No. 44560-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DEREK J. YOUNG

Appellant,

v.

THE DEPARTMENT OF LABOR AND INDUSTRIES FOR THE STATE OF WASHINGTON; and CMS PAINTING, INC.,

Respondents.

APPELLANT'S OPENING BRIEF

Ron Meyers
Ken Gorton
Tim Friedman
Attorneys for Appellant
Derek J. Young

Ron Meyers & Associates PLLC
8765 Tallon Ln. NE, Suite A
Lacey, WA 98516
(360) 459-5600
WSBA No. 13169
WSBA No. 37597
WSBA No. 37983

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I. INTRODUCTION

This case originates from a worker's compensation claim that arose out of a motor vehicle collision on June 27, 2007. A third party tortfeasor was responsible for the collision. Appellant Derek Young (hereinafter "Mr. Young") was seriously and permanently injured in the collision and sought treatment for his injuries. Mr. Young attempted to return to work. However, he found that doing his job-of-injury aggravated his injuries and he was forced to remain off of work and continue treatment.

The Department of Labor and Industries' (hereinafter "Department") ended time loss and closed the claim by order dated September 19, 2008. Mr. Young appealed to the Board of Industrial Insurance Appeals (hereinafter "BIIA") on January 12, 2009. The BIIA granted Mr. Young's appeal and a Hearing Judge was assigned. Mr. Young filed an affidavit of prejudice against the assigned Hearing Judge. The BIIA denied the affidavit and Mr. Young filed a petition for a statutory writ of mandamus in Superior Court, which placed the appeal to the BIIA in a holding pattern pending the outcome of the motion before the Superior Court. The Superior Court dismissed Mr. Young's petition for a writ and the BIIA appeal proceeded forward. Mr. Young timely filed his witness confirmation wherein he informed the parties that he intended to use the perpetuation depositions of experts that were taken

during May of 2010 in the underlying civil action against the third party tortfeasor. *CP at 326.* The Department filed a motion to exclude these depositions which was heard on October 12, 2010. During that motion hearing, Mr. Young's legal counsel brought a motion for the record requesting that the Hearing Judge recuse himself based on the fact that the Judge was hearing a case where he was aware that Mr. Young and his counsel had filed an affidavit of prejudice against him. *CP at 327(24) - 328(3).* Mr. Young's motion to recuse was denied and the parties proceeded with hearing the Department's motion to exclude the depositions. The Department's motion to exclude Mr. Young's expert witnesses' perpetuation depositions was granted. The BIIA ultimately ruled that the Department's order dated December 31, 2008 was correct and was affirmed. Mr. Young appeal the BIIA's ruling to Superior Court. The Superior Court ruled in favor of the Department, and that ruling is the basis for Mr. Young's appeal to this Court.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Whether the BIIA and Superior Court committed reversible error when they excluded the perpetuation depositions of board certified orthopedic surgeon, Dr. Patrick Bays, and occupational therapist, Dawn Jones, and excluded their respective medical reports. YES.

B. Whether the BIIA and Superior Court committed reversible error when they ruled to deny time loss, medical expenses, permanent partial disability, vocational or other Industrial Insurance Act benefits to Mr. Young in ruling that he was fixed and stable. YES.

III. STATEMENT OF THE CASE

A. Statement Of Facts

On June 27, 2007, Derek Young, while in the course and scope of his employment, was the passenger in his employer's vehicle driving south on Interstate 5. When the employer's vehicle stopped, the third party defendant failed to stop, and crashed into the rear of the employer's vehicle. Mr. Young was seriously and permanently injured.

Mr. Young brought a third party action against the negligent driver. The Department was notified of Mr. Young's third party action. In the course of the third party action, board certified orthopedic surgeon Patrick Bays, DO, conducted an independent medical examination of Mr. Young on December 4, 2009. Dr. Bays' perpetuation deposition was conducted in the third party action on May 10, 2010.

Also in the course of the third party action, board certified Occupational Therapist Dawn Jones performed a Functional Capacity Evaluation of Mr. Young on March 25, 2010. Her perpetuation deposition was conducted on May 27, 2010.

The tortfeasor's attorney was present at both Dr. Bays' and Occupational Therapist Jones' perpetuation depositions, whereat he defended the depositions aggressively as to liability, proximate cause, the nature and

extent of Mr. Young's injuries, and economic and non-economic damages. He performed a vigorous cross-examination of both experts.

Mr. Young properly disclosed Dr. Bays and Occupational Therapist Jones at the administrative level, and the Department was provided all necessary information pursuant to its discovery requests, including the written reports of Dr. Bays and Occupational Therapist Jones. Extensive responses to Request for Production were also provided by Mr. Young to the Department.

The Department was aware of, and participated in, the third party litigation, including the mediation that ultimately resolved the civil claim. Mr. Young timely filed and served a Witness Confirmation in the BIIA action, which included Dr. Bays and Occupational Therapist Jones. *CP at 291(25-28).*

On September 21, 2010, the Department moved the BIIA to exclude the preservation depositions of Dr. Bays and Dawn Jones OTR/L on the basis that the Department was not present at their depositions in the third party matter. At the October 12, 2010 BIIA hearing, because the Department's attorney was not present at Dr. Bays and Occupational Therapist Jones' perpetuation depositions, the BIIA Hearing Judge excluded their testimony. *CP at 292(20-22).* On December 10, 2010 Mr. Young brought a motion

asking for Dr. Bays' medical examination report and deposition to be admitted as exhibits. The BIIA Hearing Judge denied Mr. Young's motion in the Proposed Decision and Order dated February 16, 2011. *CP at 24(19-27).*

The BIIA's decision to exclude the reports and testimony of board certified Orthopedic Surgeon Patrick Bays and board certified Occupational Therapist Dawn Jones left Mr. Young with only a single medical expert in his case-in-chief, Chiropractor Jay Sweet.

