SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 102221-2

COURT OF APPEALS, Div II, No. 57538-8-II

ROBERT S. BACKSTEIN,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

PETITIONER'S PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Robert Backstein.

II. CITATION TO COURT OF APPEALS DECISION

Mr. Backstein requests that this Court grant discretionary review of the Court of Appeals' unpublished opinion dated March 28, 2023. *See Appendix A.*

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals violate Supreme Court and Appellate Court precedent by deeming that the Department of Labor and Industries' ("Department") order was "communicated" to Mr. Backstein as required by law? YES.

Did the Court of Appeals violate decades of Supreme Court and Appellate Court precedent by construing the Industrial Insurance Act ("IIA") narrowly and resolving doubts in favor of the Department of Labor & Industries? YES.

Did the Court of Appeals violate decades of Supreme Court and Appellate Court precedent that juries decide genuine issues of material fact? YES. Does this raise a significant

question under the Washington State Constitution, given that Mr. Backstein has a Constitutional right to a jury trial on material facts for which there are genuine issues? YES.

The Department likely issues thousands of orders every year that accept or deny workers' IIA claims. Those orders are appealable. Those orders directly and substantially affect the worker and his/her family's health and/or welfare, as they result in or prevent essential IIA benefits. Does ensuring that those life-altering Department orders be lawfully communicated to the workers involve an issue of substantial public interest that should be determined by this Court? YES.

IV. STATEMENT OF THE CASE

Mr. Backstein had four IIA claims with the Department:

SE18218 ("first claim");
BC21079 ("second claim");
BC21080 ("third claim"); and
BC21081 ("fourth claim").

Ron Meyers & Associates PLLC represented ("RMA") Mr. Backstein on all four claims. *CP 5*. The Department gave

Mr. Meyers online access to all four claims. *CP 486 line 3 and CP 508-516.*

Mr. Backstein filed his fourth claim on October 25, 2017. *CP 138.* On October 26, 2017, Mr. Backstein signed a letter, a copy of which was provided to the Department. *CP 435.* That letter stated in pertinent part, "Please note that this is also a CHANGE OF ADDRESS. All correspondence should now be mailed to my attorney at the address stated below:

> Ron Meyers
> RON MEYERS & ASSOCIATES PLLC
> 8765 Tallon Ln NE Ste A
> Olympia, WA 98516-6654

CP 450.

As of December 12, 2018, that was the last known address for Mr. Backstein as shown by the records of the Department.

On December 12, 2018, the Department mailed an order **to RMA** that rejected Mr. Backstein's third claim. *CP 134-135.* That same day, the Department also sent a letter **to RMA** discussing its rejection of Mr. Backstein's third claim. *CP 136.*

The Department sent that order and letter to RMA without obtaining or requiring an attorney-representation letter from RMA or Mr. Backstein. CP 972-973.

That **same day**, the Department mailed an order rejecting Mr. Backstein's fourth claim **to a Gig Harbor address**, which was neither RMA's address nor the last known address for Mr. Backstein as shown by the records of the Department. *CP 104-105, CP 450.*

On that same day (December 12, 2018), the Department mailed a letter to that same Gig Harbor address that contained vital information about Mr. Backstein's **first claim** (SE18218). The Department did this despite knowing that RMA was Mr. Backstein's attorney on his first claim (CP 449). That letter stated in part:

> Your contention indicates you believe the coronary artery disease was caused by radiation for non-Hodgkin's lymphoma. As that condition is allowed under another claim, SE18218, any conditions you feel may be related to that condition or its treatment should be contended under that claim. That is a self insured claim, therefore you will want to address

> that contention with that employer (city of Kent) if you wish to pursue this matter."

CP 106. *See also CP 507.* That letter not only conveyed that any conditions that Mr. Backstein felt may be related to his non-Hodgkin's lymphoma or its treatment should be contended under his first claim, but it advised him to address his contention (from his fourth claim) with the self-insured employer on his first claim. This letter also conveyed that the Department rejected Mr. Backstein's fourth claim. *CP 106.* Had the Department mailed that letter to RMA as required, RMA would have been notified of the Department's rejection of the fourth claim.

Three months earlier (September 24, 2018), the Department imported 775 pages of claim history documents from Mr. Backstein's first claim file into his fourth claim file. *CP 457-462.*

On November 4, 2019, RMA was informed that a December 12, 2018, order had been issued in Mr. Backstein's fourth claim. *CP 1702.* RMA immediately filed a protest. *CP*

472-478.

On November 21, 2019, the Department issued a Notice of Decision that it "cannot reconsider the order dated 12/12/2018 because the protest was not received within the 60 day time limitation. That order is final and binding." *CP 448.*

The sixty-day protest period does not begin to run until the Department has lawfully communicated its order. Here, the Department did not lawfully communicate its rejection order in Mr. Backstein's fourth claim. On November 20, 2019, the Department issued a letter on Mr. Backstein's fourth claim in response to RMA's November 4, 2019, protest. *CP 893*. In that letter, the Department stated that it, "cannot reconsider the order dated 12/12/2018 because the protest was not received within the 60 day time limitation." *CP 893.* In that letter, which was written to Mr. Backstein but addressed to RMA, the Department also stated in part,

> NOTE: There is no notice of attorney representation for Claim BC21081 in any of your claim files. If you are being represented by an

> attorney on this claim, BC21081, please submit a signed notice of representation to the department so any future communications regarding BC 21081 will be sent to the correct location without delay.

CP 893.

Superior Court:

Mr. Backstein appealed to the Superior Court the Board's Decision & Order that affirmed the Department's rejection of Mr. Backstein's fourth claim. *CP 1-13.* Having reviewed the records and heard oral argument, the Superior Court found that the Department's failure to serve a copy of its December 12, 2018, Notice of Decision on Mr. Backstein's attorney amounts to a substantial injustice to Mr. Backstein. The Superior Court concluded that Mr. Backstein's protest and his appeal were timely. *CP 1647-1649.* The Superior Court reversed the Board's Decision & Order and remanded the case back to the Department to reconsider its December 12, 2018, Notice of Decision. *CP 1726-1730.*

Appellate Court:

The Department appealed. On March 28, 2023, Division II of the Court of Appeals issued its unpublished opinion. That opinion violated decades of Supreme Court and Appellate Court precedent on well-settled, yet significant, legal doctrine. That opinion applies the wrong law. That opinion affects how a monolithic state agency must communicate appealable orders of substantial importance to Washington workers. It is of substantial public interest.

V. ARGUMENT

First: The Appellate Court's holding revolves entirely around its determination that, "[. . .] Backstein did not follow the written procedure under RCW 51.04.080". *Backstein v. Dep't of Lab. & Indus.*, No. 57538-8-II, 2023 WL 2660432, at *7 (Wash. Ct. App. Mar. 28, 2023).

That cannot be accurate because there is **no** written procedure under RCW 51.04.080 for Backstein to follow with

respect to service of orders appealable to the Board of Industrial Insurance Appeals ("Board").

The Court held that, "More importantly, here there no doubt or confusion, about the plain meaning and requirements of RCW 51.04.080, [. . .]." *Backstein, id.,* at 7. If RCW 51.04.080 is clear and its meaning doubtless, it is only clear and doubtless in that it does **not apply** to notices, orders or payments made **after** a Board-appealable order has been entered.

RCW 51.04.080:

> On all claims under this title, claimants' written notices, orders, or payments must be forwarded directly to the claimant **until such time as** there has been entered an order on the claim appealable to the board of industrial insurance appeals. Claimants' written notices, orders, or payments may be forwarded to the claimant in care of a representative **before** an order has been entered if the claimant sets forth in writing the name and address of the representative to whom the claimant desires this information to be forwarded. [Emph. added].

Rule: A reviewing court is required, whenever possible, to give effect to every word in a statute. *City of Olympia v. Drebick*, 156 Wash. 2d 289, 295, 126 P.3d 802 (2006).

The statute (RCW 51.04.080) uses the language, "**until such time as** there has been entered an order on the claim appealable to the [Board]." and "**before** an order has been entered [. . .]" [Emph added]. The Appellate Court **did not** give effect to this language.

