NO. 102221-2

SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT S. BACKSTEIN,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Injured workers are a vulnerable population, so the Legislature has often acted to protect them from fraud and theft. Pertinent here, under RCW 51.04.080, a worker must provide written authorization to the Department of Labor & Industries before L&I can send notices, orders, and payments to anyone besides the worker on a specific workers' compensation claim. Absent authorization, L&I must send all orders and payments "directly to the claimant." RCW 51.04.080. This protects workers, ensuring they control who receives orders and payments on a specific claim.

Robert Backstein had four workers' compensation claims. For two claims, he sent written authorizations to L&I, authorizing attorney Ron Meyers to receive orders for those claims. But for the only claim at issue in this appeal—the fourth claim—Backstein sent no written authorization. So L&I followed RCW 51.04.080 and sent the order rejecting the fourth

claim "directly to" Backstein, who did not timely appeal the order, making it final.

Backstein shows no basis for review under RAP 13.4(b). Most of his petition consists of arguments that he did not timely raise at the Court of Appeals, so the Court need not consider them here. And his fact-specific arguments will not affect other cases. He shows no conflict with cases applying the liberal construction doctrine, as that doctrine only applies when a statute is ambiguous. But here, as the Court of Appeals observed, "there is no doubt or confusion" about RCW 51.04.080's plain meaning, which L&I followed. *Backstein v. Dep't of Lab. & Indus.*, No. 57538-8-II, slip op. at 14 (Wash. Ct. App. Mar. 28, 2023). Finally, this case involves only legal issues and so does not implicate the right to a jury trial, as Backstein must concede given that he sought summary judgment.

The Court should deny review.

II. STATEMENT OF THE ISSUE

Under RCW 51.04.080, L&I must forward notices, orders, and payments on "all claims" under RCW 51 "directly to the claimant" until entry of an order that is appealable to the Board of Industrial Insurance Appeals unless "the claimant sets forth in writing" a representative's name and address to receive any notices, orders, or payments. On his fourth claim, Backstein sent no written authorization to L&I. Did L&I have to send the rejection order on Backstein's fourth claim "directly to" him?

III. STATEMENT OF THE CASE

A. Industrial Insurance Act Background

In workers' compensation cases, L&I must serve a worker with "any order, decision, or award." RCW 51.52.050(1). An order "shall become final" 60 days after the order is communicated to the worker unless the worker protests or appeals. RCW 51.52.050(1), .060(1). An untimely challenge to an L&I order renders it final, even if it contains a clear error

of law. *Marley v. Dep't of Lab. & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994).

Under RCW 51.04.080, L&I sends notices, orders, or payments directly to the claimant unless the claimant has authorized in writing for a representative to receive them:

> On all claims under this title, claimants' written notices, orders, or payments must be forwarded directly to the claimant until such time as there has been entered an order on the claim appealable to the board of industrial insurance appeals. Claimants' written notices, orders, or payments may be forwarded to the claimant in care of a representative before an order has been entered if the claimant sets forth in writing the name and address of the representative to whom the claimant desires this information to be forwarded.

RCW 51.04.080.

B. Backstein Authorized Attorney Ron Meyers to Receive Orders in Two Earlier Claims, But Not in the Claim at Issue Here

Backstein filed four separate workers' compensation claims. *See* CP 442-44, 449, 526-28, 534, 536. As detailed below, he sent a signed authorization to L&I for Meyers to represent him on his first two claims, but Backstein sent no

authorization for his third and fourth claims. CP 20, 446-47, 449-50.

In June 2017, for Backstein's first claim, Claim SE-18218, he sent a signed letter to L&I, stating that he authorized L&I to send correspondence to Meyers. CP 449. The letter listed the claim number in the "Re:" line, informed L&I that Meyers was appearing as his attorney "in this matter" and was authorized to examine the claim file "under the above claim number":

> Please be advised that Ron Meyers of RON MEYERS & ASSOCIATES PLLC *is appearing as my attorney in this matter*. This document authorizes my attorney to examine, without limitation, my claim file *under the above claim number*. Please provide my attorney with current copies of all records and provide for online claims imaging access regarding my claim.
> . . .
> Please note that this is also **A CHANGE OF ADDRESS**. All correspondence should now be mailed to my attorney at the address stated below .
> . . .

