Ayers, Virginia

DISCOVERY

Testifying v. consulting experts

Although originally designated as a testifying expert, a party may re-designate an expert as a consulting expert, and the expert's opinions are shielded from discovery and use by the opposing party, so long as the expert is properly classified as a consulting expert under CR 26. **….*In re Virginia Ayers*, BIIA Dec., 08 14932 (2009)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: VIRGINIA W. AYERS	)	**DOCKET NO. 08 14932**
	)	
CLAIM NO. Y-654341	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Virginia W. Ayers, by
Robinson & Kole, P.S., Inc., per
Nathan T. Dwyer

Employer, Aramark Correctional Services,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Ingrid Golosman, Assistant

The claimant, Virginia W. Ayers, filed an appeal with the Board of Industrial Insurance Appeals on May 28, 2008, from an order of the Department of Labor and Industries dated May 21, 2008. In this order, the Department denied Ms. Ayers' application to reopen her claim. The Department order is **REVERSED AND REMANDED**.

ISSUES

The preliminary question is whether the industrial appeals judge erred in allowing the Department to present the testimony of Frederic H.T. Braun, M.D., regarding his January 21, 2009 examination, which was performed at the request of the claimant's attorney. CR 26(b)(4) and (5). The substantive issue is whether Ms. Ayers' right shoulder condition, proximately caused by her May 13, 2003 industrial injury, worsened between July 20, 2006, and May 21, 2008, requiring further treatment.

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on May 14, 2009. The industrial appeals judge affirmed the May 21, 2008 Department order. All contested issues are addressed in this order.

The central issue raised in the Petition for Review is the extent to which a party may seek out medical opinions in preparation for trial, without risking an opponent's being permitted to discover those opinions and use them against the party that requested them. Here, the claimant's attorney referred her for an examination by Frederic H. T. Braun, M.D., who concluded that

Ms. Ayers' condition had not worsened. The Department was allowed to call Dr. Braun as its expert witness, and the industrial appeals judge affirmed the Department order based largely on Dr. Braun's opinions.

When employers or the Department seek expert medical opinions during the pendency of an appeal, they may do so either through a record review, or an examination under CR 35. The record review would not be disclosable to the claimant, unless the reviewer was named as a witness. The report of the CR 35 examination would be disclosable under the terms of that rule, but the claimant could be precluded from calling the doctor as a witness under CR 26 and *Mothershead v. Adams*, 32 Wn. App. 325 (1982).

Claimants are also free to seek expert opinions during the pendency of an appeal, and those opinions are likewise shielded from discovery and use by the opposing party, so long as the doctor is classified as a consulting expert, not a testifying expert, under CR 26. *Crenna v. Ford Motor Co.*, 12 Wn. App. 824 (1975); and *Detwiler v. Gall*, 42 Wn.App. 567 (1986). Here, the claimant initially classified Dr. Braun as a testifying expert prior to his January 21, 2009 examination. After she learned his opinions she tried to change him to a consulting expert in order to prevent the Department from using those opinions against her. The industrial appeals judge determined that "there is no indication that once the bell is rung, you can unring the bell. Once somebody is classified as a testifying expert, they're not a consulting expert." 4/1/09 Tr. 6-7. He denied the claimant's Motion in Limine, and allowed the Department to present Dr. Braun's testimony regarding his January 21, 2009 examination, noting that even if Dr. Braun was a consulting expert, the Department had shown the requisite exceptional circumstances under CR 26(b)(5)(B). 4/1/09 Tr. at 6-7.

The key issue before us is whether a party may designate an expert as a consultant after the expert has already been named as a witness. That is, when, as here, a party has identified a doctor as a witness and has promised discovery of that doctor's report in answers to interrogatories, has that party irrevocably waived any right to later shield the results of the doctor's examination of the claimant from discovery, by recasting the doctor as a consultant?

As explained below, we do not believe the claimant irrevocably waived her right to change her designation of Dr. Braun to a consulting expert and obtain the protections afforded by CR 26(b)(4) and (5). We, therefore, grant the claimant's Motion in Limine, and strike Dr. Braun's testimony with respect to his January 21, 2009 examination, beginning on page 18 of his

deposition. We have reviewed the remaining evidentiary rulings in the record of proceedings and find that no other prejudicial error was committed. All other rulings are affirmed.

