Supreme Court No. 90610-6

COA No. 71730-8-1

SUPREME COURT OF THE STATE OF WASHINGTON

Derek J. Young, Petitioner

v.

Department of Labor and Industries, Respondent,

and

CMS Painting, Inc., Defendant.

PETITION FOR DISCRETIONARY REVIEW

Tim Friedman WSBA 37983
Ron Meyers WSBA 13169
Matt Johnson, WSBA 27976
Attorneys for Petitioner

Ron Meyers & Associates, PLLC
8765 Tallon Ln NE, Ste A,
Lacey, WA 98516
(360) 459-5600

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A. IDENTITY OF PETITIONER

Petitioner Derek Young asks this Court to accept review of the decision designated in Part B of this Petition.

B. DECISION

A copy of the Court of Appeals decision, filed on July 7, 2014 is reproduced in the Appendix to the Petition at pages A1-A15.

C. ISSUES PRESENTED FOR REVIEW

1. Even if the Department of Labor and Industries ("Department") is not a "successor in interest" to a third party tortfeasor in the technical sense of CR32(a), does it contravene and undermine the strong public policy of the Industrial Insurance Act to exclude from the injured worker's case-in-chief at his Board of Industrial Insurance Appeals hearing the testimony from his independent medical experts simply because the attorney general was not given notice, when the testimony was perpetuated in the injured worker's prior third party action, and when that prior third party action was a tort action for personal injury damages to the injured worker arising out of the industrial injury, and when the depositions were attended and defended vigorously with cross examination by the third party tortfeasor's attorney?

2. Does it violate an injured worker's due process rights to his property interest in injured worker benefits when at the Board of Industrial Insurance Appeals hearing and in the Superior Court, the injured worker is denied the admission of two perpetuation depositions of his independent medical experts that were taken without notice to the attorney general, but when the perpetuation depositions were taken in the injured worker's prior third party action, and when that prior third party action was a tort action for personal injury damages to the injured worker arising out of the industrial injury, and when the depositions were attended and vigorously defended in cross examination by the tortfeasor's attorney, and when rather than allow the already perpetuated testimony, the Board of Industrial Insurance Appeals offer the injured worker the 'opportunity' to delay his case and incur the expense of calling his experts for a second time to re-give their testimony?

3. When an injured worker pursues a worker's compensation claim under the Industrial Insurance Act and pursues a third party civil action against the tortfeasor who caused the same industrial injury, is the Department the equivalent of a successor in interest to the third party tortfeasor under the liberal application of the Industrial Insurance Act?

D. STATEMENT OF THE CASE

On June 27, 2007, Petitioner Derek Young sustained an industrial injury when he was in a vehicle that was struck from behind by another driver. *CP24, 33.* He was working for CMS Painting, Inc. at the time of injury. *Id.*

Mr. Young filed an Application for Benefits with the Department on August 28, 2007 for injuries he sustained in the June 27, 2007 collision while in the course and scope of his employment. *CP 49.* His claim 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 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 Board of Industrial Insurance Appeals ("Board") on November 17, 2008. *Id.* Two days later, the Department ordered the September 19, 2008 order held in abeyance for further reconsideration. *Id.* On December 15, 2008, the Board denied the Petitioner'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.* The Petitioner filed a Notice of Appeal with the Board on January 12, 2009. *Id.*

The Board granted the Petitioner's appeal by order dated January 20, 2009. *CP 44.* The Petitioner sought recusal of the assigned industrial insurance appeals judge on multiple occasions. *CP 67 - 68; CP 72 - 77; CP* 327(24) - 328(20).