CP 449 (italicized emphases added).

In early October 2017, Backstein filed two additional claims, Claim BC-21079 (second claim) and Claim BC-21080 (third claim). For the second claim, Backstein sent an identical signed authorization letter to L&I as in his first claim, but with the second claim number in the "Re:" line. CP 450.

For the third claim, Backstein did not send a written authorization letter to L&I. *See* CP 20. Despite this, on October 27, 2017, Meyers sent a letter to L&I about the third claim, responding to L&I's request to Backstein for additional medical information. CP 451.

On October 31, 2017, Backstein filed his fourth claim, Claim BC-21081. CP 455, 464, 466. For this claim, Backstein did not send a written authorization letter to L&I. CP 446-47, 481.

On December 12, 2018, L&I issued an order rejecting Backstein's fourth claim. CP 444. L&I mailed the order to Backstein at the address he wrote on the report of accident for the fourth claim. CP 442, 444.

Also on December 12, 2018, in a separate mailing, L&I issued an order rejecting Backstein's third claim. CP 534-35. L&I mistakenly sent the order to Backstein and Meyers, even though Backstein had not sent a written authorization for Meyers to receive notices or orders related to that claim. CP 534-35.

Almost a year later, in November 2019, Backstein protested the order rejecting his fourth claim, claiming it was not communicated to his attorney. CP 472. In response, L&I issued a November 21, 2019 order stating it could not reconsider the order because the appeal was untimely. CP 448.

C. Backstein Raised Several Arguments Untimely at the Court of Appeals

Backstein appealed to the Board, and the parties cross-moved for summary judgment. CP 433-40, 818-35, 1259-1581. The Board affirmed, concluding that Backstein's appeal to the December 12, 2018 rejection order was untimely. CP 23. The superior court reversed on equitable grounds, finding that L&I's "failure to serve a copy of its December 12, 2018 order on

[Meyers] amounts to a substantial injustice to Mr. Backstein." CP 1648. At superior court, Backstein did not raise most of the arguments he now raises in his petition for review. *Compare* CP 1587-1614, 1638-43, *with* Pet. 1-30.

L&I appealed. CP 1726, 1768. In his respondent's brief at the Court of Appeals, Backstein did not argue much of what he now argues in his petition for review. *Compare* Resp't's Br. at 1-7, *Backstein*, No. 57538-8-II (RB), *with* Pet. 1-30. Rather, he argued that L&I was on "constructive notice" that Meyers represented Backstein in the fourth claim and that, by sending the rejection order to Meyers in the third claim even where there was no written authorization, L&I established a "practice and procedure" for all of his claims. RB at 4-5. Though L&I had argued in its appellant's brief that sending the rejection order on the third claim to Meyers was simply a mistake, Backstein did not argue in response that he was entitled to a jury trial to determine whether L&I sent the order mistakenly or

purposefully. Appellant's Br. at 2, 16-18, *Backstein*, No. 57538-8-II; RB at 5.

At oral argument, Backstein raised new arguments, as the panel pointed out. He argued for the first time that RCW 51.04.080 did not apply to the first Board-appealable order and that he changed his last known address for all claims when he sent his written authorization in the second claim. Oral Argument at 10:31-17:30, *Backstein*, No. 57538-8-II, https://www.tvw.org/watch/?clientID=9375922947&eventID=2023031071&startStreamAt=631&stopStreamAt=1050. A panel member observed that he was raising new arguments: "Part of the problem is that most of the arguments you are making this morning are not in your . . . 8-page brief." *Id.* at 18:37-18:58, https://www.tvw.org/watch/?clientID=9375922947&eventID=2023031071&startStreamAt=1117&stopStreamAt=1138.

D. The Court of Appeals Held that Backstein Could Show No Basis for Equitable Relief and that L&I Followed the Procedure in RCW 51.04.080

The Court of Appeals reversed in an unpublished decision. *Backstein*, slip op. at 2-3. The court applied RCW 51.04.080's plain language and held that L&I was not permitted to send the rejection order to Meyers for the fourth claim because "Backstein did not provide the Department with a notification appointing his attorney as his representative regarding his fourth claim." *Backstein*, slip op. at 11. It further held that Backstein showed no basis for equitable relief for his late appeal under relevant case law. *Id.* at 12-13.