As to the substantive issue before us, in the absence of Dr. Braun's testimony regarding his January 21, 2009 examination, we conclude that Ms. Ayers has proved aggravation. We, therefore, reverse the May 21, 2008 order and remand to the Department with direction to reopen the claim for further treatment, and take other action as indicated by the law and the facts.

DECISION

On May 13, 2003, Ms. Ayers injured her right shoulder, neck, and low back during the course of her employment with Aramark Correctional Services. The focus of this appeal is on the right shoulder. On February 24, 2004, she underwent a right rotator cuff repair. In September 2004, Greg Sharp, D.O., became her attending physician. He saw Ms. Ayers about 30 times, through May 23, 2005.

On September 27, 2005, Dr. Braun saw Ms. Ayers at the claimant's attorney's request. He felt her physical conditions were fixed and stable, and that she had physical impairments equal to 7 percent of her right arm at or above the deltoid insertion or by disarticulation at the shoulder, and Category 2 of permanent dorso-lumbar and/or lumbosacral impairments. On July 20, 2006, the claim was closed with permanent partial disability awards based on Dr. Braun's ratings for the physical conditions, as well as a Category 4 mental impairment.

On January 24, 2008, Ms. Ayers returned to Dr. Sharp and he filed an application to reopen on her behalf on January 29, 2008. On April 21, 2008, the Department required Ms. Ayers to undergo an examination by Peter Taylor, M.D. On May 21, 2008, the Department denied the application to reopen the claim.

The claimant appealed on May 28, 2008, and mediation was conducted. On September 25, 2008, the case was assigned to the industrial appeals judge for hearing. On October 16, 2008, a scheduling conference was held and an Interlocutory Order Establishing Litigation Schedule (Litigation Order) was issued. Ms. Ayers was given until December 1, 2008, to confirm her witnesses; the Department was given until December 8, 2008, to confirm its witnesses; and the parties were given until January 2, 2009, to complete discovery.

On December 1, 2008, the claimant confirmed her witnesses, including Dr. Sharp and Dr. Braun. On December 4, 2008, she amended the confirmation, scheduling Dr. Braun's deposition for February 19, 2009. On December 8, 2008, the Department confirmed its witnesses, reserving the right to call any witnesses named by the claimant, but not called by her.

The Department prepared interrogatories and requests for production on December 19, 2008. (Exhibit 5, attached to Department's Response to Motion in Limine) The record does not reflect when they were served or when the claimant responded. In her answer to Interrogatory No. 3, she identified Dr. Braun as a witness and said she was scheduled to be evaluated by him on "January 20, 2009." In her answer to Interrogatory No. 21, she indicated that Dr. Sharp and Dr. Braun would "testify that the physical conditions covered under this claim have worsened since claim closure, and the claim should be reopened for further treatment." In her answers to Interrogatory Nos. 23 and 24, she said that "Discovery is ongoing. Upon receipt of Dr. Braun's report we will forward a copy to your office."

On January 21, 2009, Ms. Ayers was examined by Dr. Braun. On that same date, the claimant amended her witness confirmation, changing the date of Dr. Braun's deposition to February 3, 2009. A Notice of Perpetuation Deposition for that date was filed, but there is no indication that the deposition occurred.

On February 6, 2009, the first hearing was held, for the presentation of the claimant's testimony, and that of her companion, Dennis Desjariais. The claimant rested, pending the publication of Dr. Sharp's deposition. The Department rested, subject to the deposition of Dr. Taylor. Neither party mentioned Dr. Braun's status.

On February 19, 2009, Dr. Sharp's deposition was taken. On February 27, 2009, the Department amended its witness confirmation, naming Dr. Braun as a witness and scheduling his deposition for March 16, 2009, stating: "Although the Claimant has not submitted an amended witness confirmation letter, the Department has learned that the Claimant does not intend to call Dr. Braun. In our December 8, 2008 witness confirmation letter, the Department reserved all witnesses named but not called by the Claimant. Particularly in light of the fact that the Department closed the claim with the PPD ratings set forth by Dr. Braun, the Department has added him as a witness who has information useful to the trier of fact."

