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IN THE  
**COURT OF APPEALS, DIVISION I**  
 FOR THE STATE OF WASHINGTON

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DOCKET NO. 709615

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SEARS ROEBUCK COMPANY,  
 Appellant,

v.

JULIE A. SCOTT,  
 Respondent.

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Employer's reply brief requesting denial of medical conditions, mental conditions, and time loss and equitable reduction of attorney's fees.

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**Appellant's Reply Brief**

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## **Introduction**

Sears respectfully renews its request for the relief stated in its opening brief. Scott's response brief fails to provide substantial evidence for allowing thoracic outlet syndrome, headaches, or panic or anxiety disorders in her 2003 worker's compensation claim. Sears requests this Court deny time loss compensation from March 3, 2007 to September 30, 2009 because Scott does not provide a valid legal reason for abandoning the jury's verdict on this issue. Sears requests equitable reduction of Scott's Superior Court attorney's fees because this case is fundamentally distinguishable from prior fee-shifting cases. Finally, Sears requests Scott's Court of Appeals attorney's fees be sanctioned due to her failure to follow the Rules of Appellate Procedure.

## **Argument and Authorities**

### **A. Scott's response brief does not illuminate substantial evidence to support attributing thoracic outlet syndrome, headaches, or panic/anxiety disorders to her 2003 claim.**

#### **1. Scott fails to identify substantial evidence to attribute thoracic outlet syndrome to her 2003 claim.**

In its opening brief, Sears explained how the Superior Court judgment attributing thoracic outlet syndrome to Scott's 2003 injury should be reversed for lack of substantial evidence.<sup>1</sup> In sum, the only

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<sup>1</sup> Br. for Appellant 8-11.

support for attributing thoracic outlet syndrome to Scott's 2003 injury was outlier medical opinion, inconsistent with the majority of the medical community, without objective support, and incongruous with the logical processes of human anatomy.<sup>2</sup>

Rather than addressing the substantive thoracic outlet insufficiencies identified in Sears' opening brief, Scott responds that its witness Dr. Ombrellaro is a thoracic outlet expert and then proceeds with an ad hominem attack on Sears's vascular expert, Dr. Kellogg.<sup>3</sup> Scott's ad hominem attack is an inaccurate statement of the record and insufficient to attribute thoracic outlet syndrome to this claim.

Scott's allegations about Dr. Kellogg are misstatements and misconstructions of the record. Scott states that Dr. Kellogg "was no longer allowed to perform forensic evaluations because he was not board certified in his field," when the record actually shows Dr. Kellogg was board certified in general surgery and still performing independent examinations.<sup>4</sup> Although Dr. Kellogg was not board certified in vascular surgery, that specialty only obtained board certification two years before

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<sup>2</sup> Br. for Appellant 8-11.

<sup>3</sup> Amended Response Br. of Respondent 13-14.

<sup>4</sup> Amended Response Br. of Respondent 14; Kellogg Dep. 3:22-23, 7:7-9, 70:5-7, July 20, 2010.

Dr. Kellogg retired from private practice.<sup>5</sup> Scott also criticizes the small proportion of Dr. Kellogg's thoracic outlet syndrome diagnoses and surgeries without acknowledging or addressing expert testimony that thoracic outlet syndrome is extremely rare.<sup>6</sup>

**2. Scott fails to identify substantial evidence to attribute headaches to her 2003 claim.**

Sears's opening brief explained that attributing headaches to Scott's 2003 injury is logically inconsistent.<sup>7</sup> Scott's 2003 claim was not for a head injury, so the only commonsense reason to attribute headaches to the 2003 injury would be if headaches were secondary to another diagnosis.<sup>8</sup> However, any possible foundational diagnosis was either not supported by substantial evidence or a diagnosis the jury found unrelated to the claim.<sup>9</sup> The timing of Scott's purported headaches was also logically inconsistent with attributing them to the 2003 injury.<sup>10</sup>

In response, Scott states that her attending physicians' opinions should be given "special consideration." However, "special consideration"

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<sup>5</sup> Kellogg Dep. 7:3-9, 71:22-23, July 20, 2010.

