98808-1

NO. 36567-1-III

COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON

JEREMY L. MATSON,

Appellant/Plaintiff,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent/Defendant.

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF PETITIONER

Jeremy L. Matson is an injured worker, covered under Title 51, RCW, who now seeks review of the decision of the Court of Appeals regarding his unconscionable wage order in his Labor & Industries claim.

CITATION TO COURT OF APPEALS DECISION

In a five page unpublished decision, Division III of our Court of Appeals affirmed a superior court grant of summary judgment finding that Mr. Matson had failed to timely appeal a Department of Labor & Industries wage order. That wage order set Mr. Matson's wage earning capacity at less than half of the state's minimum wage while disregarding statutory mandates to determine an injured worker's wage earning capacity in a "fair" and "reasonable" fashion. In so doing, Division III improperly reasoned that a department claims adjudicator need not be aware of the state's minimum wage when "fairly" determining an injured worker's wage earning capacity. This failure of reasoning justifies immediate review under RAP 13.4(b)(4), presenting an issue of substantial public interest that should be determined by the Supreme Court. Division III also improperly determined that the department would have had to make "too many inferential leaps" to recognize information timely submitted in writing by Mr. Matson's treating medical providers showing that he had full-time, supervisory and/or managerial wage earning capacity, both before and after

his industrial injury, as sufficient to put the Department on notice that it's unconscionably-low wage order determination might likely be incorrect, again justifying review under RAP 13.4(b)(4). Finally, Division III unfairly distinguished, confused and failed to apply the core legal holding of a long-standing Division I precedent, thereby misapplying res judicata doctrine and further justifying review under RAP 13.4(b)(2), the decision being in conflict with a published decision of the Court of Appeals. Mr. Matson therefore respectfully now petitions for review of *Matson v. Clean Green Spokane*, Defendant, and *The Department of Labor & Industries of the State of Washington*, Respondent, No. 365671-III (Wash. Ct. App. June 23, 2020), a copy of which is reproduced in the Appendix A attached hereto.

ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly conclude that Department of Labor & Industries claims adjudicators are allowed or imputed to be ignorant of this state's minimum wage while "fairly" determining the wage orders of injured workers?

2. Did the Court of Appeals correctly conclude that a wage order setting an injured worker's full-time wages of injury (i.e. "wage earning capacity" at time of injury) at a rate far below the legislatively-prescribed minimum wage, without a clear articulation of its wage and hour basis, is an acceptable adjudication which results in no manifest injustice?

3. Did the Court of Appeals disregard the central holding of *Somsak v. Criton Technologies/Health Tecna, Inc.*, 113 Wn. App. 84, 52 P.3d 43 (2003), thereby creating confusion as to the state of the law regarding the doctrine of res judicata?

STATEMENT OF THE CASE

On May 5, 2011 Jeremy L. Matson sustain an industrial injury when he fell off a 20-foot ladder while working full-time for his employer, fracturing his pelvis, coccyx and patella. (CABR 87)[1]. On May 18, 2011, the department allowed Mr. Matson's claim as compensable. (CABR 63)[2].

On September 29, 2011 the department issued a non-interlocutory wage order finding Mr. Matson's "wage for the job of injury is based on the monthly salary of $955.15." (CABR 63, 68-69)[3]. No hourly wage; number of hours per day; daily wage; or number of days worked per week was stated. *Id.* On October 19, 2011 Mr. Matson filed a timely protest to the department's September 29, 2011 wage order, asserting that he did not understand the basis of the department's wage order method and requesting

[1] Admitted at Exhibit F (CABR 86-91) by joint stipulation of the parties (CABR 63-66), number 18 (CABR 65).
[2] Joint stipulation of the parties, number 2 (CABR 63).
[3] Joint stipulation of the parties, number 4 (CABR 63).

clarification. (CABR 64)[4]. He asked the department to "please send me something that describes exactly how my wage was figured out, days, hours, months, I would really appreciated it." (CABR 73).

