. 212, 223, 823 P.2d 528 (1992).

maintains that Shafer waived the argument before the superior court because she “did not move for relief on that theory, nor did she attempt to obtain findings or a ruling on the theory.” Br. of Resp’t at 32. Again, the Department ignores the record. In her trial brief, Shafer clearly and unequivocally “moved for relief” on this theory:

Ms. Shafer respectfully requests this Court determine that because the closing order of October 19, 2000 was not communicated to Dr. Cook, an affected and/or aggrieved party, that it was therefore not final and binding within the meaning of RCW 51.52.050 and thus the matter should be remanded to the Department to issue an appealable [sic] closing order to all affected parties.

CP 45; *see also* CP 79-80 (request for relief under the same theory in Shafer’s reply brief).³

Next, the Department argues its failure to comply with RCW 51.52.050 is not a jurisdictional defect. The Department did not, however, raise this issue below and should be deemed to have waived it. RAP 2.5(a) (this Court generally does not review issues raised for the first time on appeal); *Pascua v. Heil*, 126 Wn. App. 520, 528 n.5, 108 P.3d 1253 (2005) (failure to object below waives non-constitutional errors on appeal).

³ The Department insinuates the superior court issued findings of fact on every issue except the issue of finality of its order. In fact, however, the superior court did not issue *any* findings of fact.

In any event, the Department's argument is without merit. Complete compliance with statutory requirements as to service is a necessary condition for appellate jurisdiction. *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 902 P.2d 1247 (1996). In that case, the applicable statute, RCW 34.05.542(2), pertaining to judicial review of an administrative decision under the Administrative Procedure Act (APA), required an aggrieved party to file a petition for judicial review of an agency order with the court and serve the petition for review on the agency, the office of the attorney general, and "all parties of record." The petitioner filed the petition for review not on the parties of record, but rather on the parties' attorneys of record. The Court concluded that service of the petition for review on all parties was a necessary condition of appellate review. *Union Bay*, 127 Wn.2d at 617. In reviewing an administrative decision, the superior court acts in a limited appellate capacity and all statutory procedural requirements must be met before the superior court's appellate jurisdiction can be invoked. *Id.* Accordingly, the superior court does not obtain jurisdiction over an appeal from an agency decision unless the petitioner complies with the statute and files the petition for review in superior court and serves it on all parties. *Id.* at 617-18 (citing *Seattle v. PERC*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991)).

Similarly here, under the applicable statute, RCW 51.52.050, service by the Department of its decision, order, or award on all the parties identified in the statute is a necessary condition to appellate jurisdiction. By its own admission, the Department, by failing to serve its closing order on Dr. Cook, failed to serve its order on all parties affected by the order. Under RCW 51.52.050, the order did not become final and neither the BIIA nor the superior court had jurisdiction over the appeal.

The Department relies on *Wells v. Western Washington Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 997 P.2d 405 (2000) and *Simmerly v. McKee*, 120 Wn. App. 217, 84 P.3d 919, *review denied*, 152 Wn.2d 1033 (2004), cases the Department claims are analogous. Because, however, the relevant statutes in those cases differ from RCW 51.52.050, the analysis in those cases does not apply here.

In *Wells*, the issue was whether the failure of the Western Washington Growth Management Hearings Board to serve all parties to the proceeding with its final order deprived the superior court of jurisdiction over a petition for review of that order. Judicial review of the Board's order was governed by the APA, RCW 34.05. Under the APA, a petition for judicial review of an agency decision must be filed and served "within thirty days after service of the final order." RCW 34.05.542(2). Another statute required the agency to serve and file its order on "each

party.” RCW 34.05.461(9). The operative date for determining time limits for judicial review is “the date of service of the order.” RCW 34.05.473(1)(c). The court held RCW 34.05.542(2) was ambiguous as to whether the 30-day period for filing a petition for review begins when the petitioning party is served with the final order or when all parties of record have been served with the final order. Because of the ambiguity, the court construed the statute to fulfill the intent of the Legislature and concluded the 30-day period commenced upon service of the final order on the individual petitioner.

As in *Wells*, the statutes at issue in *Simmerly*, the other case on which the Department relies, were ambiguous as to when the applicable time period began to run. *Simmerly* involved mandatory arbitration. Under MAR 7.1(a), the party seeking de novo review of an arbitration award must file a request within 20 days after the arbitration award is filed. Another rule, MAR 6.2, requires the arbitrator to file the award with the clerk of the superior court, with proof of service of a copy *on each party*. A statute requires the arbitrator to file his or her decision and award, together with proof of service thereof *on the parties*. RCW 7.06.050(1). This Court held the statute and rules were ambiguous because they could be read as starting the 20-day time limit for requesting a trial de novo either upon the filing of proof of service as to *all* parties or

proof of service on the individual parties. Accordingly, the Court held the time period commenced to run upon service on the individual party.

