No. 44560-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DEREK J. YOUNG

Appellant,

v.

THE DEPARTMENT OF LABOR AND INDUSTRIES FOR THE STATE OF WASHINGTON; and CMS PAINTING, INC.,

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Board of Industrial Insurance Appeals and Superior Court improperly excluded the Plaintiff's (Mr. Young's) two experts, and erred in denying Mr. Young's Industrial Insurance Act benefits.

II. ARGUMENT

A. The Department misconstrues the notice provisions and application of CR 32.

The Department misconstrues CR 32. Superior Court Rule 32(a)(5) concerns depositions of expert witnesses. CR 32(a)(5), *subsection (B)*, pertains to preservation depositions of experts that are healthcare professionals. This subsection, that is, subsection (B), requires that the "opposing party" is afforded an adequate opportunity to prepare . . . for cross examination of the deponent. The "opposing party" of the preservation deposition of Plaintiff's experts – as contemplated by CR 32(a)(5)(B) – was the tortfeasor in the civil action. The tortfeasor had qualified, licensed Washington legal counsel defending his interests at both depositions. The tortfeasor's attorney was not only present, but performed a rigorous cross examination. When interpreting CR 32(a)(5)(B), the Department incorrectly deems *itself* the "opposing party" in the civil matter wherein the perpetuation depositions were taken.

It is the last paragraph of CR 32(a) that has the language that specifically addresses the use of prior perpetuation depositions in latter actions. The Department fails to recognize that this paragraph (the last paragraph of CR32(a), stands alone and is not one within CR32(a)(5)(B). This language states:

> Substitution of parties pursuant to rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any state **and another action involving the same issues and subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.** A deposition previously taken may also be used as permitted by the Rules of Evidence. [Emphasis added.]

Accordingly, so long as (1) the Department action *involved the same issues and subject matter* as the civil tort claim and (2) the Department was the tortfeasor's *successor in interest,* the perpetuation depositions of Plaintiff's two experts in this case were permitted by CR32.

1. From the perspective of the worker's compensation matter, the civil motor vehicle case and the worker's compensation claim involve the same issues.

Notably, the Department's Response Brief makes the Plaintiff's point when it states, " ...a tort defendant's interest is in contesting liability and limiting **damages.**" DRB 22. [emphasis added]. Immediately before this statement in its Response Brief, the Department admits that the Department's

interest "is as the trustee of a fund created . . . for the purpose of providing compensation to workers and their dependents *for disabilities proximately caused by industrial accidents* or occupational diseases." DRB:22. [Emphasis added]

In the worker's compensation case, the "industrial accident" *is* the motor vehicle collision caused by the third party torfteasor – which in fact involved a claim for damages including among other things – *disability* relating to Mr. Young's back that was *proximately caused by* the motor vehicle collision (i.e. the industrial injury). CP 145-146.

The Department tries to skew the mylar-like parallels between the civil issues and the worker's compensation issues by pointing out that "fault" was an issue in his civil claim, unlike in his worker's compensation claim. This misses the point. The issues involved in the worker's compensation claim (injury, impairment, wage loss, vocational expenses . . .) were part of the Plaintiff's civil claim. The fact that "fault" was *also* a part of Mr. Young's civil claim has no bearing on the fact that issues in the worker's compensation claim are issues in the civil claim.

The Department identifies less than a handful of issues involved in Mr. Young's worker's compensation claim – and again, the Department itself acknowledges that each of those issues concern Mr. Young's medical

treatment, his disability arising from the motor vehicle collision, and his ability or inability to continue to perform his occupation.

The Department cannot reasonably represent to this Court that these issues were not at the core of Mr. Young's civil claim. The Department cannot deny that these issues, as well as many additional issues on the subject of causation and damages – the very issues central to the worker's compensation action – were raised and hashed-out in the deposition testimony that was wrongfully excluded in this case. A simple reading of Dr. Bays and Occupational Therapist Dawn Jones' deposition transcripts reveal the prevalence of these issues and the scrutiny imposed by defense counsel.