Dr. Sweet's perpetuation deposition was taken on June 4, 2009. *CP at 385.* Dr. Sweet was Mr. Young's treating chiropractor, and he treated Mr. Young from July 2, 2007 until Mr. Young's claim was closed on September 19, 2008. *CP at 393.* Dr. Sweet's testimony established a Category 4 residual impairment. *CP at 414(9) - 415(20).* Dr. Sweet also established that Mr. Young was unable to return to his employment due to his industrial injury. *CP at 417(1-4).* The Department's two medical experts were not treating providers of Mr. Young. They only saw Mr. Young once, for approximately 1.5 hours. Only one of the two doctors performed a consultation. Both doctors admitted that Mr. Young had injury caused by the industrial accident, that his injuries were supported by objective findings and that Mr. Young's low back pain caused by the industrial injury had lasted so

long that they deemed it chronic. Specific details of Dr. Sweet's testimony and the Department's doctors' testimony are discussed below in detail.

In the third party Superior Court action concerning the same industrial injury at issue in the BIIA hearing, the tortfeasor's defense attorney contested liability, causation and the nature and extent of injuries, as well as Mr. Young's ability to perform his job of injury or other work. These are the same issues that were before the BIIA. Because the June 27, 2007 third party collision was also the industrial injury at issue, the Department is responsible for Mr. Young's medical expenses, time loss, and disabilities found to have been proximately caused by the motor vehicle collision involving the third party tortfeasor. *See Title 51.* Again, the subject matter of the third party case is a motor vehicle collision, which is the identical subject matter of Mr. Young's BIIA case.

The third party defendant's attorney vigorously defended his client's interests concerning the nature, extent, and permanency of Mr. Young's injuries, whether they were caused by the motor vehicle collision, as well as Mr. Young's inability to perform his job of injury or other work. These are the identical interests defended by the Department in Mr. Young's BIIA matter, and those interests were well represented by the tortfeasor's attorney at Dr. Bays' and OT Jones' perpetuation depositions.

B. Procedural History

Mr. Young filed an Application for Benefits with the Department on August 28, 2007 for injuries he sustained in an automobile accident as a passenger riding in his employer's vehicle while in the course and scope of his employment on June 27, 2007. *CP at 49.* His claim for the industrial injury was allowed by Department Order dated September 6, 2007. *Id.* On September 18, 2008, the Department ordered time loss compensation paid through September 17, 2008. *CP at 50.* On September 19, 2008, the Department ordered the claim closed with no further medical treatment and no award of permanent partial disability. *Id.* Mr. Young timely filed a Notice of Appeal with the BIIA on November 17, 2008. *Id.* On November 19, 2008, the Department ordered the September 19, 2008 order held in abeyance for further reconsideration. *Id.* On December 15, 2008, the BIIA denied Mr. Young's appeal due to the Department's reconsideration of the September 19, 2008 order. *Id.* On December 31, 2008, the Department affirmed its Order dated September 19, 2008. *Id.* Mr. Young filed a Notice of Appeal with the BIIA on January 12, 2009. *Id.*

The BIIA granted Mr. Young's appeal by order dated January 20, 2009. *CP at 44.* Mr. Young sought recusal of the assigned industrial insurance appeals judge on multiple occasions. *CP at 67 - 68; CP at 72 - 77;*

CP at 327(24) - 328(20). After hearing Mr. Young's appeal, the BIIA issued a Proposed Decision and Order on February 16, 2011, affirming the Department's December 31, 2008 Order and ruled that Mr. Young's industrial injuries did not require further medical treatment, within the meaning of RCW 51.36.010, as of June 26, 2008; that he was not a totally and temporarily disabled worker during the period between September 18, 2008 and December 31, 2008 as contemplated by RCW 51.32.090; that the Department did not abuse its discretion when it did not provide vocational rehabilitation as provided by RCW 51.32.095; and that Mr. Young's residual impairment is best described as Category 1 for categories for permanent dorso-lumbar and lumbosacral impairments, per RCW 51.32.080 and WAC 296-20-280. *CP at 34(15-24).* Mr. Young timely filed a Petition for Review on March 7, 2011. *CP at 11 - 16.* The BIIA denied Mr. Young's Petition and ordered that the Proposed Decision and Order become the BIIA's Decision and Order on March 21, 2011.

Mr. Young timely appealed the BIIA's Decision and Order to the Superior Court on April 7, 2011. *CP at 1 - 2.* At Superior Court Mr. Young moved for summary judgment requesting the Court reverse the BIIA's determination to exclude his two medical experts. *CP at 594 - 607.* The Superior Court denied Mr. Young's motion on February 10, 2012. *CP at 823*

- *826.* Mr. Young's trial hearing in Superior Court was held on the afternoon of July 6, 2012 and Findings of Fact and Conclusions of Law and Judgment were presented six months later on January 25, 2013. *CP at 883 - 886.*

Mr. Young timely appealed the Superior Court's decision to this Court, on the basis of the aforementioned errors at the BIIA and Superior Court.