The Petitioner brought a third party tort action against the negligent driver on June 17, 2009. *CP 122.* The Department was notified of the third party action. *CP 131, 227.* 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. *CP 122,138.* Dr. Bays' perpetuation deposition was conducted in the third party action on May 10, 2010. *CP 135.*

Also in the course of the third party action, board certified Occupational Therapist Dawn Jones performed a Functional Capacity Evaluation of the Petitioner on March 25, 2010. *CP 122, 177.* Her perpetuation deposition was taken in the third party action on May 27, 2010. *CP 177.*

The tortfeasor's attorney was present and defended by objections and cross examination both Dr. Bays' and Occupational Therapist Jones' perpetuation depositions. *CP 135-155, 177-188.* The defense attorney defended the expert witnesses aggressively as to liability, proximate cause, and damages. *Id, also CP 130.*

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. *CP 122, 130,131, 259.* Extensive responses to Request for Production were also provided by Mr. Young to the Department. *CP 130, 274.*

The Department was aware of, and participated in, the third party litigation, including the mediation that ultimately resolved the civil claim. *CP 130.* Mr. Young timely filed and served a Witness Confirmation in the Board action, which included Dr. Bays and Occupational Therapist Jones. *CP 291:25-28.*

On September 21, 2010, the Department moved the Board to exclude the preservation depositions of Dr. Bays and Dawn Jones OTR/L, as the attorney general was not notified of their depositions in the third party matter. CP *110-115.* At the October 12, 2010 Board hearing, the Board judge

excluded their testimony. *CP 292:20-22.* On December 10, 2010 Mr. Young brought a motion asking for Dr. Bays' medical examination report and perpetuation deposition to be admitted as exhibits. *CP 298-300.* In the Proposed Decision and Order dated February 16, 2011, the Board judge denied the motion. *CP 24:19-27.*

The Board's decision to exclude the reports and testimony of Mr. Young's independent medical experts left Mr. Young with only the medical testimony of his treating Chiropractor, Jay Sweet DC. *CP 23.* The Attorney General presented two defense medical experts, a neurosurgeon and a chiropractor, in its case-in-chief. *CP 446, CP 513, CP 27-28.*

The Board 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 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; that the Department did not abuse its discretion when it did not provide vocational rehabilitation; 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 34:15-24.* Mr. Young timely filed a Petition for Review on March 7, 2011. *CP 11 - 16.* On

March 21, 2011, the Board denied the Petition and ordered that its Decision and Order become *the* Decision and Order on March 21, 2011. *CP 9.*

Mr. Young timely appealed the Board's Decision and Order to the Superior Court on April 7, 2011. *CP 1 - 2.* In the Superior Court, Mr. Young moved for summary judgment requesting the Court reverse the Board's exclusion of his independent medical experts. *CP 594 – 607.* The Superior Court denied the motion. *CP 823 - 826.* Mr. Young's trial hearing in Superior Court was held on 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 the Appellate Court. The Appellate Court's opinion of July 7, 2014, affirmed the Superior Court's ruling. The decisions of the Board and lower courts are contrary to Washington's strong public policy favoring injured workers.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The construction and administration of the Industrial Insurance Act, and the court and evidence rules, is of significant public importance.

The Washington Supreme Court should grant review because of the *substantial public interest* involved in the construction and administration of the Industrial Insurance Act ("Act").

> "In deciding whether case presents issues of continuing and substantial public interest,[t]hree factors in particular are determinative: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur". A fourth factor may also play a role: the "level of genuine adverseness and the quality of advocacy of the issues". Lastly, the court may consider "the likelihood that the issue will escape review because the facts of the controversy are short-lived"' *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash. 2d 781, 796, 225 P.3d 213,(2009).. Citing *In re Marriage of Horner*, 151 Wash.2d 884, 892, 93 P.3d 124 (2004)(citations omitted) (quoting Westerman, 125 Wash.2d at 286–87, 892 P.2d 1067).

Each and every injured Washington worker, including Mr. Young, are entitled to the strong public policy favoring injured workers set forth in case law and the Act, which requires a liberal construction of the Act. This policy must be applied at all levels in the injured worker's fight for benefits. It must be adhered to by all government entitles, including the Department, the Attorney General, the Board and the lower Courts.

