Supreme Court No. 94417-2
Court of Appeals No. 48390-4-II
Pierce County Superior Court No. 15-2-06271-4

SUPREME COURT

OF THE STATE OF WASHINGTON

ANDREW AHRENS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW (RAP 13.4)

Jason J. Hoeft, WSBA #39547
Emery Reddy, PLLC
600 Stewart Street, Suite 1100
Seattle, WA 98101
(206) 442-9106
Attorney for Appellant Andrew Ahrens

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IX. IDENTITY OF PETITIONER

Andrew Ahrens ("Ahrens") is the Petitioner and he resides in the City of Puyallup and the County of Pierce, at 407 Valley Avenue Northeast, Apartment F-201, Puyallup, Washington 98372.

II. CITATION TO THE COURT OF APPEALS' DECISIONS

Mr. Ahrens requests this Court review the March 14, 2017, Unpublished Opinion of the Court of Appeals, Division II.

III. ISSUE PRESENTED FOR REVIEW

The issue Petitioner Ahrens presents to this Court is that on March 14, 2017, the Court of Appeals Division II, erred when it affirmed the trial court's Order Granting the Department of Labor and Industries' (the "Department") Motion for Summary Judgment of November 20, 2015, as the court ignored facts in the record that show a reasonable hypothesis which creates a genuine issue of material fact and furthermore went beyond its function and decided the underlying factual issue.

In considering this issue it is clear that Court of Appeals' decision is in conflict with the Court of Appeals' and the Supreme Court's decisions that state summary judgment **must be denied** if there appears to be any reasonable hypothesis under which the nonmoving party may be entitled to the relief sought (**emphasis** added). *Mostrom v. Pettibon*, 25

Wash.App 158, 162, 607 P.2d 864 (1980), *Adamski v. Tacoma General Hospital,* 20 Wash.App. 98, 104, 579 P.2d 970 (1978), *Fleming v. Smith,* 64 Wash.2d 181, 185, 390 P.2d 990 (1964).

It is also clear that the Court of Appeals' decision is in conflict with the Supreme Court's decisions that state in ruling on motion for summary judgment, the court's function is not to resolve any existing factual issue, but to determine whether such genuine issue exists. *Jolly v. Fossum,* 59 Wash.2d 20, 24, 365 P.2d 780 (1961); *Hughes v. Chehalis School Dist.,* 61 Wash.2d 222, 224, 377 P.2d 642 (1962).

IV. STATEMENT OF THE CASE

On July 1, 2013, the Department issued an order ending time-loss compensation. CP 284. On July 2, 2013, the Department issued a Notice of Decision canceling the May 28, 2013, order. CP 286. On July 2, 1013, the Department issued a Notice of Decision correcting a March 18, 2013, order and determining the Department was not responsible for the Ahrens' lumbar sprain. CP 288. On July 5, 2013, the Department issued its fourth order in five days setting Mr. Ahren's wage. CP 290.

On August 27, 2013, Ahrens submitted a Protest and Request for Reconsideration. CP 293. On October 15, 2013, the Department received a letter from Patrick B. Reddy requesting the Department take action on the August 27, 2013, Protest. CP 299. Specifically, the letter requested the

Department reconsider the July 5, 2013, wage order as previously requested. *Id.*

On January 6, 2014, the Department corrected and canceled the July 3, 2013, order setting a new wage. CP 295.

Following the November 20, 2105, hearing, Judge Jerry T. Costello granted the Department's Motion for Summary Judgment. CP 358-359. On March 14, 2017, Division II of the Court of Appeals affirmed the Superior Court's decision.

V. ARGUMENT

The standard of review of orders of summary judgment dismissal is de novo review. *Korslund v DynCorp Tri-Cities Servs., Inc.,* 156 Wash.2d 168, 177, 125 P.3d 119 (2005). A material fact is one upon which the outcome of the case depends. *Atherton Condo. Apartment-Owners Ass'n Bd. Of Dirs. v. Blume Dev. Co.,* 115 Wn.2d 506, 516, 799 P.2d 250 (1990). If reasonable minds could reach two different conclusions from the evidence, then summary judgment is inappropriate. *DePhillips v. Zolt Constr. Co.,* 136 Wn.2d 26, 959 P.2d 1104 (1998).

