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FILED
COURT OF APPEALS
DIVISION II
2015 OCT 13 AM 10: 12
STATE OF WASHINGTON
BY _____
DEPUTY

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

SUPREME COURT NO.

COURT OF APPEALS No. 45478-5-II
Cons. w/ Nos. 45645-1-II & 45778-4-II

FILED
OCT 16 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Ederi Haggenmiller, Pro Se Appellant,
v.
DEPARTMENT OF LABOR AND INDUSTRIES,
STATE OF WASHINGTON Respondent.

PETITION FOR REVIEW

Ederi Haggenmiller Pro Se

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A. PETITIONER'S IDENTITY

Petitioner Ederi Haggenmiller is the plaintiff/appellant at the Court of Appeals and trial court, the injured worker/Claimant at the administrative hearing.

B. COURT OF APPEALS DECISION

The Court of Appeals decision was filed July 7, 2015. The date of the order denying motion for reconsideration is September 15, 2015. A copy of the decision and of the Court's order is in the Appendix

C. *ISSUES PRESENTED FOR REVIEW*

1. Did the Court of Appeals correctly hold that this workmen compensation action should not be allowed to proceed?

In ruling on motion for judgment as matter of law, nonmoving party's evidence, together with all reasonable inferences that may be drawn from it, must be accepted as true; the court may grant motion only if, as matter of law, there is neither substantial evidence nor reasonable inference from evidence to sustain verdict and if evidence allowed reasonable minds to reach conclusions that sustain verdict, question is one for jury. Holmes v. Wallace, October 25, 1996 84 Wash.App. 156.

2. Did the Court of Appeals err by dismissing Haggenmiller's appeal Case Number: 45645-1-II, filed November 26, 2013, when Rule 60 (b) (4) fraud, authorizes relief from void judgments?

Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b).

There is no question of discretion on the part of the court when a motion is under Rule 60 (b) (4) fraud. Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense.

Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly. By the same token, there is no time limit on an attack on a judgment as void.

3. Did the Court of Appeals err by dismissing Haggenmiller's appeal Case Number: 45778-4-II, filed January 13, 2014, when Washington Constitution does not encompass the right of jury trial on frivolous or sham claims? Exclusion of such claims comports with the long-standing principle that litigants cannot be allowed to abuse the heavy machinery of the judicial process for improper purposes that cause serious harm to innocent victims, such as to

harass, cause delay, or chill free expression. Such conduct has always been, and always will be, sanctionable. *See, e.g.,* RCW 4.84.185.

D. STATEMENT OF THE CASE

The Court of Appeals' recitation of the facts in its opinion is largely incorrect and certain important points omitted by the Court of Appeals in its opinion or discussed only briefly bear emphasis.

1. Whether the Court of Appeals erred in granting summary judgment to the Department, when Haggenmiller produced enough evidence in the form of lay and expert testimony to make it probable, as opposed to merely possible, that: Ederi Haggenmiller, the claimant, developed bilateral hearing loss and tinnitus that arose naturally and proximately out of distinctive conditions of employment and that such exposure was a substantial factor in Haggenmiller having a permanent partial disability, within the meaning of RCW 51.32.080, proximately caused by the occupational disease. (CABR 39.) The issue of entitlement is one that should be made by a jury instead of a judge on summary judgment.

Accordingly, upholding it as a summary judgment where none of Haggenmiller's consolidated appeals are summary judgments is an error. [see, EX 1: page 1, line 1; page 2, line 9; page 4, lines 19, 20; page 5, lines 7, 18; page 6, line 17; page 7, lines 16, 22; page 8, lines 1-13; page 9, lines 1-18; page 10, lines 12-26;- page 15, line 11.]

Therefore, in this case, a trial court has no discretion in ruling on a motion for a directed verdict. *Levy v. North Am. Co. for Life & Health Ins.,90 Wn.2d 846*, 851, 586 P 2d 845 (1978). It must accept as true the nonmoving party's evidence and must draw all favorable inferences from it. *Lockwood v. AC&S, Inc., 109 Wn.2d 235*, 243, 744 P.2d 605 (1987). The court must deny the motion if there is any competent evidence or reasonable inference from which "reasonable minds might reach conclusions that sustain the verdict". *Lockwood,* at 243 (quoting *Levy,* at 851). A reviewing court reviews the evidence in the light most favorable to the aggrieved party and determines whether the trial court correctly applied the law. *Jones Assocs., Inc. v. Eastside Properties, Inc., 41 Wn.App. 462*, 465, 704 P.2d 681 (1985); *Rainier Ave. Corp. v. Seattle, 76 Wn.2d 800*, 803, 459 P.2d 40 (1969).

In view of that, he is entitled to a permanent partial disability award for occupationally-induced tinnitus. An issue of first impression by an Appeals court in the interpretation of RCW 51.32.080, WAC 296-20-220 (1)(o), as on the Board's published Significant Decision In re Robert Lenk, BIIA May, 91 6525 (1993). And In re Lloyd Conrad, BIIA 92 0602 (1993).

In addition, the frequency (pitch) of Haggenmiller's tinnitus is at a considerably higher level (6,000 hertz) than the frequencies of his ratable hearing loss (500 through 3,000 hertz). In other words, Haggenmiller has an effect on his hearing functions due to his tinnitus which is not reflected in his permanent partial disability award for binaural hearing loss based solely on the loss at the lower frequencies. CABR--October 1, 2012 Page 72-73.

Tinnitus Frequency at 6,000 cycles

[HAGGENMILLER:] Dr. Kessler, in your report you mention that I have tinnitus in a high frequency. Could you please explain what "frequency" means on that tinnitus?
[Dr. KESSLER, M.D.:] Well, frequency is a sound. We measure sounds in frequencies. And the human ear hears vibrations in the air at a certain frequency of wave that hit the eardrum. So low frequencies is typically in music. We call those low pitches. So on a piano it would be way down on the bass left side. And higher frequencies are way up toward the right side, what we would call treble. So when you said my tinnitus is really high frequency and the lady tried to match it there, Dr. Nightingale in Poulsbo, you were

matching at that 6,000 hertz. And that's a real typical tinnitus matching frequency. 6,000 cycles would be an equivalent of a very, very high pitched tuning fork. Almost like a violin in an orchestra, and it would be the violin nearly as high as it goes, for those who are, you know, musically inclined.
CABR--October 1, 2012 Page 72-73.
[Dr. KESSLER, M.D.:] It's based on the plaintiff, Mr. Haggenmiller, basically saying all the things he's been trying to say in front of you guys that I've overheard, and I know it's not part of the record, but issues about sleep disturbances and depression and whatnot.
CABR--October 1, 2012 Page 70, lines 10-14.

