No. 96161-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
(Formerly Court of Appeals No. 76130-7-I)

BRANDON APELA AFOA, Appellant,

v.

WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Brandon Apela Afoa, who is a paraplegic and functional triplegic with "short gut" syndrome as a result of a pushback collision while on the job at Sea-Tac International Airport. His third-party claims against the Port of Seattle were the subject of two appeals, both of which were heard before this Court as well as the Court of Appeals.[1] This matter concerns his workers' compensation claim for attendant services benefits arising from the same incident, and Department of Labor and Industries' denial of his claims for 24 hours of daily attendant care. At trial Mr. Afoa was the plaintiff / petitioner seeking review of a decision from the Board of Industrial Insurance Appeals affirming the Department's decision to provide compensation for only 16 hours of his needed 24 hours of daily attendant care.

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[1] In Afoa I, this Court affirmed the Court of Appeals' reversal of the trial court's dismissing Mr. Afoa's claims against the Port. Afoa v. Port of Seattle (I), 176 Wn.2d 460, 296 P.3d 800 (2013); Afoa v. Port of Seattle (I), 160 Wn. App. 234, 247 P.3d 482 (Div. 1, 2011). In Afoa II, the Court of Appeals found the Port vicariously liable for injuries and damages resulting from breaches of non-delegable duties under WISHA and the retained control doctrine, including the fault allocated to four airlines to which the Port was allowed to allege non-party fault *after and only after* Mr. Afoa could no longer bring claims against those airlines in the same case. Afoa v. Port of Seattle (II), 198 Wn. App. 206, 393 P.3d 802 (Div. 1, 2017). In its July 19, 2018 opinion, this Court reversed the Court of Appeals' ruling on vicarious liability, finding that under RCW 4.24.070, liability for breaches of non-delegable duties can be apportioned to non-parties unless there is an express finding of agency on the jury verdict form, and that the trial Court had discretion allow the Port to bring late affirmative defenses of non-party fault of the airlines notwithstanding the requirements of Civil Rule 12(i). Afoa v. Port of Seattle (II), __Wn.2d__, __P.3d__800 (July 19, 2018), No. 94525-0. Mr. Afoa's motion for reconsideration is pending.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the published May 29, 2018 Decision of Division I of the Court of Appeals and of its July 11, 2018 Order Denying Motion for Reconsideration, Court of Appeals No. 76130-7-I; Afoa v. Department of Labor and Industries, __Wn. App__, 418 P.3d 190 (Div. 1, 2018).

III. ISSUES PRESENTED FOR REVIEW

This case is one of first impression as to whether an injured worker has a constitutional right to a jury trial in an appeal from the Board of Industrial Insurance appeals in a "dispute as to the amount of compensation," and whether the statutory prohibition of live witness testimony at trial violates that right. Although the Industrial Insurance Act's replacement of tort remedies with industrial insurance was found to be constitutional over a century ago, no case until now has addressed the question of whether an injured worker has a right to a jury trial to determine the amount of compensation, or whether that jury trial right is satisfied by having prior testimony read to jurors like elementary school children read plays aloud in class. Thus the following issues are presented:

A. Whether injured workers who are denied compensation under the Industrial Insurance Act have a constitutional right to a jury trial on compensation disputes under Article I § 21 of the Washington State Constitution, Dacres v. Oregon Ry. & Nav.

Co., 1 Wash. 525, 529, 20 P. 601, 603 (1889), and Sofie v. Fibreboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711 (1989).[2]

B. Whether statutory prohibitions of live witness testimony under Chapter 51.52 impermissibly infringe or hamper jury trial rights by denying the essential function of the jury of assessing witness credibility.

C. Whether the legislature can abolish constitutional jury trial rights by establishing an alternative process and declaring it to be a "special proceeding."

IV. STATEMENT OF THE CASE

On December 26, 2007, Petitioner Brandon Afoa was catastrophically injured in a collision when the brakes and steering failed on a poorly maintained powered industrial truck known as a "pushback" that Mr. Afoa was operating on the tarmac at Sea-Tac International Airport.[3] At the time of the collision, Mr. Afoa was in the course and scope of his employment with Evergreen Aviation Ground Logistics Enterprises, Inc. ("EAGLE"), and is

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[2] A statutory right to a jury trial is also provided under RCW 51.52.115

[3] See CP 15-16 (Petitioner's Trial Brief Statement of Facts) ; RP 8-9; See also Afoa v. Port of Seattle, 176 Wn.2d 460, 296 P.3d 800 (2013), Afoa v. Port of Seattle, 160 Wn. App. 234, 247 P.3d 482 (Div. 1, 2011); Afoa v. Port of Seattle (II), 198 Wn. App. 206, 393 P.3d 802 (Div. 1, 2017) Afoa v. Port of Seattle (II), __Wn.2d__, __P.3d__800 (2018), No. 94525-0 (reconsideration pending.)

thus entitled to benefits from the Washington Department of Labor and Industries under Title 51 RCW.[4]

As a result of this collision, is a T9 paraplegic with functional triplegia due to nerve injuries to his right arm. He also suffers from "short gut syndrome" from his internal abdominal injuries, which requires constant monitoring and ileostomy care.[5]

The Department approved only 16 hours per day of care under WAC 296-23-246. Mr. Afoa appealed this decision to the Board of Industrial Insurance Appeals. After the Department's decision was affirmed, Mr. Afoa appealed to superior court and requested a jury trial of twelve.[6]

The first jury trial in this matter was heard on March 21-23, 2016. In the first trial, the procedural dictates of Chapter 51.52 RCW including RCW 51.52.115 and Chapter 263-12 WAC were followed, including having the Board hearing testimony read to the jury by attorneys and paralegals,[7] with the exception of the videotaped deposition testimony of Mr. Afoa's attending

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[4] Id.
[5] Board Record 546-554 (Transcript of April 24, 2015 Video Perpetuation Deposition of Paul Nutter, M.D., Brandon Afoa's Attending Physician); Board Record 526-538 (Ex. 2-14 to Dr. Nutter's deposition: illustrative exhibits showing Mr. Afoa's injuries which Dr. Nutter discussed while showing to the camera.)
[6] See CP 17-18 (Petitioner's Trial Brief Procedural History).
[7] See CP 51-52 (Petitioner's Motion for New Trial Procedural History.)

physician, Paul Nutter, M.D. which was only allowed because it was presented at the Board hearing.[8]

The jury found for the Department.[9] In the first trial, the Court denied Mr. Afoa's request to give the "attending physician" jury instruction, WPI 6th 155.13.01, contrary to the requirement in Hamilton v. Dept. of Labor & Indus., 11 Wn.2d 569, 571, 761 P.2d 618 (1988). On April 28, 2016, the Washington Supreme Court issued its opinion in Clark County v. McManus, 185 Wn.2d 466, 372 P.3d 764 (2016). The McManus Court affirmed the holding in Hamilton requiring the attending physician instruction be given.