Many months later, on May 7, 2012, the department issued a further wage order, this time finding that Mr. Matson's wages "for the job of injury" is based upon "commission" of $776.29 per month. (CABR 82-3)[5]. This new wage order did not indicate that Mr. Matson earned "fixed" monthly wages, nor that he worked in an industry where wages are normally "fixed" by the month. *Id.* It did not state that Mr. Matson's wages were being set based on him being an exclusively seasonal, part-time or intermittent worker, nor based upon a similar worker's payroll. *Id.* It did not state that the true purpose of the order was to establish his "wage earning capacity." *Id.* It did not state that the department was computing his wage pursuant to RCW 51.08.178. *Id.* It did not state an hourly wage; number of hours per day; daily wage; or number of days worked per week. *Id.* It followed no proper or reasonable statutory formula, but it did state that Mr. Matson had 60 days to protest in writing. *Id.*

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[4] Joint stipulation of the parties, numbers 6 and 7; see also, Exhibit C (CABR 72-80), admitted by joint stipulation of the parties, number 18 (CABR 65).

[5] Admitted as Exhibit D by joint stipulation of the parties, number 18 (CABR 65).

RCW 51.08.178(1) expressly requires that if an injured worker's wages are not "fixed by the month," then they "shall be" set by multiplying the worker's daily wage by one of various available multipliers, depending upon how many days per week the worker normally worked. This statute also specifies that the "daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed." This statute commands the department that "[t]he number of hours the worker is normally employed shall be determined... in a fair and reasonable manner, which may include averaging the number of hours worked per day." This same statute, later in subsection (4), again mandates that the department compute Mr. Matson's wages on a "reasonable" and "fair" basis, by using a similar worker's payroll, whenever appropriate.

It is undeniable that the department's May 7, 2012 wage order is in derogation of legislative intent, failed the statutory commands of RCW 51.08.178, results in an unconscionably-low benefit entitlement for a full time worker and treats Mr. Matson differently than other injured workers. Sales "commissions" are nowhere directly mentioned within RCW 51.08.178, are not generally "fixed" in the labor market, and at no time did the department's wage order communicate the proper legal standard that Mr. Matson's "wage earning capacity" was at issue. Nothing in the May 7,

2012 wage order corrected the incomprehensibility of the department's early September 29, 2011 order which Mr. Matson did not understand.

Predictably, Mr. Matson did not personally protest again, which is to say he didn't beg even more abusive wage order adjudication. Then, on July 19, 2013 the department closed Mr. Matson's claim. (CABR 65)[6]. On August 3, 2015 Mr. Matson filed an application to reopen his claim, (CABR 65)[7], which was granted on August 7, 2015, effective June 19, 2015. (CABR 65)[8]. Finally, on December 20, 2016 the department issued an order asserting that it could not review its May 7, 2012 wage order due to failure of timely protest. (CABR 65)[9].

But, Mr. Matson has maintained throughout his appeals that the treatment record of Dr. John F. Long received by the department on June 5, 2012, contains information sufficient to constitute a timely legal protest to the May 7, 2012 wage order. (CABR 64)[10]. Similarly, the treatment record of Dr. Terrence Rempel, received by the department on June 8, 2012, is also a timely and valid legal protest. (CABR 64-5)[11]. Dr. Long's treatment note

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[6] Joint stipulation of the parties, number 13 (CABR 65).
[7] Joint stipulation of the parties, number 14 (CABR 65).
[8] Joint stipulation of the parties, number 15 (CABR 65).
[9] Joint stipulation of the parties, number 16 (CABR 65).
[10] Joint stipulation of the parties, number 11 (CABR 64).
[11] Joint stipulation of the parties, number 12 (CABR 64-65).

was admitted as Exhibit F in the board's record (CABR 64-5).[12] Dr. Rempel's treatment note was admitted as Exhibit G (CABR 64-5)[13]. Exhibit F is located at CABR 86 through 91 while Exhibit G is located at CABR 92 through 94. Both contain contents which speak to Mr. Matson's wage earning capacity, before and after his industrial injury. The Court of Appeals reasoned[14] that although these records "mentioned in passing" that Mr. Matson had previously worked full time, this was ineffective to communicate to a department adjudicator that a wage order showing just $776.29, less than half the minimum wage for full time workers like Mr. Matson, likely understated his actual wage earning capacity.

