

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
12/7/2020 1:59 PM  
BY SUSAN L. CARLSON  
CLERK

No. 99027-1

---

**SUPREME COURT OF THE STATE OF WASHINGTON**

---

WILLIAM A. DORN,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

---

**ANSWER TO PETITION FOR REVIEW**

---

ROBERT W. FERGUSON  
Attorney General

Anastasia Sandstrom  
Senior Counsel  
WSBA No. 24163  
Office Id. No. 91018  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-3820

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES .....2

III. STATEMENT OF THE CASE .....2

    A. The Department Issued an Order Holding Dorn’s Claim  
    Open for More Treatment.....2

    B. The Board Determined the Department’s Order Was  
    Incorrect.....3

    C. At Superior Court, the Department Defended the  
    Decision of the Board .....3

    D. At Trial, Dorn Sought a Jury Instruction to Argue the  
    Department Had “Flipped” Its Position .....4

    E. The Trial Court Denied Dorn’s Motion for a New Trial  
    for Refusal to Give His Proposed Jury Instruction .....6

IV. ARGUMENT .....7

    A. Dorn Did Not Argue at Superior Court That the  
    Department Could Not Change Its Position.....7

    B. The Department’s Actions Follow RCW 51.52.110 and  
    the Decisions of This Court .....8

V. CONCLUSION .....12

## TABLE OF AUTHORITIES

### Cases

<i>Aloha Lumber Corp. v. Dep't of Labor &amp; Indus.</i> , 77 Wn.2d 763, 466 P.2d 151 (1970).....	1, 7, 10, 11
<i>Blue Chelan v. Dep't of Labor &amp; Indus.</i> , 101 Wn.2d 512, 681 P.2d 233 (1984).....	12
<i>Mills v. Dep't of Labor &amp; Indus.</i> , 72 Wn. App. 575, 865 P.2d 41 (1994).....	9
<i>VanHess v. Dep't of Labor &amp; Indus.</i> , 132 Wn. App. 304, 130 P.3d 902 (2006).....	9

### Statutes

RCW 43.22.030 .....	9
RCW 51.52.050(2)(a) .....	3
RCW 51.52.100 .....	9, 10
RCW 51.52.110 .....	passim
RCW 51.52.115 .....	3, 9

### Rules

CR 59 .....	6
RAP 2.5.....	8

## I. INTRODUCTION

The Department of Labor & Industries is not frozen into the position it takes in its initial orders. After hearing from 11 witnesses, the Board of Industrial Insurance Appeals decided against William Dorn and reversed a Department order. With this new information, the Department then agreed with the Board that this evaluation of the evidence was correct and defended the Board's order in superior court.

Although Dorn now claims the Supreme Court should accept review because the Department chose to defend the Board order, he never objected to the Department's defense of the Board's order at superior court. Instead, he sought to inform the jury that the Department had changed its position. He did not receive that jury instruction, but the court's instructions did allow him to argue to the jury that the Department made a decision that the employer appealed, which in turn allowed him to highlight to the jury that the Department had originally ruled for him. He does not now argue that his proposed jury instruction should have been given.

This case presents no issue of substantial public interest because this Court has already held in *Aloha Lumber Corp. v. Department of Labor & Industries*, 77 Wn.2d 763, 775-76, 466 P.2d 151 (1970), that the Department may determine the extent of its involvement in a superior

court appeal and that the role of the Office of the Attorney General is to act in a manner that best represents the interests of its client.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. A party waives an argument when it fails to object at trial. At the superior court, the Department argued in opening and closing statements that the Board's decision was correct, and Dorn did not object. Did Dorn waive the argument that the Department should not be permitted to argue in support of the Board in this appeal?
2. Under RCW 51.52.110, the Department is a necessary party in superior court appeals involving the state fund. If the Board overturns an order of the Department and another party appeals to superior court, is the Department entitled to defend the decision of the Board when the Department determines the Board was correct?

## **III. STATEMENT OF THE CASE**

### **A. The Department Issued an Order Holding Dorn's Claim Open for More Treatment**

In 2013, Dorn was injured at work and the Department allowed his claim for workers' compensation benefits. CP 46, 104-05. In February 2015, the Department closed his claim. CP 36. But later it decided to keep Dorn's claim open for more treatment. CP 37, 48. It also issued an order accepting two medical conditions on the claim: left shoulder sprain and thoracic sprain. CP 48. Dorn's employer, Colvico, Inc., appealed both orders to the Board. CP 49. Colvico was a state fund employer, not a self-insured employer. Pet. 3, 5-6, 8; CP 3.<sup>1</sup>

---

<sup>1</sup> The "AV" of claim number AV-49554 is linked to state fund claims, not self-insured claims.