On March 9, 2009, the claimant filed a Motion in Limine, to restrict the Department's questioning of Dr. Braun to his first September 27, 2005 examination. The claimant argued that information regarding the second examination on January 21, 2009 was not discoverable because Dr. Braun was a consulting expert under CR 26, and the results of that examination were protected under the work product doctrine, as part of the trial preparation process. CR 26(b)(4) and (5). CR 26(b)(4) prohibits the discovery of documents and tangible things prepared in anticipation of litigation, unless there is a showing of "substantial need." CR 26(b)(5)(B) limits discovery of "facts

known or opinions held by an expert who is not expected to be called as a witness at trial." Such discovery is allowed only "as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." According to the claimant, the Department failed to show a "substantial need" to call Dr. Braun as a witness, since the Department was planning to call another witness, Dr. Taylor, who had examined Ms. Ayers on April 21, 2008. Motion in Limine, at 3.

On March 17, 2009, the Department filed its Response, arguing that it was entitled to present Dr. Braun's testimony regarding his January 21, 2009 examination for three reasons: First, the claimant had named him as a testifying expert, so the rules shielding consulting experts were inapplicable. Second, even if he was a consulting expert, the exceptional circumstances exception applied, because he was:

> the only doctor who saw the claimant at the time of closure ***and*** around the time of reopening, and who performs impairment ratings. Warren Declaration 2. Therefore, his perspective on her alleged aggravation carries substantially more weight than any other doctor. Because this perspective is not possible to replicate, his testimony should be allowed in full as an exceptional circumstance.

Response, at 4.

Third, the Department argued that the claimant had waived the protection of the work product doctrine by promising to provide Dr. Braun's report in her responses to the Department's interrogatories.

On April 1, 2009, the Motion in Limine was heard and denied. The industrial appeals judge concluded that "there is no indication that once the bell is rung, you can unring the bell. Once somebody is classified as a testifying expert, they're not a consulting expert." 4/1/09 Tr. at 6-7. He also determined that, even if Dr. Braun was a consulting expert, the Department had shown exceptional circumstances because he was in the unique position of having seen the claimant close to both terminal dates.

On April 6, 2009, the claimant sought interlocutory review of the oral ruling. She pointed out that, due to the oddities of Board litigation, she had been required to confirm her witnesses before discovery was complete, since the witness confirmation deadline was before the deadline for completing discovery. On April 7, 2009, interlocutory review was denied. On May 14, 2009, the industrial appeals judge issued his Proposed Decision and Order, finding Dr. Braun's testimony persuasive and affirming the Department's denial of reopening, based largely on Dr. Braun's opinions.

Conversion from testifying to consulting expert: Central to the industrial appeals judge's determination that the Department could discover Dr. Braun's opinions and call him as a witness is the assumption that an expert identified as a testifying witness cannot later be converted to a consulting expert. At the hearing on the Motion in Limine, the claimant's attorney acknowledged that he knew of no cases addressing this precise issue and the industrial appeals judge relied in part on that statement in denying the motion. We are not aware of any Washington case addressing the specific facts before us, where a party explicitly attempted to convert an expert from testifying to consulting status. However, we have found a case where the defendant attempted to do the reverse, convert a consultant to a witness.

In *Stevens v. Gordon*, 118 Wn. App. 43 (2003), the defendant notified the plaintiff prior to arbitration that he would not be using the report of Dr. Stephen Sears, who had examined the plaintiff under CR 35, and that "[p]ursuant to [the] *Mothershead* decision, neither party may submit or even mention the report at arbitration. I reserve the right to still call Dr. Sears should this matter go to trial. I will provide you ample notice of that decision, however." *Stevens*, 118 Wn. App. at 48. The results of arbitration favored the plaintiff and the defendant sought a trial de novo. Six weeks prior to trial, the defendant notified the plaintiff that he intended to call Dr. Sears as a witness. The plaintiff moved to exclude Dr. Sears as a witness, "arguing that he had not been included in answers to interrogatories and had been shielded from discovery by his status as a consulting expert." *Stevens*, 118 Wn. App. at 48-49. The trial court granted the motion, because "it was fundamentally unfair to subject Ms. Stevens to last minute discovery by converting the consulting expert into a testifying expert." *Stevens*, 118 Wn. App. at 51-52. The Court of Appeals affirmed.

In the current appeal, we have the reverse situation. The claimant is attempting to convert an expert whom she has identified as a witness into the protected category of consulting expert. Thus, the inquiry is different from the question facing the Court in *Stevens*. Here we are not concerned with whether the change in category will somehow prejudice the Department by forcing it to engage in last minute discovery. Instead, when a party is attempting to convert a testifying expert witness to a consulting expert, the question is whether the party has waived the protection of CR 26.