2. Whether the Court of Appeals review of the Board's or Department's decisions did not properly follow the requirements of ordinary civil standard of review that governs appeals of proceedings under the Industrial Insurance Act, Title 51 RCW. RCW 51.52.140. As a result, the COA should review the superior court's decision rather than the Board's decision. Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180, 210 P.3d 355 (2009) (footnote omitted). [see EX 1: page 1, lines 3, 5; page 2, line 9; page 4, lines 10-18; page 5, lines 1-6; page 6, lines 18-23; page 7, lines 1-12; page 11, lines 3-20; page 12, lines 1-18; page 13, lines 1-2; page 15, lines 4-7.].

3. Whether the appellate court properly addressed an issue upon which the Department did not rely in denying the claim. Cf. Hanquet v. Department of Labor & Indus., 75 Wn. App 657 662-64, 879 P.2d 326 (1994) [see, EX 1: page 1, line 5; page 2, line 4; page

4, lines 2, 14; page 5, line 4; page 6, lines 6, 12; page 11, lines 1, 3, 6, 10, 12, 13, 15, 18, 19; page 12 at bottom; page 15, line 6.]

[1] The Board's scope of review is limited to those issues which the Department previously decided. Lenk v. Department of Labor & Indus., 3 Wn. App. 977, 982, 478 P.2d 761 (1970) ("[I]f a question is not passed upon by the department, it cannot be reviewed either by the board or the superior court."). "[W]e find no warrant in the statutory enumeration of the board's powers, past or present, for the contention that the board can, on its own motion, change the issues brought before it by a notice of appeal and enlarge the scope of the proceedings." Brakus v. Department of Labor & Indus., 48 Wn.2d 218, 223, 292 P.2d 865 (1956).

(The Board may not consider an issue not passed upon by the Department, and the superior court likewise cannot consider a question not properly before the Board.) Ruse v. Dep't of Labor & Indus. 138 Wn.2d 1.

The issue for a Permanent Partial Disability Award for a Mental Health Condition was not passed upon by the Department.

The only issues raised by the notice of appeal are Hearing loss and Tinnitus.

[JUDGE:] Mr. Haggenmiller, first of all, you also wanted to clarify that the two physical aspects of this case was hearing loss and tinnitus. Are those the issues before us?
[HAGGENMILLER:] Yes.
[JUDGE:] Now, you wanted to bring to the Board's attention some significant decisions and make comments about that. Please go ahead.
[HAGGENMILLER:] I'm priding myself as a Lenk situation. My situation is the same as Lenk. I expect the resolution to be similar to it.
[JUDGE:] Just for the record, Mr. Haggenmiller was kind enough to share with Ms. Kilduff and I before the hearing began three significant decisions that he'll be relying upon.

in re: Conrad, Docket No. 92 0602;
in re: Lenk, Docket No. 91 6525; and
in re: Shellum, Docket No. 99 12154.

Ms. Kilduff, is there anything you want to add to the record so the record's clear about these issues?
[MS. KILDUFF:] Your Honor, I would just request an opportunity to submit some post-hearing briefing on legal issues implicated by these significant decisions to assist the Board in making its determination. I think that would be helpful in this case. CABR October 1, 2012 Page 4

4. Whether substantial evidence existed for the Court of Appeals to uphold the October 9, 2009 Hearing Loss Manifestation date. [See, EX 1 page 2, lines 4-6; page 5, lines 4-6; page 6, lines 12-14; page 12, lines 1-18; "footnote 7;" page 13, lines 1-2; page 15, lines 6-7;]

Haggenmiller argues that the Department's difference of opinion is a willful misrepresentation of the res judicata Board's decision and the doctrine of estoppel, prevents the re-argument of

a factual or legal issue that has already been determined by a valid judgment in a prior case involving the same parties. The department concedes that the Board did rule against an argument that that date is res judicata. RP 9/27/2013 page 16, lines 2-4.

The Department urges the Board to apply Res Judicata and dismiss this issue. A review of the jurisdictional history shows an order which determined the date of manifestation of October 9, 2009 had not become final. . . . On October 5, 2011, the Department affirmed its July 27, 2011 order. On October 6, 2011, the Department closed the claim with a permanent partial disability award. This closing order placed all issues before the Board which had not become final in previous Department orders. On December 1, 2011, Mr. Haggenmiller protested the October 6, 2011 Department order. On December 8, 2011, the Department affirmed its October 6, 2011 order. On February 6, 2011, Mr. Haggenmiller appealed the Department's December 8, 2011 order. Prior to the closure of the claim no Department order became final which established October 9, 2009 as the date of manifestation. Rather, the issue before the Board asks whether Mr. Haggenmiller produced any evidence that the October 9, 2009 date of

manifestation was incorrect. (CABR page 37, lines 30, 31; page 38, line 1, 7-17.)

[DEPARTMENT:] What's your understanding of this term "date of manifestation" that you testified to earlier?
[WITNESS:] As I mentioned hearing loss due to noise exposure occurs at the time of noise exposure and does not get worse at a later date, because of past noise exposure. (CABR October 8, 2012 page 55, lines 11-15.)
[DEPARTMENT:] And your understanding of Mr. Haggenmiller date of manifestation in this case is?
[WITNESS:] The date of my audiogram since we have not been able to produce an audiogram performed at, or near, the time he was last employed prior to my seeing him. (CABR October 8, 2012 page 55, lines 26, et seq.)
[WITNESS:] Dr. Kessler's audiogram appears to be valid looking at the overall results, and I just don't have any disagreement with the audiogram that he performed. I cannot disagree with his tinnitus evaluation, because, certainly, that could have been significantly worse, also, in a year and a half.
I have no way of knowing that. I had not seen the claimant since the date of my initial examination on January 26th, 2011.
(CABR October 8, 2012 page 52, lines 4-25.)

5. Haggenmiller' entitlement to receive medical treatment and other benefits as appropriate under the Industrial Insurance Laws together with a permanent partial disability award for occupationally-induced hearing loss. Furthermore it is undisputed that by using the Hearing Impairment Calculation Worksheet (F252-007-000) in which the results of an audiogram performed by Dr. Kessler's office as posted in the Propose Decision an order (CABR

page 35 lines 1-6) and (CABR page 15 lines 2-14) would render the correct entitlement of 25.94% for Haggenmiller's claim.

On June 5, 2012, Dr. David Kessler, an otolaryngology specialist, examined Mr. Haggenmiller. An audiogram was performed by Dr. Kessler's office. The right ear test results were: at the 500 frequency level - 20 decibel level, at the 1,000 frequency level -30 decibel level, at the 2,000 frequency level – 40 decibel level, at the 3,000 hertz – 60 decibel level. The left ear were: at the 500 frequency level - 25 decibel level, at the 1,000 frequency level - 35 decibel level, at the 2,000 frequency level – 55 decibel level, at the 3,000 frequency level – 70 decibel level.