Dr. Long's treatment note indicates that Mr. Matson was working "full time doing carpet cleaning and running a carpet business and he also[,] I believe, has another job," although Mr. Matson was hurting with various work activities and also by the end of the day (CABR 87). Dr. Long indicated Mr. Matson's "background" was working "40+" hours per week (CABR 88). No reasonable person can conclude that a worker having such

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[12] Joint stipulation of the parties, numbers 11 and 18 (CABR 64, 65).
[13] Joint stipulation of the parties, numbers 12 and 18 (CABR 64-65).
[14] The Court of Appeals never actually articulated the purpose of a wage order within an Industrial Insurance Act case, which is to establish a worker's "wage earning capacity." The concept of a "wage earning capacity" is never stated or explained in the decision under petition for review, so the "reasoning" of that decision was never likely to reach a conceptually-correct result under the law, and then didn't.

a dedicated, full-time work ethic and history had only a sub-minimum wage earning capacity of just $776.29 per month. The Court of Appeals disagreed, reasoning that Mr. Matson failed to tell the department's adjudicator what the minimum wage was at the time of his injury.

Similarly, Dr. Rempel's treatment note lists Mr. Matson's "OCCUPATIONAL HISTORY:" as being "self-employed with a carpet cleaning service. Job of injury: carpet cleaning and window cleaning. Prior work: Carpet cleaning, supervisor, manager"(CABR 93). Dr. Rempel noted that the "PLAN" was for Mr. Matson to "return" to work on a full-time, unrestricted basis (CABR 94). Division III again excused the department because its adjudicators aren't imputed to know the law.

Mr. Matson appealed the department's December 20, 2016 order to the board, contending that either and/or both of the two above-stated medical provider reports were legally-operative as protests; and as well that the May 7, 2012 wage order was so vague he could not understand it, so in all fairness, he should not be bound by it. (CABR 103-105). Without properly analyzing the core concept that department wage orders must accurately reflect an injured worker's "wage earning capacity" (which may differ from their wage at the time of injury), the board found that the medical records of Drs. Long and Rempel did not constitute protests so the May 7, 2012 wage order was final and binding (CABR 4 and 33-43). Superior court

and the Court of Appeals affirmed, both overlooking or perhaps unaware that there is a critical distinction between wages of injury and wage earning capacity held by the worker at time of industrial injury.

In addition, no court below has appropriately responded to Mr. Matson's constant appeal assertion that res judicata cannot apply to the department's May 7, 2012 wage order because it is fundamentally unfair and works a manifest injustice. Normally, courts are required to "show an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact that penetrates beneath the generality of ultimate conclusions, together with a knowledge of the standards applicable to the determination of those facts," *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 40, 395 P.2d 633 (1964), but the Court of Appeals here held neither the superior court, nor itself, to that legal standard.

Supreme Court review is now appropriate under RAP 13.4(b)(2) because the Court of Appeals misapplied, a previously-published decision of the Court of Appeals, *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wash.App. 84, 52 P.3d 43 (2002) (res judicata does not apply to a department wage order where the wage order fails to clearly detail the basis of the department's findings [according to statutory requirements]) and results in an inadequate appellate review under the rule of *Groff*, cited supra.

Supreme Court review is also appropriate under RAP 13.4(b)(4) because a significant question of law and public interest is presented, i.e., whether Department of Labor & Industries adjudicators are legally charged with a knowledge of this state's minimum wage when adjudicating an injured worker's wage earning capacity "fairly" and "reasonably" pursuant to RCW 51.08.178.

ARGUMENT

A. The Court of Appeals Misapplied the Law in Respect of Injured Worker Protest Rights.

The true test for whether a protest exists in an Industrial Insurance Act matter is whether a written statement has been presented in writing to the Department of Labor & Industries which an experienced claims adjudicator would understand to be in potential conflict with a department determination that remains eligible for reconsideration. *In Re: Mike Lambert,* 91 0107, 1991 WL 11008451, at *1 (Wash. Bd. Of Indus. Ins. Appeals Jan. 29, 1991) (a protest requires no use of "magical" statutory words, special formatting or observation of other formalities such as even requesting reconsideration); *Boyd v. City of Olympia*, 1 Wash. App. 2d, 17, 33, 403 P.3d 956 (Div. 1, 2017) (proper test to determine if writing was "calculated to put the department on notice" is an objective one).

