Supreme Court No. 1026170
Court of Appeals No. 844881-I

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

MICHAEL CONKLIN,

Petitioner,

v.

THE BOEING COMPANY, and THE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

RESPONDENT THE BOEING COMPANY'S RESPONSE TO PETITIONER'S PETITION FOR REVIEW

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I. INTRODUCTION

Respondent, The Boeing Company, asks this court to reject the petition for review of the Court of Appeals decision. Petitioner's framing of the procedural history of this case and scope of review is distorted and inaccurate. The decision does not conflict with prior appellate court decisions and does not involve any question of substantial public interest.

II. RESPONSE TO ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

As explained in Section IV and V herein, the issues raised by Mr. Conklin's Petition do not meet the criteria for review under RAP 13.4(b)(1), (2), or (4). Neither the superior court nor the Court of Appeals improperly exceeded their scope of review in this case.

III. STATEMENT OF THE CASE

Boeing agrees with the factual and procedural summary set out by the Court of Appeals, with additional detail set out below.

A. Procedural History

Mr. Conklin began working for Boeing in January 2011 and filed a workers' compensation claim in April 2011. CP 451, 642, 644. On May 22, 2012, the Department of Labor and Industries (hereinafter "the Department") issued an order closing the claim. CP 452. Mr. Conklin appealed the closing order, which eventually led to a jury trial in Snohomish County Superior Court. CP 25-31. A Judgment and Order was filed on July 29, 2015, which reflected the jury's determinations that Mr. Conklin's degenerative cervical spine conditions and lumbar spondylolisthesis and spondylolysis were proximately caused or aggravated by his occupational exposure. CP 26.

Numerous Department orders issued in 2018 leading to this ongoing litigation. CP 457-59. The dates of the orders

appealed in this current dispute are bolded, while the others are necessary for context[1]:

1. 08/31/17: Directed Boeing to pay time loss benefits[2] from June 9, 2017 through the date of the order and continuing. CP 512.
2. 11/16/17: Affirmed the order of 08/31/17. CP 510.
3. 02/16/18: Changed the order of 11/16/17. Boeing was found not responsible for the payment of time loss benefits from June 9, 2017 through August 31, 2017. CP 508-09.
4. 02/20/18: Found Mr. Conklin engaged in willful misrepresentation and ordered him to repay time loss benefits paid to him by Boeing from June 1, 2015

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[1] The orders issued during the life of this claim are compiled in the jurisdictional history assembled by the Board, which is found at CP 457-59.

[2] "'Time loss' is workers' compensation parlance for temporary total disability compensation, a wage replacement benefit." *Energy Northwest v. Hartje*, 148 Wn. App. 454, 463, 199 P.3d 1043 (2009) (citation omitted).

through June 8, 2017, plus a 50% penalty payable to the Department. CP 519-20. Time loss benefits ended as paid through May 31, 2015, and the claim closed without an award for permanent partial disability. CP 519-20.

5. 04/20/18: Affirmed the 02/16/18 order. CP 506-07.

6. 06/29/18: Directed Boeing to accept cervical degenerative disc disease. CP 121.

7. 07/13/18: Directed Boeing to authorize and pay for a C5-6, C6-7 cervical discectomy and fusion surgery. CP 501-02.

8. **07/20/18**: Corrected and superseded the 02/20/18 order and affirmed the willful misrepresentation determination but omitted language closing the claim. CP 516-17.

9. **08/15/18**: Reversed the 04/20/18 order and directed Boeing to pay time loss from June 9, 2017 through August 31, 2017. CP 504-05.

10. **08/16/18**: Affirmed the 06/29/18 order. CP 121.

11. **08/17/18**: Affirmed the 07/13/18 order. CP 500.

Mr. Conklin appealed the 7/20/18 order to the Board. CP 514. Boeing cross-appealed the 7/20/18 order and also appealed the 8/15/18, 8/16/18, and 8/17/18 orders. CP 496-97, 486-87, 488-89. Two litigation orders were issued by the Industrial Appeals Judge setting forth the issues as agreed by the parties. CP 393-94, 431-33. On both orders, the issue pertaining to Boeing's appeal of the 7/20/18 order was framed as follows: "Should the closure order of February 20, 2018, be reinstated?" CP 394, 431. The orders further reflected the parties' stipulation to the admission of the Board's jurisdictional history for jurisdictional purposes and was accompanied by a statement that the Board had jurisdiction over the parties and the subject matter of the parties' appeals. CP 396, 433.