**B. The Board Determined the Department's Order Was Incorrect**

At the Board, Colvico had the burden to prove the Department order was incorrect. RCW 51.52.050(2)(a). Colvico presented the testimony of six doctors and one lay witness. CP 34, 76, 127, 184, 229, 279, 326, 375. Dorn presented the testimony of himself, his wife, and two doctors. CP 34, 89, 103, 393, 419. After reviewing the evidence, the Board issued an order reversing the Department's order and finding Dorn's claim should be closed because he did not need additional medical treatment. CP 10, 32-33. Dorn appealed the Board's decision to superior court. CP 1-2.

**C. At Superior Court, the Department Defended the Decision of the Board**

At superior court, Dorn had the burden to prove the decision of the Board was incorrect. RCW 51.52.115. Before trial, Colvico's attorney withdrew, and Colvico did not participate in the trial. CP 474-76. When the Department reviewed the Board's decision, the weight of the evidence, including testimony not presented to the Department, was enough to convince the Department that it should support the Board's decision, which it did. RP Vol I at 3-5.

Before trial, Dorn moved in limine to address various issues. CP 477-82. He did not ask the superior court to rule that the Department was barred from changing positions at the superior court. *See* CP 477-82.

**D. At Trial, Dorn Sought a Jury Instruction to Argue the Department Had “Flipped” Its Position**

At trial, Dorn wanted to advise the jury that the Department defended its order to keep the claim open at the Board but that, at superior court, it defended the Board’s decision to close the claim. RP Vol. I at 3. He proposed a jury instruction as a vehicle to argue: “that the Department, by siding with the absent employer, has flipped its position about whether Mr. Dorn’s claim should be left open.” CP 487. The proposed jury instruction reads:

This litigation commenced when the Department of Labor and Industries issued a remain-open order. The employer, Colvico, appealed that decision to the Board of Industrial Insurance Appeals. The Board of Industrial Insurance Appeals agreed with Colvico and found that Mr. Dorn wasn’t in need of further treatment as of July 20, 2015.

CP 493.

The Department objected to the argument and jury instruction as irrelevant and prejudicial. RP Vol. I at 4-5. The superior court denied the request for the instruction:

I’m going to deny the motion. I don’t think it’s relevant as to the Department’s particular position. The issue here is whether the Board was correct in their decision, and that’s really what’s in front of the jury.

I don’t think even though the Department is here, there is no new evidence introduced. There is no ability to address the decision-making process, so I’m going to deny the motion.

RP Vol. I at 5. Dorn objected to the trial court's decision not to give the proposed instruction. RP Vol. II at 4-5.

The trial court also instructed the jury, without objection, that

- The only evidence it was to consider was the testimony in the Board Record. Ins. 1, 3; CP 527, 530;
- The Department's duty is to determine what benefits are to be provided to workers under the Industrial Insurance Act and to issue all orders related to claims under the Act. Ins. 2; CP 529;
- The Board is a separate state agency that is independent of the Department and its function is to review Department determinations when a party appeals. Ins. 2; CP 529;
- The only question before the jury was whether the Board's decision was correct that Dorn did not need medical treatment.

Jury Ins. 17; CP 521.

The court's instructions allowed Dorn to assert during his closing argument that the Department had issued an order in his favor because the instructions informed the jury that: (1) the Department issued an order, (2) the employer had appealed that order to the Board, (3) the Board found for the employer in that appeal, and (4) Dorn appealed the Board's decision to superior court. RP Vol. II at 7-8. The content of the Department order was



not introduced as evidence at the Board and was thus not presented to the jury.

In closing argument, Dorn told the jury that the employer had appealed the order:

The procedural posture of the case is a little weird. The Department issued an order. We know from the testimony that the employer was here. They put on witnesses. We know they appealed the Department order. Mr. Dorn didn't appeal the order. Mr. Dorn defended that order. The Board of Industrial Insurance Appeals agreed with the employer and said no, I don't think he needs treatment. We had to appeal, and we did.

RP Closing at 7.

**E. The Trial Court Denied Dorn's Motion for a New Trial for Refusal to Give His Proposed Jury Instruction**

The jury entered a verdict affirming the Board. CP 547. Dorn filed a motion for new trial under CR 59, arguing that the trial court erred by declining to give his proposed instruction and by not permitting him to advise the jury during closing arguments that the Department had changed position. CP 555-63. He argued that these were errors of law and that substantial justice had not been done. CP 561. The superior court denied the motion for a new trial. CP 599-600. Dorn appealed to the Court of Appeals, which affirmed the superior court. *Dorn v. Dep't of Labor & Indus.*, No. 53094-5-II, 2019 WL 4593894 (Wash. Ct. App. Aug. 11, 2020) (unpublished) (hereinafter "slip op.").

