NO. 90610-6

SUPREME COURT OF THE STATE OF WASHINGTON

DEREK J. YOUNG,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LABOR AND INDUSTRIES

Respondent.

DEPARTMENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Notice is fundamental in litigation. The civil rules require a party taking a deposition to give notice to all parties so they may fully participate in the proceeding. Derek Young did not give notice to the Department of Labor & Industries of two depositions he later sought to use in a separate proceeding against the Department. The Board of Industrial Insurance Appeals, superior court, and Court of Appeals all correctly held that the Industrial Insurance Act required compliance with the notice requirements in the civil rules. CR 32 required Young to give the Department notice of the depositions he took in a separate third party tort case in order to use them in his workers' compensation case.

Had Young given notice to the Department, he would have been able to submit his depositions as evidence at no extra cost. He offers no reason why he did not give notice to the Department. His failure to give notice does not present a substantial issue of public interest, nor does it present a constitutional issue warranting review.

II. COUNTERSTATEMENT OF ISSUES

Review is not warranted in this case, but if review were accepted, the issues presented would be:

1. RCW 51.52.100 requires the taking of testimony by deposition to comport with the civil rules. Under CR 32, a deposition may be used only against a party that had notice

of it, or against a successor in interest in an action involving the same issues and subject matter.

Did the trial court abuse its discretion in excluding depositions taken without notice and in determining that the Department was not the successor in interest to the driver in the separate tort action when the Department did not follow the driver in ownership or control of property and when the tort action and the workers' compensation action involved different issues?

2. Were Young's due process rights violated by the exclusion of two of his depositions when he failed to comply with CR 32 by taking them without notice to the Department and when, after they were excluded, Young declined several opportunities to present his witnesses with notice to the Department?

III. STATEMENT OF THE CASE

A. The Department Allowed Young's Workers' Compensation Claim, Paid Benefits, Then Closed the Claim

Young was injured in a motor vehicle accident in 2007 in the course of his employment. CP 33. The Department allowed his workers' compensation claim and paid benefits. CP 33. The Department closed the claim in 2008 without an award for permanent partial disability. CP 36. Young appealed to the Board. CP 38-39.

B. Young Took the Depositions of Three Experts Without Notice to the Department

The Attorney General's Office appeared on behalf of the Department in March 2009, and served notice of its appearance on Young's counsel. CP 116. Subsequently, the Board held a litigation

scheduling conference at which Young named "two unidentified medical witnesses and one vocational witness" as his experts. CP 64.

Young later sought to disqualify the assigned hearings judge. CP 67-69. The Board denied his affidavit of prejudice as untimely. CP 70. Young sought a writ of mandamus in superior court, seeking to remove the assigned hearings judge. CP 72-77. At his request, the Board suspended proceedings in his appeal pending the superior court's ruling. CP 81, 86-87. Nonetheless, with notice to the Department, Young took a deposition of his chiropractor, Dr. Jay Sweet, in his workers' compensation appeal. CP 385-437.

While proceedings in his workers' compensation appeal were suspended, Young filed a separate suit against the driver who hit him, seeking damages. CP 228-31. The Department was not a party to Young's third party law suit. CP 117.[1]

In April 2010, the superior court denied Young's writ of mandamus and refused to assign his workers' compensation appeal to a different hearings judge. CP 91-93.

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[1] Although the Department may intervene as a party in a third party action under RCW 51.24.030, it did not do so here. CP 117. The Department, however, has a statutory lien on a recovery in a third party action. RCW 51.24.030, .060. In many cases, it therefore participates in the mediation as a lienholder, and it did so here. CP 130. A worker cannot agree to a settlement amount in a mediation that is less than the worker's entitlement unless the Department agrees in writing. *See* RCW 51.24.090.

One month later, as part of his tort action, Young took depositions of Dr. Patrick Bays, an orthopedic surgeon, and Dawn Jones, an occupational therapist, without notice to the Department or its counsel. CP 133-55, 174-88. He also took a second deposition of Dr. Sweet as part of his tort action, again without notice to the Department or its counsel. CP 200-14.

In July 2010, the Board held a second scheduling conference in Young's workers' compensation appeal on remand from the superior court. CP 100-02. Young identified Dr. Bays, Dr. Sweet, one unidentified physical capacities examiner, and one unidentified vocational witness as his experts. CP 101. He gave no indication he had already taken the depositions of Dr. Bays or Ms. Jones, or that he had taken a second deposition of Dr. Sweet. CP 100-02. Young's responses to the Department's discovery also gave no indication he had already taken depositions of Dr. Bays or Ms. Jones, or that he had taken a second deposition of Dr. Sweet. CP 259-76.