IV. ARGUMENT

A. Standard of Review

1. Superior Court

In an appeal of a BIIA decision, the superior court holds a de novo hearing but does not hear any evidence of testimony other than that included in the BIIA records. RCW 51.52.115. *See also, Grimes v. Lakeside Industries,* 78 Wn. App. 554, 560, 897 P.2d 431 (1995). The findings and decisions of the BIIA are prima facie correct and the burden of proof is on the party challenging them. RCW 51.52.115. *See also, Ravsten v. Dept. of Labor & Indus.,* 108 Wn.2d 143, 146, 736 P.2d 265 (1987) (quoting *Weatherspoon v. Dept. of Labor & Indus.,* 55 Wn. App. 439, 440, 777 P.2d 1084 (1989)).

2. Court Of Appeals

For claims under the Industrial Insurance Act, "review is limited to

examination of the record to see whether substantial evidence supports the findings made after the superior court's *de novo* review, and whether the court's conclusion of law flow from the findings." *Young v. Dept. of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996) (citations omitted). *See also Ruse v. Dept. of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999).

B. The BIIA And The Superior Court Improperly Excluded Mr. Young's Expert Witnesses

Board of Industrial Insurance Appeals cases, and administrative hearings in general, are subject to relaxed rules of procedure and evidence because the Industrial Insurance Act is to be liberally construed in favor of the injured worker.

The Washington Supreme Court has stated that the "**guiding principle in construing the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.**" [Emphasis added.] *Dennis v. Dept. of Labor and Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)); *Boeing Co. v. Heidy*, 147 Wn.2d 78, 86, 51 P.3d 793 (2002).

Strict rules of trial procedure in civil actions are not to be applied in

claims before Department of Labor and Industries. *Otter v. Dept. of Labor and Indus.*, 11 Wn.2d 51, 118 P.2d 41 (1941). Cases subject to the Administrative Procedure Act are subject to significantly relaxed rules of evidence. *See, e.g., RCW 34.05.452(2)* (rules of evidence are "guidelines" under Administrative Procedure Act). By their own provisions, the rules of evidence apply only to court proceedings. ER 101, 1101.

Even relevant hearsay evidence is admissible in administrative hearings. *Nisqually Delta Ass'n v. City of DuPont,* 103 Wn.2d 720, 696 P.2d 1222 (1985), reconsideration denied. Hearsay evidence may be admitted at an administrative hearing if the presiding officer determines that it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. *Pappas v. State, Employment Sec. Dept.,* 135 Wn. App. 852, 146 P.3d 1208 (2006).

Specifically, RCW 34.05.452 provides that "Evidence...is admissible if...it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." *RCW 34.05.452(1).*

1. The BIIA and Superior Court failed to apply CR 32(a)(5)(B).

The BIIA and Superior Court misapplied the Civil Rules in its decision when it struck Mr. Young's expert witnesses. The Courts focused exclusively on CR 30, which deals with discovery depositions in general.

However, CR 32(a)(5)(B) addresses the use of perpetuation depositions of healthcare professionals in subsequent proceedings as follows:

RULE 32 USE OF DEPOSITIONS IN COURT PROCEEDINGS

> (a)(5)(B) The deposition of a health care professional, even though available to testify at trial, taken with the expressly stated purpose of preserving the deponents testimony for trial, may be used if, before the taking of the deposition, there has been compliance with discovery requests made pursuant to rules 26(b)(5)(A)(i), 33, 34, and 35 (as applicable) and if the opposing party is afforded an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent.
>
> Substitution of parties pursuant to rule 25 does not affect the right to use depositions previously taken; and, **when an action has been brought in any court of the United States or of any state and another action involving the same issues and subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Rules of Evidence.** [Emphasis added.]

This rule specifically contemplates the use of a perpetuation deposition of a healthcare professional in latter proceedings when the two actions involve the same issues or subject matter. In the instant case, the BIIA action did not resume until its scheduling conference on July 14, 2010. *CP at 100(6).* The perpetuation depositions of Dr. Bays and OT Jones for the third party action in Pierce County Superior Court had already taken place by

then because the trial was scheduled for June 16, 2010. Therefore, the BIIA action was a latter action as contemplated by CR 32.

Furthermore, in the third party action, the defense attorney contested liability, causation and the nature and extent of injuries, as well as Mr. Young's ability to perform his job of injury or other work. If the Court desires, Mr. Young can present Dr. Bays' and OT Jones' perpetuation deposition transcripts to prove that their depositions were defended, and that the experts were cross-examined by defense counsel. These perpetuation depositions are part of the record on appeal. *Dr. Bays, CP at 133 - 172 & 633 - 729; OT Jones, CP at 174 - 198 & 731 - 786.* Similarly, the experts' reports are part of the record on appeal. *Dr. Bays, CP at 234 - 246 & 613 - 625; OT Jones, CP at 248 - 252 & 627 - 631.*

Liability, causation and the nature and extent of Mr. Young's injuries were the same issues before the BIIA. The Department is responsible for Mr. Young's medical expenses, time loss, and disabilities found to have been proximately caused by the motor vehicle collision involving the third party tortfeasor. *See Title 51.* The subject matter of the third party case is the June 27, 2007 motor vehicle collision, which is the identical subject matter of Mr. Young's workers' compensation case.