(CABR page 35, lines 1-6.)

[DEPARTMENT:] Doctor, how then did you come up with the 26 percent loss of hearing?
[WITNESS:] I used the current formula from the Department of Labor and Industry office in Olympia. (CABR October 1, 2012, Page 51, lines 17-20)
[DEPARTMENT:] It sounded to me, sir, is that your audiogram that was done of Mr. Haggenmiller was done on June 5, 2012, in your office; is that correct?
[WITNESS:] Yes, it is.

6. Whether the Court of Appeals erred dismissing Haggenmiller's granted discretionary appeal of the orders of October 28, 2013 (CP 565-6) that strikes Haggenmiller's "Motion for Order to Show Cause" (CP 520-563) filed October 28, 2013 and

The Motion for Reconsideration, dated October 31st, 2013,(CP 567-8) which refers to the Order Vacating Judgment Denied dated October 28th, 2013, (CP 520-563) and by being filed 3 days after such date is timely filed.

7. Haggenmiller's entitlement to receive immediate payment for his granted award of 24.83% for bilateral hearing loss and tinnitus.

The Department has paid only a total of 14.51% and that such deficiency constitutes bad faith administration of Haggenmiller's worker's compensation claim. (RP 9/27/2013, page 30, line 18). CP 467-476.

Haggenmiller asserts that: on October 6, 2011, the claim was closed with an award for $8,985.15 for complete loss of hearing based on the 2009 Schedule of Benefits for an award of 10.32% (CABR 44).

On March 5, 2013, (CABR 1) the Department was ordered to increase the award payment to $21,618.36 based on the 2009 Schedule of Benefits for an award of 24.83% (CABR 40).

On March 8, 2013, the Department issues a Payment Order for $3,648.06 (CP 469-470). AB page 48 line 3.

The Department has paid a total award of $12,633.21 or 14.51% based on the 2009 Schedule of Benefits and is deficient because the BIIA ordered the Department to pay a Permanent Partial Disability Award Equal to 24.83% for bilateral hearing loss and tinnitus.

Every Court in this case has been deceived that "There's been a more than doubling of the original award. The Department accepts that." And misrepresents the payment above as "justice was done." (RP 9/27/2013, page 17, line 22 page 30 line 10).

8. Whether the Court of Appeals erred dismissing Haggenmiller's appeal to: "Motion and Declaration for Entry of Default and For Entry of Default Judgment or In the Alternative Entry of Partial Default Judgment" (CP 675-719) and "Motion and Declaration of Sanctions" (CP 721-3) Filed December 3, 2013 as under Washington State Constitution Article IV Section 20 Decisions, When to Be Made. Every cause submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof, The Jefferson County Superior Judge has failed to enter timely decisions in the cases listed above and thereby violated the State Constitution Art. 4 § 20. Also RCW

2.08.240. The Superior Court may not delay indefinitely its decision regarding this matter. (CP 729) (RP 12/13/2013, at 1–5).

9. Whether the Court of Appeals erred in its review of Haggenmiller's appeals against claims or defenses that were "frivolous and advanced without reasonable cause". (CP 738-761), (CP 763-779), (CP 813-832), (CP 833-862). Whether the Court of Appeals misapprehended, *Davis v. Cox*, No. 90233–0 (Wash. May 28, 2015). As to affirm the order of January 10, 2014 (CP 864-5) and dismiss instead of reverse and remand the case to the superior court for further proceedings in front of a jury as constitutionally required by the recent Davis decision. Because RCW 4.24.525(4)(b) requires the trial judge to adjudicate factual questions in nonfrivolous claims without a trial, holding RCW 4.24.525 violates the right of trial by jury under article I, section 21 of the Washington -2-*Davis, et al. v. Cox, et al.*, 90233-0 Constitution and is invalid. Likewise reverse the Court of Appeals and remand this case to the superior court for further proceedings.

Anti-SLAPP statutes punish those who file lawsuits-labeled strategic lawsuits against public participation or SLAPPs-that abuse the judicial process in order to silence an individual's free

expression or petitioning activity. Tom Wyrwich, *A Cure for a "Public Concern": Washington's New Anti-SLAPP Law,* 86 WASH. L. REv. 663, 666-68 (2011). Such litigation is initiated "[w]ith no concern for the inevitable failure of the lawsuit" and instead only forces the defendant into costly litigation that "devastate[s] the defendant financially and chill[s] the defendant's public involvement." *Id.* at 666-67. Though such suits are "typically dismissed as groundless or unconstitutional," the problem is that dismissal comes only after "the defendants are put to great expense, harassment, and interruption of their productive activities." LAWS OF 2010, ch. 118, § 1(1)(b).

In 1989, Washington became the first state to enact anti-SLAPP legislation. LAWS OF 1989, ch. 234 (codified as amended at RCW 4.24.500-.520). This initial statute grants speakers immunity from claims based on the speaker's communication to a governmental entity regarding any matter reasonably of concern to the governmental entity. *See* RCW 4.24.510.

The new RCW 4.24.525 statute did not amend or repeal the prior statute hence Haggenmiller is immune from claims based on his communications to a governmental entity regarding any matter reasonably of concern to the governmental entity.

10. The Department has not responded to Haggenmiller's Assignment of Errors. Respondent Brief is replete with self-serving, conclusory assertions of fact that are not supported by any citation to the record. Recitation of facts not supported by the record violates RAP 10.3(a) (4). Barnes v. Washington Natural Gas Co. 22 Wn. App. 576, 577 fn. 1,591 P.2d 461 (1979).

Failure to cite to the record for a statement of fact is a failure to comply with the Rules of Appellate Procedure and justifies the court ignoring any such statement of fact. See In re Marriage of Simpson, 57 Wn. App.677,681-82,790 P.2d 177 (1990).

The Department also inappropriately alleges facts that are not in the record at all. It is not just that the facts presented are not properly cited, it is that the purported "facts" do not exist in the record at all.

Unchallenged findings of fact are considered verities on appeal, while challenged findings are upheld so long as they are supported by substantial evidence. Conclusions of law are reviewed de novo and are upheld if supported by the findings of fact. *In re Disciplinary Proceeding Against Marshall,* 160 Wn.2d 317, 330, 157 P.3d 859 (2007).

ARGUMENT WHY REVIEW SHOULD BE GRANTED

A.-First Impression: Issue of entitlement for the interpretation of RCW 51.32.080, WAC 296-20-220 (1) (o), should be decided by a jury instead of in a fictional summary judgment.

B.- Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly. By the same token, there is no time limit on an attack on a judgment as void.

There was not a late CR 59 relief sought, that claim itself is a willful misrepresentation that has deceived the courts below.