In September 2010, Young submitted his witness confirmation to the Board. CP 288. To it, he attached the depositions he had taken of Dr. Bays, Ms. Jones, and the second deposition he had taken of Dr. Sweet in connection with his tort case. CP 288. Dr. Sweet's first deposition had been previously filed. CP 23.

The Department did not oppose admission of Dr. Sweet's first deposition, of which it was given notice and in which it participated. However, shortly after Young filed the depositions in September 2010, it moved to exclude the May 2010 depositions of Dr. Bays, Dr. Sweet, and Ms. Jones as not meeting the requirements of CR 32 and as hearsay. CP 110-19, 289. In October 2010, the Board granted the Department's motion and excluded the depositions. CP 291-92. Young did not schedule his experts to testify in his workers' compensation appeal.

At his hearing in November 2010, Young and two lay witnesses testified. CP 355-74. At the conclusion of their testimony, the hearings judge gave Young another opportunity to seek a continuance and call his witnesses before resting. CP 376. Young declined. CP 376. He made no motion to present rebuttal testimony following presentation of the Department's case.

The Board affirmed the Department. CP 9, 22-34. Young appealed.

C. The Superior Court Excluded the Depositions Because They Were Taken Without Notice

On appeal, Young moved for summary judgment, arguing his depositions were improperly excluded. CP 594-609. The court denied summary judgment, concluding the Department was not a successor in

interest to the third party driver and that the Department was entitled to notice and an opportunity to appear and cross-examine Dr. Bays and Ms. Jones. CP 823-25. The court also determined Young "could have called these witnesses in the Board proceedings to cure the deficiency of notice and opportunity to appear, but chose not to." CP 825. It held "CR 32 does not permit the use of these depositions against the Department" and that "the general rule that the Industrial Insurance Act should be liberally construed in favor of the worker does not wash away all other parties' rights under the Act, or under the Rules of the Court." CP 825. Following a bench trial, the court affirmed the Board. CP 883-87. It found Young did not need further treatment, was able to work, and had no permanent partial disability. CP 884-85.

D. The Court of Appeals Decided the Trial Court Did Not Abuse Its Discretion in Excluding Depositions Taken Without Notice

Young appealed, and the Court of Appeals affirmed, holding that the trial court did not abuse its discretion in excluding the depositions. *Young v. Dep't of Labor & Indus.*, No. 71730-8-I, slip op. (July 7, 2014). The court held the Department was not a "successor in interest" to the driver who struck Young and that the Department was entitled to notice and an opportunity to appear at the depositions Young sought to use against it. *Young*, slip op. at 8-10. Because it was undisputed Young did

not provide such notice, the court held the Board and the superior court properly excluded the depositions under CR 32. *Young*, slip op. at 10. The court also rejected Young's due process argument, ruling that he was given ample opportunity to present his witnesses and chose not to do so. *Young*, slip op. at 12. Finally, the court declined to reweigh the evidence, concluding that substantial evidence supported the superior court's decision. *Young*, slip op. at 15. Young now petitions for review.

IV. ARGUMENT

This case does not merit review. CR 32(a) permits prior depositions to be used only against a party who "was present or represented at the taking of the deposition or who had reasonable notice thereof." Young admits he did not give the Department notice of the depositions he sought to use in his workers' compensation appeal. He argues that he should be relieved of this requirement because of the overall remedial nature of the Industrial Insurance Act and asks the Court to liberally construe the law in his favor. However, Young does not ask the Court to interpret an ambiguous provision of the Industrial Insurance Act. Rather, he asks the Court to apply liberal construction to ignore unambiguous rules of civil procedure in the context of a workers' compensation appeal. Because the Industrial Insurance Act unambiguously requires all deposition testimony offered in proceedings

before the Board to conform to the requirements of the civil rules, Young fails to present an issue meriting review. RCW 51.52.100.

Young also fails to identify a significant question of constitutional law. The exclusion of Young's depositions did not deny him a meaningful opportunity to be heard. Young was given a number of opportunities to present his witnesses and chose not to do so. He argues that calling his witnesses twice would have been too expensive, but he disregards the fact that his appeal to the Board already was in progress, and he could have saved the cost of additional depositions by giving the Department notice of his depositions. No issue of constitutional law is presented by a party who argues that due process gives it an unqualified right to be heard under circumstances that exclude the opposing party from participation.

A. Failing To Give a Party Notice Does Not Present an Issue of Substantial Public Interest

This case does not present a matter of substantial public interest as Young asserts. The superior court excluded Young's depositions because he did not give notice to the party against whom he sought to use them. CP 291-92; CP 823-25. No dispute exists that Young did not give the requisite notice. *Young*, slip op. at 8. Nonetheless, Young asks this Court to grant review because of the "substantial public interest" involved in the "construction and administration of the Industrial Insurance Act."