This statute is **silent** as to the service of notices, orders, or payments **after** a Board-appealable order has been entered. To conclude that this statute also includes requirements for service **after** entry of a Board-appealable order would require the Court to construe the statute to mean something other than what it says.

The facts underlying this appeal are **not** about the propriety of serving a document before the entry of a Board-appealable order. The facts are about the propriety of serving a Board-appealable order (the 12/12/18 Notice of Decision). RCW 51.04.080, as written, does **not apply** to service of Board-appealable orders.

Rule: When the plain language is unambiguous, the legislative intent is apparent, and the Court **will not** construe the

statute otherwise. [Emph added]. *State v. J.P.,* 149 Wash. 2d 444, 450, 69 P.3d 318 (2003).

Rule: "If the language is unambiguous, a reviewing court is to **rely solely** on the statutory language." [Emph added]. *State v. Roggenkamp,* 153 Wash. 2d 614, 621, 106 P.3d 196 (2005).

Because the Appellate Court concluded that RCW 51.04.080 applies to service of a Board-appealable order even though there is no statutory language in RCW 51.04.080 addressing the service of Board-appealable orders, the Court engaged in statutory construction.

Rule: When a court construes any provision within the Industrial Insurance Act ("IIA"), a two-part rule is triggered which courts must follow: (1) the Court must construe the IIA liberally in order to achieve its purpose of providing compensation to all covered employees injured in their employment; and (2) all doubts as to how to construe the IIA must be resolved in favor of the worker. *Dennis v. Dep't of Labor & Indus. of State of Wash.,* 109 Wn.2d 467, 470, 745 P.2d 1295

(**1987**); *Michaels v. CH2M Hill, Inc.,* 171 Wn.2d 587, 598, 257 P.3d 532 (**2011**); *Spivey v. City of Bellevue,* 187 Wash. 2d 716, 726, 389 P.3d 504 (**2017**); *Johnson v. Dep't of Labor & Indus.,* 16 Wn.App 2d 254, 259, 480 P.3d 497 (**2021**).

The Appellate Court applied the wrong statute and it erroneously concluded that RCW 51.04.080 "establishes the procedure that the Department must follow in sending notices, orders, and payments to claimants."

RCW 51.04.080 has specific language about how to serve orders that were made **prior to** the entry of a Board-appealable order, but it has **no** language (let alone a procedure) about service of Board-appealable orders.

The only way to make RCW 51.04.080 apply to a Board-appealable order is to construe the statute to mean something other than, or in addition to, what it says.

In the same vein of this erroneous construction of RCW 51.04.080, the Appellate Court also held that, "The Department did not have the authority, under RCW 51.04.080, to send the

notice to Backstein's attorney." *Backstein, id.,* at 6. If by "did not have the authority, under RCW 51.04.080" the Appellate Court meant that RCW 51.04.080 "barred" the Department from sending the notice to Mr. Backstein's attorney, that is incorrect. The "notice" to which the Appellate Court refers was the December 12, 2018, Notice of Decision, which was a Board-appealable order. RCW 51.04.080, does **not** bar the Department from serving that notice on Mr. Backstein's attorney. It does not even address how to serve Board-appealable orders.

The Appellate Court also held that, "The Department followed RCW 51.04.080 in not sending the December 12, 2018 rejection order to Backstein's attorney." *Backstein id.,* at 5. That holding is based on the erroneous determination that RCW 51.04.080 applies to Board-appealable orders – a determination that is the product either of creating legislation or construing RCW 51.04.080 narrowly and resolving doubt in the Department's favor, not the worker's.

Rule: It is not the role of the judiciary to inject language into a statute. *Johnson v. Dep't of Lab. & Indus., id.*

Rule: Our state constitution gives the legislature the power to legislate, not the judiciary. *State v. Ward*, 148 Wash. 2d 803, 817, 64 P.3d 640 (2003).

The Appellate Court also dismissed the fact that the Department imported into Mr. Backstein's fourth claim 775 pages of his claim history from Mr. Backstein's first claim. The Appellate Court dismissed this fact by mistakenly determining that RCW 51.04.080, "provides a specific procedure that the claimant must follow in order for the Department to be authorized to send an order to the claimant's representative." *Backstein, id.,* at 6.

That "procedure" pertains only to notices, orders or payments made **prior to** entry of an order. *See RCW 51.04.080* Nothing in RCW 51.04.080 restricts or removes the Department's authority to send a Board-appealable order to the worker's attorney.

In summary, the Appellate Court's decision about whether the Board was required to have served Mr. Backstein's attorney with the December 12, 2018, Board-appealable Notice of Decision was based on a statute that is **silent** on that issue. In the absence of actual statutory language addressing the issue, the Appellate Court was left with resolving doubt – doubt about whether and how to apply that statue to these facts. The Appellate Court chose to construe the statute narrowly and the Court's doubt was held in favor of the government, not the worker. That decision was error and the opposite for how the Supreme Court mandates that all courts construe the IIA.

That decision violated decades of Supreme Court and Appellate Court precedent for how to construe the IIA.

Whether an authoritative determination is desirable to provide future guidance to public officers, and whether the issue is likely to recur are particularly determinative factors when deciding if a case presents matters of continuing and substantial

public interest. *Eyman v. Ferguson*, 7 Wash. App. 2d 312, 320, 433 P.3d 863 (2019). Those two factors exist here.

The Department's conduct is likely to recur, as the Department likely issues thousands of rejection orders every year, spanning across thousands of worker's compensation claims. The Supreme Court's determination here is highly desirable to provide future guidance to the Department. This case is a perfect example, as the Department relies on a statute for serving a Board-appealable order when that statute does not apply to serving Board-appealable orders. As a result, the Department failed to send RMA the rejection order – despite the fact that RMA was representing Mr. Backstein on all of his claims and would have timely protested if the Department properly communicated its order.

Second: The Appellate Court also made a significant error when it stated that, "It is undisputed that the Department sent the rejection order to Backstein at his last known address [. . .] on December 12, 2018." *Backstein, id.,* at 6. Presumably, the Court

used the phrase "his last known address" to mean the address on the October 25, 2017, Report of Accident – the Gig Harbor address.

That address cannot be the Department's "last known address" for Mr. Backstein, because on October 26, 2017, Mr. Backstein signed a letter, which was provided to the Department, which provided a change of address. *CP 450.* As far as the Department was concerned, Mr. Backstein's last known address was as set forth in that letter. He signed that letter more recently in time than the Report of Accident. The Appellate Court failed to discuss or even mentioned this material fact in its opinion.

Instead, the Appellate Court adopted as true the incorrect fact that the Department sent the December 12, 2018, order to Mr. Backstein's "last known address" – when in fact, it had not.

The Significant Board Decision of *In re David Herring*, BIIA Dec., 57,831 (1981), pertains to the Department's service of closing orders, which are Board-appealable orders. The Board publishes its significant decisions and makes them available to

the public. "These decisions are nonbinding, but persuasive authority for this Court." *O'Keefe v. State, Dep't of Lab. & Indus.,* 126 Wash. App. 760, 766, 109 P.3d 484 (2005).

It its significant decision of *In re David Herring*, *id.,* the Board cited RCW 51.52.050, not RCW 51.04.080, and concluded that, "The law [RCW 51.52.050] requires that the Department's closing orders be sent to the worker **(or implicitly his or her authorized representative)** at his last known address "as shown by the records of the department." RCW 51.52.050"". [Emph added]. *id., at 2.* The Board further ruled that to be "communicated", copies of the orders or actual knowledge of the contents and meaning of the orders "must be directed to the last known address of the claimant (or his authorized representative as shown by the Department's records)." *Id.*

The Board in *In re David Herring* noted that the Department "had the claimant's change-of-address in its records" and it then stated, "Whether the claimant did in fact receive copies of the orders at his home is not critical to

resolution of this appeal since they were issued after a change of address was filed with the Department." [Emph in original] *Id., at 2*. The Board held that, "Under these circumstances, we hold that the Department's final order dated August 11, 1978, in Claim No. G-326610, and its final order dated December 21, 1978, in claim No. G-292702, were not legally "communicated" at the claimant's last known address and therefore have remained viable and subject to appeal." *Id., at 2*. The Board held that the appeals filed by the claimant as to both claims on October 7, 1980 were timely. *Id., at 3*.