C.- The new RCW 4.24.525 statute did not amend or repeal the prior statute hence Haggenmiller is immune from claims based on his communications to a governmental entity regarding any matter reasonably of concern to the governmental entity.

CONCLUSION

For appeal 45778-4-II, filed January 13, 2014. This Court should reverse and remand the case to the superior court for further proceedings in front of a jury as constitutionally required by the recent Davis v Cox decision and instruct that RCW 4.24.525 statute

did not amend or repeal the prior statute; hence Haggenmiller is immune from claims based on his communications to a governmental entity regarding any matter reasonably of concern to the governmental entity and grant such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

For appeals 45478-5-II, and 45645-1-II. That this Court adjudges and decrees that defendants have engaged in the conduct complained of herein RCW 42.20.040 "fraud on the court".

Sanctions, as in this case of "substantive fraud" as when defendants gave false testimony and deliberately omitted relevant information. This is sufficiently serious and egregious to come within the definition of fraud on the court.

These actions merit default to preserve the integrity of a civil proceeding and Defendants should not be permitted to continue to employ the very institution they have subverted to achieve their ends. That the Court make such orders so that Haggenmiller, shall have and recover from the Department the costs of this action, in accordance with RCW 51.52.130.

That the Court award Haggenmiller the actual damages sustained as a result of Department's action complained of herein.

Each failure to establish their claims warrants reversal of the trial court and vacation of the order granting Department's Motion for Judgment as a Matter of Law. This Court should make an award of fees for Haggenmiller's successful appeal.

The relief sought is as follows.

This case is about Total Bodily Impairment under the Permanent Partial Category Awards (TBI) for award year 2011. Haggenmiller is claiming an award for category 4 Mental, (45% of $183,900.42) equals to $82,755.18.

Plus Dr. Kessler's findings of 25.94% Permanent Partial Disabilities (PPD) for award year 2011, (25.94% of $88,272.33) equals to $22,897.84 minus an original payment of $8,985.15 equals $13,912.69 The Department has made a payment of $3,648.06 towards this award on March 8, 2013. CP 467 -76.

That the Court award Plaintiff in accordance with RCW 51.52.135: Worker or beneficiary entitled to interest on award the worker or beneficiary shall be entitled to interest at the rate of (12 percent) twelve percent per annum on the unpaid amount of the award. Courts award prejudgment interest when claims are liquidated.

Hansen v. Rothaus, 107 Wn.2d 468, 472, 730 P. 2d 662 (1986). A liquidated claim exists when the amount of prejudgment interest can be determined from the evidence with exactness and without reliance on opinion or discretion? Bostain, 159 Wn.2d at 723 (citing Hansen, 107 Wn.2d at 472). A dispute over the claim, in whole or in part, does not change the character of a liquidated claim to unliquidated Id. (quoting Hansen, 107 Wn.2d at 472).

Payment Order date: October 6, 2011. (CABR at 44)

That the Court orders such other relief to fully and effectively dissipate the effects of the conduct complained of herein, or which may otherwise seem proper to the Court.

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

Signed at Jefferson County, Washington

Dated this October 13th, 2015

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APPENDIX

FILED
COURT OF APPEALS
DIVISION II

2015 JUL -7 AM 8:43

STATE OF WASHINGTON

BY_____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EDERI HAGGENMILLER, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, STATE OF WASHINGTON, Respondent.	No. 45478-5-II (Consolidated w/ No. 45645-1-II and No. 45778-4-II) UNPUBLISHED OPINION

SUTTON, J. — Ederi Haggenmiller appeals the superior court's summary judgment order in favor of the Department of Labor and Industries (Department) and affirming his industrial insurance award from the Board of Industrial Insurance Appeals (Board). Haggenmiller argues that (1) he is entitled to a permanent partial disability award for hearing loss and tinnitus greater than 24.83 percent and a separate award for a related mental health condition, (2) the Board should have set his date of occupational injury, or manifestation date, as June 5, 2012, rather than October 9, 2009, (3) the Department's responses to his post-judgment motions violated RCW 4.24.525, the

anti-SLAPP[1] statute, and (4) he is entitled to an award of attorney fees, costs, and CR 11 sanctions against the Department. We hold that (1) Haggenmiller failed to establish a genuine issue of material fact that he was entitled to a permanent disability award greater than 24.83 percent or a separate award for a mental health condition, (2) res judicata bars relitigation of the October 9, 2009 manifestation date, and even if considered, the medical evidence supports October 9, 2009 as the manifestation date, (3) Haggenmiller's claims under the anti-SLAPP statute, RCW 4.24.525, are moot because the statute is unconstitutional,[2] and (4) he is not entitled to relief on his other post-judgment motions, an award of attorney fees and costs, or CR 11 sanctions. We affirm the superior court's summary judgment order in favor of the Department, the Board's final order dated March 8, 2013, and dismiss Haggenmiller's appeal.

FACTS

I. WORKPLACE INJURY AND PERMANENT PARTIAL DISABILITY RATING AND AWARD

Haggenmiller worked as a finishing carpenter for approximately 30 years. As part of his work, he used noisy hand power tools. In 2006 and 2007, he started using impact tools and compound power saws; during this time he started experiencing hearing problems that progressively worsened. The Department accepted his hearing loss claim as an occupational disease, provided treatment, including hearing aids, set October 9, 2009 as the manifestation date

[1] Lawsuits filed under RCW 4.24.525 are called Strategic Lawsuits Against Public Participation (SLAPP). *See* LAWS OF 2010, ch. 118, § 1(b).

[2] *Davis v. Cox*, ___ P.3d ___, 2015 WL 3413375, at *11 (2015).

of his injury,[3] and entered a final order dated October 5, 2011. RCW 51.32.180(b); WAC 296-14-350. Haggenmiller did not appeal the October 5, 2011 order. The Department then closed his claim; he requested reconsideration, but the Department affirmed the closure of his claim in its December 8, 2011 order. Haggenmiller appealed that order to the Board.

At the board hearing, Haggenmiller had the burden of proving, by a preponderance of the evidence, that the Department's order setting a permanent partial disability rating of 24.83 percent for hearing loss and tinnitus was incorrect under RCW 51.52.050(2)(a). Haggenmiller presented the testimony of himself, his spouse, and a medical expert, Dr. David Kessler, an otolaryngologist. Haggenmiller testified that "[h]earing loss is really not too much of a problem for [him] at the moment," and does not affect his social interactions because he does not "really have any problems with asking people to repeat themselves." Clerk's Papers (CP) at 178. He testified that he developed tinnitus, which he believed impacted his ability to sleep, ability to drive at the end of the day, his social interactions, memory, and caused mood alterations and depression.