Pet. at 6. Specifically, Young argues that as an injured worker, he is entitled to the protection of the Industrial Insurance Act's "strong public policy" favoring injured workers. Pet. at 7. In furtherance of that policy, he argues the liberal interpretation of the Act should inure to his benefit by allowing him to submit depositions he took without notice to the opposing party. Pet. at 11.

Young's argument fails because he does not ask the Court to interpret an ambiguous provision of the Industrial Insurance Act. CP 344. Liberal construction applies only to the construction of ambiguous statutes. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993) (the liberal construction rule does not apply to unambiguous terms in the Industrial Insurance Act). RCW 51.52.100 states "no witness'[s] testimony shall be received" in a Board hearing "unless his or her testimony shall have been taken by deposition according to the statutes and rules relating to superior courts of this state." This statute is unambiguous in its requirement that parties follow the civil rules governing depositions in order for the Board to consider the testimony. CR 32 is equally unambiguous in providing that prior depositions may be used only against a party who "was present or represented at the taking of the deposition or who had reasonable notice thereof."

These provisions requiring notice to all parties about a proceeding are consistent with the spirit of the Industrial Insurance Act. The Act represents a compromise between business and labor. *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002). Each forfeited certain rights in exchange for the "sure and certain relief" provided by the Act. RCW 51.04.010; *Minton*, 146 Wn.2d at 390 (citing *West v. Zeibell*, 87 Wn.2d 198, 201, 550 P.2d 522 (1976)). Such sure and certain relief, however, can be obtained only when all affected parties, the Department, the employer, and the worker, have the opportunity to be heard. *See* RCW 51.52.100 (providing that "the Department shall be entitled to appear in *all* proceedings before the board and introduce testimony in support of its order) (emphasis added). This ensures the fair adjudication of the issues contemplated by the Act.

Young tries to sidestep CR 32's notice requirement by arguing that the Department is "the equivalent" of a "successor in interest" to the driver who struck him, if not a successor in the "technical sense" Pet. at 18, 1. He argues the driver's counsel "defended the depositions and vigorously cross examined the experts." Pet. at 11. Since the driver had "more to lose" than the Department, Young reasons "the Department's interests were well-represented by the tortfeasor's defense counsel." *Id.*

As the Court of Appeals correctly concluded, the Department was not a "successor in interest" to the driver who struck Young because it did not follow the driver in ownership or control of property. *See One Pacific Towers Homeowners' Ass'n v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 327, 61 P.3d 1094 (2002) (citing *Black's Law Dictionary* 1283 (5th ed. 1979)). The Department was not a party to Young's separate tort action; it merely held a lien on his recovery. *See* RCW 51.24.030, .060. CP 117; 342-43. As a lienholder on Young's recovery against the driver, the Department's interest in Young's tort action, if any, was derivative of Young, not the tortfeasor. CP 334-36. Moreover, its interest was not as a party to the action, but as the trustee of the fund from which it paid benefits to Young. *See Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 241, 118 P.3d 392 (2005) (Department authorized by law to act as trustee of a fund for compensating injured workers); *Mandery v. Costco Wholesale Corp.*, 126 Wn. App. 851, 855-56, 110 P.3d 788 (2005) (purpose of statutory lien is to protect the state fund by providing for reimbursement so that funds are not charged for damages caused by third parties). CP 334-35. As a trustee, the Department owes fiduciary duties to the beneficiaries of that trust. *Chavez*, 129 Wn. App. at 241 (quoting *Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 403, 663 P.2d 104 (1983)). By contrast, the driver, whose

only interest was in contesting liability and limiting damages against herself, owed no such duties to the state fund. CP 292.

Young's tort action also presented a separate set of issues than his workers' compensation claim. Young's tort claim involved common law issues of duty and breach. *Cameron v. Murray*, 151 Wn. App. 646, 651, 214 P.3d 150 (2009). In his tort action, Young sought damages from an alleged tortfeasor for injuries negligently inflicted. By contrast, workers' compensation is a no-fault system. RCW 51.04.010. In his workers' compensation action, Young sought statutory benefits for a workplace injury. The issues in Young's workers' compensation appeal were whether Young's injury occurred in the course of his employment, whether his injury required further treatment, whether he was a disabled worker, whether he was entitled to vocational services, and alternatively, his degree of permanent partial disability. CP 292. These differences are profound. CP 292. Accordingly, the Department's interests were separate and distinct from those of the driver in defending the deposition. CP 292. The Department was therefore entitled to notice and an opportunity to participate in the event Young wanted to use his depositions against the Department in his separate workers' compensation case. CP 823-25.