In fact, in its Response Brief, the Department (when discussing a different issue) admitted, "... the depositions of Dr. Bays and Ms. Jones do not simply contain statements for the purposes of "medical treatment and diagnosis": they contain assertions of proximate causation and opinions regarding the extent of Young's disability, . . ." DRB: 27. [emphasis added].

The Department's Response Brief has also revealed a fact that – once again – is consistent with Mr. Young's position. Specifically, the Department noted that "the more recovery from the tortfeasor, the more the Department can potentially obtain." DRB 20.

Essentially, the Department is admitting that it is not prejudiced by not participating in Dr. Bays and Occupational Therapist Jones' perpetuation depositions — because the Department actually benefits if the Plaintiff's experts' testimony produces greater damages for Mr. Young.

The Department's statement that "the more recovery from the tortfeasor, the more the Department can potentially obtain" leads to another important point: The only reason the Department would benefit from Mr. Young's recovery in the civil case is if the recovery was for industrial-injury damages (i.e. the issues are the same).

2. The Department IS a successor in interest.

The Department had a statutory lien against the proceeds of the motor vehicle collision settlement or verdict (i.e. the industrial injury). As stated in their own Response Brief on a different issue, "Moreover, the Department has a statutory lien against the damages that Young receives in his third party tort action to recover benefits it pays him under the Industrial Insurance Act. *See RCW 51.24.030, 060."* DRB:20.

The Department defines "successor in interest" as one who "follows another in ownership or control of property." By this very definition, the Department is unequivocally a "successor in interest" for purposes of CR32. The Department invoked its right to a statutory lien over the proceeds of the

motor vehicle collision settlement. The motor vehicle collision *was* the industrial injury. What is more, the Department is legally responsible for Mr. Young's motor vehicle collision-related medical expenses, wage loss and vocational damages. The fact that the Department has a right-of-recovery against any third party settlement or award under RCW 51.24.060 illustrates this point. The Department trusts the integrity of the third-party civil process. In the instant case, the Department asserted such a lien (i.e. ownership) over Mr. Young's settlement (i.e. property) with the tortfeasor and was paid a substantial sum. Even if the Court adopts the Department's definition of successor in interest, the Department remains a successor in interest.

The same issues involved in the motor vehicle collision civil matter are involved in the industrial injury claim. The Department, by its definition and also by Mr. Young's definition of "successor in interest" is a successor in interest. Civil Rule 32 exists for just this occasion.

B. The application and interpretation of the Civil Court Rules and the Industrial Insurance Act should comport with the clear and overriding policy set forth by the Washington State Supreme Court.

The Court gutted Mr. Young's case when it excluded the perpetuation depositions of Board Certified Orthopedic Surgeon Patrick Bays and Occupational Therapist Dawn Jones. Mr. Young incurred substantial expenses in obtaining those perpetuation depositions.

As stated above, those perpetuation depositions were conducted in the presence of a qualified, licensed defense attorney, **whose job was to defend against Mr. Young's claims for past wage loss, future wage loss, medical expenses, vocational services, and of course disability** – and in doing so cross examined Dr. Bays with over 90 questions and cross examined Occupational Therapist Jones with over 125 questions.

As discussed above, the subject matter giving rise to this civil case was – in fact – *the* industrial injury. The damages sought by Mr. Young in his civil case parallel the liabilities of the Department in the present worker's compensation claim – as the workplace injury *was* the motor vehicle collision.

It is no surprise that the Department does not want the trier of fact to hear testimony from Mr. Young's experts – as that would level the playing field and give Mr. Young a fair chance at justice. After all, the Department presented the testimony of David Rutberg, M.D., and John R. Logan, M.D., – opposed to Mr. Young who was left with a treating chiropractor.

This is clearly a result that benefits the Department, but the result is arrived at by undermining and disregarding Washington public policy. Specifically, Superior Court Civil Rule 1 - SCOPE OF RULES - directs the

Courts to construe the civil rules in a manner that **secures** outcomes that are *just*, *speedy* and *inexpensive*.