RCW 51.52.050(1) states in pertinent part that, "Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, or if the worker, beneficiary, employer, or other person affected thereby chooses, the department may send correspondence and other legal notices by secure electronic means except for orders communicating the closure of a claim."

In *In re Chambers Bay Golf Course,* BIIA Dec., 0920604 (2010), the Board held, "We are persuaded by these decisions that to be a "person aggrieved" by a decision of the Department, as that term is used in RCW 51.52.050 and RCW 51.52.060, requires that the person have a proprietary, pecuniary, or personal right which is substantially affected by the Department's determination. *Id., at 3*.

Mr. Backstein's attorney was clearly an "other person affected thereby" – as RMA had a proprietary right (as counsel on all four of his presumptive disease claims) and a pecuniary right (as RMA had a statutory and contractual right to attorney fees and costs that were substantially affected by the Department's rejection of his claim. RCW 51.32.185).

Here, the last known address as shown by the Department's records at the time the Department mailed the December 12, 2018, order, was the address on Mr. Backstein's October 26, 2017 letter – which happened to be the address of his attorney's office, RMA. *CP 450.*

The fact that this letter only referenced his second claim is immaterial. It was the last known address "as shown by the Department's records". The Department had that in its records and yet it mailed the Board-appealable order to Mr. Backstein, not his attorney. This injustice will continue to occur unless the Department receives this Court's guidance. The Department must look at **all** of its records to determine the last known address for its claimant.

By failing to send the claim-rejection order to Mr. Backstein's last known address, the Department had not "communicated" the order as required by law, and the orders remained viable and subject to appeal when they were protested by Mr. Backstein's attorney.

Third: In claim SE18218, the Department had a written notice of representation, signed by Mr. Backstein, that RMA was his attorney, that all correspondence should be sent to his attorney, and that gave RMA's address. *See CP 449.* Yet, on December 12, 2018, the Department sent a letter to Mr.

Backstein and **not** his attorney, that not only referred specifically to SE18218, but gave him specific directives concerning that claim. *See except on page four, above. See CP 106, 506.*

In that letter, the Department disclosed that in claim BC21081 (**the fourth claim**), "A determination has been made which rejects the claim filed for coronary artery disease." *CP 106, 506.* In other words, had the Department mailed that letter to Mr. Backstein's attorney as it was required (but failed) to do, the attorney would also have been notified that the Department rejected Mr. Backstein's BC21081 claim and could have timely protested or appealed.

The Appellate Court also overlooked (or disregarded) this material fact, as it too was neither discussed nor even mentioned in the Court's opinion.

Fourth: The Appellate Court usurped the role of the jury and decades of higher Court precedent that juries decide genuine issues of material fact, when it adopted as true the Department's contention that it sent the December 12, 2018 rejection order in

claim BC21080 (third claim) to Mr. Backstein's attorney "by mistake" and the incorrect fact that the Department sent the December 12, 2018, order to Mr. Backstein's "last known address" – when in fact, it had not. *Backstein, id.*, at 2.

The fact that the Department, despite not having a "written notice" of representation in claim BC21080 (third claim), sent a rejection order to Mr. Backstein's attorney and did so on the same day as it sent the rejection order to Mr. Backstein on claim BC21081 (claim at issue) is a material fact. The facts surrounding that decision are material facts.

For the Appellate Court to simply adopt as true that the Department sent that order to Mr. Backstein's attorney "by mistake" (rather than on purpose with the understanding that Mr. Meyers was his attorney) is to choose sides on a material fact when (a) Mr. Backstein had not yet deposed Department personnel on that issue and (b) that is the jury's purview. Juries decide genuine issues of material fact. *See e.g. Bates v. Bowles White & Co.,* 56 Wash. 2d 374, 380, 353 P.2d 663 (1960); *Hegre*

v. Simpson Dura-Vent Co., 50 Wash. App. 388, 397, 748 P.2d 1131 (1988); *Doherty v. Municipality of Metro. Seattle*, 83 Wash. App. 464, 470, 921 P.2d 1098 (1996); *Ripley v. Lanzer*, 152 Wash. App. 296, 315, 215 P.3d 1020 (2009); *Swank v. Valley Christian Sch.,* 188 Wash. 2d 663, 687, 398 P.3d 1108 (2017).

Whether the Department sent the order to Mr. Backstein's attorney in his third claim (despite no letter of representation) on purpose or "by mistake" is a material fact that, if it was the former, would destroy the Department's entire excuse for why, on the fourth claim, the Department did not send the rejection order to RMA.

The statute required the Department to send the rejection to RMA based on his letter of October 26, 2017 where, in a stand-alone section of that letter, he changed his address to his attorney's office. This letter was prior to the rejection order by more than a year. RCW 51.52.050.

The Department was required to give RMA online access to the claim at issue, immediately upon receipt of Mr.

Backstein's letter of October 26, 2017, changing his address to his attorney's office.

The Department gave Mr. Meyers online access to all four of Mr. Backstein's claims. *See CP 486 line 3 and Exs C, D, E & F thereto at CP 509-516.* These facts alone show that the Department knew that Mr. Backstein was represented by RMA in his fourth claim.

The Court usurped the jury's role and violated Appellate and Supreme Court precedent when it (the Court) adopted as true, without even letting discovery take place, the Department's one-sided assertion of a material fact.

This is **not** harmless error. It raises a significant question of law under the Washington State constitution. "The right of trial by jury shall remain inviolate, [. . .]" *Article 1, §21 in pertinent part.* When that right is rendered meaningless, it is no right at all. Nobody would dispute that to give a starving person food but to prevent them from eating it is to give them nothing at all. Similarly, nobody should dispute that to give Mr. Backstein

a right to a trial by jury but to prevent the jury from deciding genuine issues of material fact is to give him no right at all.

State v. O'Connell, 83 Wash. 2d 797, 839, 523 P.2d 872, supplemented, 84 Wash. 2d 602, 528 P.2d 988 (1974):

> The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.

Caldwell v. N. Pac. Ry. Co., 62 Wash. 420, 422–23, 113 P. 1099, (1911):

> The right of trial by jury being a constitutional right, the courts, in law actions, may not take questions of fact away from them and determine such questions for themselves merely because they do not agree with the jury's findings. While we have no doubt of our power to grant new trials where verdicts appear excessive, yet it is a power that should be exercised within reason, and only where it is reasonably plain that justice will be promoted thereby.

Jensen v. Shaw Show Case Co., 76 Wash. 419, 421, 136 P. 698, (1913):

> The Constitution, art. 1, § 21, provides that the right of trial by jury 'shall remain inviolate.' This provision is pregnant with meaning. The courts have no right to trench upon the province of the jury upon questions of fact. It is only where there is no evidence, either direct or circumstantial, which warrants the verdict of the jury that the courts may interfere. In proper cases the jury is an arm of the court; its province is to find the facts; and the province of the court is to declare the law.

In Mr. Backstein's case, the jury never got to draw inferences from the evidence on this issue, nor weigh the credibility of the witnesses on this issue, nor decide genuine issues of material fact.

Because RMA was representing Mr. Backstein on all four of his claims, and because of the October 26, 2017 change of address letter signed by Mr. Backstein and sent to the Department, and because the Department was in direct communication with RMA's office on Mr. Backstein's third claim even though there was no "written notice" of attorney representation, the court should rule as a matter of law that the Department knew that Mr. Backstein was represented by RMA

on the fourth claim, should have known as much – or at a minimum genuine issues of material fact exist on that issue. If this Court declines to do that, then at a minimum it should reverse the Appellate Court due to its violation of Mr. Backstein's constitutional right to a jury and its violation of long-standing Supreme and Appellate Court precedent.