<sup>6</sup> Amended Response Br. of Respondent 14; Kellogg Dep. 67:8-16, July 20, 2010 ("the diagnosis is one in a million"); Williamson-Kirkland Dep. 24:18-21, October 29, 2010 ("the major proportion of the country...doesn't believe thoracic outlet is very common, happens very often, or should have surgery very often.")

<sup>7</sup> Br. for Appellant 11-13.

<sup>8</sup> Br. for Appellant 11-12.

<sup>9</sup> Br. for Appellant 11-12.

<sup>10</sup> Br. for Appellant 12-13.

does not mean attending physician testimony is weighed more heavily or considered more credible than testimony from other experts.<sup>11</sup> There are many cases where the Washington Courts and agencies have declined to follow an attending physician's opinion because the consulting physicians' opinions were more logical or consistent with the law.<sup>12</sup> The "special consideration" rule does not provide a substantive reason why headaches could logically be related to this claim.

In response to Sears's argument that the timing of Scott's purported headaches was inconsistent with attributing them to the 2003 injury, Scott vaguely states that she "complained of headaches soon after she experienced her second work injury" without citation to the record.<sup>13</sup> That unsupported comment is insufficient to counter the actual testimony that her headache complaints did not begin until months after the 2003

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<sup>11</sup> *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 572 (1988).

<sup>12</sup> See, e.g., *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 393-94 (1992) (declining to follow an attending physician because his opinion was merely based on subjective findings); *In Re: Judith M. Overby*, BIIA Dec., 09 19369 (2011) (declining to follow an attending physician because he examined the worker months after the relevant time frame and provided inadequate explanation for his conclusions).

<sup>13</sup> Amended Response Br. of Appellant 17.

injury.<sup>14</sup> Moreover, this Court may decline to consider Scott's argument because she did not refer to the record.<sup>15</sup>

**3. Scott fails to identify substantial evidence to attribute panic or anxiety disorders to her 2003 claim.**

Sears's opening brief identified an inconsistency in the jury verdict with regard to Scott's alleged panic and anxiety disorders: the verdict indicates the 2003 injury both did, and did not, cause or aggravate Scott's preexisting somatoform disorder.<sup>16</sup> Although the typical remedy for a verdict inconsistency is remand to Superior Court, remanding is unnecessary in this case because there is not substantial evidence to support attributing a mental health disorder to the 2003 claim.<sup>17</sup> Similar to the headaches analysis, attributing a mental health diagnosis to the 2003 claim is illogical because the facts do not support a necessary foundational diagnosis.<sup>18</sup>

Scott's response does not address the verdict inconsistency.<sup>19</sup> Instead, Scott makes multiple assertions of fact without a single citation to

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<sup>14</sup> Williamson-Kirkland Dep. 44:9-10 ("She began complaining later, months later of headaches..."); Ombrellaro Dep. 22:11-24:12, June 7, 2010 (no mention of headaches in April 19, 2004 report of symptoms).

<sup>15</sup> See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992) (declining to consider arguments unsupported by reference to the record or citation to authority).

<sup>16</sup> Br. for Appellant 13-15.

<sup>17</sup> Br. for Appellant 13-15.

<sup>18</sup> Br. for Appellant 13-15.

<sup>19</sup> See Amended Response Br. of Respondent 14-17.

the record.<sup>20</sup> This Court should decline to review Scott's mental health arguments because there is no citation to the record.<sup>21</sup> However, if this Court does review Scott's mental health argument, it will be clear that Scott's argument is not only unsupported, but also incorrect.

Scott spends almost a page of her response brief providing an inaccurate summary of *Clayton v. Department of Labor and Industries*.<sup>22</sup> In *Clayton*, Clayton complained that the Superior Court did not give a specific jury instruction he wanted.<sup>23</sup> The Court of Appeals held there was no error, since Clayton's legal theory was adequately addressed in another jury instruction.<sup>24</sup> Here, Scott's summary implies the *Clayton* Court actually agreed with Clayton, but that is not the case.<sup>25</sup> In *Clayton*, Clayton lost.<sup>26</sup>

Scott's inaccurate factual statements also do not support attributing panic or anxiety disorder to this claim. Scott states "a majority of the medical providers agreed she had panic attacks and anxiety proximately

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<sup>20</sup> See Amended Response Br. of Respondent 14-17.