Mr. Afoa then moved for a new trial, which was granted.[10] The second jury trial in this matter was noted to begin on September 19, 2016, but ultimately continued to October 3-5, 2016.[11] In this trial the attending physician jury instruction was given to the jury.[12] Prior to the second trial, Mr. Afoa filed a Trial Brief stating his intention to call his sister and caregiver, witness Hannah Mulifai, to read her own Board testimony to the jury.[13] The Department filed its Motion in Limine to strike the trial brief

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[8] Id.
[9] Id.
[10] Id.
[11] Id.; CP 64-66 (Judgment)
[12] See CP 52 (Petitioner's Motion for New Trial Procedural History.)
[13] CP 15-22 (Petitioner's Trial Brief)

and prevent Ms. Mulifai from reading her testimony to the jury,[14] arguing that it would be "highly prejudicial" to the Department to allow her to do so.[15] Mr. Afoa also requested that Ms. Mulifai be permitted to answer questions from the jury under CR 43(k).[16]

Argument on the Department's motion was heard in the morning of October 3, 2016 on the first day of trial.[17] The Court granted the Department's motion to prevent Ms. Mulifai from reading her own testimony, and denied Mr. Afoa's request to allow Ms. Mulifai to answer questions from the jury.[18]

Thus in the second jury trial the procedural dictates of Chapter 51.52 RCW including RCW 51.52.115 and Chapter 263-12 WAC were followed, including having the Board hearing testimony read to the jury by attorneys and paralegals,[19] with the exception of the videotaped deposition testimony of Dr. Nutter, which was allowed because it was presented at the hearing.[20]

The Department attacked the credibility of Mr. Afoa and his caregivers. As shown in the portions of the Board record which was read to the jury at trial, the Department argued that Mr.

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[14] CP 23-29 (Department's Motion in Limine)
[15] CP 26 (Department's Motion in Limine, Page 4), lines 4:7
[16] CP 40-42 (Petitioner's Response to Motion in Limine Pages 5-7)
[17] RP 1-24
[18] RP 17:20-21:8; 23:8-10
[19] RP 17:21-22
[20] See RP 18:20-25

Afoa's caregivers were not providing the care that they testified they were providing.[21] The Department argued and implied that the caregivers were overstating the amount of time it took to perform certain tasks, as well as the frequency of the tasks.[22] The Department insinuated that Mr. Afoa and his caregivers were not telling Dr. Nutter the truth in his medical appointments.[23] The Department also went beyond merely alleging Mr. Afoa's caregivers failed to provide sufficient documentation of the care provided. The Department alleged, or heavily implied, that the caregivers were committing billing fraud. Kimberly Skoropinsky of the Department testimony read:

> However, there's one other aspect of care that we look at and it's what we consider in the course of employment and when we surveilled a lot of cases, we had to review a lot of them, we found out **caregivers were off doing errands, they were off doing shopping, they were off minding the kids or they were only in contact by cell phone, and a lot times they were sleeping**. And we made a determination, we do not consider you working as an employee if you were doing these things, so we limit. If you're off -- if you're sleeping and you only get up an hour to do care, we don't pay for

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[21] Board Record 292-309 (Cross Examination of Hannah Mulifai); Board Record 247-260 (Cross Examination of Mataala T'eo)
[22] Id.
[23] See Perpetuation Deposition of Paul Nutter, M.D., Pages 45:22 to 46:8 (Department's counsel asked Dr. Nutter "were you aware that he only gets out of bed two days a week," which was less than what Dr. Nutter thought. Though other testimony established that Mr. Afoa gets out of bed more when the weather is good, and less when it's cold and rainy and when he lacks transportation.)

> your sleeping time, we only pay for the actual care provided.

Board Record, Page 424-425 (Direct of Kimberly Skoropinsky, Pages 112:17-113:1) (emphasis added). She elaborated:

> Because then you start questioning are they really billing us – the agency becomes a concern, **because are they billing us for care that's really not being provided, or if it is being provided, why are they not documenting it.** So that becomes a real problem and I've spent a lot of energy talking to agencies. And so we go back and we ask that agency, I said we need you to go back and really retrain re-supervise and provide us with information that documents if you're doing the care or not.

Board Record, Page 433-434 (Direct of Kimberly Skoropinsky, Pages 121:26-122:7) (emphasis added). She also alleged that Mr. Afoa's paid, trained, caregivers were billing for care provided by other family members.[24] When asked in cross examination if she had any evidence that Mr. Afoa's caregivers were logging hours for care not provided or provided by other family members, Ms. Skoropinsky responded, "Not direct evidence, no." Board Record 445 (Cross of Kimberly Skoropinsky, Page 133:25)

After having heard this testimony read to them without the opportunity to see the actual witnesses testify, and after having been told that the Board had decided that only 16 hours was

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[24] Board Record 444-445 (Cross of Kimberly Skoropinsky, Pages 132-133).

needed, the second jury found for the Department.[25] Mr. Afoa moved for a new trial to be held with the taking of live witness testimony. The trial court denied this motion and entered judgment on the verdict. Mr. Afoa appealed to Division I, who affirmed the trial court's judgment, and denied reconsideration.[26]

V. ARGUMENT

In the same year that Washington's Constitution was enacted in 1889, Washington's Supreme Court decided Dacres v. Oregon Ry. & Nav. Co., 1 Wash. 525, 20 P. 601 (1889). In Dacres, the legislature had created a cause of action under the railway fence law "to secure to the owners of live stock payment of the full value of all animals killed or maimed by railroad trains." Id., 1 Wash. at 527. The law provided for compensation to be determined by an appraiser rather than a jury. Although no such cause of action had existed at common law, the Dacres court found that livestock owners had a right to a jury trial on the amount of

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[25] CP 64-66 (Judgment) The Jury answered "Yes" to the question of whether the Board was correct in its decision. Id., Page 2:21-24

[26] The Court of Appeals' decisions are attached in the Appendix hereto. The Court of Appeals opinion quotes at length the testimony presented by the Department's witnesses in support of the Department's case, while only giving brief mention of the evidence supporting Mr. Afoa's claims. This gives an inaccurate impression that the evidence was lopsided in the Department's favor. In any event, Mr. Afoa is not contending there was insufficient evidence to support a verdict in the Department's favor, and "harmless error" is not an issue. The only facts relevant to the issue at bar are facts showing the credibility of Mr. Afoa's witnesses was questioned and that Mr. Afoa was denied the opportunity to have the jury judge their credibility through live testimony.

compensation. A hundred years later, Dacres was affirmed by this Court in Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711, 716–17 (1989), finding legislative caps on compensation unconstitutional for violating the right to have compensation determined by a jury.