Kessler testified that Haggenmiller's 2009 audiogram showed a bilateral hearing loss and that he has had hearing loss since 2009. Kessler testified that Haggenmiller's condition was a permanent partial disability because, in his opinion, it would "not . . . improve over time." CP at 209-10. Kessler opined that Haggenmiller had a 20.83 percent hearing loss, with an additional 4 percent impairment due to his tinnitus, for a total combined hearing loss of 24.83 percent. Kessler

[3] The schedule of benefits for a permanent partial disability award under an occupational disease claim is determined "'as of the date the disease manifests itself,'" also referred to as the date of manifestation. *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 13, 201 P.3d 1011 (2009) (quoting *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 128, 814 P.2d 626 (1991)); *see* RCW 51.32.180(b).

did not address the manifestation date of October 9, 2009 or provide an opinion that Haggenmiller had a related mental health condition.

The Department's medical expert, Dr. Gerald G. Randolph, an otolaryngologist, examined Haggenmiller in January 2011. Randolph testified that Haggenmiller's last occupational noise exposure was in October 2009. Randolph rated Haggenmiller's bilateral hearing loss at 10.31 percent, but did not provide a tinnitus rating because, at the time of the 2011 examination, the tinnitus did not significantly impact Haggenmiller's daily life. Randolph did not disagree with Kessler's audiogram results or his assessment that Haggenmiller's tinnitus had increased since 2009.

The administrative law judge who conducted the board hearing agreed with Haggenmiller that he was entitled to a permanent partial disability award of 24.83 percent, including 4 percent for his tinnitus. The judge ruled that Haggenmiller failed to present a prima facie case to show that the October 9, 2009 manifestation date was incorrect, or that his bilateral hearing loss or his tinnitus caused a mental health condition; and the judge denied Haggenmiller's requests for attorney fees and costs, noting he had no authority to grant this relief. Haggenmiller requested review by the Board. The Board accepted the judge's proposed decision and entered a final order dated March 8, 2013. Haggenmiller appealed that order to superior court but did not appeal the order setting October 9, 2009 as the date of his occupational injury.

II. SUMMARY JUDGMENT AND POST-JUDGMENT ORDERS

The Department moved for summary judgment under CR 56 arguing that, with the additional combined permanent partial disability award of 24.83 percent, Haggenmiller could not receive any further relief based on the issues on appeal and the substantial evidence in the record. The superior court, after reviewing the pleadings and evidence, ruled that (1) a jury could not make

any other decision but to affirm the Board's March 8, 2013 order because there was no medical evidence showing that Haggenmiller was entitled to a permanent partial disability award greater than 24.83 percent, (2) there was no evidence of total bodily impairment, (3) there was no evidence from any expert that Haggenmiller had a related mental health condition, and (4) res judicata bars relitigation of October 9, 2009 as the date of his injury, and even if considered, the medical evidence supported October 9, 2009 as the date of injury. The superior court granted the Department's summary judgment motion, affirmed the Board's March 8, 2013 order, and dismissed the appeal. Haggenmiller appealed to our court.

III. POST-JUDGMENT MOTIONS

After filing his appeal in our court, Haggenmiller filed various post-judgment motions in superior court. He filed a "Motion for Order to Show Cause" and appeared ex parte, but the superior court denied the motion. He also filed a "Motion to Vacate the Judgment/Order" for reconsideration. The Department moved to strike his motion as untimely under CR 59(b), and because under RAP 7.2(a), this court had sole authority once his appeal had been filed. The superior court denied reconsideration. Haggenmiller appealed that order to this court.

While his appeals were still pending in this court, Haggenmiller filed a "Request for Entry of Default" and a "Motion and Declaration for Entry of Default Judgment or Alternative Entry of Partial Summary Judgment," and the superior court denied this motion, explaining that the motion had no legal basis. Haggenmiller filed multiple "special motions to strike" arguing that the Department's prior responses to his motions violated RCW 4.24.525, the anti-SLAPP statute.[4] The superior court denied all of Haggenmiller's special motions to strike and awarded costs to the

[4] Suppl. CP at 738-55, 763-76, 813-32, 833-52.

Department for two telephonic hearings. Haggenmiller appealed that order, as well. We consolidated his three appeals.

ANALYSIS

Haggenmiller argues that (1) he is entitled to a permanent partial disability award of 25.94 percent, consisting of 20.94 percent for bilateral hearing loss and 5 percent for tinnitus, and an award for a related mental health condition, (2) the Department's responses to his post-judgment motions interfered with his constitutional right to free speech and the right to petition and violated RCW 4.24.525(1)(a), the anti-SLAPP statute, and (3) he is entitled to an award of attorney fees, costs, and CR 11 sanctions against the Department.

We hold that (1) Haggenmiller failed to establish a genuine issue of material fact that he was entitled to a permanent disability award greater than 24.83 percent or a separate award for a mental health condition, (2) res judicata bars relitigation of the October 9, 2009 injury date, and even if considered, the medical evidence supports October 9, 2009 as the date of his occupational injury or manifestation date, (3) Haggenmiller's claims under the anti-SLAPP statute, RCW 4.24.525, are moot because the anti-SLAPP statute is unconstitutional, and (4) he is not entitled to relief on his other post-judgment motions, or an award of attorney fees, costs, or CR 11 sanctions. We affirm the superior court's summary judgment order in favor of the Department and the Board's final order dated March 8, 2013, and we dismiss Haggenmiller's appeal.

I. STANDARD OF REVIEW

On appeal to the Board, Haggenmiller had the burden of proving, by a preponderance of evidence, that the Department's order was incorrect. RCW 51.52.050(2)(a). A claimant must provide strict proof of each element of his or her claim for disability benefits under RCW 51.52.050(2). *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996). To

prove a prima facie case, expert medical testimony "'must establish that it is more probable than not that [the industrial injury] caused the subsequent disability.'" *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 319, 189 P.3d 178 (2008) (quoting *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995)).

On appeal to superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. RCW 51.52.115; *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 483, 40 P.3d 1221 (2002). The superior court reviews the Board's decision de novo based on the same evidence as was before the Board. RCW 51.52.115; *Harrison*, 110 Wn. App. at 483. "'[T]he superior court may substitute its own findings and decision for the Board's only if it finds, from a fair preponderance of credible evidence, that the Board's findings and decision are incorrect.'" *Harrison*, 110 Wn. App. at 482 (quoting *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992)).