Rule: "The IIA is construed broadly in favor of coverage in order to achieve its objective of protecting all workers." *Dep't of Lab. & Indus. of State v. Lyons Enterprises Inc.*, 185 Wash. 2d 721, 741, 374 P.3d 1097 (2016), as amended (July 13, 2016).

The Appellate Court viewed this issue through the lens of not "requiring the Department to repeat a mistake" – rather than the lens of how the Department's "mistake" was a reliable action indicating that it knew that Mr. Backstein was represented by RMA on all claims, regardless of a notice of representation.

It would be entirely reasonable for Mr. Backstein to have formed the impression that the Department would be sending all orders on all of his claims to his attorney.

Despite the lack of a letter of representation in claim BC 21080 (third claim), the Department sent a Board-appealable order to RMA, counsel for Mr. Backstein. This fact, and the October 26, 2017, letter sent to the Department changing his address to his attorney's address are facts that support the reasonable conclusion that the reason the Department sent the order in Claim BC 21080 to RMA (despite no written notice of representation) was because the Department knew that RMA was representing Mr. Backstein on **all** of his claims.

By sending the Order in the third claim (BC 21080) to RMA, the Department established a practice and procedure for all of Mr. Backstein's claims with respect to Board-appealable orders, but it also was a reliable action showing that it knew that RMA was representing Mr. Backstein on all of his claims, regardless of a written notice.

At a minimum, these facts create the reasonable inference that the Department knew that RMA represented Mr. Backstein on the fourth claim and violated the law by its ex parte mailing

of the Board-appealable order to Mr. Backstein. The Department treated Mr. Backstein's claims inconsistently and prejudiced Mr. Backstein.

VI. CONCLUSION

Each factor under RAP 13.4(b) is present. The Supreme Court should accept review.

WORD COUNT CERTIFICATION

Pursuant to RAP 18.17, this brief contains 4,954 words.

DATED: July 27, 2023

RON MEYERS & ASSOCIATES PLLC

By: _____
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APPENDIX:

Appendix A – Court of Appeals, Div II unpublished opinion dated March 28, 2023

Appendix B – Court of Appeals, Div II Order Denying Motion for Reconsideration.

Appendix C – Copies of statutes and constitutional provisions.

Appendix A

Filed
Washington State
Court of Appeals
Division Two

March 28, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ROBERT BACKSTEIN, Respondent, v. THE DEPARTMENT OF LABOR AND INDUSTRIES, Appellant.	No. 57538-8-II UNPUBLISHED OPINION

CRUSER, J. – Robert Backstein worked as a firefighter for the City of Kent from 1987-2010 and the Puget Sound Regional Fire Authority from 2010-2017. Backstein filed four workers' compensation claims for benefits related to occupational diseases that he alleged he sustained from his work as a firefighter. One of these claims, Claim No. BC-21081, was filed in October 2017. This claim was for coronary artery disease. For this claim, Backstein did not send a notification to the Department of Labor and Industries (Department) appointing an attorney as his representative as required by RCW 51.04.080.[1] The Department sent an order rejecting this claim for benefits on December 12, 2018. The order was sent to Backstein and his physician, but it was not sent to the attorney who was representing Backstein in two of his other claims.

[1] In two of the four claims filed by Backstein (the first and second ones), Backstein filed a notice with the Department pursuant to RCW 51.04.080 appointing an attorney as his representative in those claims. In the third and fourth claims, Backstein did not designate an attorney representative.

On November 4, 2019, Backstein protested the Department's order rejecting his claim. On November 21, 2019, the Department notified Backstein that it could not reconsider his claim because the protest was not received within the 60-day time limitation. On January 6, 2020, Backstein appealed the Department's December 12, 2018 order denying his claim and the November 21, 2019 order denying reconsideration to the Board of Industrial Insurance Appeals (Board). The parties subsequently filed cross-motions for summary judgment. The Industrial Appeals Judge (IAJ) granted the Department's motion for summary judgment and denied Backstein's cross-motion for summary judgment, and affirmed the Department's December 12, 2018 order denying Backstein's claim and the November 21, 2019 order rejecting Backstein's protest of the denial. Backstein petitioned for the Board to review the IAJ's "Proposed Decision and Order" regarding Backstein's claim. The Board affirmed the Department's December 12, 2018 and November 21, 2019 orders. Backstein then appealed the Board's decision in Pierce County Superior Court.

The superior court reversed the Board's order on equitable grounds and remanded to the Department to reconsider its December 12, 2018 order rejecting Backstein's fourth claim. The Department appeals the superior court's order.

We hold that (1) the superior court erred by ruling that the Department's failure to serve a copy of the rejection order on Backstein's attorney for his other claims (but not this claim) amounted to a substantial injustice where Backstein did not follow the written procedure under RCW 51.04.080, and (2) that the superior court erred in concluding that the claimant's protest and appeal were therefore timely on equitable grounds. Thus, we reverse the superior court's order,

and remand with instructions to reinstate the Board's April 14, 2021 order dismissing Backstein's appeal on Claim No. BC-21081.

FACTS

Backstein worked as a firefighter for the City of Kent from 1987-2010 and then the Puget Sound Regional Fire Authority from 2010 until his retirement in 2017. Backstein filed four workers' compensation claims for benefits related to occupational diseases that he asserted were sustained as a result of his work as a firefighter. In June 2017, Backstein submitted his first claim, Claim No. SE18218 (first claim), and sent a written notice to the Department that he was represented by his attorney, stating in part, "Please note that this is also A CHANGE OF ADDRESS. All correspondence should now be mailed to my attorney . . ." Clerk's Papers (CP) at 449 (emphasis omitted). In August 2017, Backstein submitted his second claim, Claim No. BC-21079 (second claim), and again sent written notice to the Department that he was represented by his attorney, stating in part, "Please note that this is also A CHANGE OF ADDRESS. All correspondence should now be mailed to my attorney . . ." *Id.* (emphasis omitted). The Department received Backstein's letter on October 30, 2017.

On October 6, 2017, Backstein filed Claim No. BC-21080 (third claim). For this claim, Backstein did not file a written notice that he was represented by an attorney. On October 31, 2017, Backstein filed his fourth claim, Claim No. BC-21081 (fourth claim, claim, or Claim No. BC-21081) for coronary artery disease with the Department.[2] Backstein claimed that the coronary artery disease resulted from radiation treatment that he received for his cancer diagnosis that he

[2] The BC-21081 "Report of Accident" is dated October 25, 2017 (Backstein) and October 27, 2017 (portion filled out by Backstein's physician), however it is stamped October 31, 2017, which appears to be the date that the Department received Backstein's fourth claim.

attributed to an occupational disease. On November 10, 2017, Backstein filed an occupational disease and employment history form with the Department under his second claim for chronic obstructive pulmonary disease. Backstein did not send written notice to the Department that he was represented by an attorney in either his third or fourth claims.

On December 12, 2018, the Department rejected Backstein's fourth claim. The Department's rejection letter stated:

> Your contention indicates you believe the coronary artery disease was caused by radiation for non-Hodgkins lymphoma. As that condition is allowed under another claim, SE18218, any conditions you feel may be related to that condition or [its] treatment should be contended under that claim. That is a self insured claim, therefore you will want to address that contention with that employer (City of Kent) if you wish to pursue this matter.
>
> If you are in disagreement with this decision, you may protest. Any protest must be received within sixty days of the date you receive the determination.

Id. at 66.

The Department sent its December 12, 2018 rejection notice to Backstein at his last known address and to his physician.[3] The rejection order was not sent to Backstein's attorney on his other claims. On the same day, the Department also rejected Backstein's third claim. However, in addition to sending notice of the claim rejection to Backstein, the Department mistakenly also sent the rejection notice to Backstein's attorney in his other claims, even though Backstein did not send written notice to the Department pursuant to RCW 51.04.080 that the attorney was a representative for him on the third claim.

[3] There is no dispute that the Department's December 12, 2018 rejection order was sent to Backstein and his physician.