The evidence and all reasonable inferences from the evidence shall be viewed in the light most favorable to the non-moving party. *Roger Crane & Associates, Inc. v. Felice,* 74 Wash. App. 875 P.2d 705 (1994). Any doubts as to the existence of a genuine issues of material fact should

be resolved against the non-moving party, and in favor of allowing the case to go to trial. *Ely v. Hall's Motor Transit Co.,* 590 F.2d 62 (3d Cir. 1978).

Here, the factual record indicates that two different individuals demonstrated through actions that the August 27, 2013, protest, was sufficient to place the Department on notice of need for action. Thus, there is a genuine issue of material fact at issue and the Department's Motion should have been denied.

RCW 51.52.050 does not require strict compliance in regard to the form or content of a "protest" or "request for reconsideration." **Any written document** will suffice as a protest or request for reconsideration if it is reasonably calculated to put the Department on notice that the party is requesting action inconsistent with the adverse Department decision, and it is sent to the Department within 60 days of the original order. See *In re Mike Lambert,* BIIA Dec., 91 0107 (1991). *Pearsonn v. State Dep't of Labor and Indus.,* 164 Wn. App. 426, 262 P.3d 837 (2011), as modified (Nov. 28, 2011) (appeal must be taken within 60 days of DLI order).

There are no technical requirements for a protest, it merely must be: 1) in writing, 2) sent within 60 days of the Order, and 3) sufficient to place the Department on notice that action should be taken.

Here, there is no dispute as to the first two elements of a valid protest. The August 27, 2013, protest was: 1) written and 2) sent within 60 days of the July 5, 2013, order.

The final element is a question of fact and is a material fact in dispute: *was the August 27, 2013, protest sufficient to put the Department on notice.* As discussed below, the facts reveal that reasonable persons could ***and did*** reach different conclusions. Therefore, the Department's Motion should have been denied.

First, the October 15, 2013, letter from Patrick B. Reddy, asks the Department to take action on the Protest previously sent and not yet acted upon. CP 299. This letter was sent due to the fact that Mr. Reddy believed the Protest was sufficient enough to warrant Department action, specifically in regard to the July 5, 2013, order. CP 297.

Additionally, the Department's own actions indicate the protest was sufficient to put it on notice that action was requested. On January 6, 2014, the Department corrected and canceled the July 5, 2013, order, and set a new wage for Mr. Ahrens correcting its previous mistake. CP 295.

If all proper inferences were given to the nonmoving Mr. Ahrens, it is clear that reasonable minds can and did reach different conclusions, and thus summary judgment must fail. The court erred in its decision on summary judgment when it went beyond its function of determining

whether a genuine issue of material fact exists, and instead resolved the factual issue. According to the Court of Appeals' and Supreme Court's decisions, these facts demonstrate that a reasonable hypothesis exists under which the nonmoving party may be entitled to the relief sought and thus summary judgment **must be denied** (**emphasis** added). *Mostrom*, 25 Wash.App at 162; *Adamski*, 20 Wash.App. at 104; and *Fleming*, 64 Wash.2d at 185.

The March 14, 2017, Court of Appeals' decision states that considering the facts as demonstrated by Mr. Reddy's October 13, 2013, letter and the Department's subsequent order of January 6, 2014, would be mere speculation and thus cannot be considered, citing *Hendrickson. Hendrickson v. Tender Care Animal Hospital Corporation*, 176 Wash.App. 757, 312 P.3d 52 (2013).

The *Hendrickson* opinion does not discuss or elaborate the issue of "mere speculation," however the decision it cites to, *Seven Gables Corp.*, states:

> A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wash.2d 1, 13, 721 P.2d 1 (1986), citing *Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel*, 21 Wash.App. 929, 587 P.2d 191 (1978).