This Supreme Court should now clarify that anything brought to the attention of the claims adjudicator, deposited in writing to the department's claim file, must be carefully considered. See, e.g., *Nelson v. Dep't of Labor & Indus.*, 9 Wn.2d 621, 629-630, 115 P.2d 1014 (1941) (observing that because our Industrial Insurance Act is "particularly framed to avoid legal terminology," with injured workers not intended to need lawyers, anything brought to the adjudicator's attention in the claim file is to be fairly considered). The Act is to serve workers at all levels of educational and mental sophistication and with all manner of injuries and diseases. The onus of care is, therefore, upon the department.

Here, the Court of Appeals misapplied the law by stating that timely submitted information that was conceptually contrary to the department's May 7, 2012 wage order did not qualify as a valid protest because it only mentioned Mr. Matson's wage earning capacities "in passing." In so stating, the Court of Appeals abrogated the rules of this Supreme Court in *Shafer v. Department of Labor and Industries,* 166 Wn.2d 710 (2009) (attending provider's writings qualify to be considered as protests) and also in *Taylor v. Dep't of Labor & Indus.*, 175 Wash. 1, 26 P.2d 391 (1933) (worker's appeal period is tolled until the issues raised in an attending physicians' written submissions are addressed). This Supreme Court should rule that a "mention in passing" is plainly enough for a careful adjudicator.

B. The Minimum Wage Law Reflects Washington's Public Policy and is Always Relevant to Wage Order Considerations.

RCW 49.46.005(1) provides that "the establishment of a minimum wage for employees is a subject of *vital and imminent* concern to the people of this state..." (emphasis added). This has been the case for a half century. 1961 ex.s. c 18 § 1. As noted at RCW 49.46.005(2), "the people have repeatedly amended [Washington's minimum wage act] to establish and enforce modern *fair* labor standards..." (emphasis added). The department has also been charged with its enforcement since its adoption. 1959 c 294 § 5. The department even publishes the prevailing minimum wage online by year for all to see.[15] Thus, it is absurd that Division III concluded that department claims adjudicators are excused from being fully aware of the prevailing minimum wage standards as they are determining each injured worker's wage order. Even criminals are charged with knowing the law.

But aside from the Minimum Wage Act itself, neither does the Industrial Insurance Act forgive a failure to make a "fair" and "reasonable" wage order determination. RCW 51.08.178(1) expressly commands computation of an injured worker's monthly wages in a "fair" and "reasonable" manner. Why? Because that computation becomes the basis

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[15] See at https://lni.wa.gov/workers-rights/wages/minimum-wage/history-of-washington-states-minimum-wage

of workers' compensation benefits. This statute also demands that "in cases where the worker's wages are not fixed by the month[16], they shall be determined by multiplying the daily wage" by a multiple reflecting the number of days worked per week. It requires that the "number of hours the worker is normally employed *shall* be determined by the department in a *fair and reasonable* manner..." RCW 51.08.178(1) (emphasis added). None of this was done by the department in this case.

But if the department could not "reasonably and fairly" calculate Mr. Matson's wages under RCW 51.08.178(1), then under subsection (4) "the monthly wage *shall* be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed." (emphasis added). This was not done either.

Given this state's compelling public policy to protect and enforce at least a minimum wage, this Supreme Court should now hold that any wage order establishing a wage earning capacity for a non-volunteer worker at a rate less than a minimum wage equivalent is presumptively unfair and unreasonable. No court and no department adjudicator should ever forget that the "overarching objective" of the Act is to reduce to a minimum "the suffering and economic loss arising from injuries and/or death occurring in

[16] Sales commissions are not "fixed" wages in any sense of common parlence.

the course of employment." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 802 16 P.3d 583 (2001) (referencing RCW 51.12.010). Division III forgot to mention this in its inadequately-reasoned determination below.

C. The Court of Appeals Failed to Fully Consider or Correctly Apply Res Judicata Doctrine.

1) The Department's May 7, 2012 Wage Order is Not Entitled to Res Judicata Treatment.