Unlike the statutes in *Wells* and *Simmerly*, the statute at issue here, RCW 51.52.050, is not ambiguous. It provides, in part, that a decision, order, or award of the Department becomes final sixty days “from the date the order is communicated to the parties” unless a written request for reconsideration is filed with the Department. RCW 51.52.050. An order is considered “communicated” to a party upon receipt. *Kaiser Aluminum & Chem. Corp. v. Dep’t of Labor & Indus.*, 57 Wn. App. 886, 889, 790 P.2d 1254 (1990). The unambiguous meaning of the statute is that the Department’s decision, order, or award becomes final only after all parties entitled to receive a copy of it actually receive it. Because an appeal is only from a final order, a party cannot appeal a decision of the Department until all parties entitled to communication of the decision receive it. Until all such parties receive the Department’s decision, the BIIA is without jurisdiction over an appeal of such decision.

More analogous to the relevant statute in the present case are the statutes at issue in *Leson v. Dep’t of Ecology*, 59 Wn. App. 407, 799 P.2d 268 (1990). In that case, the appellant appealed a superior court order dismissing his appeal of a Pollution Control Hearings Board decision for lack of subject matter jurisdiction. Under the statute, a petition for review

had to be served and filed within 30 days after the service of the final decision of the agency. RCW 34.04.130(2). The statute provided for effecting service of the final decision of the agency by delivering or mailing a copy of the decision, order, findings, and conclusions “to each party and to his attorney of record, if any.” RCW 34.04.120. This Court held the statute unambiguous:

RCW 34.04.120 requires the agency to notify the parties and their counsel of its final decision. Adequate notice of the decision is integral to the process of invoking appellate jurisdiction under RCW 34.04.130. It is this statutorily required event that triggers the 30-day period for a timely appeal.

Id., 59 Wn. App. at 410 (citation omitted). Accordingly, the court held the 30-day appeal period in RCW 34.04.130(2) does not begin to run unless and until a copy of the final decision is mailed “to the attorney of record and to the parties.” *Id.* (emphasis by the Court). Similarly, here, a decision, order, or award of the Department does not become final until sixty days after a copy thereof is communicated to each party entitled under RCW 51.52.050 to receive it.

Finally, the Department argues that it does not matter whether it complied with RCW 51.52.050 and sent Dr. Cook a copy of its closing order because, had Shafer or any other aggrieved party filed an appeal, the BIIA would have informed Dr. Cook of the appeal pursuant to RCW

51.52.060(2), and Dr. Cook could have filed a cross appeal. RCW 51.52.060(2) requires the BIIA to “notify other interested parties to the appeal of the receipt of the appeal and . . . forward a copy of the notice of appeal to the other interested parties.” But, notification that a notice of appeal has nothing to do with whether the Department’s order became final under RCW 51.52.050. Further, if the Department did not consider Dr. Cook a party “affected by” its closing order, then it is unlikely the BIIA would have considered Dr. Cook an “interested party” entitled to notice pursuant to RCW 51.52.060(2) of any appeal that was filed.

Finally, the Department argues that Shafer is attempting to assert the rights of Dr. Cook. As explained in Shafer’s opening brief, Shafer is not attempting to assert Dr. Cook’s rights or stand in Dr. Cook’s shoes. Rather, Shafer is basing her argument that the closing order is not final as to her or any other party on the Department’s failure to communicate the closing order to Dr. Cook.

In sum, as the Department concedes, Dr. Cook was a party affected by its order closing Shafer’s claim. Accordingly, Dr. Cook was entitled to a copy of the order. The Department’s failure to communicate its closing order to Dr. Cook prevented the order from becoming final under RCW 51.52.050. Because the order was not final, the BIIA lacked jurisdiction over the appeal. Shafer did not waive her objection to the finality of the

closing order, but rather properly raised the issue in an interlocutory appeal to the BIIA and in an appeal to the superior court.

(3) Shafer Was Improperly Ordered to Undergo a CR 35 Mental Examination

A threshold issue with regard to whether Shafer was properly required to undergo a CR 35 mental examination is whether Shafer's objection, in her petition for review, to "all adverse evidentiary and interlocutory rulings" was sufficient. *See* CABR 2. A general objection in a petition for review to all adverse evidentiary rulings is sufficient. WAC 263-12-145(3). The Department argues, with no citation to authority, that an objection to a ruling on a request for a CR 35 mental examination must be specific because it is a discovery objection, not an evidentiary objection. Although CR 35 pertains to discovery, discovery most certainly pertains to evidence. All doubts as to the meaning of the Industrial Insurance Act and, it follows, as to the meaning of regulations promulgated to implement the Act as well, must be resolved in favor of the injured worker. *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996). Shafer's objection to the CR 35 mental examination should be deemed sufficient.