The ordinary civil standard of review governs appeals of proceedings under the Industrial Insurance Act, Title 51 RCW. RCW 51.52.140. As a result, we review the superior court's order, not the Board's order. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-80, 210 P.2d 355 (2009). We review the superior court's summary judgment order de novo and engage in the same inquiry as the superior court. *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wn.2d 566, 573, 304 P.3d 472 (2013). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c); *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 471, 877, 258 P.3d 676 (2012). A genuine issue of material fact exists if "reasonable minds could differ on the facts controlling the outcome of the litigation." *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

We construe all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

The moving party in a summary judgment motion has the initial burden to show the nonexistence of a genuine issue of material fact. *Knight v. Dep't of Labor & Indus.*, 181 Wn. App. 788, 794-95, 321 P.3d 1275, *review denied*, 339 P.3d 635 (2014). Once this showing is made, the burden shifts to the nonmoving party to make a showing sufficient to establish the existence of an element essential to his case. *Cho v. City of Seattle*, 185 Wn. App. 10, 15, 341 P.3d 309 (2014), *review denied*, ___ P.3d ___ (2015). "In a claim for workers' compensation benefits, the injured worker bears the burden of proving that he is entitled to benefits." *Knight*, 181 Wn. App. at 795-96. "If this burden cannot be met as a matter of law, summary judgment for the Department is proper." *Knight*, 181 Wn. App. at 796. "A nonmoving party must set forth specific facts showing a genuine issue for trial and may not rely on speculation." *Knight*, 181 Wn. App. at 796; CR 56(e); *see Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009).

II. PERMANENT PARTIAL DISABILITY FOR HEARING LOSS

To establish a permanent partial disability award, the Department relies on a physician to calculate hearing loss in accordance with the American Medical Association's Guides to Impairment and RCW 51.32.080(2). *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 111, 206 P.3d 657 (2009); WAC 296-20-2015. The physician may also separately rate tinnitus accompanying hearing loss. *See Pollard v. Weyerhaeuser*, 123 Wn. App. 506, 510, 98 P.3d 545 (2004); *see also Jenkins v. Weyerhauser Co.*, 143 Wn. App. 246, 252, 177 P.3d 180 (2009). If the physician rates tinnitus, the Department will add zero to five percent to the hearing loss formula, depending on the severity of the tinnitus. *In re Harold Sells*, Nos. 95 4334 & 95 4547, 1996 WL 879376, at *2 (Wash. Bd. of Indus. Ins. Appeals December 20, 1996).

Of the ratings provided by the two physicians who presented medical evidence in support of Haggenmiller's permanent partial disability award, Haggenmiller's physician established the highest rating, testifying that the industrial injury caused 24.83 percent of Haggenmiller's total hearing loss. Haggenmiller presented no expert medical testimony that his hearing loss was greater than 24.83 percent. The Board agreed with Haggenmiller's physician and awarded Haggenmiller the highest disability award supported by the medical evidence: "a bilateral hearing loss of 20.83 percent, and an increase of bilateral hearing loss caused by tinnitus of 4 percent, resulting in a total bilateral hearing loss of 24.83 percent." CP at 50.

During the October 1, 2012 hearing, the Department and the administrative law judge questioned Haggenmiller's physician regarding the physician's hearing loss calculations. The judge initially questioned Haggenmiller's physician regarding the physician's tinnitus rating:

> [JUDGE:] [H]ow did you rate Mr. Haggenmiller, as far as his tinnitus goes?
> [WITNESS:] Well, he has provided me with a fair amount of written testimony about how much this tinnitus bothers him. So I would rate him in the 4 to 5 percent range.
> [JUDGE:] Well, Doctor, you're going to get to—you have to get off the fence. You have to pick 4 or 5.
> [WITNESS:] I would say 4.

CP at 213.

During this same hearing, the physician described the mathematical formula that he used to reach his final figure of 24.83 percent, but the hearing transcript reflects that the physician had significant difficulty correctly performing the necessary division and addition functions. He made several errors, including using imprecise, rounded numbers. *See, e.g.*, CP at 225 ("And then on the combined hearing loss formula, this comes out to about 25 percent."). At one point the Department and the physician had the following exchange:

> [DEPARTMENT:] [W]ithout tinnitus, Mr. Haggenmiller's bilateral hearing loss is just about 21 percent; correct?
> [WITNESS:] And I'm running those right now. Give me just a second.
> [DEPARTMENT:] Specifically, 20.94 percent?
> [JUDGE:] Just wait until the doctor answers.
> [WITNESS:] Yes, I agree with that.

CP at 225.

It appears that Haggenmiller uses this exchange as the supporting evidence for his assertion that he is entitled to a 25.94 percent total hearing loss, consisting of the aforementioned 20.94 percent hearing loss and a 5 percent tinnitus rating, based on his physician's statement that he would "rate him in the 4 to 5 percent range." CP at 213.

But after performing several more calculations, the physician corrected himself during the following exchange:

> [WITNESS:] I rounded that to 25 percent, you guys. I think it's actually 24.83333.
> [DEPARTMENT:] Okay. 24.83. So without tinnitus we're at 20.4 percent, with the tinnitus we're at 24.83 percent; correct?
> [WITNESS:] Correct.

CP at 227.

Haggenmiller provided no other supporting medical evidence, other than lay testimony, that he was entitled to a permanent partial disability award of 25.94 percent. *See Jenkins*, 143 Wn. App. at 253 (party attacking the Board's decision must support its challenge by a preponderance of the evidence). Viewing the evidence in a light most favorable to Haggenmiller, as the nonmoving party, he has not established a genuine issue of material fact that he was entitled to a greater award than the combined permanent partial disability rating of 24.83 percent for his bilateral hearing loss and tinnitus.

III. PERMANENT PARTIAL DISABILITY AWARD FOR A MENTAL HEALTH CONDITION

Haggenmiller next argues that he is entitled to a separate permanent partial disability award for a mental health condition related to his hearing loss and tinnitus. Before the Board he argued that lay testimony[5] was sufficient, that objective medical evidence was not necessary, and that certain impairments are compensable based solely on subjective statements. He also argued before the Board that it is "appropriate to analogize [his hearing loss] to categories of mental health impairment in light of the similarity in the disruption of daily living caused by the worker's tinnitus." CP at 31.

Kessler and Randolph, the two physicians who presented medical evidence, did not address any related mental health condition. The Board found that:

> Haggenmiller failed to present the necessary evidence to prove his bilateral hearing loss and tinnitus caused a mental health condition. No medical opinion was introduced during the hearing to prove [he] was suffering from a mental health condition. No medical opinion was introduced that stated a diagnosis, a cause of any mental health condition, or a permanent partial disability rating for any mental health condition.

CP at 50. The Board concluded that he "failed to establish a *prima facie* case that his bilateral hearing loss and tinnitus caused a mental health condition." CP at 50. Haggenmiller failed to present any medical evidence to create a genuine issue of material fact of a related mental health condition.

[5] Haggenmiller presented only lay testimony from himself and his wife that he has a mental health condition.