Not contesting that the successor in interest standards do not directly apply, Young argues that, in the context of a workers'

compensation appeal, "it makes little sense to interpret 'successor in interest' strictly or literally to disadvantage the injured worker." Pet. at 19. It makes even less sense, however, to interpret CR 32 in such a way that permits a party to take evidence without notice to the other because they do so in the context of a workers' compensation appeal. The Industrial Insurance Act does not provide special rules for workers presenting evidence; rather the civil rules apply to all parties. RCW 51.52.100, .140. No issue of substantial public interest is presented by a party who does not follow those rules.

Finally, neither CR 1 nor ER 102 requires admission of Young's depositions as he suggests. CR 1 provides that the civil rules "shall be construed in a way so as to secure the just, speedy, and inexpensive determination of every action." ER 102 provides that the rules of evidence are to be construed in such a way as to avoid an unjust result. It does not follow, as Young suggests, that everything that is speedier or less expensive is permitted by the civil rules.[2] Nor does CR 1 create authority for ignoring or overruling legislation. *See Moore v. Flateau*, 154 Wn. App. 210, 219, 225 P.3d 361 (2010). Young fails to show how a more "just" result could have been reached by interpreting the rules of evidence

[2] Parties before the Board bear their own costs in taking depositions. WAC 263--12-117(2).

in a way that would have allowed him to admit hearsay depositions taken without notice to the opposing party. The broad policy statements of CR 1 and ER 102 concerning how the civil rules and the rules of evidence are to be construed do not require a different result than that which was reached in this case under the more specific provisions of CR 32 and ER 802. Young's depositions were properly excluded.

B. Failing To Provide Notice To a Party Does Not Present a Significant Question of Constitutional Law

Young fails to present a significant question of constitutional law warranting review. "The fundamental requirement of due process is the *opportunity* to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)) (emphasis added). Young argues that the multiple opportunities he was given to call his witnesses were not "meaningful" because they would have required him to pay for his expert witnesses twice. Pet at 17. He argues this denied him an opportunity to rebut the expert testimony offered by the Department, citing *Robles v. Dep't of Labor & Indus.*, 48 Wn. App. 490, 494, 739 P.2d 727 (1987), and *State ex rel. Puget Sound Nav. Co. v. Dep't of Transp.*, 33 Wn.2d 448, 489, 206 P.2d 456 (1949). Pet. at 17-18.

Robles and *Puget Sound Navigation* are not on point. *Robles* dealt with a litigant who was denied due process because evidence outside the record was considered in deciding his appeal. *Robles*, 48 Wn. App. at 495. The court held that in the absence of an opportunity to "meet, explain, or rebut" the evidence, the claimant was denied due process. *Id.* *Robles* does not stand for the proposition that a worker has an unqualified right to present rebuttal evidence, or that a worker has a right to present such evidence without notice to the opposing party. Young never sought to present rebuttal testimony, and he identifies no evidence outside the record that was improperly considered in deciding his appeal. Moreover, his argument that calling his witnesses in both his tort action and workers' compensation appeal would subject him to undue expense ignores the fact that he could have saved the expense of taking more than one deposition by giving the Department notice.

Puget Sound Navigation likewise does not apply. In that case, a worker was denied due process because he was not given *any* opportunity to present evidence at a benefits hearing. *Puget Sound Nav.*, 33 Wn.2d at 489. Here, Young presented his own testimony as well as that of his medical provider and two lay witnesses. CP 22-28. Young also was given several opportunities to present the testimony of Dr. Bays and Ms. Jones and chose not to do so. CP 825. As the Court of Appeals concluded,

Young had ample opportunity to be heard. CP 376. Unlike the worker in *Puget Sound Navigation*, Young asks the Court to find that due process gives him not just a right to present evidence, but to do so in a manner that excludes the other party against whom he seeks to offer it. The routine application of the notice requirements of the civil rules does not present a significant constitutional issue.

V. CONCLUSION

Young fails to identify either an issue of substantial public importance or of constitutional law meriting this Court's review. CR 32 and RCW 51.52.100 are unambiguous and required exclusion of Young's depositions. The Department asks this Court to deny Young's petition for review.

RESPECTFULLY SUBMITTED this 3rd day of October, 2014.

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DECLARATION OF MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Answer to Petition for Discretionary Review and this Declaration of Mailing to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Ron Meyers
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DATED this 3rd day of October, 2014.

ZELMA HAMMER
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OFFICE RECEPTIONIST, CLERK

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Subject: Young v. Dept. of Labor & Industries; No. 90610-6

Please find attached for filing the Department's Answer to Petition for Discretionary Review and Declaration of Mailing with regards to the above matter.

Thank you,

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