> These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. **They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.** CR 1[emphasis added].

Even the purpose and construction of the evidence rules are to SECURE fairness, elimination of unjustifiable expense and delay, and promote truth and just proceedings.

Evidence Rule 102 - PURPOSE AND CONSTRUCTION - provides:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Requiring Mr. Young to doubled-down on his costs by bringing back an orthopedic surgeon and occupational therapist for a repeat deposition does not secure an inexpensive – or speedy – outcome. The rules should not be construed or administered to force the injured worker to unnecessarily pay a king's ransom in consideration of a paltry sum.

Likewise, gutting Mr. Young's case by excluding the testimony of his two experts, when their depositions were defended by well qualified counsel

involving the same issues at play in the worker's compensation case – does not secure justice.

Nonetheless, this is exactly the way that the lower Court and Board construed *and* administered the rules in this industrial insurance case. The "overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action." *Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 933 P.2d 1036 (1997). In this action, the lower court could have and should have – but did not – choose to construe and administer the rules to secure a just determination.

Judicial Council Comment to Evidence Rule 102, which per *5 Wash. Prac., Evidence Law and Practice § 102.1 (5th ed.)* was unadopted but remains an accurate summary of the intent of the rule, provides in pertinent part:

> The rule is the same as Federal Rule 102. This generalized statement of purpose is comparable to CR 1, CrR 1.2, and RAP 1.2. The Rules of Evidence, like other court rules, give the judge the authority to interpret the rules in a way which avoids an unjust result. See Petrarca v. Halligan, 83 Wn.2d 773, 522 P.2d 827 (1974).
>
> "Following the rules is not an end in itself. Rather, the rules are carefully designed to enable judges, lawyers, litigants, and juries to achieve sound results .... Rule 102 recognizes the responsibility judges bear by enumerating goals which cannot

> be achieved mechanically, and which will compete with another at times."

5 Wash. Prac., Evidence Law and Practice § 102.1 (5th ed.)

Consequently, the proposed but unadopted comment quoted above in this section remains an accurate summary of the intent of the rule.

At the Board level, the statutes and rules regarding procedures in civil cases in the superior courts shall be followed. WAC. 263-12-125.

In a choice to secure less expense over more expense, less delay over more delay, and more justice over less justice, the lower Court picked the latter – on all counts. Notably, all doubts were chosen in favor of the Department.

The "**guiding principle in construing the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker**." [Emphasis added.] *Dennis v. Dept. of Labor and Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)); *Boeing Co. v. Heady*, 147 Wn.2d 78, 86, 51 P.3d 793 (2002).

A policy requiring liberal construction is a command that the coverage of an act's provisions be liberally construed and that its exceptions

be narrowly confined. *Nucleonics Alliance, Local 1–369 v. WPS*, 101 Wn.2d 24, 29, 677 P.2d 108 (1984).

Despite the Department's best efforts to misdirect the focus away from this being an action within the industrial insurance act (given the liberal construction in its application) – that is exactly what this case is. The Plaintiff is a claimant as defined by the Industrial Insurance Act. This appeal is an appeal from a Superior Court proceeding based on the record at the Board of Industrial Insurance Appeals. The source of benefits in this matter derive not from the civil justice system but from the Industrial Insurance Act. While the process may include use of certain civil rules, their use, interpretation and application in worker's compensation claims are clearly and unequivocally to serve the overriding purpose and policy at the core of the Industrial Insurance Act.

By excluding the Plaintiff's two medical experts, the Court furthered a policy whereby the perpetuation depositions taken in a third party action (where the incident is the industrial injury) cannot be used in the later worker's compensation proceeding unless the Attorney General is present at the deposition, regardless of the expense, contents of the medical testimony, or whether the expert was cross examined by opposing counsel for the third party.