In 1911, the legislature enacted Washington's Industrial Insurance Act ("IIA"), which abolished common law negligence claims of workers against their direct employers and replaced it with a no-fault system designed to provide "sure and certain relief" to workers who were injured on the job. RCW 51.04.010. The IIA was immediately challenged on constitutional grounds. It was first challenged by State Auditor C. W. Clausen who denied payment of a furniture bill for the newly created Industrial Insurance Department on the grounds that the IIA was unconstitutional. State v. Clausen, 65 Wash. 156, 117 P. 111 (1911). It was next challenged by the Mountain Timber Company, an employer contesting the mandatory premiums. State v. Mountain Timber Co., 75 Wash. 581, 135 P. 645 (1913); Mountain Timber Co. v. State of Washington, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917). In both Clausen and Mountain Timber, the courts upheld the IIA as a legitimate exercise of the State's police power to tax and regulate industry. Constitutional jury rights were raised, but only in the context of whether the legislature could abolish a cause

of action. The Courts ruled it could, and that jury trial rights were not implicated because once the cause of action was abolished, there was "nothing left to be tried by a jury." Shea v. Olson, 185 Wash. 143, 156–57, 53 P.2d 615, 620–21 (1936) (discussing Clausen and Mountain Timber). However, until now, Washington courts have not addressed the question of whether an injured worker (or a self-insured employer) is entitled to a jury trial in a dispute over compensation.[27]

Review is appropriate under on all four grounds set forth in RAP 13.4 (b), which provides:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

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[27] The process has survived challenges based on due process rights, but not jury trial rights. *See* Buffelen Woodworking Co. v. Cook, 28 Wn. App. 502, 507, 625 P.2d 703 (Div. 2, 1981). ("We cannot find that the system is so susceptible to error as to deny due process of law.") *See also* Zavala v. Twin City Foods, 185 Wn. App. 838, 343 P.3d 761 (Div. 3, 2015) (Affirmed due process following a bench trial, where no jury trial was requested and no jury trial rights were implicated.)

RAP 13.4 (b). The Court of Appeals' held "the IIA and the limitation on presentation of evidence and testimony does not violate the right to a jury trial guaranteed by article I, section 21."[28] However, the opinion is not clear as to whether it found injured workers have no jury trial rights or whether they do have those rights, but those rights are satisfied by having prior testimony read to a jury. If the former, the decision is on conflict with the Supreme Court's decisions in Dacres and in Sofie providing jury trial rights to have compensation and damages determined by a jury. If the latter, the decision is in conflict with decisions of this Court and with other decisions of the Court of Appeals finding assessing the credibility of witnesses to be an essential function of the jury.[29] Further, it is self-evident that the question of whether injured workers, or self-insured employers for that matter, have a constitutional right to a jury trial in disputes regarding the amount of compensation is a significant question of law under the Washington Constitution and one that involves an issue of substantial public interest.

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[28] Appendix A, Page 16.
[29] State v. Demery, 144 Wn.2d 753, 762, 30 P.3d 1278, 1283 (2001) *citing* State v. Whelchel, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); In re Marriage of Swaka, 179 Wn. App. 549, 554, 319 P.3d 69, 71 (Div. 2, 2014); Herriman v. May, 142 Wn. App. 226, 234, 174 P.3d 156, 160 (Div. 3, 2007); Kinsman v. Englander, 140 Wn. App. 835, 843–44, 167 P.3d 622, 626 (Div. 2, 2007).

A. Injured Workers have Constitutional and Statutory Rights to a Jury Trial in Compensation Disputes

Injured workers, such as Mr. Afoa, as well as self-insured employers, have constitutional rights to a jury trial under Article I, Section 21 of the Washington State Constitution, which Provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wa. Const. art. I, § 21. Washington courts interpret this provision as guaranteeing those rights to trial by jury that existed at the time of the constitution's adoption in 1889. Bird v. Best Plumbing Group, LLC, 175 Wn.2d 756, 768, 287 P.3d 551 (2013); Sofie v. Fibreboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711 (1989). Actions sounding in tort and in contract are legal in nature. Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 617 P.2d 704 (1980).

Prior to Washington's adoption of the Industrial Insurance Act, actions against one's employer for workplace injuries sounded in tort. Sofie, 112 Wn.2d at 650. The Sofie Court found that although the Legislature has the power to remove causes of action, as it did when enacting the Industrial Insurance Act, it does not have the power to deny "litigants an essential function of the jury." Id. at 650-651. Specifically, the Sofie Court found the Legislature

did not have the power to remove the essential function of determination of damages from the jury. Id.

In addition to his constitutional right to a jury trial, which cannot be abrogated by statute, the subject statute itself provides for a right to a jury trial. RCW 51.52.115. Statutory construction is a question of law to be reviewed de novo. Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003).

B. Prohibiting Live Witness Testimony Deprives Injured Workers of the Essential Function of the Jury in Assessing Witness Credibility, Impermissibly Hampering Jury Trial Rights.

The procedural dictates of Chapter 51.52 RCW denied Mr. Afoa his rights to a jury trial by prohibiting live testimony, which deprived him of the essential function of the jury in assessing the credibility of witnesses. The right to a jury trial "remains inviolate so long as … all such cases … triable by jury continue to be so triable without any restrictions or conditions which materially hamper or burden the right." State Bd. of Med. Examiners v. Macy, 92 Wash. 614, 622, 159 P. 801, 804 (1916).

The Washington Supreme Court has recognized that "it is the function of the jury to assess the credibility of a witness and the reasonableness of the witness's responses." State v. Demery, 144 Wn.2d 753, 762, 30 P.3d 1278, 1283 (2001) *citing* State v. Whelchel, 115 Wn.2d 708, 724, 801 P.2d 948 (1990). The Court

of Appeals has found that the "credibility of the witnesses and the weight of the evidence was a question for the jury alone." Herriman v. May, 142 Wn. App. 226, 234, 174 P.3d 156, 160 (Div. 3, 2007). Washington courts strongly prefer live testimony, and are loathe to depart from it without a good reason, as observed by Division II in Kinsman v. Englander:

> But our court rules strongly favor the testimony of live witnesses whenever possible so that the fact finder may observe the witnesses' demeanor to determine their veracity.

Kinsman v. Englander, 140 Wn. App. 835, 843–44, 167 P.3d 622, 626 (Div. 2, 2007) *superseded by* change in CR 43(a)(1). In the 2014 case of In re Marriage of Swaka, Division II affirmed the revised rule. Though in doing so, the Swaka court re-emphasized the importance of live testimony, citing the comment to the corresponding Federal Rule 43 with approval:

> The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. **The opportunity to judge the demeanor of a witness face-to face is accorded great value in our tradition**. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

In re Marriage of Swaka, 179 Wn. App. 549, 554, 319 P.3d 69, 71 (Div. 2, 2014) (emphasis added) *quoting* FRCP 43 advisory committee's note to 1996 amendments.

In Sofie v. Fibreboard Corp., The Washington Supreme Court examined the power of the Legislature to shape litigation, and the limits of the power. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 650–53, 771 P.2d 711, 719–20 (1989), *amended*, 780 P.2d 260 (1989). The Sofie court struck down the Legislature's attempt to limit non-economic damages in civil suits. The Sofie Court explained:

> The Legislature has power to shape litigation. Such power, however, has limits: it must not encroach upon constitutional protections. In this case, by denying litigants an essential function of the jury, the Legislature has exceeded those limits.