The legislature mandated that the Act, that is, Title 51,

> "**shall be liberally construed for the 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.

The above policy was echoed by the Washington Supreme Court,

> "It has been repeatedly stated by this court that the Workmen's Compensation Act is highly remedial in character and, as such, is to be liberally construed with a view to the accomplishment of its beneficent purposes." *Hastings v. Dep't*

> *of Labor & Indus.*, 24 Wash. 2d 1, 12, 163 P.2d 142 (1945). Citing *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 82 P.2d 865; *Campbell v. Department of Labor and Industries*, 2 Wash.2d 173, 97 P.2d 642; *Nelson v. Department of Labor and Industries*, 9 Wash.2d 621, 115 P.2d 1014; *Berry v. Department of Labor and Industries*, 11 Wash.2d 154, 118 P.2d 785, 140 A.L.R. 392.

This Court has furthered this strong public policy favoring injured workers by holding that when construing the Act, **all doubts be resolved in favor of the injured worker**.

> "To this end, the guiding principle in construing provisions of 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**." *Dennis v. Dep't of Labor & Indus. of State of Wash.*, 109 Wash. 2d 467, 470, 745 P.2d 1295 (1987). [emphasis added].

a. The issues for which review is sought are of a public nature.

The administration and construction of the Act by the Department, Board and lower courts affects thousands of Washington's injured workers annually. The construction and administration of the Act is of a public nature. Injured workers must be ensured that the adjudicators of their claims construe and administer the Act, the evidence and court rules in a way that upholds the purpose, goals and overriding public policy of: Promoting *just* determinations of actions; Eliminating unjustified expense and delay; Ensuring that the economic loss and suffering of injured workers is kept to a

minimum; and Ensuring that all doubts in construing the Act are determined in the injured worker's favor.

> "The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, see, e.g., Federated Publications, Inc. v. Kurtz, 94 Wash.2d 51, 54, 615 P.2d 440 (1980); **the validity and interpretation of statutes and regulations**, see, e.g., In re Wilson, 94 Wash.2d 885, 887, 621 P.2d 151 (1980); . . ." *Hart v. Dep't of Soc. & Health Servs.*, 111 Wash. 2d 445, 449, 759 P.2d 1206, 1208 (1988) [emphasis added].

In *In re Marriage of Horner,* the issue concerned the interpretation of a statute. The Washington State Supreme Court stated,

> "This issue is of a public nature because it concerns the interpretation of RCW 26.09.520 and because the Court of Appeals opinion was not limited to the Horner facts, but contained an interpretation of the statute." *In re Marriage of Horner*, 151 Wash. 2d 884, 892, 93 P.3d 124, 129 (2004).

The present case involves the construction of the Act (Title 51), which governs the processing of all injured workers in the State. The policy of the Act demands that the Board and the Courts construe the Act liberally.

> EMPLOYMENTS INCLUDED -- DECLARATION OF POLICY
> There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state. **This title shall be liberally construed** for the 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.* [emphasis added].

The legislature chose "liberally." Its meaning should not get lost or

glossed-over by the Board and lower courts at the expense of a fair and just hearing for the injured worker.

The Washington Supreme Court in *Dennis v. Dept. of Labor and Industries* discussed the genesis of Act, including the surrendering of civil remedies in exchange for more certainty and less struggle for the worker.