Waiver: According to the claimant, she amended her witness confirmation at the February 6, 2009 hearing, indicating that Dr. Braun would not be called. Motion in Limine, at 2. Presumably, the claimant is referring to an oral amendment. As the Department says, no amended witness confirmation was filed. The record of the hearing is not explicit, but it appears likely that the

parties and the industrial appeals judge were aware Dr. Braun would not be called as a witness by the claimant as of February 6, 2009, given the fact that the claimant rested subject only to the deposition of Dr. Sharp.

In *Mothershead v. Adams*, 32 Wn. App. 325 (1982), the Court left for another day the possibility that a party may waive its right to shield its expert, as follows:

> We express no opinion in circumstances where a party by its own acts waives its right to shield its expert. A party might allow a deposition to be taken, and stipulate for its use or might list an expert as a witness to be called at trial in answer to interrogatories and not call him. Neither of these situations is before us, and we do not pass on the effect of the rule under those facts.

Mothershead, 32 Wn. App. at 329 (footnote 4).

In *Crenna v. Ford Motor Co.*, 12 Wn. App. 824 (1975), the plaintiffs had named an expert in response to interrogatories, but had "stated that it had not been determined 'who or if anyone will be called as an expert witness at the trial.'" *Crenna*, 12 Wn. App. at 827. The plaintiffs later named a different expert as a witness, and the defendant sought to subpoena the originally identified expert. The plaintiffs filed a motion in limine to quash the subpoena and bar the testimony of the expert. The trial court granted the motion, finding no exceptional circumstances under CR 26 that would justify allowing the defendants to present testimony from the plaintiffs' consulting expert. The Court of Appeals affirmed.

In *Pimental v. Roundup*, 32 Wn. App. 647, 656-657 (1982), affirmed, 100 Wn.2d 39, 51 (1983), the Court of Appeals held that the defendant waived the protections afforded by CR 26 with respect to its consulting expert, by permitting that expert to be deposed and by stipulating that the deposition could be used for all purposes. The Court distinguished *Crenna* and *Mothershead*, since no depositions had been taken in those cases. The Court also pointed out that in *Mothershead* the defendant's expert was not listed as a witness to be called at trial. *Pimental*, 32 Wn.App. at 657. In *Crenna*, the plaintiffs had identified their consulting expert in interrogatories, but reserved the question of whether the expert would testify.

The issue here is whether by naming Dr. Braun as a witness, and responding to the Department's interrogatories with a promise to provide his report once it was received, the claimant waived the right to later shield Dr. Braun's report from discovery and prevent the Department from naming him as a witness and presenting his testimony regarding the January 21, 2009 examination. Put another way, what actions are sufficient to irrevocably waive the protections afforded with respect to consulting experts by CR 26? While not absolutely clear, it does not appear that the claimant provided Dr. Braun's report to the Department. The Department argues waiver based

solely on the claimant's identification and confirmation of Dr. Braun as a witness, and her answers to interrogatories promising to provide his report when it became available.

The facts here clearly do not rise to the level of a *Pimental* waiver. In that case, the defendant allowed its expert to be deposed and stipulated to the use of the deposition for all purposes. However, while the issue was not decided, the Court in *Mothershead* suggested that identifying an expert as a witness might be sufficient to show waiver.

Here, the deadlines and consequences of non-compliance set forth in the Litigation Order placed the claimant between a rock and a hard place. She was required to identify and confirm her witnesses by December 1, 2008, a month before the January 2, 2009 deadline for completing discovery. On the other hand, the claimant's attorney could have more clearly preserved Ms. Ayers' rights under CR 26, and should not have assumed Dr. Braun's opinions would be favorable. The claimant's attorney also failed to explain why Ms. Ayers was not examined by Dr. Braun until January 21, 2009, after the January 2, 2009 deadline for completing discovery. We note, however, that given the speed with which hearings are scheduled at the Board, and the informality of our process, it is not unusual to see cases such as this, where an examination occurs just days before testimony is scheduled.

In addition, the Department also failed to comply with the deadlines set forth in the Litigation Order. The industrial appeals judge directed the parties as follows: "A **January 2, 2009** deadline is established for the completion of discovery under the civil rules. This includes the minimum time allowed by rule for a party to respond to a discovery request (e.g., interrogatories and requests for production must be served no later than 30 days prior to January 2, 2009)." Litigation Order, at 1. The record does not reflect when the Department served its interrogatories on the claimant. However, they were not prepared until December 19, 2008, which means the claimant had at least until Monday, January 19, 2009, to respond under CR 33.