Sofie v. Fibreboard Corp., 112 Wn.2d at 651. The Sofie Court also examined Bellingham v. Hite, which held that "certain municipal cases may be tried without a jury **provided there is right to jury trial on appeal.**" Sofie at 651 (emphasis added) *citing* Bellingham v. Hite, 37 Wn.2d 652, 225 P.2d 895 (1950). It also examined Christie-Lambert Van & Storage Co. v. McLeod, which upheld the mandatory arbitration statute. Sofie at 651 *citing* Christie–Lambert Van & Storage Co. v. McLeod, 39 Wn. App. 298, 693 P.2d 161 (1984). The Sofie Court found that the procedures in those cases "do not deprive the jury of any of its essential functions" and that "Washington's mandatory arbitration law does not supplant the jury in civil litigation" by shifting costs and fees to the losing party. Sofie at 652-653. Like the ability to determine damages at

issue in Sofie, the ability to assess witness credibility is an essential function of the jury upon which the Legislature cannot encroach without exceeding its power.

C. The Legislature Cannot Abolish Jury Trial Rights by Declaring Disputes Subject to "Special Proceedings."

The Court of Appeals wrongfully accepted the circular reasoning of the Department, who asserted the Legislature has the "power to command the courts to prohibit live testimony" simply by creating a "special proceeding" under which the courts will apply CR 81 and defer to procedures set by the legislature. This argument must fail for the same reasons as set forth above. Injured workers have constitutional rights to a jury trial in compensation disputes. The statutes also provide for a jury trial, but conflict with the Civil Rules by impermissibly prohibiting live testimony in jury trials. The Civil Rules prevail under CR 81 (b), which provides "these rules supersede all procedural statutes and other rules that may be in conflict." CR 81 (b). These rights cannot be abrogated by labeling them "special proceedings."

In Scheib v. Crosby, Division III noted the "term 'special proceedings' is not defined. Case law provides guidance." The Scheib court then listed cases finding the following categories to be special proceedings: Sexually violent predator actions, will contests, actions under the Administrative Procedure Act, and unlawful detainer actions. Scheib v. Crosby, 160 Wn. App. 345, 351, 249 P.3d 184 (2011). None of these categories are for cases at law where jury trial rights apply, or that involve the determination

of damages. The Scheib court then quoted from the following passage in Putman:

> A more appropriate definition of special proceedings would include only those proceedings created or completely transformed by the legislature. This would include actions unknown to common law (such as attachment, mandamus, or certiorari), as well as those where the legislature has exercised its police power and entirely changed the remedies available (such as the workers' compensation system).

Putman v. Wenatchee Valley Med. Ctr., P.S., 166 Wn.2d 974, 982, 216 P.3d 374, 378 (2009) (quoted by Scheib at 351.). However, the discussion in Putman referred to the replacement of a worker's cause of action against his employer with compensation from the industrial insurance fund:

> While the legislature has made some changes to medical malpractice claims, it has not extinguished the common law action and replaced it with a statutory remedy. *Cf.* Lane v. Dep't of Labor & Indus., 21 Wn.2d 420, 428, 151 P.2d 440 (1944) (holding that the workers' compensation act "took away from the workman his common-law right of action for negligence" and "[i]n its place it provided for industrial insurance," thereby "creating the right of the workman to compensation" from the workers' compensation fund). Therefore, under the standard described above, medical malpractice suits do not qualify as special proceedings and are not exempt from the civil rules under CR 81(a).

Putman v. Wenatchee Valley Med. Ctr., P.S., 166 Wn.2d 974, 982, 216 P.3d 374, 378 (2009). Putman did not hold that a dispute over the amount of compensation would be a "special proceeding" under which jury trial rights did not apply.

The Court of Appeals ceded an alarming amount of power to the legislature by rejecting Mr. Afoa's claim that the court rule providing for witnesses to answer jury questions prevails over the statutory prohibition of same under Putman. The opinion suggests that the legislature can avoid the constraints of Putman and alter or abrogate any court rule at will simply by designating a matter as subject to a "special proceeding." Under this holding, the legislature could effectively abolish civil jury trials entirely and render jury trial rights under article I, section 21 of Washington's constitution meaningless. It need only create an administrative "Department of Civil Claims" under which all civil disputes would be determined by an arbitrator, appraiser, or administrative law judge. The judicial branch would hold only "appellate jurisdiction" over these "special proceedings," under which juries could be abolished entirely and rules of procedure and evidence determined solely by the legislature. The only limits would be due process constraints, limitations under the United States Constitution, and the political process. Perhaps the Legislature may see such a scheme as an attractive alternative to properly funding Washington's civil justice system.

VI. CONCLUSION

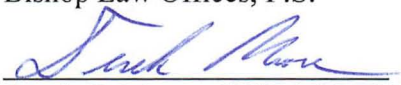
Injured workers (and self-insured employers) have constitutional and statutory rights to a jury trial, which include

having the essential function of determining witness credibility to be performed by the jury. The statutory prohibition of live testimony and requirement that prior testimony from the Board hearing be read to the jury impermissibly hampers and burdens those rights.

For the aforesaid reasons, Mr. Afoa respectfully requests this Court reverse the Court of Appeals and remand this case for a true trial de novo, in which he is allowed to present live witness testimony, with juror questions permitted, and with testimony not limited to that which was heard at the Board.

Respectfully submitted this 7th day of August, 2018.

Bishop Law Offices, P.S.



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VII. APPENDIX

A. Court of Appeals Published Opinion

B. Order Denying Motion for Reconsideration

C. Wash. Const. Article I § 21

RCW 51.52.115

Civil Rule 43

APPENDIX A

Court of Appeals
Published Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

BRANDON APELA AFOA, Appellant, v. WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 76130-7-I PUBLISHED OPINION FILED: May 29, 2018

SCHINDLER, J. — As the result of a compromise between employers and workers, in 1911, the legislature enacted the Industrial Insurance Act (IIA), Title 51 RCW. Employers agreed to pay personal injury claims that were not compensable under common law. In exchange, workers agreed to forfeit common law tort remedies. The IIA gives the worker the right to appeal the decision of the Department of Labor and Industries to the Board of Industrial Insurance Appeals. Either party may appeal the decision of the Board to superior court. In 2013, Brandon Afoa filed a claim for 24-hour-a-day in-home attendant care services. Based on an independent assessment, the Department agreed to 16 hours a day for in-home attendant care services. The Board affirmed the decision. Afoa appealed to superior court and filed a jury demand. The jury found the Board correctly decided that Afoa needed only 16 hours a day for

attendant care services. Afoa seeks reversal of the jury verdict. Afoa claims limiting the record in an IIA appeal to the evidence presented at the Board violates his right to a jury trial under article I, section 21 of the Washington Constitution and the separation of powers doctrine. We reject the argument that the IIA violates the right to a jury trial under article I, section 21 or separation of powers. The legislature had the authority to abolish the common law cause of action for negligence for workers and in its place enact workers' compensation under the IIA. The IIA limits the appeal to superior court to the certified record of the evidence presented to the Board, and under the civil rules the superior court IIA appeal is a special proceeding. We affirm.