<sup>21</sup> See *Cowiche*, 118 Wn.2d at 809 (declining to consider arguments unsupported by reference to the record or citation to authority).

<sup>22</sup> Amended Response Br. of Respondent 16-17; *Clayton v. Dep't of Labor & Indus.*, 36 Wn.2d 325 (1950).

<sup>23</sup> *Clayton*, 36 Wn.2d at 327.

<sup>24</sup> *Id.* at 329.

<sup>25</sup> See Amended Response Br. of Respondent 16-17.

<sup>26</sup> *Clayton*, 36 Wn.2d at 329.

caused by the industrial injuries,” when actually four of the seven medical experts testified Scott did not have a claim-related mental health condition.<sup>27</sup> Even though Scott’s witnesses felt she had claim-related panic and anxiety disorders, attributing even a portion of Scott’s mental health problems to the 2003 claim is illogical if there is no underlying claim-related medical condition to trigger a mental health problem.<sup>28</sup>

**B. Scott’s argument for remanding the issue of time loss compensation to the Department is an incorrect statement of law.**

In its opening brief, Sears asked this Court to deny time loss compensation from March 3, 2007 to September 30, 2009 because that was the jury’s verdict.<sup>29</sup> In response, Scott alleges the Superior Court did not have subject matter jurisdiction to decide Scott’s entitlement to time loss compensation.<sup>30</sup> However, Scott’s entitlement to time loss is a question of scope of review, not subject matter jurisdiction. Scott cannot raise a scope of review question after the jury’s verdict. However, even if

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<sup>27</sup> Amended Response Br. of Respondent 15; *cf.* Robinson Dep. 13:23-24, August 31, 2010 (no mental health diagnosis related to the claims); Brigham Dep. 31:24, July 19, 2010 (no underlying medical condition that would cause a mental health problem); Kellogg Dep. 64:17-65:14, July 20, 2010 (no underlying medical condition that would cause pain to trigger a mental health problem); Williamson-Kirkland Dep. 64:8, October 29, 2010 (no evidence that the industrial injuries caused a mental health problem).

<sup>28</sup> *See* Br. for Appellant, 13-15.

<sup>29</sup> Br. for Appellant 15-16.

<sup>30</sup> Amended Response Br. of Respondent 18-22.

timely raised, this issue was within the Superior Court's scope of review because the Department must have considered time loss compensation when closing the claim.

Scott has confused subject matter jurisdiction with scope of review. Subject matter jurisdiction is an adjudicative body's authority to hear the type of controversy in a case.<sup>31</sup> The Superior Court has jurisdiction to hear controversies with decisions of the Board of Industrial Insurance Appeals.<sup>32</sup> A court does not lack subject matter jurisdiction solely because a particular issue is outside its scope of review.<sup>33</sup> Because this case includes a controversy with a Board decision about time loss compensation, Scott's entitlement to time loss compensation was within the Superior Court's subject matter jurisdiction.<sup>34</sup>

With regard to time loss, Scott's response brief actually addressed the Superior Court's scope of review. The Superior Court's scope of review in a worker's compensation claim is de novo review of appealed

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<sup>31</sup> *Magee v. Rite Aid*, 167 Wn. App. 60, 72 (2012).

<sup>32</sup> RCW 51.04.010 (abolishing jurisdiction of the courts except for as provided in the Industrial Insurance Act); RCW 51.52.110 (Industrial Insurance Act provision giving authority to appeal Board decisions to Superior Court).

<sup>33</sup> *Magee*, 167 Wn. App. at 72.

<sup>34</sup> See CABR 220, Department closing order (specifically addressing time loss compensation); CABR 219, Scott's BIIA appeal (where Scott requests, *inter alia*, "time loss benefits but not inclusive from May 2, 2009 to September 25, 2009"); CABR 147, BIIA *Interlocutory Order Establishing Litigation Schedule* (including time loss as issue before the Board).

Board decisions, so essentially the Superior Court's scope of review is tied to the Board's scope of review.<sup>35</sup> The Board's scope of review is fixed by the Department order on appeal and limited by the issues raised in the notice of appeal.<sup>36</sup> Here, the Department order on appeal specifically addressed Scott's entitlement to time loss compensation and Scott raised that issue in her appeal.<sup>37</sup> Therefore, Scott's complaints about the jury's time loss verdict are complaints about the jury's scope of review.