Here, it is an undisputed fact that the Department of Labor and Industries took action on January 6, 2014, to change the July 5, 2013, wage order. This fact is not speculation or an argumentative assertion that there is an unresolved factual issue. As the Court of Appeals points out, RCW 51.52.050(1) states that the July 5, 2013, order would become final and binding 60 days after the Department communicates the order unless the party files a written request for reconsideration. On January 6, 2014, 186 days after the initial wage order was issued on July 5, 2013, the Department corrected Mr. Ahrens' wage order. It is not speculation that the Department took action beyond the 60-day time-period. The fact that action was taken 126 days beyond the 60-day period which would have rendered the order final and binding, is a significant factual rebuttal to the Department's Motion. The Court of Appeals ignored these facts and went beyond its function weighing the evidence and resolved the existing factual issue. *Jolly,* 59 Wash.2d at 24; *Hughes,* 61 Wash.2d at 224.

The cases of *Mostrom* and *Adamski* state that summary judgment will be denied if there appears to be any reasonable hypothesis under which the nonmoving party may be entitled to the relief sought. Yet the

March 14, 2017, Decision ignores this rule in favor of a proposition that Ahrens needed to present rebuttal factual evidence that demonstrates beyond a reasonable hypothesis, evidence as to the exact reason the Department took the action it did to change its order on January 6, 2014. However, in citing the above rule, the Court of Appeals in *Adamski* cites the Supreme Court case of *Fleming,* which demonstrates that the factual record showing a reasonable hypothesis be just that – a hypothesis to be explored at trial.

In *Fleming,* the Supreme Court was examining the intent of a deceased man in the designation of his beneficiary on his life insurance policy. The Supreme Court found that the facts demonstrated that the intent of the man was not known and that the factual record illustrated more testimony and evidence was needed to truly understand the intent of the deceased man. Therefore, the Supreme Court concluded that summary judgment was not proper and that "the instant case needed the full exploration of a trial." *Fleming*, 64 Wash.2d at 185.

This analysis is true in the instant case as well. The factual record is clear that the Department took action beyond the 60-day time period to correct an order. No action would have been taken without a protest, as RCW 51.52.050 would have determined that order to be final and binding. Therefore, to the extent the reason behind the Department's action

requires more testimony to explore whether it acted in response to the August 27, 2013, protest, a full trial is required.

Mr. Ahrens deserves his opportunity to present this evidence to a trier of fact. This is especially true, not only because of the policy reasons that support Mr. Ahrens as the non-moving party, but because this matter is with context of Title 51.

Title 51 was the result of a compromise between employers and workers. *Dennis v. Department of Labor and Industries of State of Wash.*, 109 Wash.2d 467, 745 P.2d 1295 (1987). In exchange for limited liability, the employer would pay on some claims for which there had been no common-law liability. *Id.* The worker gave up common law remedies and would receive less, in most cases, than he would have received had he won in court in a civil action, and in exchange would be sure of receiving that lesser amount without having to fight as hard for it. *Id.*

RCW 51.04.010 embodies these principles, and declares, among other things, that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided [by the Act] regardless of questions of fault and to the exclusion of every other remedy." *Id.* To this end, the guiding principle in construing provisions of 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

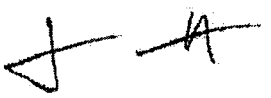
compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Id,* citing multiple sources.

VI. CONCLUSION

When all evidence is taken into account, it is clear that an issue of material fact exists based on the actors at the time the protest was filed. The Departments' Motion for Summary Judgment should have been denied. The Court's Decision should be reversed, and this case remanded to be heard on the merits.

DATED this 13TH day of April, 2017.

Respectfully Submitted,



Jason J. Hoeft, WSBA #39547
Emery Reddy, PLLC
600 Stewart Street, Suite 1100
Seattle, WA 98101
(206) 442-9106
Attorney for Appellant Ahrens

CERTIFICATE OF SERVICE

I, Kalli Lehmann, under penalty of perjury of the laws of the state of Washington, certify and declare that I caused a true and correct copy of the foregoing document to be served on the following parties as indicated below:

April 13, 2017 Katy A. Dixon Attorney General of Washington Labor & Industries Division 800 Fifth Avenue, Suite 2000 Seattle, WA 98104	[X] By United States Mail [ ] By Legal Messenger [ ] By Electronic CM/ECF [ ] By Overnight Express Mail – Fed Ex [X] By Facsimile 206.587.4290 [ ] By Email

Dated 13th day of April, 2017, in Seattle, WA.