Industrial Injury

Brandon Afoa worked at Seattle-Tacoma International Airport for Evergreen Aviation Ground Logistics Enterprises Incorporated. On December 26, 2007, Afoa was severely injured at work. Afoa is a paraplegic with nerve damage to his right arm and hand.

After release from the hospital, the Department of Labor and Industries (Department) paid for 24-hour-a-day in-home attendant care services. When Afoa was stable, the Department reduced in-home attendant care services to 16 hours a day. Afoa's father Mataala Te'o and Afoa's sister Hannah Mulifai provided in-home care services through Maxim Healthcare Services. Te'o provided care for Afoa during the day and Mulifai was available to provide care later in the day and at night.

Denial of Request for Additional In-Home Care Services

In 2013, Afoa filed a claim to increase the amount the Department paid for in-home attendant care services from 16 to 24 hours a day. At the request of the

Department, registered nurse consultant Elaine Baker conducted an assessment to determine necessary in-home attendant care services for Afoa. Baker recommended 16 hours a day for in-home attendant care services. The Department issued a notice of decision on January 30, 2014. The Department denied the request to increase in-home attendant care services to 24 hours a day.

Appeal to the Board

Afoa appealed the decision to the Board of Industrial Insurance Appeals (Board). An industrial appeals judge (IAJ) conducted a hearing on the appeal. A number of witnesses testified, including Afoa, Te'o, Mulifai, occupational therapist Christiane Buhl, occupational nurse consultant Kimberly Skoropinski, and registered nurse Baker. The IAJ admitted into evidence the videotaped deposition testimony of Afoa's expert Dr. Paul Nutter.

Occupational therapist Buhl worked with Afoa before his discharge from the hospital to skilled nursing care. Buhl focused on "strengthening his upper extremities, using his right arm, and increasing his time out of bed." Buhl testified that with assistance, Afoa could dress, groom, and feed himself. According to Buhl, Afoa "needed maximum assistance" for 50 to 75 percent of the tasks needed to bathe.

Afoa testified about his injuries and the in-home care services Te'o and Mulifai provide for him. Te'o and Mulifai testified about caring for Afoa.

Occupational nurse consultant Skoropinski testified that initially, Afoa received 24-hour attendant care, but when he "became more stable, care hours were reduced to 16." Skoropinski testified the Department pays "for actual care provided and not for hours that the caregiver is sleeping." Skoropinski described the tasks necessary for the

care of Afoa and testified Afoa "needed only 6 hours of attendant care per day, but the Department continues to pay for 16." Skoropinski testified that "care services are not paid for on a per shift basis and the 16 hours per day payment is intended to be spread throughout a 24-hour day."

Registered nurse consultant Baker testified about her assessment of the number of hours Afoa needed for in-home attendant care services. Baker testified the Washington Administrative Code "allow[s] for attendant care to take care of the worker[']s activities of daily living and not chore services."[1] After reviewing the caregiver records, Baker recommended the Department provide 16 hours of attendant care each day. Baker testified that "even . . . if each task were accounted for it would not add up to that amount."

Afoa's expert Dr. Nutter testified that in his opinion, "optimal care would be for [Afoa] to have 24-hour aide services." However, Dr. Nutter admitted he told the Department that "continuously after January 1, 2013 . . . 16 hours of care would be appropriate."

The IAJ affirmed the decision of the Department to deny the request for 24-hour-a-day in-home attendant care services. The IAJ found, "The time necessary to perform these tasks, along with other daily needs, do not come close to a need for the caregivers to be compensated for 24 hours." The IAJ concluded that while Te'o and Mulifai are available throughout a 24-hour period, "their services are not needed constantly through the day." Based on "the present tasks of daily living" and other necessary attendant care, the IAJ concluded the Department "is adequately compensating Mr. Afoa's caregivers with its determination of 16 hours per day" and

[1] See WAC 296-23-246.

affirmed the January 30, 2014 Department decision to deny the claim for 24-hour care services.

The proposed decision and order states, in pertinent part:

FINDINGS OF FACT

. . . .

2. Brandon A. Afoa sustained an industrial injury on December 26, 2007 and as a result has paralysis from T-9[2] down, internal injuries, and right arm nerve damage.

3. The December 26, 2007 industrial injury proximately caused Mr. Afoa to need assistance in activities of daily living along with frequent changing of bags and frequent changes of position in bed.

4. Through January 30, 2014, the assistance Mr. Afoa needed on a daily basis is best quantified as the 16 hours per day for which the Department of Labor and Industries is paying.

CONCLUSIONS OF LAW

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

2. Brandon A. Afoa's daily level of assistance through January 30, 2014 is at the 16-hour home health aide level pursuant to WAC 296-23-246.

3. The January 30, 2014 order of the Department of Labor and Industries is correct and is affirmed.[3]

The Board adopted the proposed decision and order and denied the petition for review.

Superior Court Appeal

Afoa filed an appeal of the decision and a jury demand in superior court. The Industrial Insurance Act (IIA), Title 51 RCW, governs the appeal of a Board decision to

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[2] Ninth thoracic vertebra.

[3] Boldface in original.

superior court. Because review is de novo, the jury considers only the certified Board record and does not hear new evidence. RCW 51.52.115; Hill v. Dep't of Labor & Indus., 161 Wn. App. 286, 291, 253 P.3d 430 (2011).

The court instructs the jury on the findings of the Board on each material issue. RCW 51.52.115. The findings and decision of the Board are "prima facie correct" and the burden is on the party challenging the decision to support the claim by a preponderance of the evidence. RCW 51.52.115; Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 179-80, 210 P.3d 355 (2009); Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999).[4]

In his trial brief, Afoa stated Mulifai would "read her own testimony transcript to the jury." Afoa argued that under CR 43(k), the court should also allow Mulifai to answer questions posed by the jury.[5] The Department filed a motion in limine to preclude Afoa from calling Mulifai to read her testimony to the jury or answering questions posed by the jury. The Department argued that under the IIA, the record on review is limited to the certified Board transcript. The court granted the motion in limine.

During the trial, attorneys and paralegals read testimony from the certified Board record. Afoa also played the videotaped deposition of his expert Dr. Nutter to the jury.

Jury instruction 1 states the jury must consider the evidence that consists only of "the testimony of the witnesses which has been read to you, or provided to you by

[4] RCW 51.52.115 provides, in pertinent part, "In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same."

[5] CR 43(k) states, "The court shall permit jurors to submit to the court written questions directed to witnesses."

video, from the certified Appeal Board record," as well as the exhibits admitted.[6] Jury instruction 9 also states:

> The law requires that this case be tried solely on the evidence and testimony that was offered before the Board of Industrial Insurance Appeals. This means that the parties are not permitted to bring witnesses into court and have them testify before you. The evidence that you are to consider is limited to that contained in the record.