The Department deposed Backstein regarding his various claims on May 29, 2019. On November 4, 2019, Backstein protested the December 12, 2018 decision to close his fourth claim. Backstein contended, in part, that the Department's order rejecting his fourth claim was not properly communicated to his attorney as required by RCW 51.52.050 and RCW 51.04.080. On November 21, 2019, the Department notified Backstein that it could not reconsider his fourth claim because his protest was not received within 60 days of the December 12, 2018 rejection order, making the order final and binding.

On January 6, 2020, Backstein appealed the Department's December 12, 2018 and November 21, 2019 orders regarding his fourth claim to the Board. He argued, *inter alia*, that the November 21, 2019 order was incorrect because the December 12, 2018 order was not properly communicated to Backstein's attorney under RCW 51.52.050 and RCW 51.04.080. On February 6, 2020, the Board issued an order agreeing to hear Backstein's appeal of the Department's December 12, 2018 rejection of his fourth claim, "subject to proof that it was filed within 60 days of the CLAIMANT's receipt of the decision." *Id.* at 923.

The parties filed cross-motions for summary judgment regarding Backstein's fourth claim. The IAJ affirmed the Department's December 12, 2018 order rejecting Backstein's fourth claim, and the November 21, 2019 order that declined to consider Backstein's appeal of his fourth claim. The IAJ granted the Department's motion for summary judgment and denied Backstein's motion for summary judgment. Backstein petitioned for the Board to review the IAJ's Proposed Decision and Order regarding Backstein's fourth claim.

The Board granted review of the IAJ's Proposed Decision and Order. The Board affirmed the Department's November 21, 2019 order and dismissed Backstein's appeal of the Board's

December 12, 2018 order. The Board concluded that Backstein's protest and appeal were untimely. As a result, the Board declined to address Backstein's arguments regarding the firefighter presumption and why his claim should be allowed. The Board reasoned that Backstein's appeal was untimely even if the Department knew, or should have known, that Backstein's attorney was representing him because the statutes at issue required a signed authorization before the Department was allowed to send orders to a representative of the injured worker. The Board also concluded that Backstein was not entitled to the remedy of equitable estoppel against the Department to excuse his untimely protest to the Department's December 12, 2018 order.

Backstein appealed the Board's decision in Pierce County Superior Court. The superior court, after hearing oral argument on the parties proposed orders, reversed the Board's order and remanded to the Department to reconsider its December 12, 2018 order rejecting Backstein's fourth claim. The superior court made written findings of fact and conclusions of law. The Department challenges the superior court's factual finding that its failure to serve a copy of its December 12, 2018 order on Backstein's attorney amounted to a substantial injustice to Backstein. The Department also assigns error to several of the superior court's conclusions of law, including:

> 1. Mr. Backstein's November 16, 2018[4] protest of the Department's December 12, 2018 order was timely.
> 2. Mr. Backstein's January 6, 2020 appeal of the December 12, 2018 order was timely.
> 3. The April 14, 2021 Board of Industrial Insurance Appeals decision and order is reversed in its entirety.
> 4. The matter is remanded to the Department to reconsider its December 12, 2018 Notice of Decision and take such further action as necessary under the facts and the law.

[4] The superior court incorrectly stated that Backstein protested on November 16, 2018. Backstein protested on November 4, 2019. On November 6, 2019, the protest was received and filed. This is clearly a typo as it would be impossible to appeal an order a month before it was entered.

Id. 1648.

Backstein moved for attorney fees, which the court granted after a hearing, on July 1, 2022. The Department appeals the superior court's order which reversed the Board's April 14, 2021 decision dismissing Backstein's appeal.

DISCUSSION

The Department contends that the superior court erred in reversing the Board's order dismissing Backstein's appeal because RCW 51.04.080 requires the Department to send its orders and decisions directly to an injured worker unless the worker informs the Department in writing that it should send them to the worker's designated representative in that claim. The Department argues that the trial court erred in finding that it was a substantial injustice for it to not mail the rejection order in the fourth claim to Backstein's attorney. The Department also assigns error to the superior court's conclusion that Backstein's protest and appeal of the December 12, 2018 order were timely.

Backstein argues that the superior court's order should be affirmed because the Department knew that Backstein's attorney represented him and the Industrial Insurance Act (IIA) must be liberally construed in favor of the injured worker. Backstein contends that the November 21, 2019 order is incorrect because the December 12, 2018 order was not properly communicated to his attorney under RCW 51.04.080 and RCW 51.52.050. According to Backstein, the Department was on notice that his attorney represented him in the fourth claim because Backstein's "claim history documents" were transferred to his fourth claim and they included notice that Backstein's attorney was his legal representative. Br. of Resp't at 1. As a result, Backstein contends that the Department *should have* sent the its December 12, 2018 rejection order to Backstein's attorney.

The Department argues that giving notice on one claim does not give notice on another claim.

We agree with the Department.

A. LEGAL PRINCIPLES

The IIA, Title 51 RCW, governs workers' compensation claims. On appeal from the superior court for an industrial insurance claim, we review the superior court's decision, not the Board's order. *Leitner v. City of Tacoma*, 15 Wn. App. 2d 1, 12 476 P.3d 618 (2020); *see also* RCW 51.52.140. We review " 'whether substantial evidence supports the trial court's factual findings and . . . whether the trial court's conclusions of law flow from the findings.' " *Masco Corp. v. Suarez*, 7 Wn. App. 2d 342, 347, 433 P.3d 824 (2019) (quoting *Hendrickson v. Dep't of Lab. and Indus.*, 2 Wn. App. 2d 343, 351, 409 P.3d 1162 (2018)). Conclusions of law are reviewed de novo. *Id.* at 347. We review the superior court's decision in the same way we review other civil cases. RCW 51.52.140.

We review the fashioning of equitable remedies for an abuse of discretion. *Borton & Sons, Inc. v. Burbank Props., LLC*, 196 Wn.2d 199, 206, 471 P.3d 871 (2020). Although " 'the fashioning of the remedy may be reviewed for abuse of discretion, the question of whether equitable relief is appropriate is a question of law.' " *Id.* at 206 (quoting *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005)). The trial court abuses its discretion if the decision is based upon untenable grounds, or the decision is manifestly unreasonably or arbitrary. *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998).

Statutory interpretation is a question of law reviewed de novo. *Masco Corp.*, 7 Wn. App. 2d at 347. "The goal of statutory interpretation is to determine and give effect to the legislature's

intent." *Birgen v. Dep't of Lab. & Indus.*, 186 Wn. App. 851, 857, 347 P.3d 503 (2015). "If a statute is unambiguous, we must apply the statute's plain meaning as an expression of legislative intent without considering other sources." *Id.* at 857-858. We do not rewrite clear statutory language under the guise of interpretation. *Id.* at 858. Moreover, we give great weight to the Department's interpretation of the IIA. *Peterson v. Dep't of Lab. & Indus.*, 17 Wn. App. 2d 208, 217, 485 P.3d 338 (2021).

RCW 51.04.080 establishes the procedure that the Department must follow in sending notices, orders, and payments to claimants. The statute states:

> On all claims under this title, claimants' written notices, orders, or payments must be forwarded directly to the claimant until such time as there has been entered an order on the claim appealable to the board of industrial insurance appeals. Claimants' written notices, orders, or payments may be forwarded to the claimant in care of a representative before an order has been entered if the claimant sets forth in writing the name and address of the representative to whom the claimant desires this information to be forwarded.

RCW 51.04.080.

RCW 51.52.050(1) provides that an order becomes final 60 days after it is communicated to the parties unless a written request for reconsideration or appeal is filed. RCW 51.52.060(1) provides that a person aggrieved by a Department order must file a notice of appeal to the Board "within sixty days from the day on which a copy of the order, decision, or award was communicated to such person." "The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim." *Marley v. Dep't of Lab. & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994).

B. ANALYSIS

1. *RCW 51.04.080*

The plain language of the statute makes clear that the claimant must personally convey to the Department a notification that sets forth the representative's name and address if a claimant wants to have a Department order forwarded to their representative. The statute requires that a claimant's written notices, orders, or payments be forwarded directly to the claimant until there is an order on the claim that is appealable to the Board. However, the statute also allows the claimant to request that any written notices, orders, or payments be forwarded to a representative designated by the claimant to receive such materials, but the claimant must set forth "in writing the name and address of the representative to whom the claimant desires this information to be forwarded." RCW 51.04.080. Here, Backstein did not, in this fourth claim, make a written request authorizing the Department to forward notices to Backstein's attorney.