#### IV. ARGUMENT

Dorn argues a theory that he did not argue at the superior court, that the relevant statute contradicts, and that this Court's precedent does not support. The Department's ability to defend the Board's order, rather than its original order, reflects routine procedure at the superior court, and presents no issue of substantial public interest. Facts do not remain static after the Department's initial decision. Here, the Board considered the testimony of 11 witnesses—evidence not available to the Department when it made its initial decision—and issued a carefully reasoned decision based on that record. The Department, as an independent party, was allowed under *Aloha* to consider those new facts when assessing its interests at the superior court and deciding what position to take once the case was on appeal. 77 Wn.2d at 776. This tracks its role as a separate party. This Court should deny review.

##### **A. Dorn Did Not Argue at Superior Court That the Department Could Not Change Its Position**

Dorn has abandoned his claim of error on the jury instructions and closing argument. Instead, he raises an argument he did not make at the superior court: that the Department could not change its position from the order it issued. Pet. 3.

Pointing to the principle that parties generally cannot take a position contrary to that taken earlier in the same case, Dorn argues that the Department should be unable to change its position. Pet. 3. But Dorn has waived any arguments about inconsistent positions. At trial, Dorn sought to argue to the jury that the Department had “flipped” its position, but he never argued that the Department could not change its position as a matter of law. RP Vol. I at 3-5. Dorn sat silently by while counsel for the Department made opening and closing arguments asking the jury to find the decision of the Board was correct. RP Opening at 12-16; RP Closing at 8-15. Dorn did not object to the arguments made by the Department or otherwise seek to limit the Department’s participation. *Id.* He cannot now raise this argument. RAP 2.5.

**B. The Department’s Actions Follow RCW 51.52.110 and the Decisions of This Court**

Even leaving aside that Dorn waived his argument, it lacks merit and does not present an issue of substantial public interest.

Dorn argues that the Department “stepped in” as counsel for the employer and that the Department is doing the “bidding” of self-insured employers or is a “pawn” or “tool” of self-insured employers, somehow showing unfairness. Pet. 4, 6, 8. This is nonsense. Not only is a self-insured employer not involved, the Department is an independent party

that may pursue its own interests and is not a “tool” or “pawn” of employers. RCW 51.52.110. And the suggestion that Colvico somehow tricked the Department into defending the Board’s decision at superior court is unsupported and meritless.

The Department’s interest is as a fiduciary over funds held in trust for workers’ compensation purposes when it administers the Industrial Insurance Act. RCW 43.22.030; *Mills v. Dep’t of Labor & Indus.*, 72 Wn. App. 575, 578, 865 P.2d 41 (1994) (“The Department’s primary responsibility is to administer a social insurance system . . . .”); *VanHess v. Dep’t of Labor & Indus.*, 132 Wn. App. 304, 310-11, 130 P.3d 902 (2006). The Department must exercise “all the powers and perform all the duties prescribed by law with respect to the administration of workers’ compensation and medical aid in this state.” RCW 43.22.030. If the Department determines that the Board’s decision after an evidentiary hearing furthers this purpose, the Department can defend that order. *See* RCW 51.52.110. That the Department’s position may align with another party does not make the Department counsel for that party or mean that it is doing the bidding of that party.

To carry out its responsibilities, the Department may appear in appeals to the Board and to superior court. RCW 51.52.100, .115. The Department is “entitled to appear in all proceedings before the board.”

RCW 51.52.100. When a state fund claim is appealed to the superior court, the Department is a necessary party. RCW 51.52.110; *Aloha*, 77 Wn.2d at 776. RCW 51.52.110 provides “[t]he department shall, in all cases not involving a self-insurer, within twenty days after the receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed at issue.” This statute grants wide authority about how the Department may appear in a superior court proceeding. *Aloha*, 77 Wn.2d at 775-76.

Once the Department appears in superior court, this Court has held that the Department’s interests guide its participation. *Id.* at 775-76. In *Aloha*, the Court addressed the question of the Department’s participation in appeals to the superior court where the Department is neither the appellant nor the prevailing party at the Board. The procedural posture of *Aloha* mirrors the procedural posture of this appeal: the Board reversed the Department’s order and a party other than the Department appealed the Board’s decision to superior court. *Id.* at 774. At the superior court, the Attorney General, as the representative of the Department, defended the Board’s order. *Id.* at 774-75. This Court ruled that in this situation the Department remains the Attorney General’s client and that the Attorney General must be “guided by the interests of his client in determining the extent of his participation in the appeal. *Id.* at 776. And the court rejected

the idea that the Attorney General must zealously defend the Department's original order. *Aloha*, 77 Wn.2d at 776.