IV. OCTOBER 9, 2009 HEARING LOSS MANIFESTATION DATE

Haggenmiller next argues that the manifestation date of his occupational injury should be June 5, 2012, the date that Kessler performed an audiogram,[6] rather than October 9, 2009, as set by the Board in its October 5, 2011 order. The Department responds that res judicata precludes the parties from rearguing this issue as Haggenmiller did not appeal the Department's order[7] setting October 9, 2009 as the manifestation date, and that order is final and binding on both parties. We agree with the Department.

"[T]he civil rules for superior court, including CR 60, apply to proceedings before the Board and superior court." *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 172, 937 P.2d 565 (1997) (a party must "properly appeal" a Board order for the appellate court to consider it); RCW 51.52.140; WAC 263-12-125. If a party fails to appeal a board order within the 60-day time limit under RCW 51.52.060(1), the party's "claim is deemed res judicata on the issues the order encompassed, and '[t]he failure to appeal an order . . . turns the order into a final adjudication, precluding any reargument of the same claim.'" *Arriaga v. Dep't of Labor & Indus.*, 183 Wn. App. 817, 824-25, 335 P.3d 977 (2014) (alteration in original) (quoting *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 669, 175 P.3d 1117 (2008)), *review denied*, 182 Wn.2d 1012 (2015).

Under RCW 51.52.050(1)(a) and .060, Haggenmiller had 60 days to appeal the Board's October 5, 2011 order (setting the manifestation date of October 9, 2009). He did not appeal and

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[6] The parties refer to this as an audiogram, which is the graphical display of the hearing test.

[7] The Department's separate October 5, 2011 order affirmed its July 27, 2011 order, set the manifestation date of injury as October 9, 2009, and allowed Haggenmiller's claim for bilateral hearing loss due to occupational noise exposure.

the October 5, 2011 order is final and binding on both parties and res judicata bars relitigation of this issue. *Arriaga*, 183 Wn. App. at 824-25.

V. ANTI-SLAPP MOTION

Haggenmiller argues that the Department's pleadings filed in response to his post-judgment motions infringed on his free speech and right to petition and violated RCW 4.24.525(1)(a), the anti-SLAPP statute. RCW 42.24.525. Haggenmiller also implies that his pleadings qualify as "protected activity" under RCW 4.24.525(1)(a), to include: prelitigation letters and threats to sue, motion to reconsider, motion for relief, motions for costs, and notice of appeal. Br. of Appellant at 29, 38; *see* Suppl. CP at 738-39. He claims the Department's pleadings violate RCW 4.24.525(1)(a) because they "pre-empt[ed] Haggenmiller's ability to seek relief from a court . . . at a time of his own choosing[,]" which in turn "create[d] an undue burden on Haggenmiller that he did not anticipate when making the initial claim for compensation." Br. of Appellant at 38. And he argues that the Department's "suit against Haggenmiller for making a permanent partial disability claim creates a chilling effect on all citizens who are contemplating making a permanent partial disability claim." Br. of Appellant at 38-39.

Our Supreme Court recently held that the anti-SLAPP statute is unconstitutional. *Davis v. Cox*, ___ P.3d ___, 2015 WL 3413375, at *11 (2015). Thus, Haggenmiller's claims under the anti-SLAPP statute are moot.

VI. ATTORNEY FEES AND COSTS

Haggenmiller requests attorney fees and costs in this appeal under RAP 18.1(a) and RCW 51.52.130(1). RAP 18.1(a) provides that a party may recover its reasonable attorney fees if "applicable law" permits such recovery. RCW 51.52.130(1) allows attorney fees and costs only in cases where the worker has appealed and "the decision and order of the board is reversed or

modified and if the accident fund or medical aid fund is affected by the litigation." Haggenmiller cites no authority for a pro se litigant to receive attorney fees. He is not a prevailing party under RAP 18.1(a) or RCW 51.52.130(1) and thus, he is not entitled to an award of fees or costs.

VII. CR 11 SANCTIONS

Haggenmiller also requests sanctions against the Department under CR 11.[8] He argues that it was "unfair" for the Board to schedule the board hearing in Olympia, rather than in Jefferson County, where Haggenmiller resides. Br. of Appellant at 2. He claims that (1) the Department engaged in a "fraud on the court," (2) he refers to the Department as "cheaters," (3) he was prejudiced, and (4) he was denied due process. Br. of Appellant at 2, 48-49. He requests an award in the amount of $1,710.45 to reimburse him for four hours driving at $400.00 per hour, plus $0.555 per mile for 190 miles, plus a $5.00 bridge toll fee. But Haggenmiller fails to show how the Department's request that the Board hold its hearing in Olympia to accommodate a witness

[8] CR 11 provides in part:

> The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is well grounded in fact;
>
> (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court . . . may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

was for an "improper purpose" or violated the rules. CR 11(a)(3). We deny his request for CR 11 sanctions.

CONCLUSION

We hold that (1) Haggenmiller failed to establish a genuine issue of material fact that he was entitled to a permanent disability award greater than 24.83 percent or a separate award for a mental health condition, (2) res judicata bars relitigation of the October 9, 2009 manifestation date, and even if considered, the medical evidence supports October 9, 2009 as the manifestation date, (3) Haggenmiller's claims under the anti-SLAPP statute, RCW 4.24.525, are moot because the anti-SLAPP statute is unconstitutional, and (4) he is not entitled to relief on his other post-judgment motions, or an award of attorney fees, costs, or CR 11 sanctions. We affirm the superior court's summary judgment order in favor of the Department, affirm the Board's final order dated March 8, 2013, and dismiss Haggenmiller's appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Worswick, J.
WORSWICK, J.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EDERI HAGGENMILLER,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

No. 45478-5-II

ORDER REQUESTING AN ANSWER TO MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the opinion filed July 7, 2015 in the above entitled matter. As the motion appears to raise a substantial issue and an answer would assist the Court in resolving the motion, the Court requests that the RESPONDENT file an answer to the motion for reconsideration within ten (10) days of this order. Accordingly, it is

SO ORDERED.

DATED this 29th day of July, 2015.

FOR THE COURT:

Bjorgen, A.C.J.
ACTING CHIEF JUDGE

FILED
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DIVISION II
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STATE OF WASHINGTON
BY _____
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EDERI HAGGENMILLER,

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WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

No. 45478-5-II

ORDER DENYING MOTION FOR RECONSIDERATION

FILED
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DIVISION II
2015 SEP 15 AM 10:52
STATE OF WASHINGTON
BY
DEPUTY

APPELLANT moves for reconsideration of the Court's **July 7, 2015** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Sutton, Worswick

DATED this 15th day of September 2015.

FOR THE COURT:

Bjorgen, A.C.J.
ACTING CHIEF JUDGE

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RCW 51.52.070 Contents of notice

The notice of appeal to the board shall set forth in full detail the grounds upon which the person appealing considers such order, decision, or award is unjust or unlawful, and shall include every issue to be considered by the board, and it must contain a detailed statement of facts upon which such worker, beneficiary, employer, or other person relies in support thereof.
The worker, beneficiary, employer, or other person shall be deemed to have waived all objections or irregularities concerning the matter on which such appeal is taken other than those specifically set forth in such notice of appeal or appearing in the records of the department.