The court instructed the jury on the material findings and decision of the Board. Jury instruction 7 states:

> This is an appeal from the findings and decision of the Board of Industrial Insurance Appeals. The Board made the following material findings of fact:
>
> 1. Brandon A. Afoa sustained an industrial injury on December 26, 2007 and as a result has paralysis from T-9 down, internal injuries, and right arm nerve damage.
>
> 2. The December 26, 2007 industrial injury proximately caused Mr. Afoa to need assistance in activities of daily living along with frequent changing of bags and frequent changes of position in bed.
>
> 3. Through January 30, 2014, the assistance Mr. Afoa needed on a daily basis is best quantified as the 16 hours per day which the Department of Labor and Industries is paying.
>
> By informing you of these findings the court does not intend to express any opinion on the correctness or incorrectness of the Board's findings.

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[6] Jury instruction 1 further states:

> You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

Jury instruction 8 addresses the burden of proof:

The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable and it is for you to determine whether it is rebutted by the evidence. The burden of proof is on Brandon Afoa to establish by a preponderance of the evidence that the decision is incorrect.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

Jury instruction 11 defines "proper and necessary" attendant services:

Attendant services are proper and necessary health care services provided to maintain the injured worker in his or her residence. The Department covers proper and necessary attendant services that are provided consistent with the injured worker's needs, abilities, and safety. Only services that are necessary due to the physical restrictions caused by the accepted industrial injury are covered. Examples of covered services include:

- Bathing and personal hygiene;
- Dressing;
- Administration of medications;
- Specialized skin care, including changing or caring for dressing or ostomies;
- Tube feeding;
- Feeding assistance (not meal preparation);
- Mobility assistance, including walking, toileting and other transfers;
- Turning and positioning;
- Bowel and incontinent care; and
- Assistance with basic range of motion exercises.

Not covered are services that further the everyday environmental needs of the injured worker that are unrelated to the medical care of the injured worker. Examples include: housecleaning, laundry, shopping, meal planning and preparation, transportation of the injured worker, errands for the injured worker, recreational activities, yard work, and child care.

The jury found the Board was correct in deciding Afoa needed only 16 hours a day for in-home attendant care services. The jury answered "yes" in response to the following question:

> Was the Board of Industrial Insurance Appeals correct in deciding that through January 30, 2014, the assistance Mr. Afoa needed on a daily basis is best qualified as 16 hours per day?

Motion for New Trial

Afoa filed a motion for a new trial. Afoa argued the IIA violated his state constitutional right to a jury trial under the Washington State Constitution and the separation of powers doctrine. Afoa asserted he was entitled to present the "testimony of his caregivers and of the Department's witnesses, with testimony not limited to that which was heard at the Board of Industrial Insurance Appeals." The superior court denied the motion for a new trial. The court entered judgment on the jury verdict. Afoa appeals.

Constitutional Right to a Jury Trial

Afoa claims the statutory provision of the IIA that limits the evidence in a jury trial to the certified Board record violates his constitutional right to a jury trial guaranteed by article I, section 21 of the Washington Constitution.

Whether a statute is constitutional is a question of law that we review de novo. Kitsap County v. Mattress Outlet, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005). A statute is presumed constitutional. The burden is on the party challenging the statute to prove beyond a reasonable doubt that the statute is unconstitutional. Island County v. State, 135 Wn.2d 141, 146, 955 P.2d 377 (1998); Bird v. Best Plumbing Grp., LLC, 175 Wn.2d

756, 768, 287 P.3d 551 (2012); State ex rel. Peninsula Neigh. Ass'n v. Dep't of Transp., 142 Wn.2d 328, 335, 12 P.3d 134 (2000).

The legislature enacted the IIA in 1911. LAWS OF 1911, ch. 74. The adoption of the IIA "was the product of a grand compromise" between employers and workers. Birklid v. Boeing Co., 127 Wn.2d 853, 859, 904 P.2d 278 (1995); Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 572, 141 P.3d 1 (2006).

Before adoption of the IIA, an injured worker could sue an employer "in only a limited number of cases; cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workman." State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 196, 117 P. 1101 (1911). Under the common law, no remedy at all was afforded "[f]or the greater number of" industrial injuries. Clausen, 65 Wash. at 196.

The IIA is a no-fault compensation system that gives "sure and certain relief" for injured workers "regardless of questions of fault and to the exclusion of every other remedy." RCW 51.04.010. Employers agreed to limited liability "for claims that might not have been compensable under the common law." Cowlitz Stud Co., 157 Wn.2d at 572. "In exchange, workers forfeited common law remedies." Cowlitz Stud Co., 157 Wn.2d at 572.

The legislature created a new system of worker compensation benefits that were unavailable at common law and did not exist before adoption of the IIA in 1911. The legislature made the IIA the exclusive remedy and abolished civil actions for workplace injury negligence. RCW 51.04.010; Clausen, 65 Wash. at 169-70, 175; Dennis v. Dep't

of Labor & Indus., 109 Wn.2d 467, 469-70, 745 P.2d 1295 (1987).[7] RCW 51.04.010 states:

> 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.

Under the Washington Constitution, the superior court exercises appellate jurisdiction "as may be prescribed by law." CONST., art. IV, § 6. Because the legislature expressly abolished the jurisdiction of state courts over civil actions for workplace injuries, the Department has original jurisdiction under the IIA for workplace injuries. RCW 51.04.010; Dougherty v. Dep't of Labor & Indus., 150 Wn.2d 310, 314, 76 P.3d 1183 (2003). The IIA gives the superior court appellate jurisdiction over Board decisions. RCW 51.52.110; Dougherty, 150 Wn.2d at 314. In Dougherty, the Washington Supreme Court held that under the IIA, state court "original jurisdiction over

[7] The statutory bar to sue an employer is subject to two exceptions. Under RCW 51.24.020, an employee may sue the employer for deliberately injuring the employee. Under RCW 51.24.030(1), an employee may sue a third party for personal injury damages.

workplace injuries was abolished when the Washington legislature enacted" the IIA. Dougherty, 150 Wn.2d at 314.

> The act declared that "all phases of the premises are withdrawn from private controversy . . . 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 act provided."

Dougherty, 150 Wn.2d at 314[8] (quoting LAWS OF 1911, ch. 74, § 1; RCW 51.04.010).

The IIA governs appeals to the superior court from the decision of the Board. RCW 51.52.115 states the superior court acts in an appellate capacity, review is de novo, and the evidence is limited to the certified Board record. City of Bellevue v. Raum, 171 Wn. App. 124, 139, 286 P.3d 695 (2012); Elliott v. Dep't of Labor & Indus., 151 Wn. App. 442, 445-46, 213 P.3d 44 (2009). RCW 51.52.115 gives either party the right to request a jury trial on "the exact findings of the board." Elliott, 151 Wn. App. at 445-46; Lewis v. Simpson Timber Co., 145 Wn. App. 302, 315-16, 189 P.3d 178 (2008). The court or the jury address only issues of law or fact that were included in the notice of appeal to the Board and the proceedings before the Board. RCW 51.52.115; Elliott, 151 Wn. App. at 446. RCW 51.52.115 states:

> Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon

[8] *Alteration in original.*

> the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the superior court shall refer the same to the department with an order directing it to proceed in accordance with the findings of the court: PROVIDED, That any award shall be in accordance with the schedule of compensation set forth in this title. In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court.