The Washington Supreme Court defines successor in interest through

Webster's Dictionary as "the change in legal relations by which one person comes into the enjoyment of or becomes responsible for one or more of the rights or liabilities of another person." *One Pacific Towers Homeowners' Ass'n v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 327, 61 P.3d 1094 (2002).

It cannot be reasonably disputed that the Department is a successor in interest of the third party torfteasor, as there can be no doubt that the liabilities of the tortfeasor (time loss, medical expenses, disability) are also the responsibility of the Department. The Department's responsibility to compensate Mr. Young for these losses caused by the work-related collision are statutory. *Title 51.*

The BIIA and Superior Court should not have excluded the perpetuation testimony of Dr. Bays and Occupational Therapist Jones. There was no need for two defense attorney's at Dr. Bays' and OT Jones' perpetuation depositions, making redundant objections and conducting duplicative cross examination. The Department was a successor in interest of the tortfeasor, and in so excluding Mr. Young's experts the BIIA and Superior Court ignored CR 32.

Here, there is little argument that the Department is legally responsible for special damages and other payments related to Mr. Young's

injuries from the negligent driver. The fact that the Department has a right of recovery against any third party settlement or award under RCW 51.24.060 further illustrates this point. The Department trusts the integrity of the third-party civil process. There is no need for multiple attorneys representing, in essence, the same interests. In the instant case, the Department asserted such a lien over Mr. Young's settlement with the negligent driver and was paid a substantial sum. Therefore, pursuant to CR 32, the BIIA and Superior Court should have permitted Mr. Young to submit the perpetuation depositions from his two medical experts as evidence.

Furthermore, CR 32 also states that "a deposition previously taken may also be used as permitted by the Rules of Evidence." This sentence, as read, exists independently of the other requirements of CR 32. The Rules of Evidence contemplate the admission of expert testimony under ER 702, "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Moreover, ER 803 exempts statements for purposes of medical diagnosis from the hearsay rule, including statements "describing medical history, or past or present symptoms, pain ... or general character of the cause." Accordingly, no portions of the Rules of Evidence prohibit the use of perpetuation depositions of healthcare professionals to be used in a latter proceeding. Therefore, the

BIIA should have permitted Mr. Young's experts to testify.

2. The BIIA and Superior Court did not give Mr. Young a fair chance to rebut the Department's experts.

Civil Rule 32(c) requires a fair opportunity to rebut expert testimony presented by a perpetuation deposition at a hearing or trial as follows:

RULE 32 USE OF DEPOSITIONS IN COURT PROCEEDINGS

> (c) Effect of Taking or Using Depositions.
> ... At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

In the instant case, the Department's expert witness, Dr. Rutberg, read and relied upon the report from Mr. Young's medical expert, Dr. Patrick Bays, who was stricken by the lower Courts.

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Q Doctor, did you review the deposition of Derek Young, or have you reviewed anything since you saw him?
A I have been sent an IME that was performed under the auspices of Jura.
Q And did that affect, or was that included in your evaluation?
A I just recently received that.
Q And have you read it before testifying here today?
MS. JOHNSON: I'm going to object. This is beyond the scope of direct. And I don't believe --
By whom was the report sent to you, doctor?
THE WITNESS: I don't know who it came from,

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quite frankly.

2 Q (By Mr. Meyers) It wasn't me, doctor. And so, since you
3 were asked what you relied on in framing opinions, and
4 you've given opinions today, and you had this narrative
5 report before today. I'm just asking if you had a chance
6 to review it?
7 A Yeah, I've read through it.
8 Q And that's not unusual in your business as a medical
9 consultant, is it, doctor?
10 A What's that? What are you referring to?
11 Q That you would look at somebody else's IME?
12 A No, that's not unusual.
13 Q Is it customary?
14 A Okay. Go ahead.
15 Q I'm sorry, doctor. Is it customary?
16 A If it exists, it's customary, right.

CP at 500 - 501

The BIIA and Superior Courts did not take into consideration whether the Department's expert relied upon the reports of Mr. Young's experts, nor whether striking Mr. Young's experts would violate CR 32 with regard to Mr. Young's ability to present rebuttal testimony. The lower Courts simply read and misapplied CR 30, which applies to discovery depositions, and ignored CR 32, which applies to perpetuation depositions for healthcare professionals. Rebuttal testimony is permitted under CR 32, and the BIIA should have permitted Mr. Young to present the testimony of his two medical experts for this reason as well. Mr. Young's case was materially prejudiced by the Board's failure to do so.

3. The BIIA and Superior Court wrongfully prevented Mr. Young from presenting all evidence in his case-in-chief.

WAC 263-12-115.

The authorizing statute for BIIA proceedings sets forth the following:

Procedures at hearings.

(2) Order of presentation of evidence.

> (a) In any appeal under either the Industrial Insurance Act ... the appealing party **shall initially introduce all evidence** in his or her case-in-chief except that in an appeal from an order of the department that alleges fraud or willful misrepresentation the department or self-insured employer shall initially introduce all evidence in its case-in-chief.
> ...
>
> (4) Rulings. The industrial appeals judge on objection or on his or her own motion shall exclude all **irrelevant or unduly repetitious evidence** and statements that are inadmissible pursuant to WAC 263-12-095(5). All rulings upon objections to the admissibility of evidence shall be made in accordance with rules of evidence applicable in the superior courts of this state. [Emphasis added.]