> "In *Stertz v. Industrial Ins. Comm'n,* 91 Wash. 588, 590–91, 158 P. 256 (1916), this court explained the genesis of this state's workers' compensation scheme: The Industrial Insurance Act (Act), RCW Title 51, was the result of a compromise between employers and workers. In exchange for limited liability the employer would pay on some claims for which there had been no common law liability. The worker gave up common law remedies and would receive less, in most cases, than he would have received had he won in court in a civil action, and **in exchange would be sure of receiving that lesser amount without having to fight for it.** Industrial injuries were viewed as a cost of production.
>
> RCW 51.04.010 embodies these principles, and declares, among other things, that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided [by the Act] regardless of questions of fault and to the exclusion of every other remedy." To this end, **the guiding principle in construing provisions of 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.**" *Dennis v. Dep't of Labor & Indus. of State of Wash.*, 109 Wash. 2d 467, 469-70, 745 P.2d 1295 (1987).[emphasis added].

In the present case, the testimony of Mr. Young's independent

medical experts pertaining to his damages from the industrial injury was perpetuated in his third party tort claim. The tortfeasor's counsel defended the depositions and vigorously cross examined the experts. That testimony conformed to the standards of any perpetuation deposition or trial testimony.

Mr. Young offered this testimony in his Board hearing. The Department's interests were well represented by the tortfeasor's defense counsel. A tortfeasor who causes an industrial injury has more to lose, in both the dollar amount and type of damages, in the civil tort case than does the Department in the worker's compensation case.

The Board construed and administered the Act and the court rules and evidence rules in a way that placed unjust and unnecessary barriers on the injured worker. A liberal construction of the Act with all doubts in favor of the injured worker is the guiding principal in construction of the Act. Ensuring *just* determinations, *fair* administration of the rules, and *eliminating* unjust expenses and delay, are the guiding principles in construing the court and evidence rules. Forcing an injured worker to double-down on expert-witness costs to call his or her experts for a second time to say what was already said and perpetuated in the prior third party tort action upholds **none** of those policies.

When the event giving rise to an injury serves both as the industrial

injury and the subject of a civil tort claim, the issue in this case is public in nature. It involves the Court's interpretation, construction and administration of the overriding policy of the Act, the evidence rules and court rules.

The Court construed RCW 51.24.030, 51.24.060, RCW 51.24.060(1), 51.04.010, 51.52.100, WAC 263-12-117 and 263-12-115, Court Rule 32, in a way contrary to CR 1, ER 102, and contrary to the strong public policy for construing the Act. The Board and lower courts constued the Act and rules to arrive at a decision that favored *more* expense, *more* delay, *more* barriers and struggle, and *less* fairness and justice – all against the injured worker.

Mr. Young is a "claimant" as defined by the Act. The Board adjudicates worker's compensation claims under the Act. The source of benefits in this matter derive not from the civil justice system but from the Act. While the process may include use of certain civil and evidence rules, their construction and administration must still serve the overriding purpose and policy of the Act. Further, Superior Court Civil Rule 1 provides:

> 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. [emphasis added].

The Washington Supreme Court in *Burnet v. Spokane Ambulance* recognized the overriding responsibility of the Courts to interpret the rules in a way that

advances *just* determinations.

> "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." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997).

Regarding the purpose in construing the evidence rules, ER102 provides:

> "PURPOSE AND CONSTRUCTION –
> These rules shall be construed to secure **fairness** in administration, **elimination of unjustifiable expense and delay**, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and **proceedings justly determined**." [Emphasis added].

Judicial Council Comment to Evidence Rule 102, which per *5 Wash. Prac., Evidence Law and Practice § 102.1 (5th ed.)* was un-adopted but remains an accurate summary of the intent of the rule, provides in pertinent part:

> "The rule is the same as Federal Rule 102. This generalized statement of purpose is comparable to CR 1, CrR 1.2, and RAP 1.2. The Rules of Evidence, like other court rules, give the judge the authority to interpret the rules **in a way which avoids an unjust result**. See Petrarca v. Halligan, 83 Wn.2d 773, 522 P.2d 827 (1974)." *5 Wash. Prac., Evidence Law and Practice* § 102.1 (5th ed.) [Emphasis added].

The construction and administration of the civil and evidence rules when processing and adjudicating Industrial Insurance Act claims is an issue that pertains to every injured worker who will ever have an industrial injury claim for benefits before the Board in Washington State.