Dorn argues that *Aloha* implicitly supports his position (Pet. 8), but it does not—the Court recognized the ability of the Department to participate and left the decision about what level and form of participation to pursue to the Department. *Aloha*, 77 Wn.2d at 776.

Dorn's fear that the Department would not participate if a claimant's attorney withdrew (Pet. 6) is misplaced, because the Department is involved in state fund jury trials no matter which side appeals (RCW 51.52.110) and participates to aid its interests. (In self-insured cases, the Department does not always participate, but this is not a self-insured matter.) The Department has been aligned with pro se workers in many cases.

Dorn argues that this case will somehow lead to back door appeals by the Department. Pet. 6. But Dorn is the one that appealed, and the

//

//

//

//

//

//

Department did not align itself with Dorn, so that hypothetical concern is not present in this case.<sup>2</sup>

Finally, Dorn argues the Department's change of position was relevant because it goes to the Department's credibility, but he fails to note that the jury did learn about the Department's initial order in closing argument. Pet. 4; RP Closing at 7. And in any event, the Department's credibility was not at issue. The only question before the jury was Dorn's need for medical treatment, and it was the credibility of the medical witnesses, not that of the Department, that was relevant to this question. The Department's credibility has no bearing on Dorn's need for continued medical treatment.

## V. CONCLUSION

Dorn failed to preserve his argument at the superior court, so his petition presents no issue of substantial public interest. His arguments invite the Court to disturb the well-settled principle that the Department may participate in superior court as guided by its interests, but he provides

---

<sup>2</sup> Dorn cites *Blue Chelan v. Department of Labor & Industries*, 101 Wn.2d 512, 681 P.2d 233 (1984). In *Blue Chelan*, the employer appealed the decision of the Board to superior court and the Department appeared as well to argue against the Board's decision (the Department did not have the right to appeal). 101 Wn.2d at 515-16. This was permissible because an aggrieved party started the appeal and the Department could participate. *Id.* at 516. In dicta, the court commented that on appeal, the Department had shouldered a disproportionate responsibility, noting that it found this action "unfortunate." *Id.* But here, Dorn's situation is the opposite as he appealed and the Department, an independent party, is defending the Board's order.

no compelling reason for the Court to do so. This Court should deny review.

RESPECTFULLY SUBMITTED this 7th day of December, 2020.

ROBERT W. FERGUSON  
Attorney General



Anastasia Sandstrom  
Senior Counsel  
WSBA No. 24163  
Office Id. No. 91018  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 464-7740



No. 99027-1

**SUPREME COURT  
STATE OF WASHINGTON**

WILLIAM A. DORN,

Petitioner,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON

Respondent.

CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Answer to Petition for Review and this Certificate of Service in the below described manner:

**E-Filing via Washington State Appellate Courts Portal:**

Susan L. Carlson  
Supreme Court Clerk  
Supreme Court of the State of Washington

**E-Mail via Washington State Appellate Courts Portal:**

Mark C. Wagner  
Law Office of Mark C. Wagner  
[mark@markcwagner.com](mailto:mark@markcwagner.com)

//

//

DATED this 7th day of December, 2020.

A handwritten signature in black ink, appearing to read "Shana Pacarro-Muller". The signature is written in a cursive style with a large initial 'S'.

SHANA PACARRO-MULLER  
Legal Assistant  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 464-7740

**WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE**

**December 07, 2020 - 1:59 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 99027-1  
**Appellate Court Case Title:** William A. Dorn v. Department of Labor and Industries  
**Superior Court Case Number:** 17-2-10147-3

**The following documents have been uploaded:**

- 990271\_Answer\_Reply\_Plus\_20201207135646SC939060\_4301.pdf  
This File Contains:  
Answer/Reply - Answer to Petition for Review  
Certificate of Service  
*The Original File Name was 201207\_Answer.pdf*

**A copy of the uploaded files will be sent to:**

- iniseaeservice@atg.wa.gov
- mark@markcwagner.com

**Comments:**

Answer to Petition for Review and Certificate of Service

---

Sender Name: Shana Pacarro-Muller - Email: shana.pacarrormuller@atg.wa.gov

**Filing on Behalf of:** Anastasia R. Sandstrom - Email: anastasia.sandstrom@atg.wa.gov (Alternate Email: )

Address:  
800 Fifth Avenue, Ste. 2000  
Seattle, WA, 98104  
Phone: (206) 464-7740

**Note: The Filing Id is 20201207135646SC939060**