FILED
SUPREME COURT
STATE OF WASHINGTON
3/22/2023 10:42 AM
BY ERIN L. LENNON
CLERK

NO. 101646-8

SUPREME COURT
OF THE STATE OF WASHINGTON

MARK S. LANGHORST,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

STEVE VINYARD
Senior Counsel
WSBA No. 29737
Office Id. No. 91022
Labor and Industries Division
P.O. Box 40121
Olympia, WA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

I. INTRODUCTION

Mark Langhorst seeks to graft a remedy on to the law that the Legislature did not create—a remedy that will hurt other workers. This unauthorized remedy involves a worker's ability to apply to reopen their closed workers' compensation claims (commonly called an aggravation application). Under RCW 51.32.160, an application to reopen a workers' claim becomes "deemed granted" if the Department does not issue an order in response to the aggravation application within 90 days (or 150 days following an extension). Under the plain language of the statute, this is the only circumstance where an aggravation application is deemed granted.

Complying with the 90-day requirement, within 65 days, the Department issued an order denying Langhorst's claim. Because the Department issued a timely order denying the application, his application is not deemed granted.

Langhorst points to another statute, RCW 51.52.060, to say it has a deemed granted provision, but RCW 51.52.060, if it

applies, in no way provides for an application ever becoming "deemed granted." It simply contains no language about "deemed granted."

Langhorst's arguments would shackle the Department's ability to help workers on a reconsideration request of a Department order denying reopening. For example, the Department could have only a single day to reconsider one of its decisions before it would become "deemed granted." This could happen if the Department issues an order denying a reopening request after 100 days, the worker requests reconsideration 49 days later, and the Department now only has one day to consider the issue before hitting the 150-day deadline. Workers in these cases would not receive the benefit of a reconsideration request because the Department would have no time to develop additional evidence before the time to act is triggered. So the Department would be compelled to deny reopening. This is because the worker has the burden to show entitlement to benefits, and is if there is no adequate medical

evidence to support reopening, the Department must deny the request. So while Langhorst's theory aids him, it will hurt other workers.

The petition for review should be denied.

II. ISSUE

If the Department issues an order denying a reopening application within 65 days of receiving the application, does it comply with RCW 51.32.160's direction that the Department act on an application "within ninety days of receipt of such application by . . . the department"?

III. STATEMENT OF THE CASE

A. Background on Workers' Compensation Claims, Reopening Applications, and Requests for Reconsideration

When a worker experiences an industrial injury or occupational disease, they may apply for workers' compensation benefits with the Department. *See* RCW 51.32.010. Once treatment has concluded and the worker has reached maximum medical improvement, a worker is evaluated

for permanent disability and the claim closes with a permanent award, if appropriate. WAC 296-20-01002 (proper and necessary), to -19000.

After a workers' compensation claim has closed, the Industrial Insurance Act permits workers to file applications to reopen their claim. RCW 51.32.160. To reopen a claim, a worker must demonstrate that a condition caused by the injury objectively worsened after the claim was closed. *Hendrickson v. Dep't of Lab. & Indus.*, 2 Wn. App. 2d 343, 353–54, 409 P.3d 1162 (2018) (collecting cases). The Department must act on the application "within ninety days of receipt of such application," plus an optional 60 days for good cause; if the Department does not deny the application within that time period it is deemed granted. RCW 51.32.160(1)(d).

When a worker disagrees with a decision of the Department, they may file a protest, also known as a request for reconsideration, under RCW 51.52.050, or they may appeal to the Board of Industrial Insurance Appeals under RCW

51.52.060. RCW 51.52.050(2)(a). A timely request for reconsideration automatically places the Department order in abeyance and obligates the Department to reconsider its decision. *In re Clarence Haugen*, No. 91 1687, 1991 WL 11008460, at *2 (Wash. Bd. Indus. Ins. App. May 28, 1991).

B. The Department Acted on Langhorst's Application To Reopen Within 65 Days, so "Within Ninety Days of Receipt of Such Application"

Langhorst sustained an industrial injury in January 2012, and his claim was closed in November 2014. AR 72–73. Langhorst applied to reopen his claim on April 9, 2019. AR 75, 77. He was paid provisional wage replacement benefits (time- loss compensation) while the Department considered his application. AR 128. On June 13, 2019, 65 days after Langhorst filed his application, the Department denied the application because "[t]he medical record show[ed] the conditions caused by the injury have not worsened since the final claim closure." AR 79.

Langhorst requested reconsideration on June 18, 2019, seeking Department review of the June 13, 2019 order. AR 80. This operated to place the denial order in abeyance. AR 81, 128; *see Haugen*, 1991 WL 11008460, at *2.

In his protest, Langhorst stated he wanted to find a second opinion about his medical condition better than that of Manuel Pinto, MD, the provider he had relied upon in his application to reopen. AR 77, 80. The Department arranged for an Independent Medical Exam (IME). AR 83; *see also* AR 136.