Scott waived any argument about the jury's authority to decide her entitlement to time loss compensation when she failed to raise the scope of review issue until after the jury rendered its verdict. Scott waived the scope of review argument when she failed to raise it in her Board *Petition for Review*.<sup>38</sup> Scott also waived the scope of review argument when she failed to raise the defense in a Superior Court pretrial pleading, since any defense (with a few exceptions, not including scope of review) that is not raised in a Superior Court response pleading is waived.<sup>39</sup>

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<sup>35</sup> RCW 51.52.115.

<sup>36</sup> *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982 (1970).

<sup>37</sup> CABR 220, Department closing order (specifically addressing time loss compensation); CABR 219, Scott's BIIA appeal (where Scott requests, *inter alia*, "time loss benefits but not inclusive from May 2, 2009 to September 25, 2009.")

<sup>38</sup> See *Magee*, 167 Wn. App. at 73 (a defense not raised in a Board *Petition for Review* is waived); CABR 47, Scott's BIIA *Petition for Review* (Scott requests time loss compensation without raising issue of scope of review).

<sup>39</sup> CR 12(b).

However, even if Scott raised the scope of review issue in a timely manner, her argument is without merit because the opinions she relies on are fundamentally distinguishable from this case. Each opinion Scott relies on (*Lenk*, *Hanquet*, and *Cole*) relates to a Department order which rejected a claim.<sup>40</sup> When the Department rejects a claim, the Department has not exercised its original jurisdiction to determine the nature and extent of benefits, including time loss compensation.<sup>41</sup> There is a clear distinction between “reject” cases and cases where the claim was allowed and the Department exercised its original jurisdiction.<sup>42</sup> In cases where the Department already exercised its original jurisdiction (i.e., the claim was allowed), the reviewing courts have authority to determine how interrelated issues affect each other when new conclusions are reached on appeal.<sup>43</sup>

Scott’s response brief argues for an overly narrow interpretation of what “issues” the reviewing Courts may consider, essentially arguing that

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<sup>40</sup> Amended Response Br. of Respondent 18-22; *Lenk*, 3 Wn. App. at 979; *Hanquet v. Dep’t of Labor & Indus.*, 75 Wn. App. 657, 659 (1994); *Cole v. Dep’t of Labor & Indus.* 137 Wn. 538, 538 (1926).

<sup>41</sup> *In re: Anton E. Worklan*, BIIA Dec., 26,538 (1967); *see also Magee*, 167 Wn. App. at 75 (Board significant decisions are persuasive authority).

<sup>42</sup> *Id.*

<sup>43</sup> *See, e.g., In re: Anton E. Worklan*, BIIA Dec., 26,538 (1967) (Board has authority to determine permanent disability for a condition previously segregated by the Department); *see also Magee*, 167 Wn. App. at 75 (Board significant decisions are persuasive authority).

the reviewing Courts cannot determine how interrelated issues affect one another.<sup>44</sup> In addition to being inconsistent with the law (*see infra.*), that interpretation is an unjust policy. This is not a case where Scott was surprised by the jury considering her time loss compensation, since it was Scott who raised the issue on appeal and her experts all provided testimony on the issue.<sup>45</sup> Moreover, Scott's interpretation of scope of review would improperly narrow the statutory authority of the Board and Superior Court to adjudicate worker's compensation appeals, and promote piecemeal litigation.

**C. Scott's response brief sidesteps the fee-shifting policy Sears asks this Court to adopt.**

Sears's opening brief requested that this Court equitably reduce Scott's Superior Court attorney's fees because the fee-shifting purpose is not served when a worker appeals two Department orders on two separate claims, and is unsuccessful on all issues related to one of them.<sup>46</sup> In response, Scott repeated the fee-shifting rule and stated that Sears's

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<sup>44</sup> Amended Response Br. of Respondent 18-22.