The determination of whether to allow Ms. Ayers to recast Dr. Braun as a consulting expert and preclude the Department from presenting his testimony regarding his January 21, 2009 examination is within our sound discretion. We are guided by the strong policy interest in permitting all parties to explore options and prepare for trial without being concerned that they will be required to provide their work product to their opponents. As the Court in *Mothershead* said when it affirmed a protective order precluding the plaintiff from deposing a doctor retained by the defendant for a CR 35 examination: "Our conclusion permits both plaintiff's and defendant's lawyers to seek out various experts to determine facts without the chilling effect of having some expert with whom they

consulted and with whom they disagreed being called as a witness against them. Any other course is subject to the accusation it encourages parties to sit back and let their opponents do their work for them." *Mothershead*, 32 Wn. App. at 331.

In the current case, there are several additional reasons for allowing Ms. Avery to change her designation of Dr. Braun from an expert witness to a consulting expert, i.e., the tight time frames imposed on the parties, the fact that Ms. Avery was required to confirm her witnesses a month prior to the January 2, 2009 deadline for completing discovery, and the fact that neither party completed discovery by that date. On the facts here, we hold that Ms. Ayers did not irrevocably waive her right to classify Dr. Braun as a consulting expert with respect to his January 21, 2009 examination.

Exceptional circumstances: Because we consider Dr. Braun a consulting expert for the claimant, the Department was only permitted to present his testimony regarding the January 21, 2009 examination if it showed exceptional circumstances under CR 26(b)(5)(B). In its Response to the Motion in Limine, the Department contended that Dr. Braun was in a unique position because he was "the only doctor who saw the claimant at the time of closure and around the time of reopening, and who performs impairment ratings." Response, at 2, 4. We are perplexed by that characterization. If the intent was to distinguish Dr. Braun from Dr. Sharp, the statement is inaccurate. Dr. Sharp saw the claimant just four months before Dr. Braun's September 27, 2005 examination. He saw the claimant again on January 24, 2008, filed the application to reopen, and testified that he routinely rates impairment.

More importantly, if the Department felt Dr. Braun's input was unique and critical, nothing precluded it from requiring Ms. Ayers to undergo an examination by Dr. Braun when it received the application to reopen. The Department has the authority to require claimants to attend independent medical examinations (IMEs). RCW 51.32.110; RCW 51.36.070. Dr. Braun testified that he routinely performs IMEs for the Department, so he is apparently qualified to do so under WAC 296-23-302 through 296-23-392, RCW 51.32.112, and RCW 51.32.114. However, instead of requiring Ms. Ayers to be examined by Dr. Braun, the Department made the strategic choice to send the claimant to Dr. Taylor, whose opinion was used to deny the application to reopen. The Department then waited until the claimant had arranged for and presumably paid for an examination by Dr. Braun, before deciding that his opinions were essential.

In order to show exceptional circumstances under CR 26(b)(5)(B), the Department was required to show it was "impracticable . . . to obtain facts or opinions on the same subject by other

means." However, the Department could have had Ms. Ayers examined by Dr. Braun on its own initiative when the claimant filed her application to reopen, and chose not to do so. Thus, it was clearly not impracticable for the Department to obtain his opinions by some means other than waiting for the claimant to choose to undergo an examination with him, as part of her trial preparation. In addition, the Department already had a medical opinion to support its order, Dr. Taylor's. The Department has therefore failed to show exceptional circumstances which would warrant permitting it to present Dr. Braun's testimony regarding his January 21, 2009 examination, and that portion of his deposition, beginning on page 18, is stricken.

Aggravation: That leaves Dr. Braun's testimony regarding his earlier September 27, 2005 examination, as well as Dr. Sharp's and Dr. Taylor's testimony with respect to whether Ms. Ayers' right shoulder condition worsened thereafter. Dr. Sharp was the attending physician from September 2004, to May 23, 2005. He did not see the claimant again prior to the first terminal date of July 20, 2006. According to the claimant, she was undergoing only psychiatric treatment and her physical condition remained about the same from May 23, 2005, through July 20, 2006. 2/6/09 Tr. at 10.