On December 19, 2019, the Department affirmed the denial of Langhorst's application. AR 82.

C. The Board and Superior Court Affirmed the Department's Order Because the Department Responded To Langhorst's Application Within 90 Days

Langhorst appealed to the Board of Industrial Insurance Appeals, which affirmed the Department. AR 1, 15–20. In its order, the Board noted that "[t]he critical undisputed fact in this appeal is the Department issued a timely order denying Mr. Langhorst's application to reopen his claim under RCW

51.32.160(1)(d),” thus the decision was not deemed granted. AR 15.

Langhorst then appealed the Board’s order to superior court. CP 1–14. At hearing, the court noted that it “would be rewriting or adding to the statute if it were to say that there is a ‘deemed granted’ provision in 51.52.060.” RP 26. As a result, the superior court affirmed the Board, concluding that “Mr. Langhorst’s application to reopen his claim filed on April 9, 2019, is not deemed granted under RCW 51.32.160, RCW 51.52.050, or RCW 51.52.060.” CP 79–82.

Langhorst appealed to the Court of Appeals. CP 83–88. The Court of Appeals affirmed the superior court in a published decision, concluding that the plain language of RCW 51.32.160 and RCW 51.52.060 did not support Langhorst’s arguments. *Langhorst v. Dep’t of Lab. & Indus.*, No. 56095-0-II, slip op. at 5, 7-8 (Dec. 20, 2022).

Langhorst then petitioned for review.

IV. ARGUMENT

No issue of substantial public interest is presented by this case as the Court of Appeals' decision tracks with the plain language of the relevant statutes, while Langhorst's proposed interpretation adds words to the statute that the Legislature did not include. Langhorst therefore fails to show an issue of substantial public interest under RAP 13.4(b)(4), and Langhorst does not claim—nor could he plausibly claim—that any of the other bases for review under RAP 13.4(b) apply.

RCW 51.32.160 provides that an application is "deemed granted" if the Department fails to issue an order within 90 days of receiving a reopening application (or 150 days if the Department extends its time to act). RCW 51.32.160 does not provide for an application being deemed granted in any other situation. Since the Department issued an order denying the application to reopen Langhorst's claim 65 days after receiving the application, the application is not deemed granted.

Contrary to Langhorst's argument, RCW 51.52.060(4) does not create a "deemed granted" requirement.[1] Even if RCW 51.52.060(4) applies, it limits the Department's timeframe to act, but does not provide for a deemed granted outcome if that timeframe is exceeded.

A. The Industrial Insurance Act Is Unambiguous: Only RCW 51.32.160 Finds an Application Deemed Granted, and It Does Not Apply Here

Because the Department complied with RCW 51.32.160, and because no other statute contains a deemed granted provision, Langhorst's application is not deemed granted as a matter of law.

---

[1] The Court of Appeals assumed for argument's sake that RCW 51.52.060 applied. It does not for two reasons. First, there was a request for reconsideration here, which triggers RCW 51.52.050, the reconsideration by the Department statute, not RCW 51.52.060, the appeal to the Board statute. Second and relatedly, RCW 51.52.060(4) governs the Department's timeframe to reassume a decision regarding a reopening application following an appeal to the Board or the Department taking further action on its own volition, not the Department's ability to take action when a party asks the Department to reconsider its decision, as Langhorst did.

1. Langhorst's reopening application cannot be deemed granted because the Department issued an order denying Langhorst's application within 90 days

This case is resolved on the plain language of RCW 51.32.160, RCW 51.52.050, and RCW 51.52.060.[2] The Department met its statutory obligation under RCW 51.32.160 by issuing an order denying Langhorst's application within 90 days. No other provision of the Industrial Insurance Act finds

---

[2] Because this case is resolved on the plain language of the statutes there is no need to consider the legislative history and its interaction with *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 858 P.2d 503 (1993). In any event, *Tollycraft* supports the Department's position because in that case the Court concluded that the aggravation application was not deemed granted because the Department issued an order denying the aggravation application within the statutory deadline set out in RCW 51.32.160. Nor do Board decisions show ambiguity. Langhorst misrepresents the Board's decisions and ignores that the Board has consistently rejected the conclusion that an aggravation becomes "deemed granted" if the Department's decision in response to a reopening request exceeds the time limitations in RCW 51.52.060. *In re Joseph Brown*, No. 96 4577, 1996 WL 33410739 (Wash. Bd. Indus. Ins. App. Aug. 20, 1996); *In re Elois Short*, No. 95 4522, 1996 WL 879374 (Wash. Bd. Indus. Ins. App. Dec. 20, 1996). No Board decision supports Langhorst's proposed interpretation of the statute.

an application for reopening deemed granted besides RCW 51.32.160(1)(d), which provides:

> If an order denying an application to reopen filed on or after July 1, 1988, is not issued within ninety days of receipt of such application by the self-insured employer or the department, such application shall be deemed granted. However, for good cause, the department may extend the time for making the final determination on the application for an additional sixty days.