<sup>45</sup> CABR 219, Scott's BIIA appeal (where Scott requests, *inter alia*, "time loss benefits but not inclusive from May 2, 2009 to September 25, 2009"); *In re: Anton E. Worklan*, BIIA Dec., 26,538 (1967) (identifying the "element of surprise" a policy consideration related to the Board's scope of review); *see also Magee*, 167 Wn. App. 75 (Board significant decisions are persuasive authority).

<sup>46</sup> Br. for Appellant 16-19.

reliance on the fee shifting case, *Brand v. Department of Labor and Industries*, was “misplaced.”<sup>47</sup>

Sears is not relying on *Brand*. Sears’s opening brief distinguished this case from *Brand* by explaining that *Brand* addressed one injury, one claim, and one appeal – but this case addresses two injuries, two claims, and two appeals consolidated into one adjudication.<sup>48</sup> Sears respectfully requested that this Court recognize the distinction between these cases and equitably reduce Sears’s liability for Scott’s Superior Court attorney’s fees in light of the fact that Scott lost on every issue related to her 2002 claim.<sup>49</sup> There is no policy reason for shifting a worker’s attorney’s fees when the worker is unsuccessful on appeal.<sup>50</sup>

**D. Sears requests Scott be sanctioned against receiving attorney’s fees at the Court of Appeals.**

If Scott prevails at this Court, Sears respectfully requests any attorney’s fees under RCW 51.52.130 be sanctioned due to Scott’s failure to follow the Washington Rules of Procedure. After this Court rejected Scott’s first response brief and gave her two weeks to correct citation mistakes, Scott submitted an amended brief which changed a handful of

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<sup>47</sup> Amended Response Br. of Respondent 22-24.

<sup>48</sup> Br. for Appellant 16-19.

<sup>49</sup> Br. for Appellant 16-19.

<sup>50</sup> See Br. for Appellant 16-19.

citations but left over 50 statements of law and fact uncited. Sears was harmed by Scott's failure to make a good faith attempt at citation. Preparing this reply brief took longer than typical because Sears's attorney needed to scour the record to confirm/refute Scott's unreferenced statements. Moreover, Scott's extension to correct her brief effectively afforded Sears two less weeks to develop this reply brief.

Pursuant to Washington Rule of Appellate Procedure 18.9, Sears respectfully requests this Court bar Scott's receipt of Court of Appeals attorney's fees for failure to follow the appellate rules, should she prevail at this Court.<sup>51</sup> If that sanction is inappropriate, Sears respectfully requests the quality of Scott's brief be considered when determining the reasonableness of her attorney's fees, and the extra burden on Sears be considered when determining the appropriateness of any Lodestar multiplier.

### **Conclusion**

Scott's response brief did not provide logical, substantial evidence to support relating thoracic outlet syndrome, headaches, or mental health conditions to her 2003 claim. Scott's response brief did not raise a valid

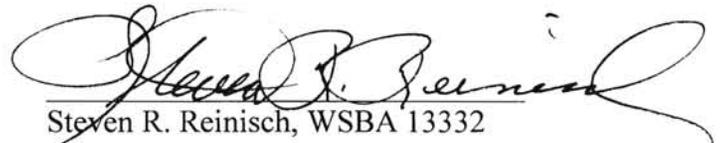
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<sup>51</sup> See RAP 18.9(a): "Sanctions. The appellate court on its own initiative or on motion of a party may order a party ... who ... fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court."

legal reason for discarding the jury's verdict denying time loss compensation from March 3, 2007 to September 30, 2009. Scott response brief did not provide a direct response to Sears's policy argument for equitably reducing her Superior Court attorney's fees.

Rather, Scott's response brief provided inaccurate summaries of the law and facts, was generally unsupported by any citation to record, and offered arguments that either did not directly respond to Sears's opening brief or were invalid attempts to do so. Sears respectfully requests this Court grant the relief stated in Sears's opening brief and/or bar her Court of Appeals attorney's fees.

Respectfully submitted,



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*Attorney for Sears Roebuck Co.*

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**CERTIFICATE OF MAILING**

I hereby certify that I filed the foregoing APPELLANT’S REPLY BRIEF on the following individuals on April 23, 2014, by depositing them with the U.S. Postal Service in envelopes with first class postage affixed and addressed to:

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I further certify that I filed the original and one copy of the foregoing with:

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By mailing this 23rd day of April, 2014

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