Kalli Lehmann

Kalli Lehmann
Legal Assistant

APPENDIX 1

Filed
Washington State
Court of Appeals
Division Two

March 14, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ANDREW R. AHRENS, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	No. 48390-4-II UNPUBLISHED OPINION

SUTTON, J. — Andrew R. Ahrens appeals from a superior court order granting summary judgment to the Department of Labor and Industries (Department) and affirming a July 5, 2013 wage rate order issued by the Department after finding that there was no question of fact as to whether Ahrens had failed to timely challenge the July 5, 2013 order. We agree that there was no question of fact. Accordingly, we affirm the superior court's order granting summary judgment and affirming the Department's July 5, 2013 wage rate order.

FACTS

Ahrens was injured at work in 2012 and the Department allowed his claim. Following the injury, the Department issued the following orders: (1) On March 18, 2013, the Department issued a notice of decision stating that it was responsible for Ahrens's "lumbar strain," (2) on July 3, 2013, the Department issued an order correcting and superseding the March 18, 2013 order, finding that Ahrens' "lumbar sprain" was unrelated to his industrial injury, (3) on July 5, 2013, the

Department issued an order setting Ahrens' wages at the time of his injury at $1,056.70 per month.[1] Clerk's Papers (CP) at 84, 136-37.

On August 27, Ahrens submitted a letter captioned "**PROTEST AND REQUEST FOR RECONSIDERATION**" stating:

> I am writing on behalf of the Claimant, Mr. Andrew Ahrens, to protest and request reconsideration of the Department of Labor & Industries Notice of Decision *dated July 3, 2013*, and which was received by the Claimant on July 8, 2013 (the "Order"). A true and correct copy of the Order is attached to this correspondence. The Order reversed the Department's Notice of Decision dated March 18, 2013. A true and correct copy of the March 18, 2013 Order is attached to this correspondence.
>
> The Order is incorrect because Mr. Ahern's lumbar sprain was caused by his industrial injury. Mr. Ahrens injured his back while in physical therapy for his bilateral knee condition accepted under his open workers' compensation claim. Additionally, an independent medical exam dated February 28, 2013 determined that the sprain was causally related to his August 16, 2012 workplace injury.
>
> Mr. Ahrens was not experiencing back pain at the time of his injury. Any prior back pain was aggravated and lit up by his August 16, 2012 workplace injury. The Claimant requests that the Department reverse the Order and issue a new order accepting Mr. Ahrens' lumbar strain under his claim.

CP at 135 (emphasis added). Copies of the July 3, 2013 and March 18, 2013 orders, both of which addressed the lumbar sprain issue, were attached to the letter. The letter did not mention any other action by the Department, and Ahrens did not attach copies of any other orders.

On September 10, the Department issued a notice of decision stating that it was reconsidering the July 3, 2013 lumbar sprain order and would issue a new order after further

[1] The notice stated, "The wage for the job of injury is based on $23.00 per hour, 1.46 hours per day, 4.00 days per week = $604.44 per month." CP at 84. It also included health care benefits of $452.26 per month, for a total gross wage received of $1,056.70 per month. It is unclear how the Department arrived at the $604.44 monthly pay.

review. On October 2, the Department issued a notice of decision, stating that it had reconsidered the July 3, 2013 lumbar sprain order and had determined that the order was correct.

On October 15, Ahrens submitted a new protest letter. This protest letter stated,

> I am writing on behalf of the Claimant, Mr. Andrew Ahrens, to request that the Department take action on the protest of August 27. Specifically, *the Department has not yet reconsidered the wage order dated July 5*. In addition, this letter serves as a protest and request for reconsideration **of all overpayment orders in this matter** as the wage contains a typographical error that the claim manager previously overlooked. This also constitutes a protest of all segregation orders in this matter. If you do not desire to take action on this protest, please forward it to the Board of Industrial Insurance Appeals as a direct appeal.