RCW 51.52.115 clearly prohibits "evidence or testimony other than, or in addition to," the certified record filed by the Board. " '[C]ounsel for the litigants adopt unique "role playing" capacities and "read" their respective parts to the jury, in the same manner as they would when reading a witness' deposition." Lewis, 145 Wn. App. at 316 (quoting Buffelen Woodworking Co. v. Cook, 28 Wn. App. 501, 503, 625 P.2d 703 (1981)).

Article I, section 21 of the Washington State Constitution states, "The right of trial by jury shall remain inviolate." The statutory prohibition against witness testimony does not violate the state constitutional right to a jury trial.

In Clausen, the Washington Supreme Court held adoption of the IIA was a constitutional exercise of police power. Clausen, 65 Wash. at 177-78, 195. Because the legislature abolished civil actions for workplace injuries when it enacted Title 51 RCW, the court rejected the argument that the IIA violated the right to a jury trial under article I, section 21 of the state constitution. Clausen, 65 Wash. at 210-11, 212. In State v. Mountain Timber Co., 75 Wash. 581, 582-84, 135 P. 645 (1913), the court adhered to the decision in Clausen and rejected the argument that the IIA violated the Seventh Amendment to the United States Constitution and the right to a jury trial under

article I, section 21 of the state constitution. The United States Supreme Court affirmed. Mountain Timber Co. v. State, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917). The Supreme Court held the IIA does not violate the Seventh Amendment right to a trial by jury because "[a]s between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury." Mountain Timber, 243 U.S. at 235.

Afoa cites Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989), and Dacres v. Oregon Railway & Navigation Co., 1 Wash. 525, 20 P. 601 (1889), to argue that limiting the evidence to the certified Board record violates his state constitutional right to a jury trial. Neither case supports his argument.

In Sofie, the court addressed whether the statute that limited noneconomic damages in a personal injury or wrongful death action, RCW 4.56.250, violated the right to a jury under article I, section 21 of the Washington Constitution. Sofie, 112 Wn.2d at 638. In analyzing the right to a jury trial under article I, section 21, the court examined "the right as it existed at the time of the constitution's adoption in 1889" to determine the scope of the right to a jury for the cause of action. Sofie, 112 Wn.2d at 645. The court held RCW 4.56.250 violated the state constitutional right to a jury determination of the amount of noneconomic damages in a tort cause of action. Sofie, 112 Wn.2d at 648-50. The court states only the jury has the power under the constitution " 'to weigh the evidence and determine the facts—and the amount of damages in a particular case is an ultimate fact.' " Sofie, 112 Wn.2d at 646 (quoting James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). "Washington has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic

damages," and article I, section 21 protects the jury's role to determine damages. Sofie, 112 Wn.2d at 648.

> The Legislature has the power to shape litigation. Such power, however, has limits: it must not encroach upon constitutional protections. In this case, by denying litigants an essential function of the jury, the Legislature has exceeded those limits.

Sofie, 112 Wn.2d at 651.

By contrast, the court expressly distinguished the holding in Sofie from the IIA. Citing Mountain Timber, 75 Wash. at 583, the Washington Supreme Court states the legislature had the authority to abolish a cause of action and instead, adopt a "mandatory industrial insurance scheme." Sofie, 112 Wn.2d at 651. Therefore, "if the cause of action is completely done away with, then the right to trial by jury becomes irrelevant. Since the right attaches to civil trials, there can be no right—and no constitutional violation—if no civil trial is available." Sofie, 112 Wn.2d at 651.

In Dacres, the court held a statute that allowed an appraiser to determine the value of animals killed or maimed by railroad companies was unconstitutional because the legislature "has no power to deprive any person or corporation of the right of trial by jury in a common-law action" for damages. Dacres, 1 Wash. at 527-29. But unlike in Dacres, the legislature had the authority to abolish the common law civil cause of action for workplace injuries in exchange for adopting a new statutory scheme that gives injured workers "sure and certain relief . . . regardless of questions of fault and to the exclusion of every other remedy." RCW 51.04.010; Clausen, 65 Wash. at 177-78, 195.[9]

[9] Afoa also cites Allison v. Department of Labor & Industries, 66 Wn.2d 263, 401 P.2d 982 (1965). Allison did not address the constitutional right to a jury trial or the presentation of witness testimony. In Allison, the Washington Supreme Court held the Department was entitled to a new trial in a worker compensation case because the evidence established two jurors were biased in favor of the plaintiff. Allison, 66 Wn.2d at 265.

We hold the IIA and the limitation on presentation of evidence and testimony does not violate the right to a jury trial guaranteed by article I, section 21.

Separation of Powers

Afoa also claims RCW 51.52.115 violates the separation of powers doctrine. Afoa asserts limiting the evidence to the certified Board record conflicts with the civil rule that provides the court shall allow jurors to pose questions to witnesses. See CR 43(k). Because an IIA appeal to superior court is a special proceeding under CR 81(a), we disagree.

Under the separation of powers doctrine, the fundamental function of each branch of government must remain inviolate, and one branch may not threaten the independence or integrity of another. Putman v. Wenatchee Valley Med. Ctr., PS, 166 Wn.2d 974, 980, 216 P.3d 374 (2009).

The judicial branch has the inherent power to promulgate court rules. Putman, 166 Wn.2d at 980. CR 81(a) states the Civil Rules shall govern all civil proceedings "[e]xcept where inconsistent with rules or statutes applicable to special proceedings." In Putman, the court defined "special proceedings" as "those proceedings created or completely transformed by the legislature." Putman, 166 Wn.2d at 982. "This standard protects the separation of powers" doctrine by preserving the right to adopt court rules for traditional actions and allowing "the legislature to set rules for newly created proceedings." Putman, 166 Wn.2d at 982. The court cites as examples of special proceedings "actions unknown to common law (such as attachment, mandamus, or certiorari)" and proceedings "where the legislature has exercised its police power and entirely changed the remedies available (such as the workers' compensation system)."

Putman, 166 Wn.2d at 982. The Washington Supreme Court states the IIA " 'took away from the workman his common-law right of action for negligence' and '[i]n its place it provided for industrial insurance,' thereby 'creating the right of the workman to compensation' from the workers' compensation fund." Putman, 166 Wn.2d at 982[10] (quoting Lane v. Department of Labor & Industries, 21 Wn.2d 420, 428, 151 P.2d 440 (1944)).

We hold RCW 51.52.115 does not violate the separation of powers. The superior court did not err in denying Afoa's request to allow the jury to pose questions to witnesses under CR 43(k).

We affirm the judgment on the jury verdict that affirms the decision of the Board.

WE CONCUR:

[10] Alteration in original.

APPENDIX B

Court of Appeals
Order Denying Motion for
Reconsideration

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

BRANDON APELA AFOA, Appellant, v. WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 76130-7-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Brandon Afoa filed a motion for reconsideration of the opinion filed on May 29, 2018. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

APPENDIX C

Wash. Const. Article I § 21, RCW 51.52.115, and Civil Rule 43

granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

SECTION 13 HABEAS CORPUS. The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety requires it.