Backstein moved for reconsideration, raising additional new arguments. Resp't's Mot. Recons. at 1-27, *Backstein*, No. 57538-8-II. The Court of Appeals denied the motion.

Backstein seeks review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Backstein cannot establish any RAP 13.4(b) criteria for review. The Court of Appeals' routine application of RCW

51.04.080's plain language and its fact-specific analysis that Backstein could show no equitable basis excusing an untimely appeal conflict with no appellate court decision, involve no significant constitutional issue, and do not present a matter of substantial public interest. RAP 13.4(b).

A. The Court Should Decline to Consider Backstein's Untimely Arguments

The Court should decline to consider arguments Backstein waived by waiting to raise them until oral argument and his motion for reconsideration at the Court of Appeals. Appellate courts generally do not consider such arguments. *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 675 n.6, 398 P.3d 1108 (2017) (declining to address argument raised for first time at oral argument); *1515–1519 Lakeview Boulevard Condo. Ass'n v. Apartment Sales Corp.*, 146 Wn.2d 194, 203 n.4, 43 P.3d 1233 (2002) (declining to address argument not raised until motion for reconsideration at Court of Appeals); *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641

(2006) (describing how party abandons issue by failing to brief it).

Most of the petition consists of these arguments. These include arguments that RCW 51.04.080 does not apply to Board-appealable orders (Pet. 8-16); that Backstein changed his last known address on all claims by sending a letter in one of his claims (Pet. 17-21); that his attorney is an aggrieved party (Pet. 20); that a letter in the fourth claim referred to the first claim, so it should have been sent to his attorney (Pet. 22), and that a jury should decide whether L&I made a mistake by sending Meyers the rejection order in the third claim (Pet. 25).

Backstein made none of these arguments in his respondent's brief at the Court of Appeals, so they are abandoned. *See* RB at 1-7. Instead, he argued that L&I was on "constructive notice" that Meyers represented Backstein in the fourth claim and that L&I established a "practice and procedure" for all of his claims. RB at 4-5. As *infra* Part IV.C

explains, these arguments are incorrect and present no reason for review.

In any case, none of Backstein's untimely arguments presents an issue warranting review. *See infra* Part IV.D.

B. Backstein Cannot Show that the Court of Appeals' Application of RCW 51.04.080 Conflicts with Any Appellate Decision or Presents an Issue of Substantial Public Interest

Even if this Court considers RCW 51.04.080's written authorization requirement, the Court of Appeals applied it correctly. Citing liberal construction, Backstein incorrectly argues that the court's plain language application "violate[s] decades of Supreme Court and Appellate Court precedent by construing the [Act] narrowly and resolving doubts in favor of [L&I]." Pet. 1, 8, 15. But courts only liberally construe ambiguous statutes; here, there is no ambiguity. *Harris v. Dep't*

of Lab. & Indus., 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). No conflict exists.

RCW 51.04.080 is unambiguous. If a claimant wants L&I to send notices, orders, and payments to any representative, the claimant's written authorization is needed:

> On all claims under this title, claimants' written notices, orders, or payments must be forwarded directly to the claimant until such time as there has been entered an order on the claim appealable to the board of industrial insurance appeals. Claimants' written notices, orders, or payments may be forwarded to the claimant in care of a representative before an order has been entered if the claimant sets forth in writing the name and address of the representative to whom the claimant desires this information to be forwarded.

RCW 51.04.080.

RCW 51.04.080's first sentence unambiguously requires that L&I send notices, orders, and payments "directly to the claimant until" L&I enters an appealable order in the claim. This ensures that any interlocutory notice, order, or payment will go directly to the claimant and that the claimant will receive the first appealable order. Because RCW 51.04.080

requires that these be forwarded "directly to the claimant," this first sentence establishes a general rule that L&I cannot send these decisions to anyone but the claimant.