Additionally, when the issue on which review is requested implicates due process rights, it is one in which there is *sufficient public interest* to warrant deciding it. *In re Dependency of H.*, 71 Wash. App. 524, 528, 859 P.2d 1258 (1993).

> "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. [emphasis added].

Mr. Young's claim was gutted when he was not given a meaningful opportunity to present his two independent medical experts' testimony. The due process argument will be further developed in section 2 below, and is incorporated herein by this reference, for the sake of brevity.

b. The issues for which review is sought are likely to recur.

This issue may recur in any of the numerous on-the-job injuries every year that are caused by a negligent third party. This would include motor vehicle collisions, premises liability injuries, construction site injuries, or any other fact-pattern of on-the-job injury caused by a negligent third party.

Given the parallels between the liabilities of tort defendants and liabilities of the Department (e.g. medical expenses, wage loss, impairment, vocational rehabilitation expenses), it is likely that a deposition of the injured party's medical experts defended by qualified defense counsel in the tort claim will be offered in the industrial injury case. This is especially true, considering the cost and delay to the injured worker of taking a repeat deposition of the same expert when the Department's interests were already well represented by the tortfeasor's defense counsel. Also, injured workers don't always know in advance that their deposition of an expert in their tort case will be used in a latter industrial injury hearing.

Because tort cases include general damages, *in addition to* special damages such as time-loss, vocational training and medical expenses, the tortfeasor has *more to lose* in a civil action than the Department in the worker's compensation claim.

The sheer number of worker's compensation claims arising out of third party torts brought in Washington State, together with the public policy of the Act, means a recurrence of this fact pattern is highly likely.

c. An authoritative determination by the Supreme Court giving guidance is desirable.

Washington's injured workers are powerless against the Department, Attorney General's office, Board of Industrial Insurance Appeals, and even

the court system, if those entities misconstrue or fail to uphold the public policy in favor of injured workers borne out of the Act and case law.

Guidance to those entities against whom an injured worker is pitted must be given on how to construe the court rules, the evidentiary rules, and the Act, when processing and adjudicating a worker's compensation claim.

2. The violation of due process rights of injured workers in his or her ability to prosecute a worker's compensation claim governed by the Act is a significant question of law under the Washington State Constitution.

A *significant question of law under the Washington State Constitution* is involved. Washington injured worker's Constitutional due process rights are violated when the worker is prevented from a meaningful opportunity of a full adjudication of his or her industrial insurance claim.

> "12 Const. art. 4, s 1 and s 30 vests the judicial power in the supreme court, court of appeals and superior courts of this state. Upon creation, these courts assumed certain powers and duties. These duties include, among others, the fair and impartial administration of justice and the duty to see that justice is done in the cases that come before the court. The administration of justice demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief." *Iverson v. Marine Bancorp oration*, 83 Wash. 2d 163, 167, 517 P.2d 197 (1973); [internal citations omitted]

"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,* at 50; 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.

In *Robles v. Department of Labor & Indus.*, 48 Wn. App. 490, 494, 739 P.2d 727 (1987), the Court heard an appeal whereby the Board used a medical treatise to reach its decision without permitting the claimant opportunity to rebut the treatise's opinions. The Court ruled that the Board'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.

In many if not most circumstances, the injured worker is out of work, and without adequate resources to fund the costs of a worker's compensation case. It is neither "meaningful" nor a realistic "opportunity" for an injured worker to have to call the same medical expert twice – once in his tort action and once in his parallel worker's compensation case. It does not give the injured worker a fair and meaningful opportunity to have his or her claim fully adjudicated or to meet, explain and rebut the Department's medical experts, when the Board and lower courts gut the worker's case by excluding his independent experts' testimony in disregard of the strong public policy of the Act and the overriding purpose and goals in administering the court and

evidence rules.