Res judicata, or claim preclusion, is an affirmative defense that bars relitigation of claims and issues that were litigated, or could have been, in a prior action. This doctrine normally applies to the issues encompassed within department orders. *Marley v. Dep't of Labor & Indus.*, 125 Wash.2d 533, 537 886 P.2d 189 (1994); *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997). However, "[f]undamental fairness requires that a claimant must be clearly advised of the issue" being decided before reconsideration is barred by res judicata. *Somsak*, 113 Wash.App. at 92 (citing *King v. Dep't of Labor & Indus.*, 12 Wash. App. 1, 4, 528 P.2d 271 (1974)). Fundamental fairness also requires that the application of res judicata "does not work an injustice on the party against whom it is to be applied." *Winchell's Donuts v. Quintana*, 65 Wn.App. 525, 529-30, 828 P.2d 1166 (1992); *Malland v. Dep't of Retirement Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985) (additional citation omitted)). Whether res judicata

bars a party pursuing an action is to be decided as a matter of law. *Kuhlman v. Thomas*, 78 Wash.App. 115, 119-20, 897 P.2d 365 (1995).

a) The Department's May 7, 2012 Wage Order was Timely Protested.

"[T]he purpose behind RCW Title 51 is to insure against the effective loss of **wage-earning capacity.**" *Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 233, 905 P.2d 1220 (1995) (citing *Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 197, 120 P.2d 1003 (1942)) (emphasis added). "Wage-earning capacity means sustainable wage-earning capacity." *Adams*, 128 Wn.2d at 233. It obviously doesn't refer only to "commissions," although those may be a part of the department's consideration. The proper focus of every wage order must remain on the injured worker's pre-injury, wage-earning capacity. *Dep't of Labor & Indus. v. Avundes*, 140 Wash.2d 282, 287 996 P.2d 593, 596 (Wash. 2000) ("This statute should be construed liberally in a way that is most likely to reflect a worker's lost earning capacity, with doubts resolved in favor of the worker") (citing *Double D. Hop Ranch v. Sanchez*, 133 Wash.2d 793, 798, 947 P.2d 727, 952 P.2d 590 (1997). Unfortunately, this foundational concept was nowhere properly recognized within the department's May 7, 2012 wage order, nor by the Court of Appeals. This Supreme Court should now restate that "fundamental fairness," whenever the department adjudicates an all-important wage order, demands a close attention to the

injured or sick worker's "wage earning capacity," not just the wages paid at the time of injury, which may differ.

Mr. Matson's treating occupational medical providers, Drs. John F. Long and Terrance Rempel, were careful to address Mr. Matson's wage earning capacity in their treatment records. Their records are valid as timely protests if the information contained therein was of such a nature as would have objectively informed an experienced department claims adjudicator that its May 7, 2012 wage order was potentially incorrect. *In Re: Mike Lambert,* 91 0107, 1991 WL 11008451, at *1 (Wash. Bd. Of Indus. Ins. Appeals Jan. 29, 1991) (a protest requires no use of "magical" statutory words, special formatting or observation of other formalities such as specifically requesting reconsideration); *Boyd v. City of Olympia*, 1 Wash. App. 2d, 17, 33, 403 P.3d 956 (Div. 1, 2017) (proper test to determine if writing was "calculated to put the department on notice" is an objective one). The Supreme Court will please note that Division III failed to articulate this "potentially incorrect" standard.

As Mr. Matson has long argued below, there is little comprehensible medical purpose for why a treating physician would ever need to record in standard medical treatment notes that a patient previously worked in full-time work; "40+" hours per week; or as a supervisor; or had started his own business, etc., unless to communicate relevant "wage earning capacity"

information to the department. In occupational medicine records, this information is used specifically to notify the department of key "background" or "OCCUPATIONAL HISTORY" facts which bear on the injured worker's current and previous wage-earning capacity so that the department can then make indemnity payments and vocational determinations thereupon. Here, Drs. Long and Rempel documented exactly these critical facts regarding Mr. Matson's specific wage-earning capacity, so their timely-filed treatment records are valid protests.

b) The Department's Wage Order is Impermissibly Vague with Respect to Statutory Requirements, So Did Not Clearly Advise Mr. Matson.

The department's wage orders of September 29, 2011 and May 7, 2012 are very comparable in their contents and legal deficiencies. Both omit or otherwise defy the injured worker to guess at the department's statutorily-mandatory considerations. The undisputed facts show that Mr. Matson could not understand the first of these two similarly-vague wage orders. The most reasonable inference is that he therefore could not and did not understand the second wage order either.