CP at 146 (emphasis added).

On October 18, the Department issued a notice of decision stating that the Department could not reconsider the July 5, 2013 wage rate order because it had not received a timely protest. Ahrens appealed the October 18, 2013 order to the Board of Industrial Insurance Appeals (Board). CP at 151. He argued that the October 18, 2013 order was incorrect "because the claim manager should have reconsidered the clearly erroneous order after the claimant's August 27 protest, and in light of the claimant's returned mail concerning [loss of earning power] benefits." The Claimant was covered by health insurance but only worked 1 hour per day? That is simply absurd." CP at 152.

On January 6, the Department issued a notice of decision correcting and superseding the orders dated July 3, 2013, October 2, 2013 and October 18, 2013. The Department issued a revised wage calculation of $3,571.06 per month.[2]

[2] The wage was based on an hourly wage of $23.00, for an average of 4.52 hours per day, 30 days a month, plus insurance.

But on January 14, the Department issued a notice of decision stating that the January 6, 2014 order was "null and void because the Department did not have jurisdiction to issue the order." CP at 167. On January 15, the Department issued a notice of decision stating that it could not reconsider the July 5, 2013 wage rate order because the protest was not received within 60 days.

Ahrens appealed the January 14, 2014 order to the Board.[3] He asserted that he timely protested the July 5, 2013 wage rate order. The Department moved for summary judgment. The Department argued that there was no question of fact as to whether Ahrens timely objected to the July 5, 2013 wage rate order because the plain language of the August 27, 2013 protest letter did not mention or otherwise reference the July 5, 2013 wage rate order—it referenced only the July 3, 2103 and March 18, 2013 orders, which were related to the lumbar sprain issue. The Department acknowledged that it had erred when it issued its January 6, 2014 order, but it asserted that order had no weight because it was subsequently withdrawn.

Ahrens argued that reasonable minds could disagree as to whether the August 27, 2013 protest put the Department on notice that it was to take action on the July 5, 2013 wage rate order. He argued that his October 15 protest letter specifically alerted the Department that it had not taken action on the July 5, 2013 order and that the Department's own actions, specifically its January 6, 2014 order, demonstrated the Department believed it must take action.

The industrial insurance appeals judge granted the Department's summary judgment motion and affirmed the July 5, 2013 wage rate order. Ahrens appealed this decision to the superior court.

[3] Ahrens also appealed a January 16, 2014 overpayment order; this order is not at issue on appeal.

At the superior court, the Department again moved for summary judgment. The superior court granted the Department's motion for summary judgment and affirmed the Board's decision, finding that there was no genuine issue of material fact as to whether Ahrens had timely appealed the July 5, 2013 order.

Ahrens appeals.

ANALYSIS

Ahrens argues that the trial court erred in deciding on summary judgment that he failed to timely protest the July 5, 2013 wage rate order. He contends that summary judgment was inappropriate because there was a question of fact as to whether the August 27, 2013 protest letter put the Department on notice that he was challenging the July 5, 2013 wage rate order. We disagree.

I. STANDARD OF REVIEW

"RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising under the Industrial Insurance Act." *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002). "When a party appeals from a board decision, and the superior court grants summary judgment affirming that decision, the appellate court's inquiry is the same as that of the superior court." *Stelter*, 147 Wn.2d at 707 (citing *Our Lady of Lourdes Hosp. v. Franklin County,* 120 Wn.2d 439, 451, 842 P.2d 956 (1993)). We base our review "solely on the evidence and testimony presented to the Board." *Stelter*, 147 Wn.2d at 707 (citing RCW 51.52.115; *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 800 n.4, 953 P.2d 800 (1998)).

A summary judgment motion will be granted only if after viewing all the pleadings, affidavits, depositions, admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party, it can be said that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment as a matter of law. *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014). A nonmoving party attempting to preclude a summary judgment "'may not rely on speculation, [or on] argumentative assertions that unresolved factual issues remain.'" *Hendrickson v. Tender Care Animal Hosp. Corp.*, 176 Wn. App. 757, 762, 312 P.3d 52 (2013) (alteration in original) (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)), *review denied*, 179 Wn.2d 1013 (2014).