Under RCW 51.32.160, the Department must issue "an order denying an application to reopen . . . within ninety days of receipt of such application." RCW 51.32.160(1)(d). The Department may extend this deadline by 60 days for good cause. *Id.* This statute applies to "receipt of [the reopening] application." *Id.* By its very terms it does not apply to receipt of a "reconsideration" request. RCW 51.32.160 does not purport to put any limit on the Department's ability to reconsider one of its decisions when a party asks it to reconsider its decision, as Langhorst did.

Here, the Department received Langhorst's application to reopen his claim on April 9, 2019. AR 128. On June 13, 2019, 65 days later, the Department issued an order denying the reopening application. AR 79. Thus, the Department complied with RCW 51.32.160 and the application is not "deemed granted."

2. When it applies, RCW 51.52.060(4)(b)(ii) does not make an application to reopen a claim "deemed granted"

No statute aside from RCW 51.32.160 has a deemed granted provision. Langhorst requested reconsideration of a Department order under RCW 51.52.050, which provides:

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

RCW 51.52.050(2)(a). This statute does not impose a deemed granted requirement if there is a request for reconsideration involving a reopening application.

Likewise, the plain language of the statute Langhorst relies on, RCW 51.52.060, does not have a deemed granted provision.

> (4) The department, either within the time limited for appeal, or within thirty days after receiving a notice of appeal, may:
>
> . . .
>
> (ii) Hold an order, decision, or award issued under RCW 51.32.160 in abeyance for a period not to exceed ninety days from the date of receipt of an application under RCW 51.32.160. The department may extend the ninety-day time period for an additional sixty days for good cause.

Langhorst is incorrect that RCW 51.52.060(4)(b)(ii) applies, but even if RCW 51.52.060(4)(b)(ii) did apply in his situation, it contains no deemed granted provision.

On the contrary, RCW 51.52.060(4)(b)(ii) sets the timeframe for how long the Department can wait before taking further action on an appeal regarding an application to reopen a

claim, but does not contain any language that a claim becomes "deemed granted" if that timeframe is exceeded. By providing a deemed granted provision solely in RCW 51.32.160, and not including one in RCW 51.52.050 or RCW 51.52.060, the Legislature has indicated that there is no deemed granted provision in the latter statutes. To express one thing in a law implies the exclusion of the other, and courts do not add words to statutes. *See State v. Kelley*, 168 Wn.2d 72, 83, 226 P.3d 773 (2010) (noting that the "exclusion is presumed to be deliberate"); *City of Seattle v. Fuller*, 177 Wn.2d 263, 269, 300 P.3d 340 (2013). The Legislature could have included a deemed granted provision in the reconsideration or appeal statutes but it chose not to. *See* RCW 51.52.050, .060.[3] So even when

[3] This does not mean workers have no remedy if they believe the Department has failed to diligently address a request for reconsideration with regard to a reopening application. The remedy they can seek is a writ of mandamus compelling the Department to promptly act on the request. *See Dils v. Dep't of Lab. & Indus.*, 51 Wn. App. 216, 220, 752 P.2d 1357 (1988) (recognizing right of workers to seek writ of mandamus if Department fails to act on workers' claims with adequate

RCW 51.52.060(4)(b)(ii) applies, an application does not become "deemed granted" if the Department takes action outside the timeframe set out in the statute.

Nor is Langhorst correct that the amendments the Legislature made to RCW 51.52.060 after the *Tollycraft* case caused his application to become deemed granted. Pet. at 8–9. As noted, RCW 51.52.060(4)(b)(ii)—in its current form—does not provide for an application becoming deemed granted. If the Legislature intended for its amendments to overrule *Tollycraft* and provide for a deemed granted remedy in a case of this kind, it would have done so through those amendments. It did not, and this Court should reject Langhorst's attempt at rewriting the statute.

B. The Legislature Intended for Workers To Have Access To Reconsideration on the One Hand, and on

---

promptness). A writ of mandamus can be used to compel a public officer to engage in an action they have a duty to perform. *Butts v. Constantine*, 198 Wn.2d 27, 45, 491 P.3d 132 (2021).

the Other Hand Did Not Intend a Reopening Application To Be Automatically Granted