The statute's second sentence creates an exception to this general rule, providing the claimant a mechanism to ask L&I to send orders to a representative. The request must be "in writing" and identify the representative's name and address. RCW 51.04.080. This language is also unambiguous.

As the Court of Appeals correctly recognized, L&I followed RCW 51.04.080, sending the order on the fourth claim directly to Backstein, as he had provided no written authorization for that claim. *Backstein*, slip op. at 10. Backstein asserts, in a conclusory fashion and without citation to the record, that Meyers represented him "on all of his claims." Pet. 16. But the record belies this assertion: it includes only two written authorizations—one for the first claim and one for the second claim. CP 446-47, 449-50. Backstein did not send any written authorizations for the third or fourth claims.

Backstein argues that RCW 51.04.080 does not apply because the facts here concern "the propriety of serving a Board-appealable order (the 12/12/18 Notice of Decision)." Pet. 10. But the Court need not consider Backstein's untimely argument that RCW 51.04.080 "does not apply to notices, orders, or payments made after a Board-appealable order has been entered." Pet. 9 (emphasis omitted).

Even if the Court considers this belated statutory argument, it is wrong. Key to RCW 51.04.080's application here, the rejection order in the fourth claim was the first Board-appealable order in the claim. CP 457-60. RCW 51.04.080's first sentence contemplates that L&I will forward the first Board-appealable order directly to the claimant. The phrase "has been entered" is in the present-perfect tense. *See The Chicago Manual of Style* § 5.132, at 268 (The University of Chicago Press, 17th ed. 2017); *see also Est. of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 433-34, 275 P.3d 1119 (2012) (considering present-perfect tense in plain

language analysis). The present-perfect tense "denotes an act, state, or condition that is now completed or continues up to the present." *The Chicago Manual of Style* § 5.132, at 268. "Until" means "up to the time that : up to such time as." Until, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/until (last visited Sept. 24, 2023). So it is "up to the time" that entry of the first Board-appealable order is "now completed" that L&I must send orders directly to the claimant. That necessarily includes the first Board-appealable order because entry of that order is not "completed" until L&I issues it.

Consistent with this interpretation, the Court of Appeals has previously applied RCW 51.04.080 to a rejection order. *Smith v. Dep't of Lab. & Indus.*, 22 Wn. App. 2d 500, 511, 512 P.3d 566, *review denied*, 200 Wn.2d 1013, 519 P.3d 588 (2022). Backstein is thus wrong that "there is no statutory language in RCW 51.04.080 addressing the service of Board-appealable orders." Pet. 11. RCW 51.08.040's first sentence

addresses such service, requiring L&I to send the first Board-appealable order "directly to the claimant" unless the claimant has sent a written authorization to L&I, as RCW 51.04.080's second sentence allows.

Backstein argues that RCW 51.04.080 does not address how L&I is to serve notices, orders, and payments *after* L&I has issued a Board-appealable order. Pet. 10. To make this argument, he relies on the word "before" in the statute's second sentence to argue the "statute is silent as to the service of notices, orders, or payments after a Board-appealable order." Pet. 10 (emphasis omitted). But that sentence is easily harmonized with RCW 51.04.080's first sentence. That is because, by necessity, L&I must receive any written authorization *before* it issues an order (including the first appealable order). Otherwise, L&I would not know to forward an order to a claimant's representative.

L&I acknowledges that RCW 51.04.080 does not explicitly address whether all Board-appealable orders issued

after the first Board-appealable order must be forwarded directly to the claimant. But that is of no concern here, as this case involves the first Board-appealable order on Backstein's fourth claim. *See* CP 443-44, 457-60. As such, Backstein is wrong that RCW 51.04.080 "is silent as to the service of notices, orders, or payments after a Board-appealable order has been entered" and that a court would "construe the statute to mean something other than what it says" by concluding that RCW 51.04.080 "includes requirements for service after entry of a Board-appealable order." Pet. 10 (emphasis omitted). He is wrong because the statute explicitly addresses service of the first Board-appealable order by using "until" and the present-perfect tense, as discussed above. *Contra* Pet. 10. So the statute is not silent as he says, as it encompasses the first Board-appealable order. That resolves this case, as this case involves the first Board-appealable order.