Ms. Ayers was examined by Dr. Braun on September 27, 2005, and his findings formed the basis for claim closure on July 20, 2006. Dr. Sharp had Dr. Braun's September 27, 2005 report in his file. Comparing that report with Ms. Ayers' status when he saw her on May 23, 2005, he felt her condition had not changed significantly between those two dates. Sharp Dep. at 17, 29-30. Thus, Dr. Braun and Dr. Sharp are in comparable positions to speak to the claimant's condition as of the first terminal date, and they do not have any significant disagreement as to her status at that point.

Dr. Sharp next saw Ms. Ayers on January 24, 2008, and filed the application to reopen, based on her right shoulder condition and his concerns that she was developing a frozen shoulder. He recommended an MRI arthrogram and an orthopedic consult to determine if further surgery was warranted. If the claimant was not a surgical candidate, then he recommended osteopathic and physical therapy.

In finding Dr. Taylor and Dr. Braun more persuasive than Dr. Sharp, the industrial appeals judge emphasized that:

> Dr. Sharp did not see Ms. Ayers between May 23, 2005 and January 24, 2008 and that he did not look at his notes to conclude that she had gotten worse. Dr. Sharp estimated that he had seen "a couple of hundred" patients in-between those two dates. Sharp Dep. at 28.
>
> . . .

> A little less than three years is a long time to conclude that patient's findings are objectively worse from memory alone.

Proposed Decision and Order, at 9 and 13.

It is true that when Dr. Sharp saw Ms. Ayers again on January 24, 2008, and concluded that her condition had worsened, he did so based on his memory of what her condition had been when he last saw her. Sharp Dep. at 20, 28. He said it was "really easy" to make the comparison with a patient he has treated and rehabilitated previously. Sharp Dep. at 30-31. However, that is not the extent of Dr. Sharp's testimony regarding worsening.

On January 24, 2008, he found "severely limited range of motion of abduction of the right arm and also flexion, and severe muscle guarding in the cervical/thoracic area with any kind of shoulder movement that from my assessment was much increased over the last visit three years prior." Sharp Dep. at 19. Comparing his January 24, 2008 examination with his May 23, 2005 examination, he felt Ms. Ayers was "severely more impaired" based on "mostly the muscle spasm and the guarding and the inability to even do a thorough assessment without her being in substantial amounts of pain." Sharp Dep. at 20. He did not push the claimant with respect to evaluating her range of motion beyond flexion and abduction, because "it so clearly had developed and progressed so much worse than three years ago." Sharp Dep. at 22. Likewise, comparing Ms. Ayers' range of motion on January 24, 2008, with her range of motion when Dr. Braun saw her on September 27, 2005, he determined that "she had substantially more range of motion decrease" on the latter date. Sharp Dep. at 23. Aside from the reduced range of motion, he pointed to muscle spasm, guarding, and trigger points in support of his opinion that Ms. Ayers' condition had worsened. In particular, he relied on "the general condition of the myofascial tissue in the shoulder area, which was essentially one big spasm knot." Sharp Dep. at 24.

Dr. Taylor performed an IME on April 21, 2008, four months after Dr. Sharp's examination. Unlike Dr. Sharp, Dr. Taylor did not have Dr. Braun's September 27, 2005 report (Taylor Dep. at 40) nor was he aware of its existence (Taylor Dep. at 15). Instead, he referred to two other IMEs performed in June 2004, and June 2005, which did not form the basis for the July 20, 2006 closing order.

The assistant attorney general did not provide Dr. Taylor a copy of Dr. Braun's report and ask him to compare his findings with Dr. Braun's findings. Instead, Dr. Taylor gave a conclusory opinion at the outset of his testimony that there had been no objective worsening since claim closure in 2006. Taylor Dep. at 10. Then, at the end of direct examination, the assistant attorney general asked him to "assume that the doctor who performed the closing exam . . . saw

her . . . after the time that she applied for reopening of her claim, and I'd like you to assume that that doctor testified that, if anything, her physical condition had improved between the two dates, would that be consistent with your findings as well?" Taylor Dep. at 34. The claimant's attorney did not object to this question, which apparently refers to Dr. Braun and the portion of his deposition testimony covered by the claimant's Motion in Limine. Dr. Taylor answered in the affirmative then reiterated his opinion that there had been no objective worsening. Taylor Dep. at 34.

On cross-examination, Dr. Taylor was asked what he compared his range of motion findings with in order to reach that conclusion. Taylor Dep. at 39-40. His answer is not entirely clear. Our sense is that he did not compare his own findings with prior findings, because he did not believe Ms. Ayers' range of motion deficits were objective. It is possible, however, that he did compare his findings with those of the June 2004 and June 2005 IME examiners. What he clearly did not do was to compare them with Dr. Braun's September 27, 2005 findings.