Nonetheless, the superior court found that the Department's failure to serve a copy of its December 12, 2018 order on Backstein's attorney amounted to a substantial injustice. Backstein argues that because the Department sent a copy of its rejection order to Backstein's attorney in the third claim, even though he did not file a notice of representation in that claim, the Department should have also served a copy of its December 12, 2018 order on the fourth claim to his attorney. We disagree with Backstein. In industrial insurance cases, there is no precedent for requiring the Department to repeat a mistake on one claim that it made on another. The Department followed RCW 51.04.080 in not sending the December 12, 2018 rejection order to Backstein's attorney.

In *Smith v. Department of Labor & Industries*, 22 Wn. App. 2d 500, 511, 512 P.3d 566, *review denied*, 200 Wn.2d 1013 (2022), Division One held that RCW 51.04.080 requires that

claimants, and not attorneys, "set forth in writing the name and address of the claimant's representative." The court concluded that the Department was not required to forward a copy of the rejection order to the attorney because the claimant did not send a notification to the Department setting forth the claimant's representative as required by RCW 51.04.080. *Id.* Here, like in *Smith*, Backstein did not provide the Department with a notification appointing his attorney as his representative regarding his fourth claim. Consequently, the Department was not required, or permitted, to send a copy of its December 12, 2018 rejection order to Backstein's attorney.

The Department contends that its transfer of 775 pages of "claim history" from Backstein's first claim to his fourth claim has no bearing on its statutory obligations under RCW 51.04.080. Br. of Appellant at 26-27. We agree with the Department because the statute provides a specific procedure that the claimant must follow in order for the Department to be authorized to send an order to the claimant's representative. Moreover, as Division One concluded in *Smith,* the statute's requirement encourages claimants to decide whether to pay the costs associated with representation. *Id.* at 509-510. Furthermore, the requirement provides clarity to the Department when it processes various claims because a claimant may elect to have a representative for one claim and not a separate claim. *Id.* at 510.

The Department contends that it did not establish a "custom and practice" when it sent Backstein's attorney the December 12, 2018 rejection order in the third claim. The Board rejected Backstein's argument in its April 14, 2021 decision and order, finding that the Department's mailing of one order in violation of the statute and Department policy was a mistake and did not establish a custom and practice. We agree with the Department because it followed RCW 51.04.080 in not sending the rejection order on his fourth claim to his attorney.

2. RCW 51.52.050 and RCW 51.52.060

Backstein failed to protest the Department's order rejecting his claim for over 10 months, and failed to appeal the Department's order rejecting his claim for over a year. Thus, Backstein's protest and appeal were filed long after the Department's order became final under RCW 51.52.050(1) and RCW 51.52.060(1). Nonetheless, the superior court concluded that Backstein's November 4, 2019 protest and January 6, 2020 appeal were timely.

In *Marley*, the supreme court clarified that where an aggrieved party has not appealed a final Department order deciding a claim within the applicable appeal period, that party is precluded from challenging the claim unless the order was void when entered. 125 Wn.2d at 538, 542-544. Here, the December 12, 2018 order became final on February 16, 2019, because Backstein did not challenge the order within the 60-day time period under RCW 51.52.050(1). Thus, the Department's order became final and his November 4, 2019 protest and January 6, 2020 appeal were untimely.

The tolling of the 60-day requirement set forth in RCW 51.52.050 and RCW 51.52.060 is only permitted in limited circumstances. *Kingery v. Dep't of Lab. & Indus.*, 132 Wn.2d 162, 174, 177-78, 937 P.2d 565 (1997); *Pearson v. Dep't of Lab. & Indus.*, 164 Wn. App. 426, 442-45, 262 P.3d 837 (2011); *Dep't of Lab. & Indus. v. Fields Corp*, 112 Wn. App. 450, 459, 45 P.3d 1121 (2002). Backstein does not explain why the superior court's imposition of equitable relief was proper. In industrial insurance cases, equitable relief is only appropriate where (1) the party was incompetent or otherwise unable to understand a Department order or circumstances outside the party's control rendered it impossible to file a timely appeal, (2) when the party was diligent in

pursuing their rights, and (3) there was misconduct by the Department. *Kingery*, 132 Wn.2d at 174, 177-78; *Pearson*, 164 Wn. App. at 442-445; *Fields Corp.*, 112 Wn. App. at 459.

Here, Backstein was not entitled to equitable relief. Like in, *Kingery* and *Pearson*, and unlike in *Fields Corp.*, Backstein was competent and there were no circumstances beyond his control. *Kingery*, 132 Wn.2d at 174, 177-78; *Pearson*, 164 Wn. App. at 442-445; *Fields Corp.*, 112 Wn. App. at 459. More importantly, Backstein was not diligent in pursuing his rights. He did not protest until more than 10 months after the rejection order was sent and did not appeal for more than a year. Backstein does not adequately explain, nor does the record reveal, why it took him more than 10 months to file his protest, and over a year for him to appeal the December 12, 2018 rejection order.[5] It is undisputed that the Department sent the rejection order to Backstein at his last known address and his physician on December 12, 2018. The rejection order explicitly stated that Backstein had 60 days to appeal the Department's decision. He did not do so until January 6, 2020. We conclude that Backstein was not diligent in pursuing his rights. Lastly, the Department did not engage in any misconduct because it complied with RCW 51.04.080 by sending the rejection order to Backstein. RCW 51.04.080. The Department did not have the authority, under RCW 51.04.080, to send the notice to Backstein's attorney.

[5] Backstein stated in his deposition that his attorneys took care of the fourth claim, BC-21081, and he did not know if his claim had been denied. He guessed that BC-21081 had been denied, but he did not know. Backstein indicated that he had a very complex claim and medical history so he let his attorneys take care of it for him. The fact that the Department asked Backstein about whether Backstein knew if his claim was pending or had been denied demonstrates that Backstein was put on further notice regarding the denial of his fourth claim during the deposition on May 29, 2019, even assuming *arguendo* that he never received the Department's December 12, 2018 order that was sent to Backstein's last known address. Backstein was not diligent in pursuing his fourth claim.

Backstein argues that the court's interpretation of the IIA must be guided by policy considerations. He contends that the policy of the IIA is remedial in nature and must be liberally construed in favor of the injured worker. He quotes *Boeing Co. v. Heidy*, where the court stated that, " 'All doubts about the meaning of the [IIA] must be resolved in favor of workers.' " Br. of Resp't at 6 (alteration in original) (quoting *Boeing Co. v. Heidy*, 147 Wn.2d 78, 51 P.3d 793 (2002)). It is true that in general, the statute must be read in a manner consistent with its stated purpose. *Birgen*, 186 Wn. App. at 862. However, the IIA's liberal construction requirement must be applied in conjunction with the court's ultimate goal of carrying out legislative intent by giving effect to the legislature's statutory language. *Id.* More importantly, here there is no doubt or confusion, about the plain meaning and requirements of RCW 51.04.080, RCW 51.52.050, and RCW 51.52.060.

The plain language of RCW 51.04.080 demonstrates that the legislature intended that a claimant provide written notice to the Department of a change in address for each claim that the claimant wanted their representative to receive future notices, orders, and payments. Moreover, the plain language of RCW 51.52.050 and RCW 51.52.060 demonstrate that the legislature intended that the failure to appeal an order within 60 days makes the order final. We refrain from giving liberal construction to the statutes that would be contrary to their plain language. *Id.*

Therefore, we hold that the superior court erred by ruling that the Department's failure to serve a copy of the rejection order on Backstein's attorney amounted to a substantial injustice where Backstein did not follow the written procedure under RCW 51.04.080. We also hold that the superior court erred in concluding that Backstein's protest and appeal of the Department's

rejection order were timely because he did not protest or appeal within the 60-day statutory requirement.