The lower court's decision has sweeping consequences that rise to a level *far above* the use of a treatise in *Robles, supra*, which triggered due process violations. The backbone of Mr. Young's case-in-chief was removed when his independent medical experts were excluded. 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.*

3. Whether the Department is the equivalent of a successor in interest to the tortfeasor who caused the industrial injury is of significant public importance.

The Washington Supreme Court should grant review because of the *substantial public interest* in a determination as to whether in worker's compensation claims, where the industrial injury was caused by a third party's tortuous conduct, the Department should be considered the equivalent of a successor in interest to the third party tortfeasor.

CR 32(a)(5)(B) addresses the use of perpetuation depositions in latter proceedings, when the prior proceeding involves the same issues and subject matter. To that end, the present case is a prime example, in that a motor vehicle collision caused by a third party was the industrial injury.

a. The issues for which review is sought are of a public nature, likely to recur, and an authoritative determination by the Supreme Court giving guidance is desirable.

This issue has bearing on all workers whose industrial injury was caused by the negligence of a third party. This issue also has bearing on whether, as in the present case, injured workers will be faced with incurring double the independent medical expert expense and additional time spent to re-call witnesses for a second time in their Board hearing when those witnesses were already perpetuated and cross examined by a defense counsel whose client has more to lose than the Department.

In cases governed by the Act and the strong public policy of construing the Act liberally with all doubts in favor of the injured worker, it makes little sense to interpret "successor in interest" strictly or literally to disadvantage the injured worker. There appears to be no case in Washington State courts construing "successor in interest" in this context.

This is not a real property dispute, contract dispute, a dispute involving business law, or any other similar action. This is an action under the Act, where the Department and tortfeasor's interests are aligned. Defeating or minimizing the injured worker's claim to damages from the work-place injury reduces payments by the tortfeasor and Department. The fact that the Department hired two defense medical experts to testify against

the interests of the injured worker is a prime example.

In the civil action the tortfeasor is more at-risk, in that liability exists for pain, suffering, loss of enjoyment of life, and inconvenience *in addition to* the damages to which the Department is liable. The Department's interests were well represented by third party counsel at the injured worker's perpetuated expert depositions.

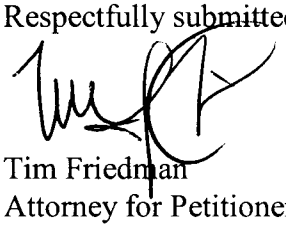
The issue on which review is requested is public in nature, is likely to recur, and guidance is needed by the Supreme Court.

F. CONCLUSION

The Petitioner respectfully requests that this Court accept review for the reasons indicated in Part E, and either admit the depositions of Dr. Bays and Occupational Therapist Jones and make findings consistent with their testimony, or reverse the lower decisions and order the Board to re-open the case with the limited purpose of considering the testimony and medical reports of Dr. Bays and OT Jones and rule accordingly.

August 6, 2014

Respectfully submitted,



Tim Friedman
Attorney for Petitioner

APPENDIX A1 -A15

APPENDIX A1 -A15

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEREK J. YOUNG, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent, CMS PAINTING, INC., Defendant.	No. 71730-8-I DIVISION ONE UNPUBLISHED OPINION FILED: July 7, 2014

APPELWICK, J. — Young appeals from the termination of his workers' compensation benefits. He argues that the Board of Industrial Insurance Appeals and the superior court erred in excluding two of his expert witness depositions taken in a third-party tort claim. The depositions were taken without notice to the Department and without the opportunity for the Department to appear. We affirm.

FACTS

Derek Young was injured in a June 2007 car accident while in the course of his employment. Young's workers' compensation claim was accepted and he received time-loss benefits through September 17, 2008. The Washington Department of Labor and Industries (the Department) closed Young's claim on September 19, 2008, because his "medical record shows treatment is no longer necessary and there is no permanent partial disability." On December 31, 2008, the Department issued a notice of decision and

affirmed the order terminating Young's benefits. Young appealed to the Board of Industrial Insurance Appeals (the Board or BIIA).