This ignores that the Department's interests were protected by competent counsel. This ignores that the issues were the same, and it ignores that the Department (asserting a statutory lien over the proceeds of the settlement and having substantially identical liabilities as the tortfeasor for plaintiff's damages) is the successor in interest.

Yet on the other hand, in worker's compensation cases where remuneration to the injured worker is frequently nominal, the Department argues for a public policy decision that essentially requires that the Plaintiff's counsel either know ahead of time that the deposition will be used in a latter proceeding and interlace objections from two different opposing counsel, or it forces the Plaintiff to pay thousands of dollars more in expert witness fees for a second round of perpetuation depositions. Each expert's testimonial fee for the claimant, in essence and effect, doubles.

C. Due Process was not provided.

The Department's position is essentially – and incorrectly – that Mr. Young had an *opportunity* to present his experts and did not, and therefore his due process rights were not violated.

The Department gives no thought about the prohibitive nature of incurring substantial costs to re-taking the perpetuation depositions of his experts or even calling them to testify live. Contrary to the Department's

assertion, Mr. Young took the *opportunity* to obtain expert witnesses for his Board hearing – and did just that when he obtained and perpetuated the testimony of Board Certified Orthopedic Surgeon Dr. Bays and Occupational Therapist Dawn Jones. Mr. Young then took the opportunity to present their testimony at his Board hearing. His experts were wrongfully excluded.

> "12 Const. art. 4, s 1 and s 30 vests the judicial power in the supreme court, court of appeals and superior courts of this state. Upon creation, these courts assumed certain powers and duties. **These duties include, among others, the fair and impartial administration of justice and the duty to see that justice is done in the cases that come before the court. The administration of justice demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief.**"

Iverson v. Marine Bancorp oration, 83 Wash. 2d 163, 167, 517 P.2d 197, 199 (1973); [internal citations omitted] [emphasis added].

The Department's argument, that is, that Mr. Young "had the opportunity" to re-called his two experts (or re-deposed them), completely ignores the financial detriment and hardship associated with financing this unnecessary task – and is hardly the "opportunity to be heard" that is at the core of due process.

It is stated in Mr. Young's opening brief, but it bears repeating that Washington courts have held that denying a party the right to present evidence or rebut evidence in an administrative action rises to a violation of

due process. In *State ex rel. Puget Sound Navigation Co. v. Department of Transportation*, 33 Wn.2d 448, 495, 206 P.2d 456 (1949), the Washington Supreme Court found a violation of due process as follows:

> This action of the department clearly resulted in a denial to appellant (the common carrier) of due process of law, as appellant was deprived of all opportunity to introduce before the department evidence, which it claims was available, concerning the effect of the increase in its operating expenses that would necessarily follow from the considerably greater amount of wages it would be required to pay.

In *Robles v. Department of Labor & Indus.*, 48 Wn. App. 490, 494, 739 P.2d 727 (1987), the Court heard a similar appeal whereby the BIIA used a medical treatise to reach its decision without permitting the claimant opportunity to rebut the treatise's opinions. The Court ruled that the BIIA's failure to provide the claimant with "an opportunity to meet, explain, and rebut their contents, amounts to a denial of due process." *Id.* at 494.

Mr. Young incurred the costs of obtaining his experts, perpetuated their testimony, presented that testimony at the Board hearing. He had the opportunity to obtain experts, and he did. That was taken from him, when his experts were wrongfully excluded.

III. CONCLUSION

The Court should admit the depositions of Mr. Young's experts and make findings consistent with their testimony. Alternatively, the Court

should reverse the lower decisions and order the BIIA to re-open the case with the limited purpose of considering Dr. Bays' and Occupational Therapist Jones' testimony and medical reports and ruling accordingly.

Mr. Young should be granted attorney fees and costs.

DATED: October 25, 2013.

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DECLARATION OF MAILLING

I declare under penalty of perjury under the laws of the State of Washington that on October 25, 2013, I mailed the Appellant's Reply Brief and this Declaration of Mailing to the Washington State Court of Appeals, Division II and to counsel for all parties on the record and/or pro se parties by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

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