II. NO QUESTION OF FACT

The Department's orders become final 60 days after the Department communicates the order to a party unless the party files a written request for reconsideration with the Department or files an appeal to the Board. RCW 51.52.050(1). Here, the parties agree that the written notice must be "reasonably calculated to put the Department on notice that the party is requesting action inconsistent with the adverse Department decision." Br. of Appellant at 3; Br. of Resp't at 8; *see In re Mike Lambert*, No. 91 0107, 1991 WL 11008451, *1 (Wash. Bd. of Indus. Ins. Appeals Jan. 29, 1991).

Ahrens argues that his August 27, 2013 protest letter put the Department on notice that he was challenging the July 5, 2013 wage rate order. But the plain text of the August 27, 2013 protest letter refers only to the orders issued July 3, 2013 and March 18, 2013, both of which addressed whether the Department was responsible for Ahrens' lumbar sprain. The protest letter also

discusses facts related only to the lumbar sprain issue. Additionally, Ahrens only attached copies of the July 3, 2013 and March 18, 2013 orders that addressed only the lumbar sprain. There is nothing in the August 27, 2013 protest letter remotely suggesting that Ahrens was challenging any other Department order issued within 60 days of August 27, 2013. Given the specificity of the August 27, 2013 letter and the lack of anything suggesting that Ahrens was challenging any other action by the Department, we agree with the Board and the superior court that there is no likelihood that any reasonable person would have concluded that the August 27, 2013 protest letter was intended to challenge the July 5, 2013 wage rate order. Thus, summary judgment for the Department was appropriate.

Ahrens further argues that his October 2013 protest letter and the Department's January 6, 2014 order demonstrate that at least two people, his counsel and the person handling his case for the Department, believed that the August 27, 2013 protest letter was sufficient to put the Department on notice that he was challenging the July 5, 2013 wage rate order. He contends that this establishes at least a question of fact as to this issue. But Ahrens' argument is based on mere speculation, which we cannot consider when reviewing a summary judgment order. *Hendrickson*, 176 Wn. App. at 762.

Ahrens further asserts that the Department's own act of issuing a series of four orders relating to different aspects of his benefits on consecutive days created the confusion in the first instance.[4] He argues that under these circumstances, the August 27, 2013 protest letter put the claim manager on notice that the Department needed to address all orders it had sent within 60 days of the protest letter. Ahrens cites no authority establishing that all orders issued within 60 days of a protest letter should be considered by the Department. Thus, we decline to consider this argument.[5] RAP 10.3; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Finally, Ahrens argues that the trial court erred by not considering the Department's January 6, 2014 order. He contends that he is entitled to have the court consider the Department's later actions because the Industrial Insurance Act is remedial in nature and is to be liberally construed in favor of the injured worker. But, as discussed above, whether the January 6, 2013 order demonstrated that the Department found that the August 27, 2013 letter was sufficient to put the Department on notice that Ahrens was challenging the July 5, 2013 ruling is mere speculation, which cannot be considered on a summary judgment motion. *Hendrickson*, 176 Wn. App. at 762. Accordingly, this argument fails.

[4] In addition to the July 3, 2013 and the July 5, 2013 orders, the Department also issued two additional orders: (1) a July 1, 2013 order ending time-loss compensation, and (2) a July 2, 2013 order cancelling a May 28, 2013 order. The May 28, 2013 order is not part of the record.

[5] Additionally we note that the specificity of the August 27, 2013 protest letter does not suggest that Ahrens was confused about which order issued in or around July 2013 he was challenging.

Because there was no question of fact as to whether Ahrens timely protested the July 5, 2013 wage rate order, we affirm.

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, P.J.

Johanson, J.

JOHANSON, J.

APPENDIX 2

RCW 51.04.010

Declaration of police power—Jurisdiction of courts abolished.