The BIIA held a status conference with Young and the Department on March 16, 2009. The BIIA characterized the issues on appeal as: (1) whether Young's injury required further medical treatment; (2) whether Young was a totally and temporarily disabled worker due to residual impairment from September 18, 2008 to December 31, 2008; (3) whether Young was entitled to vocational rehabilitation; and (4) alternatively, what degree of permanent partial disability best described Young's residual impairment. The BIIA ordered Young's perpetuation depositions to be taken by July 27, 2009 and filed by August 10, 2009. The BIIA also ordered the parties to send each other the names of their witnesses, along with the date, time, and location where all their witnesses would testify. Young named two unidentified medical witnesses and one unidentified vocational witness as his experts.

On June 4, 2009, with notice to the Department, Young took a perpetuation deposition of Dr. Jay Sweet, his chiropractor. The Department appeared and cross-examined Sweet.

On June 17, 2009, Young brought a personal injury claim against Marilyn Werner. Young alleged that Werner negligently caused the car accident that injured him. He requested both economic and noneconomic damages.

In May 2010, as part of his tort claim, Young took depositions of three expert witnesses without notice to the Department. They were: (1) Patrick Bays, an orthopedic surgeon; (2) a second deposition of Sweet; and (3) Dawn Jones, an occupational

therapist. On September 9, 2010, Young filed these three depositions with the BIIA to support his workers' compensation claim.

The Department moved to exclude the three depositions from Bays, Sweet, and Jones, taken in Young's tort claim. The Department did not object to Sweet's 2009 deposition, because it received notice and appeared at that deposition. However, the Department argued, the three May 2010 depositions were taken without notice, without the opportunity for cross-examination, and in a separate matter than the BIIA appeal. The Department asserted that this violated CR 32(a) and WAC 263-12-117. Young argued in response that there was sufficient commonality of issues and interests between the defendant driver in the tort action and the Department in his workers' compensation appeal.

The BIIA granted the Department's motion. The BIIA explained that the Department did not receive notice of the depositions. The BIIA also reasoned that the differences between the civil lawsuit and Young's workers' compensation claim were "profound." The goal of the civil suit was for Young to prove liability and damages, while the defendant likely sought to deny liability and contest the value of damages. By contrast, the BIIA appeal involved eligibility for further medical treatment, time-loss benefits, and eligibility for vocational rehab. The BIIA did not exclude Sweet's deposition from June 2009.

On November 22, 2010, the BIIA held a hearing on the merits of Young's appeal. Young and two lay witnesses testified: Brian Boatright, Young's brother, and Wendell Crawford, Young's former roommate. At the conclusion of their testimony, the BIIA judge gave Young the opportunity to file a motion to continue before resting his case. Young

did not do so and did not call his experts to testify. As such, Sweet's first deposition was the only expert opinion that supported Young's appeal.

The Department introduced testimony from Dr. Leonard Rutberg, a neurosurgeon, and Joan Logan, a chiropractor.

On February 16, 2011, the BIIA issued a proposed decision and order affirming the Department's denial of further benefits to Young. The BIIA acknowledged that the opinion of a worker's attending physician is entitled to special consideration. However, Dr. Sweet did not provide an opinion about whether Young's injury required further medical treatment. By contrast, the Department's experts "each unequivocally said the claimant's industrial injury condition had resolved, he had reached maximum medical improvement, and further treatment was not warranted."

Young petitioned for review of the BIIA's proposed decision. On March 21, 2011, the BIIA denied Young's petition and adopted the proposed decision and order. Young appealed BIIA's decision to Pierce County Superior Court.