The above authorizing statute permits a claimant to introduce "all evidence" in his case-in-chief, and does not set forth any limitations regarding medical testimony. The same statute only permits the BIIA to exclude irrelevant or unduly repetitious evidence, and to apply the Court's rules of evidence. Here, the evidence excluded was highly relevant to the determination of Mr. Young's injuries, and paramount to Mr. Young's case in chief. Without his two medical experts, Mr. Young could not be expected to receive a fair and full hearing on its merits, and make a reasonable showing

that he was injured and eligible for benefits.

Furthermore, while the BIIA is permitted to apply the rules of evidence to its rulings, there is nothing in the rules to prevent the introduction of Mr. Young's expert testimony and the BIIA and Superior Court failed to make such an analysis in its written decision. Moreover, the Washington Supreme Court has mandated that, "[t]he strict rules of trial procedure in civil actions are not to be applied in claims before the Department of Labor and Industries." *Otter v. Dept. of Labor and Indus.*, 11 Wn.2d 51, 56, 118 P.2d 41 (1941). In other words, the rules of evidence are not to be strictly construed against the injured worker, especially when it comes to the admissibility of highly relevant and important medical testimony.

Cases subject to the Administrative Procedure Act are subject to significantly relaxed rules of evidence. *See, e.g.,* RCW 34.05.452(2) (rules of evidence are "guidelines" under Administrative Procedure Act). Relevant hearsay evidence is admissible in administrative hearings. *Nisqually Delta Ass'n v. City of DuPont,* 103 Wn.2d 720, 734, 696 P.2d 1222 (1985). Hearsay evidence may be admitted at an administrative hearing if the presiding officer determines that it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. *Pappas v. State Employment Sec. Dept.,* 135 Wn. App. 852, 146 P.3d

1208 (2006). Specifically, RCW 34.05.452 provides that "Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs."... RCW 34.05.452(1).

In sum, the perpetuation depositions of Dr. Bays and Occupational Therapist Jones should have been admitted in order to provide the least costly, most efficient, and fair method of procuring their testimony for Mr. Young's administrative hearing. WAC 263-12-115 and the standards set forth above by the Washington Supreme Court should have been followed, permitting Mr. Young to present his case-in-chief.

4. The BIIA and Superior Court failed to consider the factors of WAC 263-12-117 before it summarily excluded Mr. Young's experts.

As a matter of practice and custom, the Board routinely permits perpetuation depositions of healthcare providers pursuant to CR 32. The Board is authorized to do so under WAC 263-12-117, which requires the Board to take into consideration several factors when ruling on this issue.

WAC 263-12-117. Perpetuation depositions.

(1) Evidence by deposition. The industrial appeals judge may permit or require the perpetuation of testimony by deposition, subject to the applicable provisions of WAC 263-12-115. Such ruling **may only be given after the industrial appeals judge gives due consideration to**: (a) **the complexity of the issues raised by the appeal**; (b) **the desirability of having**

> **the witness's testimony presented at a hearing**; (c) **the costs incurred by the parties in complying with the ruling**; and (d) **the fairness to the parties** in complying with the ruling. [Emphasis added]

In the instant case, the BIIA and Superior Court failed to make an analysis under these standards. The BIIA failed to take into consideration the complexities of Mr. Young's case and the need for medical testimony in order to make a claim for benefits under Title 51. The BIIA did not properly weigh the excessive costs that would be incurred by Mr. Young if he was required to obtain two additional perpetuation depositions for the BIIA action or call his two experts live at the hearing. The BIIA summarily excluded his two experts from the proceedings, and failed to provide a whole range of options that would have allowed the testimony while remedying any prejudice to the Department. *CP at 292(20-24).*

For example, the BIIA or the Superior Court could have permitted the two witnesses to be cross examined at the hearing. The BIIA could have permitted the Department to make objections on the record. The BIIA could have permitted both. The BIIA or the Superior Court could have permitted the depositions to be considered as one of several portions of evidence in the medical record.

The BIIA or the Superior Court could have, and should have, determined that the attorney for the third party zealously cross examined both

witnesses on the same issues and subject matter that are central to the Department's case. The BIIA or Superior Court could have correctly interpreted CR 32, which permits the use of depositions in subsequent court proceedings, and admitted the depositions as evidence.

Furthermore, the BIIA and Superior Court failed to consider the fairness to the parties when making its ruling. *Id.* For example, the lower Courts failed to analyze the devastating impact that its ruling would have on Mr. Young's ability to present his case by having qualified medical experts opine on the nature and extent of his injuries and economic damages. In fact, the lower Courts failed to analyze any prejudice that would occur to either party when making its decision, including whether the Department would be prejudiced by a lesser remedy (such as permitting objections on the record). This analysis was paramount because the BIIA was specifically tasked with weighing medical evidence in order to determine whether Mr. Young was entitled to benefits under Title 51.

The BIIA and Superior Court's failures to address these concerns and its exclusion of Mr. Young's two medical experts amount to a denial of his right to due process. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Buffelen Woodworking Co. v. Cook,* 28 Wn. App. 501, 505, 625 P.2d 703

(1981), *quoting*, *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). In *Buffelen*, the Court held that "an applicant for workers' compensation benefits whose claim is not fully adjudicated has a property interest of sufficient magnitude to trigger the application of procedural due process requirements." *Id.* at 505.