The Court of Appeals applied RCW 51.04.080 correctly. It did not legislate. *Contra* Pet. 14. Backstein shows no conflict

with cases applying liberal construction because RCW 51.04.080 is unambiguous.[1] Nor is there a matter of substantial public interest to "provide future guidance to public officers" for an "issue [that] is likely to recur." Pet. 15. No guidance is needed when RCW 51.04.080 is unambiguous. Every year, claimants send L&I thousands of written authorizations, without confusion.

C. Backstein's Fact-Specific Arguments, Which the Court of Appeals Rejected, Show No Basis for Review

Backstein also re-argues two theories that the Court of Appeals rejected: (1) that L&I established a "practice and procedure" for his claims by sending the rejection order in the

[1] If there were an ambiguity, L&I's interpretation favors workers, not Backstein's. Under L&I's interpretation, the claimant would be sent the initial allowance or rejection order directly (absent a written authorization). This protects claimants, ensuring that they can exercise their appeal rights to the initial Board-appealable order. Backstein's interpretation would leave claimants in limbo, making it unclear to whom L&I should send the initial appealable order. Backstein's interpretation also does not make sense in the context of the statutory scheme, which requires L&I to serve all orders on workers under RCW 51.52.050(1) at their last known address. That's what L&I did here.

third claim to Meyers and (2) that importing claim history documents from the first and second claims into the fourth claim put L&I on notice that he was represented. Pet. 14, 29. He does not explain how these fact-specific claims warrant review under RAP 13.4. They do not.

The Court of Appeals correctly held that, even though L&I mistakenly sent an order on the third claim to Meyers, L&I still had to follow RCW 51.04.080 and send the rejection order in the fourth claim directly to Backstein. *Backstein*, slip op. at 10. Meyers had voluntarily communicated with L&I about the third claim, which could explain why L&I mistakenly sent the order in the third claim to Meyers. CP 451. But as the Court of Appeals determined, "there is no precedent for requiring the Department to repeat a mistake on one claim that it made on another." *Backstein*, slip op. at 10.

Backstein, in a new argument, contends that the Court of Appeals' statement that L&I made a mistake "usurped the role of the jury" because a jury should decide whether L&I's action

was mistaken or purposeful. Pet. 22, 25. He then claims this violates his right to a trial by jury under the state constitution. Pet. 25 (citing Const. art. I, § 21).

This is a red herring. Why L&I sent the order to Meyers on the third claim is legally irrelevant. This appeal involves the *fourth* claim and whether RCW 51.04.080 allowed L&I to send the rejection order to anyone besides Backstein. What L&I did in Backstein's other claims does not matter, which is why the Court of Appeals also rejected Backstein's argument that L&I's action in his third claim created a "custom and practice" for all his claims. *Backstein*, slip op. at 10-11. The Court of Appeals did not "choose sides on a material fact." *Contra* Pet. 23. Why L&I sent the rejection order in the third claim to Meyers is not material to the fourth claim. *Contra* Pet. 23.

A jury does not need to decide an irrelevant fact, so no jury trial right is implicated here. What's more, Backstein ignores that he filed a motion for summary judgment in this case. CP 818-35. At no time before his motion for

reconsideration at the Court of Appeals did he suggest a jury should weigh in on whether L&I's action on the third claim should be considered a mistake. *See* CP 818-35, 846-48, 884-89, 1587-1615; RB at 1-7; Resp't's Mot. Recons. at 11-12. This argument has no merit.

D. Backstein Cannot Show His Untimely Arguments at the Court of Appeals Present Any Reason for Review

Backstein re-raises several arguments he did not raise *timely* at the Court of Appeals, without explaining how any of them meet RAP 13.4 criteria. Even if the Court considers them, none offers a basis for review.

Last known address. Backstein argues that Meyers' October 26, 2017 letter, which explicitly references only his second claim (BC-21079), changed his "last known address" for his fourth claim (BC-21081). Pet. 17 (citing CP 450). But Backstein's argument turns on selectively quoting the second paragraph and ignoring the rest of the letter. Pet. 3. The full letter shows it applies only to the second claim:

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October 26, 2017

Kevin Kincade
Berkley Risk Administrative Company
PO Box 88842
Seattle, WA 9 '8138

Re: Claim No. : BC21079
Claimant : Robert S. Backstein
DOI : 12/5/2016

Dear Ms. Fleischman:

Please be advised that Ron Meyers of RON MEYERS & ASSOCIATES PLLC is appearing as my attorney in this matter. This document authorizes my attorney to examine, without limitation, my claim file under the above claim number. Please provide my attorney with current copies of all records and provide for online claims imaging access regarding my claim.