In general, Dr. Taylor found a "massive amount of pain magnification and nonphysiologic findings" (Taylor Dep. at 21), and detailed many examples (Taylor Dep. at 21-32). The two examinations by Dr. Sharp and Dr. Taylor are only four months apart, but reveal very different pictures, which are difficult to reconcile. According to Dr. Sharp, there was no indication Ms. Ayers was being less than honest in her presentation. Sharp Dep. at 20. Dr. Braun's testimony regarding his September 27, 2005 examination also gives no hint of the kinds of behaviors that Dr. Taylor interpreted as symptom magnification. Indeed, Dr. Braun apparently considered Ms. Ayers' shoulder range of motion deficits objective at that time, since they formed the basis for his 7 percent impairment rating, as required by the *AMA Guides to the Evaluation of Permanent Impairment*. Braun Dep. at 17-18.

The industrial appeals judge makes a reasonable point regarding the difficulty of accepting Dr. Sharp's range of motion findings in January 2008 as objective, in light of Dr. Taylor's detailed assessment in April 2008 that Ms. Ayers' performance was inconsistent and non-physiologic. Dr. Sharp also failed to record specific degrees when he tested Ms. Avery's range of motion, and limited his evaluation to abduction and flexion, because Ms. Ayers was in such pain when he saw her. Ultimately, however, we find the opinions of the attending physician more persuasive. Unlike Dr. Taylor, Dr. Sharp compared his own findings before and after claim closure, and compared his own findings with the findings the Department relied on to close the claim. He did not base his opinion of objective worsening solely on decreased range of motion. He also noted increased muscle spasm, guarding, and trigger points. Based on his testimony, Ms. Ayers has proved that

her right shoulder condition, proximately caused by her May 13, 2003 industrial injury, worsened between July 20, 2006, and May 21, 2008, and required further treatment.

FINDINGS OF FACT

1. On May 16, 2003, the claimant, Virginia W. Ayers, filed an Application for Benefits with the Department of Labor and Industries in which she alleged that she sustained an industrial injury on May 13, 2003, during the course of her employment with Aramark Correctional Services.

   On June 11, 2003, the Department allowed the claim.

   On July 20, 2006, the Department accepted responsibility for the diagnosis of depression and closed the claim with a permanent partial disability award equal to 7 percent of the right arm at or above the deltoid insertion or by disarticulation at the shoulder, Category 2 of permanent dorso-lumbar and/or lumbosacral impairments, and Category 4 of permanent mental health impairments.

   On January 29, 2008, Ms. Ayers filed an application to reopen her claim.

   On May 21, 2008, the Department denied the application to reopen.

   On May 28, 2008, Ms. Ayers filed a Notice of Appeal with the Board of Industrial Insurance Appeals.

   On June 5, 2008, the Board granted the appeal under Docket No. 08 14932.

2. On May 13, 2003, Virginia W. Ayers injured her neck, right shoulder, and low back during the course of her employment with Aramark Correctional Services at the Whatcom County Jail, when she pushed on a heavy door that did not open. She also developed a mental health condition proximately caused by her May 13, 2003 industrial injury.

3. As of July 20, 2006, Ms. Ayers' conditions, proximately caused by her May 13, 2003 industrial injury, had reached maximum medical improvement, with a resulting permanent partial disability equal to 7 percent of the amputation value of her right arm at or above the deltoid insertion or by disarticulation at the shoulder, Category 2 of permanent dorso-lumbar and/or lumbosacral impairments, and Category 4 of permanent mental health impairments.

4. Ms. Ayers' right shoulder condition, proximately caused by her May 13, 2003 industrial injury, worsened between July 20, 2006, and May 21, 2008, as demonstrated by objective medical findings, and required further proper and necessary treatment.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. Between July 20, 2006, and May 21, 2008, Ms. Ayers' right shoulder condition, proximately caused by her May 13, 2003 industrial injury,

became aggravated and required further proper and necessary treatment within the meaning of RCW 51.32.160 and RCW 51.36.010.

3. The May 21, 2008 Department order is incorrect and is reversed. The claim is remanded to the Department, with direction to reopen the claim, provide treatment, and take further action as indicated by the law and the facts.

Dated: October 6, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member