Washington courts have held that denying a party the right to present evidence or rebut evidence in an administrative action rises to a violation of due process. In *State ex rel. Puget Sound Navigation Co. v. Department of Transportation*, 33 Wn.2d 448, 495, 206 P.2d 456 (1949), the Washington Supreme Court found a violation of due process as follows:

> This action of the department clearly resulted in a denial to appellant (the common carrier) of due process of law, as appellant was deprived of all opportunity to introduce before the department evidence, which it claims was available, concerning the effect of the increase in its operating expenses that would necessarily follow from the considerably greater amount of wages it would be required to pay.

In *Robles v. Department of Labor & Indus.*, 48 Wn. App. 490, 494, 739 P.2d 727 (1987), the Court heard a similar appeal whereby the BIIA used a medical treatise to reach its decision without permitting the claimant opportunity to rebut the treatise's opinions. The Court ruled that the BIIA's failure to provide the claimant with "an opportunity to meet, explain, and rebut their contents, amounts to a denial of due process." *Id.* at 494.

Here, the BIIA and Superior Court's refusal to allow Mr. Young an

opportunity to present medical testimony from two different experts effectively denied him his right to be heard in violation of due process. The lower court's decision had sweeping consequences that rise to a level far above the use of a treatise in *Robles, supra*, which triggered due process violations. These two medical experts were retained to address Mr. Young's medical condition as related to the collision, the exact issue being adjudicated at the BIIA level. The right to present evidence in an administrative hearing is fundamental and recognized by the Washington Supreme Court. *See e.g., Puget Sound Navigation, supra.* It should be provided to Mr. Young.

5. There is no record of willful & deliberate wrongdoing, yet the BIIA and Superior Court employed the harshest of sanctions when excluding Mr. Young's experts, a sanction reserved only on a showing of willful & deliberate wrongdoing.

The Washington Supreme Court has determined that the exclusion of expert testimony is reserved as "one of the harsher" sanctions that a Court can impose against a party for wrongdoing. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). The Court specifically stated that such an extreme sanction is only warranted after its been shown, on the record, that a party disobeyed a court order in a "willful and deliberate" way so as to substantially prejudice the other parties' ability to prepare for trial. *Id.*

In the instant case, it is unclear whether the BIIA was issuing a sanction against Mr. Young for failing to have the Department present at the third party perpetuation depositions. However, it is unchallenged that the BIIA struck Mr. Young's perpetuation depositions, and did so without offering a lesser alternative to Mr. Young or the Department.

The *Burnet* court was faced with a situation where a party failed to disclose its experts according to the trial court's schedule order. The trial court excluded the witnesses. The Washington Supreme Court reversed and ruled as follows:

> In any case, we are satisfied that it was an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and excluding expert witness testimony on the credentialing issue without first having at least considered, on the record, a less severe sanction that could have advanced the purposes of discovery and yet compensated Sacred Heart for the effects of the Burnets' discovery failings. See *Fisons*, 122 Wash.2d at 355-56, 858 P.2d 1054.
>
> Furthermore, even if the trial court had considered other options before imposing the sanction that it did, we would be forced to conclude that the sanction imposed in this case was too severe in light of the length of time to trial, the undisputedly severe injury to Tristen, and the absence of a finding that the Burnets willfully disregarded an order of the trial court. See *Lane v. Brown & Haley*, 81 Wash.App. 102, 106, 912 P.2d 1040 ("[T]he law favors resolution of cases on their merits."), *review denied*, 129 Wash.2d 1028, 922 P.2d 98 (1996).

Id. at 497-98.

The BIIA failed on the record to contemplate a less severe alternative in violation of the standards set forth by the Washington Supreme Court. As discussed above, there were several options available. Moreover, Mr. Young confirmed his expert witnesses on September 10, 2010, pursuant to the Board's new scheduling order. *CP at 291(25-28).* The BIIA entered its Proposed Decision And Order on February 16, 2011. *CP at 22-34.* In other words, Mr. Young did not wait until a few days before the hearing to submit his witnesses or their perpetuation depositions. Nor did the BIIA make a finding that Mr. Young willfully disregarded an order (because he did not). In sum, the BIIA failed to properly analyze these standards, and failed to properly apply them before it took the severe and extreme measure of striking Mr. Young's medical experts.

In fact, there would be no prejudice to the Department by the admission of the perpetuation depositions of Mr. Young's experts.

6. Public policy requires a fair hearing on its merits.

The Washington Supreme Court in *Burnet, supra,* stated the following:

> While we are not unmindful of the need for efficiency in the administration of justice, our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action. See CR 1.

Id. at 498.

Superior Court Civil Rules, CR 1

> These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Mr. Young is simply asking the Court to consider all of the medical testimony in this case. The BIIA's decision to eliminate Mr. Young's experts–a board certified Orthopedic Surgeon and a board certified Occupational Therapist expert–left him with only a chiropractor to testify versus the Department's two medical doctors. This is not only unfair, it raises the specter of bias because Mr. Young asked the BIIA judge several times to recuse himself (he refused each time) before the BIIA made its decision. *CP at 23(12-14).*

Furthermore, by doing so, the BIIA set forth a policy whereby the perpetuation depositions taken in a third party action cannot be used in a BIIA proceeding unless the Attorney General is present at the deposition, regardless of the expense, contents of the medical testimony, or whether the expert was cross examined by opposing counsel for the third party. This creates an untenable situation whereby claimant's counsel must either know ahead of time that the deposition will be used in a latter proceeding and

interlace objections from two different opposing counsel, or force the claimant to pay thousands of dollars more in expert witness fees for a second perpetuation deposition (which only increases with additional experts).