Please note that this is also **A CHANGE OF ADDRESS**. All correspondence should now be mailed to my attorney at the address stated below:

Ron Meyers
RON MEYERS & ASSOCIATES PLLC
8765 Tallon Ln NE Ste A
Olympia, WA 98516-6654

This notice revokes all prior notices regarding attorneys.

DATED this 26 day of October, 2017.

Signed: _____
ROBERT S. BACKSTEIN, CLAIMANT

cc: Ron Legros, Department of Labor and Industries, PO Box 44291, Olympia, WA 98504-4291

CP 450.

On its face, the letter says it applies to one claim—the second claim. The "Re:" line lists only the second claim (BC-21079). CP 450. The first paragraph says that Meyers "is appearing as my attorney *in this matter*" and authorizes him to

examine "my claim file *under the above claim number*." CP 450 (emphasis added). Backstein characterizes the second paragraph as a "stand-alone section" that changed his address for all claims. Pet. 24. But no reasonable reader, including L&I, would read the paragraph in isolation and ignore all the other language stating it is claim-specific. Such a reading would also curtail claimants' rights to choose whether to pay costs associated with representation for their other claims. *See Smith*, 22 Wn. App. 2d 500, 509-10 (explaining that the written authorization requirement in RCW 51.04.080 "encourages claimants themselves to decide whether they pay the costs associated with representation").[2]

So the last known address for Backstein on the fourth claim, as shown by L&I's records, was the address he wrote on

[2] Backstein cites *In re David Herring*, Nos. 57,831 & 57,830, 1981 WL 375943 (Wash. Bd. Indus. Ins. App. July 30, 1981), but that case is different because there the claimant *did* send a written change of address for the specific claim but it "did not get into the Department's computer." 1981 WL 375943, at *2. *Contra* Pet. 17-19.

his report of accident for the fourth claim. *See* RCW 51.52.050(1). L&I correctly sent the order to Backstein there.

Attorney as aggrieved party. Backstein argues that Meyers was an "aggrieved" party with appeal rights under RCW 51.52.050(1), which requires L&I to "serve the worker, beneficiary, employer, *or other person affected thereby*" with orders. (Emphasis added). He argues Meyers is a "person affected thereby." Pet. 20

But attorneys act on their clients' behalf. Allowing an attorney to act as an "aggrieved party," independent from the worker, would raise concerning ethical issues. To take just one example, what would happen if an attorney wanted to appeal an order, but the client didn't? Attorneys can't ignore their clients and act independently.

Nevertheless, Backstein cites a Board case to argue Meyers had "proprietary" and "pecuniary" rights in the fourth claim. Pet. 20 (citing *In re Chambers Bay Golf Course*, No. 09 20604, 2010 WL 5882060, at *2 (Wash. Bd. Indus. Ins. App.

Dec. 7, 2010)). He conclusorily asserts that Meyers was "counsel on all four of his presumptive disease claims" (Pet. 20), but this ignores the undisputed fact that Backstein did not file a written authorization on the fourth claim, as the Court of Appeals acknowledged:

> In two of the four claims filed by Backstein (the first and second ones), Backstein filed a notice with the Department pursuant to RCW 51.04.080 appointing an attorney as his representative in those claims. In the third and fourth claims, Backstein did not designate an attorney representative.

Backstein, slip op. at 1 n.1. Meyers had no proprietary right in the fourth claim.

Nor did he have a pecuniary right based on an attorney fee statute since he was not the attorney on the fourth claim. *Contra* Pet. 20 (citing RCW 51.32.185); CP 446-47. Backstein cites a "contractual right to attorney fees," (Pet. 20) but the record includes no contractual arrangement, so the argument is factually unsupported.