ATTORNEY FEES

Backstein devotes one sentence in his brief to request attorney fees pursuant to RAP 18.1, RCW 51.52.130, and RCW 51.32.185.[6]

RCW 51.52.130(1) provides, in pertinent part, "If, on appeal to the . . . appellate court from the decision and order of the [B]oard, said decision and order is reversed or modified . . . a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court." We deny Backstein's request for attorney fees based on RCW 51.52.130 because we reverse the superior court's order, which reversed the decision and order of the Board dismissing Backstein's appeal.

RCW 51.32.185(9)(b) provides in relevant part, "When a determination involving the presumption established in this section is appealed to any court and the final decision allows the claim for benefits, the court shall order that all reasonable costs of the appeal, including attorney fees . . . be paid to the firefighter." We also reject Backstein's request for attorney fees pursuant to RCW 51.32.185. The Board did not address the firefighter presumption because it dismissed Backstein's appeal on procedural grounds. The superior court's order reversing the Board's decision did not allow Backstein's claim for benefits, it merely eliminated the procedural hurdle barring Backstein from proceeding with his claim.

[6] RCW 51.32.185 was amended in 2019. *See* LAWS OF 2019, ch. 133, § 1. Because the amendment does not impact our analysis, we cite to the current version of the statute.

Because we reverse the superior court's order, which reversed the decision and order of the Board dismissing Backstein's appeal, we reject Backstein's request for attorney fees on appeal.[7]

CONCLUSION

We reverse the superior court's order, and remand with instructions to reinstate the Board's April 14, 2021 order dismissing Backstein's appeal on claim BC-21081.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

GLASGOW, C.J.

VELJACIC, J.

[7] The Department filed an amended notice of appeal challenging the attorney fee award to Backstein at the superior court, but did not assign error to, brief, or argue this issue. Consequently, we do not consider it.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

June 27, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ROBERT BACKSTEIN, Respondent, v. THE DEPARTMENT OF LABOR AND INDUSTRIES, Appellant.	No. 57538-8-II ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Robert Backstein moves for reconsideration of the Court's unpublished opinion filed on March 28, 2023. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Glasgow, Cruser, Veljacic

FOR THE COURT:

CRUSER, J.

Appendix C

PDF **RCW 51.04.080**

Sending notices, orders, payments to claimants.

On all claims under this title, claimants' written notices, orders, or payments must be forwarded directly to the claimant until such time as there has been entered an order on the claim appealable to the board of industrial insurance appeals. Claimants' written notices, orders, or payments may be forwarded to the claimant in care of a representative before an order has been entered if the claimant sets forth in writing the name and address of the representative to whom the claimant desires this information to be forwarded.

[**2013 c 125 § 4**; **2007 c 78 § 1**; **1972 ex.s. c 43 § 2**; **1961 c 23 § 51.04.080**. Prior: **1959 c 308 § 2**; **1957 c 70 § 5**; prior: 1947 c 56 § 1, part; 1927 c 310 § 7, part; 1923 c 136 § 4, part; 1921 c 182 § 6, part; 1919 c 131 § 6, part; 1911 c 74 § 10, part; Rem. Supp. 1947 § 7684, part.]

RCW 51.32.185 Occupational diseases—Presumption of occupational disease for firefighters and fire investigators—Limitations—Exception—Rules—Advisory committee on occupational disease presumptions.

(1)(a) In the case of firefighters as defined in RCW 41.26.030(17) (a), (b), (c), and (h) who are covered under this title and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, and public employee fire investigators, there shall exist a prima facie presumption that: (i) Respiratory disease; (ii) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (iii) cancer; and (iv) infectious diseases are occupational diseases under RCW 51.08.140.

(b) In the case of firefighters as defined in RCW 41.26.030(17) (a), (b), (c), and (h) and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, and law enforcement officers as defined in RCW 41.26.030(19) (b), (c), and (e), who are covered under this title, there shall exist a prima facie presumption that posttraumatic stress disorder is an occupational disease under RCW 51.08.140.

(c) In the case of law enforcement officers as defined in RCW 41.26.030(19) (b), (c), and (e) who are covered under Title 51 RCW, there shall exist a prima facie presumption that: (i) Any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion in the line of duty; and (ii) infectious diseases are occupational diseases under RCW 51.08.140.

(d) This presumption of occupational disease established in (a), (b), and (c) of this subsection may be rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.

(2) The presumptions established in subsection (1) of this section shall be extended to an applicable member following termination of service for a period of three calendar months for each year of requisite service, but may not extend more than sixty months following the last date of employment.

(3)(a) The presumption established in subsection (1)(a)(iii) of this section shall only apply to any active or former firefighter or fire investigator who:

(i) Has cancer that develops or manifests itself after the firefighter or fire investigator has served at least ten years; and

(ii)(A) Was given a qualifying medical examination upon becoming a firefighter or fire investigator that showed no evidence of cancer; or

(B)(I) For a firefighter or fire investigator who became a firefighter or fire investigator on or after July 28, 2019, the employer did not provide a qualifying medical examination upon becoming a firefighter or fire investigator; or

(II) For a firefighter or fire investigator who became a firefighter or fire investigator before July 28, 2019, the employer did not provide a qualifying medical examination upon becoming a

firefighter or fire investigator and the employer provides a qualifying medical examination on or before July 1, 2020. If a firefighter or fire investigator described in this subsection (3)(a)(ii)(B)(II) did not receive a qualifying medical examination before July 1, 2020, or is diagnosed with a cancer listed in (b) of this subsection at the time of the qualifying medical examination under this subsection (3)(a)(ii)(B)(II) and otherwise meets the requirements of this section, the presumption established in subsection (1)(a)(iii) of this section applies.

(b) The presumption established in subsection (1)(a)(iii) of this section shall only apply to the following cancers: Prostate cancer diagnosed prior to the age of fifty, primary brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma, bladder cancer, ureter cancer, colorectal cancer, multiple myeloma, testicular cancer, kidney cancer, mesothelioma, stomach cancer, nonmelanoma skin cancer, breast cancer in women, and cervical cancer.

(4) The presumption established in subsection (1)(a)(iv) and (c)(ii) of this section shall be extended to any firefighter, fire investigator, or law enforcement officer who has contracted any of the following infectious diseases: Human immunodeficiency virus/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, or mycobacterium tuberculosis.

(5) The presumption established in subsection (1)(b) of this section only applies to active or former firefighters as defined in RCW 41.26.030(17) (a), (b), (c), and (h) and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, and law enforcement officers as defined in RCW 41.26.030(19) (b), (c), and (e) who have posttraumatic stress disorder that develops or manifests itself after the individual has served at least ten years.

(6) If the employer does not provide the psychological exam as specified in RCW 51.08.142 and the employee otherwise meets the requirements for the presumption established in subsection (1)(b) of this section, the presumption applies.

(7) Beginning July 1, 2003, this section does not apply to a firefighter, fire investigator, or law enforcement officer who develops a heart or lung condition and who is a regular user of tobacco products or who has a history of tobacco use. The department, using existing medical research, shall define in rule the extent of tobacco use that shall exclude a firefighter, fire investigator, or law enforcement officer from the provisions of this section.

(8) For purposes of this section, "firefighting activities" means fire suppression, fire prevention, fire investigation, emergency medical services, rescue operations, hazardous materials response, aircraft rescue, and training and other assigned duties related to emergency response.

(9)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final decision allows the claim for benefits, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter, fire investigator, or law enforcement officer, or his or her beneficiary by the opposing party.

(b) When a determination involving the presumption established in this section is appealed to any court and the final decision allows the claim for benefits, the court shall order that all reasonable

costs of the appeal, including attorney fees and witness fees, be paid to the firefighter, fire investigator, or law enforcement officer, or his or her beneficiary by the opposing party.

(c) When reasonable costs of the appeal must be paid by the department under this section in a state fund case, the costs shall be paid from the accident fund and charged to the costs of the claim.

(10)(a) The director must create an advisory committee on occupational disease presumptions. The purposes of the advisory committee are to review scientific evidence and to make recommendations to the legislature on additional diseases or disorders for inclusion under this section.