The public policy of the State of Washington is set forth in our first Civil Rule, which states that our rules will be construed and administered to secure the just, speedy, and inexpensive determination of every action. The BIIA and Superior Court's decision does not comply with this rule. Board of Industrial Insurance Appeals cases, and administrative hearings in general, are subject to relaxed rules of procedure and evidence because the Industrial Insurance Act is to be liberally construed in favor of the injured worker. [WAC 263-12-115(4) "All rulings upon objections to the admissibility of evidence shall be made in accordance with *rules of evidence* applicable in the superior courts of this state."]

Strict rules of trial procedure in civil actions are not to be applied in claims before the Department of Labor and Industries. *Otter v. Dept. of Labor and Indus.*, 11 Wn.2d 51, 118 P.2d 41 (1941). Cases subject to the Administrative Procedure Act are subject to significantly relaxed rules of evidence. *See, e.g., RCW 34.05.452(2)* (rules of evidence are "guidelines" under Administrative Procedure Act).

The issues of Mr. Young's symptoms, diagnosis, causation, ability to

work, wage loss, and permanent disability relating to the motor vehicle accident of June 27, 2007 are the issues in this BIIA case. These were addressed in the third party perpetuation depositions and defended by an attorney whose client's interests in the issues were the same as the Department's interests. It was error to exclude Mr. Young's experts in his BIIA case when these issues were methodically addressed and these witnesses were vigorously cross examined by defense counsel in the third party case.

C. The BIIA and Superior Court Incorrectly Denied Time Loss, Medical Expenses, Permanent Partial Disability, Vocational Or Other Industrial Insurance Act Benefits To Mr. Young

Dr. Sweet was Mr. Young's treating chiropractor, and by law the Courts must give special consideration to his opinions. *Hamilton v. Dept. of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1998). Given Dr. Sweet's favorable opinions for Mr. Young, and given the medical facts that the Department's doctors could not dispute as described below, it is evident that the BIIA and Superior Court's ruling discontinuing further medical treatment, denying Mr. Young a Category 4 disability impairment, denying him further time loss, and denying vocational rehabilitation was error. Dr. Sweet testified that:

> 1. Mr. Young sustained a herniated disc at T6-7 caused by the industrial injury; *CP at 405 - 406.*

2. Mr. Young sustained an annular fissure at L4-5 caused by the industrial injury; *CP at 411.*

3. Mr. Young sustained degenerative disc disease at L4-5 caused by the industrial injury; *CP at 411.*

4. Mr. Young sustained a bulging disc at L5-S1, which narrowed the canal in which the spinal cord runs, caused by the industrial injury; *CP at 409.*

5. As of Mr. Young's last visit on 12/5/08, he had restrictions in his Cervical, Thoracic, Lumber and pelvic spine, a tender left levator scapula, decreased lumbar range of motion, back joint restrictions, low back spasm, and tenderness to palpation at L4,L5,S1; *CP at 416.*

6. That Mr. Young's decreased range of motion, pain on range of motion, spasm around his lumber spine, joint restrictions, and vertebral subluxations in his lumber spine were clinical findings to support a CAT 4 impairment rating; *CP at 415.*

7. That Mr. Young's herniated disc at T6-7, annular fissure at L4-5, degenerative disc disease at L4-5, canal narrowing, and bulging disc at L5-S1 were objective findings to support a CAT 4 impairment rating; *CP at 415.*

8. Mr. Young would not be able to return to his employment as a painter or work as a laborer. *CP at 417.*

The Department's two testifying medical examiners, Dr. Rutberg and Dr. Logan, only met Mr. Young once, and only spent a combined total of roughly 1.5 hours with him. *CP at 483.* Dr. Logan did not even bother to personally consult with Mr. Young. *CP at 553.* Both Dr. Rutberg and Dr. Logan conceded that no evidence exists to indicate that Mr. Young's medical

conditions pre-existed the industrial injury or if they did, there is no evidence that they were symptomatic prior to the industrial injury. *CP at 498; CP at 566.* In fact, the Department's doctors could not testify to anything besides the industrial injury as the cause of Mr. Young's pain or objective findings. *CP at 491 & 492; CP at 586.*

The Department's doctors both conceded that Mr. Young's low back pain is chronic, having lasted for approximately a year from the accident until their examination. *CP at 489; CP at 564.* The Department's doctors also both admitted that Mr. Young's degenerative disc disease at L4-5, annular fissure at L4-5 and canal narrowing are all objective findings. *CP at 489; CP at 564(7-19).*

Nonetheless, the Department's hired doctors fell in line with the Department, opining that as of their examination of June 26, 2008, Mr. Young did not need more treatment and that he had no low back impairment.

What's more, Drs. Logan and Rutberg failed to consider Mr. Young's muscle spasms when making their permanent partial disability rating. *CP at 499.* Dr. Rutberg admitted that Mr. Young had hypertonicity at his thoracic and lumbar spine. *CP at 494.* He also testified that hypertonicity is a "spasm". *CP at 494.* Nonetheless, Dr. Rutberg then admitted that he did not look at any Washington Administrative Code other

than WAC 296-20-280 for determining Mr. Young's impairment rating. Dr. Logan specifically admitted that they did not consider WAC 296-20-270 by stating "Well, I don't know that we would have incorporated that into this, no." *CP at 573(1-3).* This was error. WAC 296-20-270 provides that muscle spasms shall be considered in selecting a category of impairment. The Department's doctor's failed to so.