The May 7, 2012 order doesn't follow any known statutory or case law formula, so it is both subjectively and objectively vague. The objective deficiencies here are similar to the deficiencies found by Division One in *Somsak*. In that case, the injured worker had an open industrial insurance

act claim for a period of years. *Somsak*, 113 Wn. App. at 89. Her claim closed by unprotested order of March 8, 1989. *Id.* at 92. There was then a subsequent reopening and additional orders were issued in 1996, reflecting "adjustments made to her prior monthly benefits," neither of which orders were protested. *Id.* However, neither the closing order nor the two wage benefit adjustment orders detailed the underlying factual basis for Somsak's time loss compensation rate. *Id.* Then, on February 5, 1998, the department finally issued a detailed wage order discussing Somsak's hourly wage rate, hours per day worked, and days per week worked. *Id.* at 89. Somsak protested because overtime hours and healthcare benefits were not included. *Id.* at 89-90. Somsak's complaints were litigated up through the board to a superior court jury which found Somsak entitled to have 48 hours per month in overtime and healthcare benefits added to her wage order. *Id.* at 91. Somsak's self-insured employer, Criton, appealed, arguing that her protest and subsequent appeals were time-barred under the doctrine of res judicata, based upon the closing order in 1989 and the two time loss adjustment orders of 1996. *Id.* Division I of the Court of Appeals disagreed and held that "fundamental fairness requires that a claimant must be clearly advised of the issue before it will be barred by the doctrine of res judicata." *Id.* at 92 (internal citations omitted). Further, because the orders Somsak failed to protest did not state the hours she worked, the rate of her pay, or mention

her health care benefits, Division I found that the factual basis for Somsak's time loss benefits were "not encompassed within the terms" of the department's previous orders. *Id.* at 92-93. Thus, fundamental fairness prevented res judicata from attaching to those vague orders. *Id.* at 93.

Here Division III erred by attempting to distinguish the procedural history of Somsak without either appreciating or applying its core holding, which is that vague department wage orders cannot become final and binding where they result in injustice.

Just exactly like the three prior orders discussed in *Somsak*, the department's wage order of May 7, 2012 fails to discuss Mr. Matson's wages of injury in the mandatory statutory terms found within RCW 51.08.178(1), and alternatively, in terms of his "wage-earning capacity," as was discussed by our Supreme Court in *Avundes* and as animates the method of RCW 51.08.178(4). Because the May 7, 2012 order fails to set forth essential statutory and case law considerations, it does not "clearly advise" Mr. Matson. It is vague. Accordingly, res judicata cannot apply.

c) The Department's Wage Order is Fundamentally Unfair.

The department's May 7, 2012 wage order was statutorily improper, vague, and resulted in a determination which is so far below acceptable legal standards that Supreme Court should declare it to be fundamentally unfair.

CONCLUSION

Supreme Court should hold that a Department of Labor & Industries wage order must be adjudicated carefully, with full awareness of what constitutes a "fair" and "reasonable" wage for each worker, including by automatically considering the allowable minimum wage as a mandatory reference point. Where, as here, the Department has issued an substantively indefensible wage order that follows no semblance of a statutory formula found under RCW 51.08.178, that order too shall be treated as presumptively unfair, and courts should not under that circumstance give primacy to procedural considerations over substantive considerations (i.e., res judicata should not be applied). Here, the May 7, 2012 wage order should be remanded to the department for further consideration. Attorney fees should also be awarded to Mr. Matson pursuant to 51.52.130(1) and RAP 18.1(b).

RESPECTFULLY SUBMITTED this 23rd day of July, 2020.

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

JEREMY MATSON, Appellant, v. CLEAN GREEN SPOKANE, Defendant, and THE DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	)	No. 36567-1-III UNPUBLISHED OPINION

PENNELL, C.J. — Jeremy Matson appeals a wage order issued under the Industrial Insurance Act, Title 51 RCW. We affirm.

FACTS

Jeremy Matson suffered an industrial injury and applied for benefits from the Department of Labor and Industries. The Department allowed Mr. Matson's claim and

issued a wage order of $955.15 per month on September 29, 2011.[1] The September 2011 order informed Mr. Matson he had up to 60 days to file a protest, otherwise the decision would become final. Mr. Matson filed a timely protest. In it, he challenged the Department's wage calculation.