(b)(i) The advisory committee shall be composed of five voting members, appointed by the director as follows:

(A) Two epidemiologists;

(B) Two preventive medicine physicians; and

(C) One industrial hygienist.

(ii) The research director of the department's safety and health assessment and research for prevention program shall serve as the advisory committee nonvoting chair.

(iii) Members serve for a term of four years and may be reappointed. Members shall not be compensated for their work on the advisory committee. As a condition of appointment, voting members and the chair must have no past or current financial or personal conflicts of interest related to the advisory committee activities. Voting members of the advisory committee may not be current employees of the department.

(c) The chair or ranking member of the appropriate committee or committees of the legislature may initiate a request for the advisory committee to review scientific evidence and to make recommendations to the legislature on specific disorders or diseases, or specific occupations, for inclusion under this section by notifying the director.

(d) The process of developing an advisory committee recommendation must include a thorough review of the scientific literature on the disease or disorder, relevant exposures, and strength of the association between the specific occupations and the disease or disorder proposed for inclusion in this section. The advisory committee must give consideration to the relevance, quality, and quantity of the literature and data. The advisory committee may consult nationally recognized experts or subject matter experts in developing its recommendations. The advisory committee must provide a recommendation to the legislature within the earlier of one hundred eighty days of the request or when the advisory committee reaches a consensus recommendation.

(e) Each recommendation must include a written description of the scientific evidence and supporting information relied upon to assess the causal relationship between the occupation and health condition proposed for inclusion under this section. Estimates of the number of Washington workers at risk, the prevalence of the disease or disorder, and the medical treatment and disability costs should, if available, be included with the recommendation.

(f) The recommendation must be made by a majority of advisory committee's voting members. Any member of the advisory committee may provide a written dissent as an appendix to the committee's recommendation.

(g) The department's safety and health assessment and research for prevention program shall provide organizational and scientific

support to the advisory committee. Scientific support must include for consideration of the advisory committee preliminary written reviews of the scientific literature on the disease and disorder, relevant exposures, and strength of the association between the specific occupations and the health condition or disorders proposed for inclusion in this section. [2019 c 133 § 1; 2018 c 264 § 3; 2007 c 490 § 2; 2002 c 337 § 2; 1987 c 515 § 2.]

Legislative findings—1987 c 515: "The legislature finds that the employment of firefighters exposes them to smoke, fumes, and toxic or chemical substances. The legislature recognizes that firefighters as a class have a higher rate of respiratory disease than the general public. The legislature therefore finds that respiratory disease should be presumed to be occupationally related for industrial insurance purposes for firefighters." [1987 c 515 § 1.]

PDF **RCW 51.52.050**

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

(1) Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, or if the worker, beneficiary, employer, or other person affected thereby chooses, the department may send correspondence and other legal notices by secure electronic means except for orders communicating the closure of a claim. In the event the department has made an order communicating the closure of a claim of a self-insured employer, the self-insured employer may serve the department order provided the self-insured employer does so using a separate, secure, and verifiable nonelectronic means of delivery and includes the department prescribed notice explaining the contents of the order and any protest or appeal rights. The service by the self-insured employer is a communication for the purposes of filing an appeal under RCW **51.52.060**. Persons who choose to receive correspondence and other legal notices electronically shall be provided information to assist them in ensuring all electronic documents and communications are received. Correspondence and notices must be addressed to such a person at his or her last known postal or electronic address as shown by the records of the department. Correspondence and notices sent electronically are considered received on the date sent by the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia. However, a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

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

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

recoupment of benefits as a basis to grant or deny a motion to stay. If a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW **51.32.240**.

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

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

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

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

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

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

[**2019 c 190 § 1**; **2011 c 290 § 9**; **2008 c 280 § 1**; **2004 c 243 § 8**; **1987 c 151 § 1**; **1986 c 200 § 10**; **1985 c 315 § 9**; **1982 c 109 § 4**; **1977 ex.s. c 350 § 75**; **1975 1st ex.s. c 58 § 1**; **1961 c 23 § 51.52.050**. Prior: **1957 c 70 § 55**; **1951 c 225 § 5**; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1947 c 247 § 1, part; 1911 c 74 § 20, part; Rem. Supp. 1947 § 7676e, part. (iii) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (iv) 1923 c 136 § 7, part; 1921 c 182 § 10, part; 1917 c 29 § 3, part; RRS § 7712, part. (v) **1917 c 29 § 11**; RRS § 7720. (vi) 1939 c 50 § 1, part; 1927 c 310 § 9, part; 1921 c 182 § 12, part; 1919 c 129 § 5, part; 1917 c 28 § 15, part; RRS § 7724, part.]

NOTES:

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

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

PDF **RCW 51.52.060**

Notice of appeal—Time—Cross-appeal—Departmental options.

(1)(a) Except as otherwise specifically provided in this section, a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board. However, a health services provider or other person aggrieved by a department order or decision making demand, whether with or without penalty, solely for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within twenty days from the day on which a copy of the order or decision was communicated to the health services provider upon whom the department order or decision was served, a notice of appeal to the board.

(b) Failure to file a notice of appeal with both the board and the department shall not be grounds for denying the appeal if the notice of appeal is filed with either the board or the department.

(2) Within ten days of the date on which an appeal has been granted by the board, the board shall notify the other interested parties to the appeal of the receipt of the appeal and shall forward a copy of the notice of appeal to the other interested parties. Within twenty days of the receipt of such notice of the board, the worker or the employer may file with the board a cross-appeal from the order of the department from which the original appeal was taken.

(3) If within the time limited for filing a notice of appeal to the board from an order, decision, or award of the department, the department directs the submission of further evidence or the investigation of any further fact, the time for filing the notice of appeal shall not commence to run until the person has been advised in writing of the final decision of the department in the matter. In the event the department directs the submission of further evidence or the investigation of any further fact, as provided in this section, the department shall render a final order, decision, or award within ninety days from the date further submission of evidence or investigation of further fact is ordered which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days.

(4) The department, either within the time limited for appeal, or within thirty days after receiving a notice of appeal, may:

(a) Modify, reverse, or change any order, decision, or award; or

(b)(i) Except as provided in (b)(ii) of this subsection, hold an order, decision, or award in abeyance for a period of ninety days which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days pending further investigation in light of the allegations of the notice of appeal; or

(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.

For purposes of this subsection, good cause includes delay that results from conduct of the claimant that is subject to sanction under RCW **51.32.110**.

The board shall deny the appeal upon the issuance of an order under (b)(i) or (ii) of this subsection holding an earlier order, decision, or award in abeyance, without prejudice to the appellant's right to appeal from any subsequent determinative order issued by the department.

This subsection (4)(b) does not apply to applications deemed granted under RCW **51.32.160**.

(5) An employer shall have the right to appeal an application deemed granted under RCW **51.32.160** on the same basis as any other application adjudicated pursuant to that section.

(6) A provision of this section shall not be deemed to change, alter, or modify the practice or procedure of the department for the payment of awards pending appeal.

[**1995 c 253 § 1**; **1995 c 199 § 7**; **1986 c 200 § 11**; **1977 ex.s. c 350 § 76**; **1975 1st ex.s. c 58 § 2**; **1963 c 148 § 1**; **1961 c 274 § 8**; **1961 c 23 § 51.52.060**. Prior: **1957 c 70 § 56**; **1951 c 225 § 6**; prior: 1949 c 219 §§ 1, part, 6, part; 1947 c 246 § 1, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 §§ 2, part, 6, part; 1927 c 310 §§ 4, part, 8, part; 1923 c 136 § 2, part; 1919 c 134 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 §§ 5, part, 20, part; Rem Supp. 1949 §§ 7679, part, 7697, part.]

NOTES:

Reviser's note: This section was amended by 1995 c 199 § 7 and by 1995 c 253 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW **1.12.025**(2). For rule of construction, see RCW **1.12.025**(1).

Severability—1995 c 199: See note following RCW **51.12.120**.

RON MEYERS & ASSOCIATES PLLC

July 27, 2023 - 1:45 PM

Filing Petition for Review

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