The Department's doctors also inexplicably testified that Mr. Young was able to return to employment, despite also testifying that they have no understanding of Mr. Young's job requirements. *CP at 483; CP at 557.*

The Department's doctors only saw Mr. Young once. They failed to comply with the law by not considering, among other findings, Mr. Young's muscle spasms when making their impairment rating. They admitted that objective findings existed to substantiate Mr. Young's injuries, and they admitted his low back pain from the accident had become chronic. They had no understanding of Mr. Young's job requirements. Therefore, the lower courts ruling that Mr. Young was fixed and stable unfairly denied him his due process rights and benefits.

D. The Purpose Of The Industrial Insurance Act Is Remedial In Nature And Shall Be Liberally Construed In Favor Of The Injured Worker

Construction of a statute is a question of law, which is reviewed *de*

novo under the error of law standard. *State v. Keller*, 143 Wn.2d 267, 276 19 P.3d 1030 (2001); *Pasco v. Public Empl. Relations Comm'n,* 119 Wn.2d 504, 507, 833 P.2d 381 (1992); *Inland Empire Distrib. Sys., Inc., v. Util. & Transp. Comm'n,* 112 Wn.2d 278, 282, 770 P.2d 624 (1989). The courts retain the ultimate authority to interpret a statute. *Franklin County Sheriff's Office v. Sellers,* 97 Wn.2d 317, 325-26, 646 P.2d 113 (1982), cert. denied, 459 U.S. 1106, 103 S. Ct. 730, 74 L. Ed.2d 954 (1983).

The Court's objective is to determine the Legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). When determining the Legislature's intent, the Court shall first look to the plain meaning of the statute. *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002); *Lacey Nursing Ctr., Inc. v. Dept. of Revenue,* 128 Wn.2d 40, 53, 905 P.2d 338 (1995). To determine the plain meaning, this Court must look at the text and "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d at 600. If this reading of the statute leads to more than one interpretation, then the statute is ambiguous and this Court "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 288 (2007).

The Industrial Insurance Act is the produce of a compromise between employers and workers. Under the Industrial Insurance Act, the employers accept limited liability for claims that might not otherwise be compensable under the common law. In exchange, workers forfeit common law remedies. *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572, 141 P.3d 1 (2006). RCW 51.04.010 provides that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy."

The Washington Supreme Court has stated that the "guiding principle in construing the Industrial Insurance Act is remedial in nature and shall be liberally construed in order to achieve its purpose of "reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. "All doubts about the meaning of the [IIA] must be resolved in favor of workers." *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987); *Boeing Co. v. Heidy,* 147 Wn.2d 78, 86, 51 P.3d 793 (2002).

E. Attorney's Fees And Costs

RCW 51.52.130 provide fees and costs at the BIIA, the Superior Court and in the Appellate Courts when Board decisions are decided in favor of the worker or beneficiary. Mr. Young requests attorney fees and costs for all

levels of appeal.

V. CONCLUSION

The Court should admit the depositions of Mr. Young's experts and make findings consistent with their testimony. Alternatively, the Court should reverse the lower decisions and order the BIIA to re-open the case with the limited purpose of considering Dr. Bays' and Occupational Therapist Jones' testimony and medical reports and ruling accordingly.

Mr. Young should be granted attorney fees and costs.

DATED: July 26, 2013.

RON MEYERS & ASSOCIATES PLLC

By: _____
Ron Meyers, WSBA No. 13169
Ken Gorton, WSBA No. 37597
Tim Friedman, WSBA No. 37983
Attorneys for Appellants

No. 44560-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DEREK J. YOUNG

Appellant,

v.

THE DEPARTMENT OF LABOR AND INDUSTRIES FOR THE STATE OF WASHINGTON; and CMS PAINTING, INC.,

Respondents.

DECLARATION OF SERVICE

Ron Meyers
Ken Gorton
Tim Friedman
Attorneys for Appellant
Derek J. Young

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Lacey, WA 98516
(360) 459-5600
WSBA No. 13169
WSBA No. 37597
WSBA No. 37983

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on July 29, 2013, I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS:
1. APPELLANT'S OPENING BRIEF; and
2. DECLARATION OF SERVICE.

ORIGINAL AND ONE COPY TO:

David Ponzoha, Court Administrator/Clerk
Washington State Court of Appeals
Division II
950 Broadway Ste 300
Tacoma, WA 98402-4454

[ ] Via U.S. Postal Service
[ ] Via Facsimile:
[✓] Via Hand Delivery / courtesy of ABC Legal Messenger Service
[ ] Via Email:

COPIES TO:

Attorney for Respondent Department of Labor and Industries:
Michael J. Throgmorton, AAG
Office of the Attorney General
7141 Cleanwater Dr SW
Tumwater, WA 98504

[ ] Via U.S. Postal Service
[ ] Via Facsimile:
[✓] Via Hand Delivery / courtesy of ABC Legal Messenger Service
[ ] Via Email:

Pro se Respondent CMS Painting, Inc.:
4514 Toutle Ct SE
Olympia, WA 98501

[✓] Via U.S. Postal Service
[ ] Via Facsimile:
[ ]Via Hand Delivery / courtesy of ABC Legal Messenger Service
[ ] Via Email:

DATED this 26th day of July, 2013, at Lacey, Washington.

Connie G. Wall

Connie G. Wall, Paralegal