Letter on the first claim. Backstein argues that, because a letter L&I sent to him on December 12, 2018 on the fourth claim (BC-21081) referred to his first claim (SE-18218) in which Meyers represented him, L&I was required to send this letter to Meyers so that Meyers could have protested or appealed the rejection order in the fourth claim. Pet. 21-22 (citing CP 106, 506). He cites no legal support for this idea, and there is none. A court may generally assume that, where a party has not cited authority, the party has found none after a diligent search. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

The letter simply explains to Backstein that his fourth claim is rejected because his contended medical condition in the fourth claim relates to a condition that had been accepted in his first claim, so he should ask for that condition to be accepted in the first claim. CP 506. Mere reference to the first claim in the letter about the fourth claim did not somehow require L&I to

send the letter to Backstein's attorney, when the order itself had to be sent "directly to the claimant" under RCW 51.04.080.

Attorney's online access to all claims. Finally, Backstein argues that L&I knew he was represented in the fourth claim because Backstein's attorney had "online access" to all four claims. Pet. 25; *see also* Pet. 2-3 (citing CP 486, 508-16). The record does not support this. His primary citation for this fact is to his counsel's legal argument in a notice of appeal stating that his counsel had online access to all four claims.[3] "Argument of counsel does not constitute evidence." *Green v. A.P.C. (Am. Pharm. Co.)*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998). This argument also is a distraction because the operative fact in this case is whether Backstein sent a written authorization for the fourth claim; he did not. CP 446-47.

[3] The record also does not support this, as Backstein cites no declaration stating that Meyers had online access to all four claims at the time L&I issued the rejection order in the fourth claim in December 2018. *See* Pet. 25 (citing CP 509-16). Instead, he cites printouts from L&I's claim and account center that all appear to bear a subsequent date of 12/12/2019. *Id.*

E. Backstein Shows No Reason for Review when He Fails to Show that the Court of Appeals Was Wrong in Concluding He Was Not Entitled to Equity

Finally, though Backstein focuses on the statutory issue in this case, the superior court granted him relief on equitable grounds. CP 1648. His petition does not address equity at all, thus conceding that the Court of Appeals' application of well-established equitable principles, which rejected any claim that equity excused his late appeal, was correct. *See State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (finding a failure to respond to an argument acts as a concession).

As the Court of Appeals explained, the 60-day appeal period in RCW 51.52.050 and .060 is tolled only in limited circumstances when a party can prove three elements:

> (1) the party was incompetent or otherwise unable to understand a Department order or circumstances outside the party's control rendered it impossible to file a timely appeal, (2) when the party was diligent in pursuing their rights, and (3) there was misconduct by the Department.

Backstein, slip op. at 12 (collecting cases).

The Court of Appeals applied these elements, finding that Backstein was competent; that no circumstances beyond his control prevented his appeal; that he was not diligent, as he did not explain his late appeal and even conceded in a deposition almost five months before he ultimately appealed that he guessed that his fourth claim had been denied; and that L&I did not engage in misconduct. *Id.* at 13. Because there is no equitable basis to allow Backstein's late appeal, this is not a basis for review.

V. CONCLUSION

The Court should deny review.

This document contains 4,977 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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RESPECTFULLY SUBMITTED this 26th day of September, 2023.

ROBERT W. FERGUSON
Attorney General

Paul Weideman
Assistant Attorney General
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No. 102221-2

SUPREME COURT
STATE OF WASHINGTON

ROBERT S. BACKSTEIN,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries Answer to Petition for Review and this Certificate of Service in the below described manner:

E-Filing via Washington State Appellate Courts Portal:

Erin L. Lennon
Supreme Court Clerk
Washington State Supreme Court

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E-Mail via Washington State Appellate Courts Portal:

Ron G. Meyers
Ron Meyers & Associates PLLC
8765 Tallon Lane NE Ste A
Olympia, WA 98516
Email: ron.m@rm-law.us

DATED this 26th day of September, 2023.

ERLYN R. GAMAD
Paralegal

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

September 26, 2023 - 8:15 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,221-2
Appellate Court Case Title:	Robert Backstein v. The Department of Labor and Industries
Superior Court Case Number:	21-2-05703-1

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