1. Langhorst's construction hurts workers

Apart from the fact that it is not supported by the plain language of the relevant statutes, Langhorst's argument would hurt workers as the Department would be forced to issue orders denying workers' requests for reconsideration. Workers are held to "strict proof of their right to receive the benefits provided by the act." *Cyr v. Dep't of Lab. & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955) (quoting *Olympia Brewing Co. v. Dep't of Lab. & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949)); *see also Robinson v. Dep't of Lab. & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744 (2014). And a worker cannot prevail in having a reopening application granted without a medical opinion. *See Phillips v. Dep't of Lab. & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956); *Eastwood v. Dep't of Lab. & Indus.*, 152 Wn. App. 652, 661, 219 P.3d 711 (2009). If

a worker does not have time to present additional evidence[4] or if the Department does not have time to seek a medical opinion, the Department will have to deny the request for reconsideration because it is the worker's burden to show entitlement to benefits. At that point, the worker would be forced to litigate at the Board, where the worker would also bear the burden of proof. RCW 51.52.050(2)(a). So Langhorst's theory may help him, but it will hurt other workers.

2. It makes no sense that a request for reconsideration received after 150 days (with the timing driven by the worker) would automatically be granted; the Legislature intended the Department to adjudicate requests for reconsideration

Whether a request for reconsideration is granted should not hinge on when the worker chooses to file the request. Langhorst's proposed interpretation of RCW 51.32.160 contradicts the Legislature's intent that the Department

[4] Notably, when Langhorst asked the Department to reconsider its decision regarding the reopening request, he asked for time to acquire an additional medical opinion supporting his request to reopen the claim. AR 77, 80.

adjudicate reconsideration requests, as it would not leave the Department with adequate time to do so. RCW 51.52.050. Under Langhorst's construction of the statutes, if the Department received a reopening application and took 150 days for good cause to deny the request, even a quick protest by a worker or employer would automatically force a deemed granted outcome. *See* RCW 51.52.050(1) (party has 60 days to request reconsideration). For example, if the Department issued an order denying a reopening request 100 days after it received the request (after granting itself a 60 day extension), and a worker choose to protest this decision 60 days later, the reopening request would be retroactively deemed granted under Langhorst's theory. This is because any order the Department issued at that point would be issued on the 160th day or later, which is more than 150 days after the reopening request was received. And because a request for reconsideration automatically places the original order in abeyance and obligates the Department to reconsider its order as requested,

the Department cannot decline to reconsider a decision regarding an aggravation application if it receives a timely request for reconsideration. *Haugen*, 1991 WL 11008460, at *2. With no time to do so, the Department would effectively have no reconsideration power, contrary to RCW 51.52.050. It would make no sense for the Legislature to grant reconsideration power in RCW 51.52.050 and take it away in RCW 51.52.060. Nor would it make sense to encourage workers to time the filing of a request for reconsideration in order for it to cause an application to become retroactively deemed granted.

The Legislature has showed no intent that the mere action of filing a reconsideration request means that reopening is deemed granted. Indeed, the Legislature's intent in RCW 51.52.050 is for the Department to adjudicate requests for reconsideration—not automatically grant them.

V. CONCLUSION

For the reasons explained above, this Court should deny the petition for review.

This document contains 3,208 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 22nd day of March, 2023.

ROBERT W. FERGUSON
Attorney General

STEVE VINYARD
Senior Counsel
WSBA #29737
Office Id. No. 91022
Labor and Industries Division
7141 Cleanwater Drive SW
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7715

NO. 101646-8

SUPREME COURT
OF THE STATE OF WASHINGTON

MARK S. LANGHORST, Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	DECLARATION OF SERVICE

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

E-Filing via Washington State Appellate Courts Portal:

Erin L. Lennon
Supreme Court Clerk
Washington State Supreme Court

E-Mail via Washington State Appellate Courts Portal:

Alden L. Byrd
Una Legin
Washington Law Center
alden@washingtonlawcenter.com

una@washingtonlawcenter.com

DATED this 22nd day of March, 2023 at Tumwater, Washington.

AUTUMN MARSHALL
Legal Assistant 4
(360) 586-7737

ATTORNEY GENERALS' OFFICE, L&I DIVISION, OLYMPIA

March 22, 2023 - 10:42 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,646-8
Appellate Court Case Title:	Mark S. Langhorst v. WA State Dept. of Labor and Industries
Superior Court Case Number:	20-2-02404-7

The following documents have been uploaded:

- 1016468_Answer_Reply_20230322104039SC169116_7868.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was DeptAnsToPFR.pdf

A copy of the uploaded files will be sent to:

- alden@washingtonlawcenter.com
- byrd.alden@gmail.com
- liolyce@atg.wa.gov
- una@washingtonlawcenter.com

Comments:

Sender Name: Autumn Marshall - Email: autumn.marshall@atg.wa.gov
Filing on Behalf of: Steve Vinyard - Email: steve.vinyard@atg.wa.gov (Alternate Email: LIOlyCEC@atg.wa.gov)

Address:
P.O. Box 40121
Olympia, WA, 98504-0121
Phone: (360) 586-7707

Note: The Filing Id is 20230322104039SC169116