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

[1977 ex.s. c 350 § 1; 1972 ex.s. c 43 § 1; 1961 c 23 § 51.04.010. Prior: 1911 c 74 § 1; RRS § 7673.]

APPENDIX 3

RCW 51.52.050

Service of departmental action—Demand for repayment—Orders amending benefits—Reconsideration or appeal.

(1) Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, or if the worker, beneficiary, employer, or other person affected thereby chooses, the department may send correspondence and other legal notices by secure electronic means except for orders communicating the closure of a claim. Persons who choose to receive correspondence and other legal notices electronically shall be provided information to assist them in ensuring all electronic documents and communications are received. Correspondence and notices must be addressed to such a person at his or her last known postal or electronic address as shown by the records of the department. Correspondence and notices sent electronically are considered received on the date sent by the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia. However, a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

(2)(a) Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.

(b) An order by the department awarding benefits shall become effective and benefits due on the date issued. Subject to (b)(i) and (ii) of this subsection, if the department order is appealed the order shall not be stayed pending a final decision on the merits unless ordered by the board. Upon issuance of the order granting the appeal, the board will provide the worker with notice concerning the potential of an overpayment of benefits paid pending the outcome of the appeal and the requirements for interest on unpaid benefits pursuant to RCW **51.52.135**. A worker may request that benefits cease pending appeal at any time following the employer's motion for stay or the board's order granting appeal. The request must be submitted in writing to the employer, the board, and the department. Any employer may move for a stay of the order on appeal, in whole or in part. The motion must be filed within fifteen days of the order granting appeal. The board shall conduct an expedited review of the claim file provided by the department as it existed on the date of the department order. The board shall issue a final decision within twenty-five days of the filing of the motion for stay or the order granting appeal, whichever is later. The board's final decision may be appealed to superior court in accordance with RCW **51.52.110**. The board shall grant a motion to stay if the moving party demonstrates that it is more likely than not to prevail on the facts as they existed at the time of the order on appeal. The board shall not consider the likelihood of recoupment of benefits as a basis to grant or deny a motion to stay. If a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW **51.32.240**.

(i) If upon reconsideration requested by a worker or medical provider, the department has ordered an increase in a permanent partial disability award from the amount reflected in an earlier order, the award reflected in the earlier order shall not be stayed pending a final decision on the merits. However, the increase is stayed without further action by the board pending a final decision on the merits.

(ii) If any party appeals an order establishing a worker's wages or the compensation rate at which a worker will be paid temporary or permanent total disability or loss of earning power benefits, the worker shall receive payment pending a final decision on the merits based on the following:

(A) When the employer is self-insured, the wage calculation or compensation rate the employer most recently submitted to the department; or

(B) When the employer is insured through the state fund, the highest wage amount or compensation rate uncontested by the parties.

Payment of benefits or consideration of wages at a rate that is higher than that specified in (b)(ii)(A) or (B) of this subsection is stayed without further action by the board pending a final decision on the merits.

(c) In an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

[**2011 c 290 § 9; 2008 c 280 § 1; 2004 c 243 § 8; 1987 c 151 § 1; 1986 c 200 § 10; 1985 c 315 § 9; 1982 c 109 § 4; 1977 ex.s. c 350 § 75; 1975 1st ex.s. c 58 § 1; 1961 c 23 § 51.52.050.** Prior: **1957 c 70 § 55; 1951 c 225 § 5;** prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1947 c 247 § 1, part; 1911 c 74 § 20, part; Rem. Supp. 1947 § 7676e, part. (iii) 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. (iv) 1923 c 136 § 7, part; 1921 c 182 § 10, part; 1917 c 29 § 3, part; RRS § 7712, part. (v) **1917 c 29 § 11;** RRS § 7720. (vi) 1939 c 50 § 1, part; 1927 c 310 § 9, part; 1921 c 182 § 12, part; 1919 c 129 § 5, part; 1917 c 28 § 15, part; RRS § 7724, part.]

NOTES:

Application—2008 c 280: "This act applies to orders issued on or after June 12, 2008." [**2008 c 280 § 7.**]

Adoption of rules—2004 c 243: See note following RCW **51.08.177.**