SECTION 14 EXCESSIVE BAIL, FINES AND PUNISHMENTS. Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

SECTION 15 CONVICTIONS, EFFECT OF. No conviction shall work corruption of blood, nor forfeiture of estate.

SECTION 16 EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided,* That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use. [**AMENDMENT 9,** 1919 p 385 Section 1. Approved November, 1920.]

Original text — Art. 1 Section 16 EMINENT DOMAIN — *Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into the court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.*

SECTION 17 IMPRISONMENT FOR DEBT. There shall be no imprisonment for debt, except in cases of absconding debtors.

SECTION 18 MILITARY POWER, LIMITATION OF. The military shall be in strict subordination to the civil power.

SECTION 19 FREEDOM OF ELECTIONS. All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

SECTION 20 BAIL, WHEN AUTHORIZED. All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature. [**AMENDMENT 104,** 2010 Engrossed Substitute House Joint Resolution No. 4220, p 3129. Approved November 2, 2010.]

Original text — Art. 1 Section 20 BAIL, WHEN AUTHORIZED — *All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great.*

SECTION 21 TRIAL BY JURY. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

SECTION 22 RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [**AMENDMENT 10,** 1921 p 79 Section 1. Approved November, 1922.]

Original text — Art. 1 Section 22 RIGHTS OF ACCUSED PERSONS — *In criminal prosecution, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public*

RCW 51.52.115

Court appeal—Procedure at trial—Burden of proof.

Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW **51.52.110**: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the superior court shall refer the same to the department with an order directing it to proceed in accordance with the findings of the court: PROVIDED, That any award shall be in accordance with the schedule of compensation set forth in this title. In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court.

[**1961 c 23 § 51.52.115.** Prior: **1957 c 70 § 62; 1951 c 225 § 15;** prior: (i) 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. (ii) **1949 c 219 § 6; 1939 c 184 § 1;** Rem. Supp. 1949 § 7697-2.]

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TAKING OF TESTIMONY

(a) Testimony.

(1) Generally. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(2) Multiple Examinations. When two or more attorneys are upon the same side trying a case, the attorney conducting the examination of a witness shall continue until the witness is excused from the stand; and all objections and offers of proof made during the examination of such witness shall be made or announced by the attorney who is conducting the examination or cross examination.

(b) and (c) (Reserved. See ER 103 and 611.)

(d) Oaths of Witnesses.

(1) Administration. The oaths of all witnesses in the superior court

(A) shall be administered by the judge;

(B) shall be administered to each witness individually; and

(C) the witness shall stand while the oath is administered.

(2) Applicability. This rule shall not apply to civil ex parte proceedings or default divorce cases and in such cases the manner of swearing witnesses shall be as each superior court may prescribe.

(3) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions.

(1) Generally. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(2) For injunctions, etc. On application for injunction or motion to dissolve an injunction or discharge an attachment, or to appoint or discharge a receiver, the notice thereof shall designate the kind of evidence to be introduced on the hearing. If the application is to be heard on affidavits, copies thereof must be served by the moving party upon the adverse party at least 3 days before the hearing. Oral testimony shall not be taken on such hearing unless permission of the court is first obtained and notice of such permission served upon the adverse party at least 3 days before the hearing. This rule shall not be construed as pertaining to applications for restraining orders or for appointment of temporary receivers.

(f) Adverse Party as Witness.

(1) Party or Managing Agent as Adverse Witness. A party, or anyone who at the time of the notice is an officer, director, or other managing agent (herein collectively referred to as "managing agent") of a public or private corporation, partnership or association which is a party to an action or proceeding may be examined at the instance of any adverse party. Attendance of such deponent or witness may be compelled solely by notice (in lieu of a subpoena) given in the manner prescribed in rule 30(b)(1) to opposing counsel of record. Notices for the attendance of a party or of a managing agent at the trial shall be given not less than 10 days before trial (exclusive of the day of service, Saturdays, Sundays, and court holidays). For good cause shown in the manner prescribed in rule 26(c), the court may make orders for the protection of the party or managing agent to be examined.

(2) Effect of Discovery, etc. A party who has served interrogatories to be answered by the adverse party or who has taken the deposition of an adverse party or of the managing agent of an adverse party shall not be precluded for that reason from examining such adverse party or managing agent at the trial. Matters admitted by the adverse party or managing agent in interrogatory answers, deposition testimony, or trial testimony are not conclusively established and may be rebutted.

(3) Refusal To Attend and Testify; Penalties. If a party or a managing agent refuses to attend and testify before the officer designated to take the party's deposition or at the trial after notice served as prescribed in rule 30(b)(1), the complaint, answer, or reply of the party may be stricken and judgment taken against the party, and the contumacious party or managing agent may also be proceeded against as in other cases of contempt. This rule shall not be construed:

(A) to compel any person to answer any question where such answer might tend to be incriminating;

(B) to prevent a party from using a subpoena to compel the attendance of any party or managing agent to give testimony by deposition or at the trial; nor

(C) to limit the applicability of any other sanctions or penalties provided in rule 37 or otherwise for failure to attend and give testimony.

(g) Attorney as Witness. If any attorney offers to be a witness on behalf of the attorney's client and gives

evidence on the merits, the attorney shall not argue the case to the jury, unless by permission of the court.

(h) Report or Transcript as Evidence. Whenever the testimony of a witness at a trial or hearing which was reported is admissible in evidence at a later trial, it may be proved by the certified transcript thereof.

(i) (Reserved. See ER 804.)

(j) Report of Proceedings in Retrial of Nonjury Cases. In the event a cause has been remanded by the court for a new trial or the taking of further testimony, and such cause shall have been tried without a jury, and the testimony in such cause shall have been taken in full and used as the report of proceedings upon review, either party upon the retrial of such cause or the taking of further testimony therein shall have the right, provided the court shall so order after an application on 10 days' notice to the opposing party or parties, to submit said report of proceedings as the testimony in said cause upon its second hearing, to the same effect as if the witnesses called by either party in the earlier hearing had been called, sworn, and testified in the further hearing; but no party shall be denied the right to submit other or further testimony upon such retrial or further hearing, and the party having the right of cross examination shall have the privilege of subpoenaing any witness whose testimony is contained in such report of proceedings for further cross examination.

(k) Juror Questions for Witnesses. The court shall permit jurors to submit to the court written questions directed to witnesses. Counsel shall be given an opportunity to object to such questions in a manner that does not inform the jury that an objection was made. The court shall establish procedures for submitting, objecting to, and answering questions from jurors to witnesses. The court may rephrase or reword questions from jurors to witnesses. The court may refuse on its own motion to allow a particular question from a juror to a witness.

[Originally effective July 1, 1967; amended effective January 1, 1977; April 2, 1979; September 1, 1988; October 1, 2002; September 1, 2006, September 1, 2010; April 28, 2015; September 1, 2015.]

BISHOP LAW OFFICES, P.S.

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Filing Petition for Review

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