The Department issued a corrected wage order On May 7, 2012, lowering Mr. Matson's monthly wage to $776.29.[2] That order reflected the Department's conclusion that Mr. Matson's wages stemmed solely from commissions. The May 2012 order also restated the 60-day deadline for filing a protest. Mr. Matson did not respond. The Department closed Mr. Matson's claim on July 19, 2013.

On June 4 and 7, 2012, two of Mr. Matson's physicians forwarded treatment records to the Department. The records referenced Mr. Matson's employment status as full time. They also documented Mr. Matson's medical circumstances, progress, and treatment plan. None of the records referenced Mr. Matson's wages or the May 7, 2012, wage order. Nor did they suggest the Department should take any action inconsistent with the terms of the May 7 order.

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[1] The order also stated Mr. Matson's marital status was single, and he had one child. This was relevant to the benefit calculation under RCW 51.32.060 and .090.

[2] Again, the order stated Mr. Matson was single with one child.

More than three years later, on August 3, 2015, Mr. Matson filed an application with the Department to reopen his claim. He then asked the Department to reconsider the May 2012 wage order. The Department declined, reasoning the protest period had passed.

Mr. Matson unsuccessfully appealed the Department's denial of reconsideration to the board of industrial insurance appeals and then to superior court. He argued the June 2012 treatment records from his doctors to the Department constituted a timely protest. Neither the board nor the superior court agreed.

Mr. Matson appeals.

ANALYSIS

The sole issue on appeal is whether Mr. Matson was barred from challenging the May 2012 wage order based on the failure to file a timely protest under RCW 51.52.050 and .060.

Washington's Industrial Insurance Act requires a party aggrieved by a department order to protest the order within 60 days. RCW 51.52.050(1), .060(1)(a). The Act does not require protests to take any particular form; to be considered a protest, a communication need not contain magical words such as "protest" or "request for reconsideration." *Boyd v. City of Olympia*, 1 Wn. App. 2d 17, 29, 403 P.3d 956 (2017). Nor must a protest be submitted by the worker instead of a third party. RCW

51.52.050(2)(a) (A protest may be filed by the worker, beneficiary, employer, or other aggrieved person.). Rather, a communication qualifies as a protest if it reasonably puts the Department on notice that the worker is taking issue with some aspect of the Department's decision. *Boyd*, 1 Wn. App. 2d at 30-31.

The June 2012 treatment records do not qualify as protests. Though the records mentioned in passing that Mr. Matson had worked full time, this was insufficient to constitute a notice of protest. To side with Mr. Matson, we would have to rule the Department should have inferred that: (1) because Mr. Matson was working full time in June 2012, he was also working full time at the time of his injury, and (2) a wage order of $726.29 was insufficient to account for full-time work, even at minimum wage. This requires too many inferential leaps to meet the standard for reasonable notice. Even under the generous standard for protests under the Act, the treatment records submitted in Mr. Matson's case were insufficient to qualify as protests. Accordingly, we hold Mr. Matson failed to protest the May 2012 wage order within 60 days.

To overcome that failure, Mr. Matson cites to *Somsak v. Criton Technologies/Health Tecna, Inc.*, 113 Wn. App. 84, 52 P.3d 43 (2003). He claims that, as in *Somsak*, his wage order did not include information he needed to understand the Department's basis for its decision. Mr. Matson's reliance on *Somsak* is misplaced. *Somsak* turned on the

Department's failure to include information used to calculate the worker's wages in its initial orders, followed by revelation of this information in a subsequent order. The worker in *Somsak* filed a timely protest when she received the Department's final order and the information therein. *Id.* at 93. Here, there was no newly disclosed information for Mr. Matson to protest. His window for challenging the Department's May 2012 order therefore expired 60 days after issuance.

CONCLUSION

The order on appeal is affirmed. Mr. Matson's request for attorney fees is denied.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, C.J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON

JEREMY L. MATSON

Appellant/Plaintiff,

Vs.

THE DEPARTMENT OF LABOR

Respondent/Defendants.

NO: 36567-1-III

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this day the documents referenced below were filed and served in the manner indicated:

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