The Department claims Shafer did not put her mental condition in controversy until March 3, 2004, when she "confirmed an actual

psychiatric expert would testify.” Br. of Resp’t at 40. The Department, however, ignores the evidence in the record establishing that Shafer put her mental condition in controversy months prior to that date. Specifically, the record contains evidence that Shafer’s counsel informed IAJ Sawtell during a telephonic mediation conference held on November 26, 2003 that Shafer’s claim involved, inter alia, depression. CABR 149-52. Additionally, the record shows that Shafer identified Dr. Lanny Snodgrass, a psychiatrist, as an expert witness on January 5, 2004 during a telephonic scheduling conference. CABR 129, 147. The Department’s delay in seeking a CR 35 mental examination is grounds for concluding the Department failed to meet its burden of showing good cause for the examination. *Tietjen v. Dep’t of Labor & Indus.*, 13 Wn. App. 86, 91-92, 534 P.2d 151 (1975).

The Department also argues it was under no obligation to attempt to obtain the information it sought by other means. Br. of Resp’t at 39. The Department’s assertion is not supported by the case law. In fact, one factor relevant to the determination of “good cause” under CR 35 is the possibility of obtaining the desired information by other means. *See, e.g., Marroni v. Matey*, 82 F.R.D. 371, 372 (E.D. Pa. 1979).⁴ *See also, Storms*

⁴ Cases construing the comparable federal rule, Fed. R. Civ. P. 35, are pertinent in construing CR 35 because Washington adopted the federal rule. *Eberle v. Sutor*, 3 Wn. App. 387, 389, 475 P.2d 564 (1970).

v. Lowe's Home Ctrs., Inc., 211 F.R.D. 296, 298 (W.D. Va. 2002) (holding the movant failed to establish good cause for requiring the plaintiff to submit to a vocational assessment, where the movant had access to the plaintiff's medical records, a report of a vocational expert, and all other discoverable materials). Here, as discussed, the Department had access to psychiatric evaluations of Shafer, but made no attempt to obtain from these records the information it sought regarding Shafer's mental condition. *See* Br. of Appellant at 29-30.

Because of the Department's unreasonable and unnecessary delay in requesting a CR 35 examination, the timing of the examination is relevant to whether the BIIA abused its discretion in granting the Department's request for the examination. The Department requested Shafer's mental examination to be held only 15 days before the hearing on Shafer's application to reopen her claim was to commence. CR 35(b) requires the report of the examining psychologist to be delivered no later than 30 days before the commencement of trial. Although the rule allows this deadline to be altered by order of the trial court (or, here, the BIIA), it does not follow, as the Department suggests, that the BIIA has unfettered discretion in all cases to grant the Department's request to shorten the deadline. Here, the BIIA rewarded the Department's unreasonable delay in seeking a CR 35 mental examination by allowing the Department to

delay the examination until only 15 days before the hearing to Shafer's prejudice. Under these circumstances, the BIIA abused its discretion in permitting the Department to conduct a CR 35 mental examination of Shafer without requiring the Department to obtain the desired information by other means, in permitting the Department to wait months after being on notice that Shafer's mental condition was in controversy to move for a CR 35 mental examination, and in allowing the Department to delay the examination until 15 days before the hearing.

As discussed in Shafer's opening brief, because the BIIA abused its discretion in ordering the CR 35 mental examination by Dr. Schneider, the superior court abused its discretion in denying Shafer's motion in limine to exclude Dr. Schneider's testimony. And, because Dr. Schneider's deposition was improperly admitted, the superior court erred in awarding the Department its costs for transcribing the deposition. *See* Br. of Appellant at 30-31. Finally, because Dr. Schneider's CR 35 mental examination was improperly ordered, it was error for the BIIA and the jury to rely on his deposition testimony that Shafer's mental problems were not exacerbated by her industrial injury. The evidence properly presented to the jury, namely the testimony of Dr. Hart, established that Shafer's industrial injury caused further mental problems or exacerbated those she was already suffering. Tr., Apr. 16, 2004 at 39-40.

C. CONCLUSION

For the reasons discussed here and in Shafer's opening brief, this Court should reverse the judgment in favor of the Department and remand with directions to enter judgment in favor of Shafer. Shafer is entitled to an award of attorney fees at trial and on appeal pursuant to RCW 51.52.130. Costs on appeal, including reasonable attorney fees, should be awarded to Shafer.

DATED this 27th day of November, 2006.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I deposited in the U.S. Postal Service a true and accurate copy of the following document: Reply Brief of Appellant in Court of Appeals Cause No. 58454-5-I to the following:

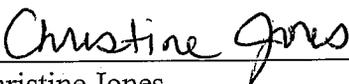
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Original filed via ABC Legal Messengers:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 29, 2006, at Tukwila, Washington.



Christine Jones
Legal Assistant
Talmadge Law Group PLLC

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