Mr. Conklin filed summary judgment motions regarding Boeing's appeals of the 8/16/18 order and 8/17/18 order based on the 2015 Superior Court Judgment and Order. CP 386-87, 523. The motion regarding Boeing's appeal of the 8/16/18

appeal was granted, and that order became final and binding. CP 124, 533. The motion regarding Boeing's appeal of the 8/17/18 order was denied. CP 386-87, 533-34. Thus, the cross-appeals of the 7/20/18 order (willful misrepresentation), 8/15/18 order (time loss June 9, 2017 through August 31, 2017), and 8/17/18 (directing payment of surgery) orders remained in dispute.

Following the parties' presentation of evidence, a Proposed Decision and Order issued. CP 326-349. Both Mr. Conklin and Boeing filed Petitions for Review. CP 244-318. The Board granted the Petitions for Review and issued a Decision and Order. CP 275, 232-42. Mr. Conklin appealed the Decision and Order to Snohomish County Superior Court. CP 226. The trial court affirmed the Decision and Order in its entirety. CP 1-8.

Mr. Conklin then appealed the Snohomish County Superior Court judgment to the Court of Appeals, Division I. After briefing and argument from both parties, the Court of

Appeals issued an unpublished decision affirming the superior court judgment in its entirety.

B. Factual History

Boeing incorporates by reference the factual history set out in its Court of Appeals' brief.

IV. ARGUMENT AGAINST GRANTING DISCRETIONARY REVIEW

The Supreme Court grants discretionary review only in limited circumstances, including when a constitutional question exists, when the decision of the Court of Appeals conflicts with a Supreme Court decision or conflicts with a published Court of Appeals decision, or if the issue is of substantial public interest. RAP 13.4(b). Here, Mr. Conklin contends the decision of the Court of Appeals conflicts "with numerous appellate decisions" and involves "numerous issues" of substantial public interest. All of these arguments hinge on Mr. Conklin's contention that the Board, the trial court, and the appellate court exceeded the scope of review. As the trial and appellate courts found,

Mr. Conklin ignores the various issues raised and that are necessary to the adjudication of the three orders being litigated.

A. The Court of Appeals' Decision Did Not Conflict with Prior Appellate Decisions.

Mr. Conklin focuses a significant portion of his argument on *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 879 P.2d 236 (1994) for his position that the Court of Appeals' decision conflicts with prior appellate decisions. This focus is misplaced; *Hanquet* does not support Mr. Conklin's argument.

In *Hanquet*, the Department denied an individual's claim on a singular basis, finding he was a sole proprietor, not a worker. 75 Wn. App. at 660. The Board ultimately affirmed the denial order, but on a different basis than the Department. It found *Hanquet* was a worker, but still excluded because he was not in the course of his trade. No parties raised this issue or presented evidence on it at hearing. *Id.* at 660-61. When the case reached the Court of Appeals, the Board's decision was deemed to have exceeded the scope of its review because the

grounds it utilized to affirm the denial order was not raised by any party and was therefore not before the Board as a basis or reason to reach a decision. *Id.* at 662-64. The Court of Appeals specifically cited to *Brakus v. Dep't of Labor & Indus.* for the notion that the Board cannot, on its own motion, change the issues before it as framed by a party's notice of appeal such that the scope of the proceedings is expanded. *Id.* at 662 (citing *Brakus v. Dep't of Labor & Indus.*, 48 Wash. 2d 218, 223, 292 P.2d 865 (1965)).

Hanquet is the antithesis of Mr. Conklin's situation. Here, four different Department orders were appealed. Numerous issues and dockets were before the Board, one of which was Boeing's appeal of the 7/20/18 order seeking to reinstate the closing order dated February 20, 2018. A closing order "explicitly or by necessary implication" determines the "totality of the claimant's entitlement to all benefits of whatever form, as of the date of the claim closure." *In re Randy Jundul,* BIIA Dec. 98 21118 (1999); *In re Mary E. Trudesson*, Dckt.

No. 06 17967 (October 7, 2008); *In re Gene A. Palmer*, Dckt. No. 07 21701 (June 10, 2010).[3] Thus, each of the issues the superior court and Court of Appeals addressed was squarely and clearly within the scope of their authority to review. They were not only identified by the numerous orders both parties appealed, but also expressly served as the basis for Boeing's appeal of the 7/20/18 order.