HARRY v. BUSE TIMBER & SALES, INC.No. 79613-1. 201 P.3d 1011 (2009)

As Corrected March 10, 2009.

¶ 2...schedule of benefits. RCW 51.32.180(b) is ambiguous as to whether "the date ... the disease ... [i]s totally or partially disabling" refers to the first date any compensable hearing loss first occurred, or the last date hazardous workplace noise contributed to the disability for which a worker seeks compensation. Applying the liberal construal mandate, we hold occupational hearing loss is "partially disabling" within the meaning of **RCW 51.32.180(b) as of the date a worker was last exposed to hazardous occupational noise.** Harry v. Buse Timber & Sales, Inc.No. 79613-1. 201 P.3d 1011 (2009)

¶ 16 Considering the purpose of the IIA, the liberal construal mandate, the definition of occupational disease, and the nature of occupational hearing loss, we interpret "the date the disease ... becomes totally or partially disabling," **RCW 51.32.180(b), as referring to the date the aggregate compensable disability occurred, not the date a compensable loss first occurred.** Accordingly, we hold the date of last injurious exposure is the date occupational hearing loss is "partially disabling" within the meaning of RCW 51.32.180(b). Harry v. Buse Timber & Sales, Inc.No. 79613-1. 201 P.3d 1011 (2009)

RCW 51.32.080 Permanent partial disability; Specified, Unspecified,

(3)(a) Compensation for any other permanent partial disability not involving amputation shall be in the proportion which the extent of such other disability, called unspecified disability, shall bear to the disabilities specified in subsection (1) of this section, which most closely resembles and approximates in degree of disability such other disability,

and compensation for any other unspecified permanent partial disability shall be in an amount as measured and compared to total bodily impairment. To reduce litigation and establish more certainty and uniformity in the rating of unspecified permanent partial disabilities, the department shall enact rules having the force of law classifying such disabilities in the proportion which the department shall determine such disabilities reasonably bear to total bodily impairment. In enacting such rules, the department shall give consideration to, but need not necessarily adopt, any nationally recognized medical standards or guides for determining various bodily impairments.

WAC 296-20-220
Special rules for evaluation of permanent bodily impairment.

(o) In cases of injury or occupational disease of bodily areas and/or systems which are not included in these categories or rules and which do not involve loss of hearing, loss of central visual acuity, loss of an eye by enucleation or loss of the extremities or use thereof, examiners shall determine the impairment of such bodily areas and/or systems in terms of percentage of total bodily impairment.

RCW 42.20.040

False report.

Every public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor.

[1909 c 249 § 98; RRS § 2350.]

RCW 2.08.240

Limit of time for decision.

Every case submitted to a judge of a superior court for his or her decision shall be decided by him or her within ninety days from the submission thereof: PROVIDED, That if within said period of ninety days a rehearing shall have been ordered, then the period within which he or she is to decide shall commence at the time the cause is submitted upon such rehearing, and upon willful failure of any such judge so to do, he or she shall be deemed to have forfeited his or her office.

[2011 c 336 § 21; 1890 p 344 § 12; RRS § 39.]

RCW 4.24.510

Communication to government agency or self-regulatory organization — Immunity from civil liability.

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

[2002 c 232 § 2; 1999 c 54 § 1; 1989 c 234 § 2.]

RCW 51.52.130

Attorney and witness fees in court appeal.

(1) If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

(2) In an appeal to the superior or appellate court involving the presumption established under RCW 51.32.185, the attorney's fee shall be payable as set forth under RCW 51.32.185.

[2007 c 490 § 4; 1993 c 122 § 1; 1982 c 63 § 23; 1977 ex.s. c 350 § 82; 1961 c 23 § 51.52.130. Prior: 1957 c 70 § 63; 1951 c 225 § 17; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

RCW 51.52.135

Worker or beneficiary entitled to interest on award — Rate.

(1) When a worker or beneficiary prevails in an appeal by the employer to the board or in an appeal by the employer to the court from the decision and order of the board, the worker or beneficiary shall be entitled to interest at the rate of twelve percent per annum on the unpaid amount of the award after deducting the amount of attorney fees.

(2) When a worker or beneficiary prevails in an appeal by the worker or beneficiary to the board or the court regarding a claim for temporary total disability, the worker or beneficiary shall be entitled to interest at the rate of twelve percent per annum on the unpaid amount of the award after deducting the amount of attorney fees.

(3) The interest provided for in subsections (1) and (2) of this section shall accrue from the date of the department's order granting the award or denying payment of the award. The interest shall be paid by the party having the obligation to pay the award. The amount of interest to be paid shall be fixed by the board or court, as the case may be.

[1983 c 301 § 1.]

RCW 51.52.140

Rules of practice — Duties of attorney general — Supreme court appeal.

Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal advisor of the department and the board.

[1961 c 23 § 51.52.140. Prior: 1957 c 70 § 64; 1951 c 225 § 19; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

RCW 4.84.185

Prevailing party to receive expenses for opposing frivolous action or defense.

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

[1991 c 70 § 1; 1987 c 212 § 201; 1983 c 127 § 1.]

FILED
COURT OF APPEALS
DIVISION II
2015 OCT 13 AM 10: 12
STATE OF WASHINGTON
BY
DEPUTY

No. 45478-5. Cons. w/ Nos. 45645-1-II & 45778-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

Ederi Haggenmiller, Pro Se Appellant,
v.
DEPARTMENT OF LABOR AND INDUSTRIES,
STATE OF WASHINGTON Respondent.

Certificate of Service

92372-8
COURT CLERK

TO: DAVID C. PONZOHA
WASHINGTON STATE
COURT OF APPEALS DIVISION TWO
950 Broadway, Suite 300,
Tacoma, WA 98402-4454

AND TO: Christine J. Kilduff
Attorney at Law
9119 31st St W
University Place, WA, 98466 -1629
christinekilduff@gmail.com

Defendant

FILED
OCT 16 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

James P Mills
Office of the Attorney General - Tacoma
1250 Pacific Ave Ste 105
PO Box 2317
Tacoma, WA, 98401-2317

Defendant

I certify that on this day I served the attached **PETITION FOR REVIEW** to **THE SUPREME COURT OF THE STATE OF WASHINGTON**, plus this certificate of service to the parties to this proceeding as listed above. A true and correct copy thereof was delivered to the United States Postal Service and placed into the stream of mail to the respective parties as indicated.
Dated this 13th day of October, 2015.

Ederi Haggenmiller

Ederi Haggenmiller H. 360 732 0346
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