Mr. Conklin ignores that Boeing also appealed the 7/20/18 order to the Board, and specifically requested the closing wording of the February 20, 2018 order be reinstated. He ignores that the 7/20/18 order corrected and superseded that earlier February 20, 2018 order, which addressed willful misrepresentation and claim closure. While Mr. Conklin apparently disagrees with the outcome favorable to Boeing, the simple fact is that the Board, trial court, and appellate court

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[3] "'Time loss' is workers' compensation parlance for temporary total disability compensation, a wage replacement benefit." *Energy Northwest v. Hartje*, 148 Wn. App. 454, 463, 199 P.3d 1043 (2009) (citation omitted).

correctly understood the scope of the orders appealed. All issues in terms of medical and vocational fixity were properly before the superior court and the Court of Appeals.

Mr. Conklin's petition also alleges the Court of Appeals decision contradicts the *Brakus* decision. 48 Wash.2d 218. This argument also fails. In *Brakus*, an injured worker appealed an order closing his claim with a permanent partial disability award, seeking a greater award than reflected in the order. *Id.* at 219. The Court of Appeals found the Board erred when it found the worker was not entitled to any permanent partial disability award. *Id.* at 219-20. *Brakus* has been interpreted to stand for the proposition that when a worker appeals a Department order, they cannot find themselves in a worse position than if they had never appealed. See e.g. *In re: Earl Crosson*, Dckt. No. 18 24422 (April 14, 2020). *Brakus* does not address the current scenario, where cross-appeals of an order exist.

Mr. Conklin argues that *his* appeal of the 7/20/18 order cannot leave him in a worse position than if he had allowed the

willful misrepresentation finding to become final and binding. However, he continues to overlook and/or ignore the fact that Boeing also appealed the 7/20/18 order and specifically sought to reinstate the wording closing the claim that was originally included in the closing order dated February 20, 2018. This squarely put the issue of whether claim closure was appropriate (and thus, Mr. Conklin's entitlement to medical treatment and time loss benefits) before the superior court and Court of Appeals. That the Board, superior court, and Court of Appeals made Findings of Fact and Conclusions of Law that were adverse to Mr. Conklin's arguments and interests does not mean each tribunal exceeded the scope of its review or authority.

Mr. Conklin's emphasis on *Hanquet* and *Brakus* are misplaced. The Court of Appeals decision in this case does not contradict those decisions or any other Supreme Court or published Court of Appeals decision such that his Petition

should be granted on this basis. Mr. Conklin's petition should be denied.

B. Mr. Conklin Does Not Present an Issue of Substantial Public Interest Warranting Review.

With his continued misplaced reliance on *Hanquet* and *Brakus*, Mr. Conklin also characterizes the "exceeding of scope of review" as an issue of substantial public interest. He urges this Court to review the Court of Appeals' decision because it permits Boeing to recoup the time loss benefits three separate tribunals have now determined Mr. Conklin was not entitled to receive. As the Board, trial court, and appellate court correctly understood, the issue of entitlement to those benefits was properly at issue due to the three orders appealed by Boeing.

Additionally, Boeing's ability to assert an overpayment as a result of these decisions is governed by RCW 51.32.240(4) and does not result in a substantial public interest this Court should address. To the contrary, the legislature expressed its intent to allow recovery. Also contrary to Mr. Conklin's

arguments, the Court of Appeals' decision does not enable or embolden employers as RCW 51.32.240(4) can only be utilized after what is often lengthy and costly litigation of Department orders. This functional and practical limitation prevents misuse or injustice arising from overpayments that self-insured employers may seek to assess following a final adjudication. And here, no such injustice exists because Mr. Conklin misrepresented his entitlement to the benefits in question.

No public interest is at issue in the Court of Appeals' decision that supports this Court granting Mr. Conklin's Petition. It should be denied.

V. CONCLUSION

Mr. Conklin's arguments stem from a distortion of the procedural history of this case. Despite his baseless attempt to present this matter as solely arising from his appeal of the 7/20/18 order; in actuality, Boeing also appealed that order and three other orders. Mr. Conklin fails to establish a basis under RAP 13.4(b) for this Court to grant review the Court of

Appeals' decision. Boeing respectfully requests this Court deny Mr. Conklin's petition.

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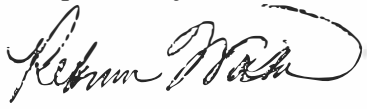
Dated: January 3, 2023

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I hereby certify under penalty of perjury that on this date, I filed a copy of **RESPONDENT THE BOEING COMPANY'S RESPONSE TO PETITIONER'S PETITION FOR REVIEW** via e-filing with the following:

Washington State Supreme Court
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I further certify under penalty of perjury that on this date, I served a copy of the foregoing **RESPONDENT THE BOEING COMPANY'S RESPONSE TO PETITIONER'S PETITION FOR REVIEW** via the Washington state Supreme Court's efile and service system and email on the following:

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