On October 7, 2011, Young moved for summary judgment, asking the superior court to reverse the BIIA's decision to exclude the depositions from his two medical experts, Bays and Jones. Young did not argue that Sweet's second deposition should be admitted. Young asserted that the Industrial Insurance Act, Title 51 RCW, must be liberally construed in his favor, and so relaxed rules of evidence and court rules applied.

On February 10, 2012, the superior court denied Young's motion for summary judgment. The court reasoned 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." The court concluded that the

Department was not a successor in interest to a third party tortfeasor. Therefore, the court held that the Department was entitled to notice and opportunity to appear and to cross-examine Young's experts. The court explained that Young could have called these witnesses in the BIIA proceedings to cure the deficiency, but did not do so.

Young's appeal proceeded to a bench trial before the superior court. The superior court subsequently entered findings of fact and conclusions of law, including the following finding:

> The record reflects that the Board gave appropriate consideration to the testimony of Mr. Young's attending physician, Dr. Sweet. Dr. Sweet testified that he did not usually do disability ratings for his patients, did not offer a specific rating of Mr. Young's permanent partial disability, and stated that he had no further curative treatment to recommend for Mr. Young. His testimony including but not limited to findings of spasm and reduced range of motion did not provide a preponderance of the evidence on which to reverse the Board's decision.

The court also made the following conclusions of law:

> 2.2 As of June 26, 2008, Derek Young's industrial injury condition did not require further proper and necessary medical treatment, within the meaning of RCW 51.36.010.
>
> 2.3 During the period between September 18, 2008 and December 31, 2008, inclusive, Derek Young was not a totally and temporarily disabled worker, as contemplated by RCW 51.32.090.
>
> 2.4 Based on the record, the Department's supervisor, or his or her designee, did not abuse his or her discretion when the Department did not provide vocational rehabilitation, as provided by RCW 51.32.095.
>
> 2.5 Derek Young's residual impairment, proximately caused by his industrial injury, 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.

The superior court affirmed the BIIA's order dated March 24, 2011, which affirmed the Department's decision dated December 31, 2008 terminating Young's workers' compensation benefits.

Young appeals.

DISCUSSION

We review workers' compensation cases the same as we review any other civil judgment. Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180, 210 P.3d 355 (2009). Our review is limited to examining the record to see whether substantial evidence supports the superior court's findings and whether the court's conclusions of law flow from the findings. Id. at 180-81. We view the record in the light most favorable to the prevailing party. Id. We do not reweigh competing testimony or inferences. Id. We review a trial court's decision to deny admission of a deposition under CR 32 for abuse of discretion. Sutton v. Shufelberger, 31 Wn. App. 579, 585, 643 P.2d 920 (1982). A trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. Morin v. Burris, 160 Wn.2d 745, 753, 161 P.3d 956 (2007).

I. Exclusion of Expert Witness Depositions

Young argues that the BIIA and the superior court improperly excluded the two depositions and medical reports from his expert witnesses, Jones and Bays.

A. Relaxed Rules of Procedure and Evidence

Young argues that BIIA cases are subject to relaxed rules of procedure and evidence, because the Industrial Insurance Act must be liberally construed in favor of the injured worker. Young is correct that the Industrial Insurance Act "is to be liberally construed in order to achieve its purpose of providing compensation to all covered

employees injured in their employment." Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). All doubts about the meaning of the Act must be resolved in favor of the worker. Id. In 1941, the Washington Supreme Court stated that "strict rules of trial procedure in civil actions are not to be applied to claims before the department of labor and industries." Otter v. Dept. of Labor & Indus., 11 Wn.2d 51, 56, 118 P.2d 41 (1941). Young relies heavily on this excerpt from Otter.

Young's argument fails for two reasons. First, Young does not ask us to interpret an ambiguous provision of the Industrial Insurance Act. The liberal construction mandate comes into play when there is statutory ambiguity. See, e.g., Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 811, 16 P.3d 583 (2001). RCW 51.52.100 states that "no witness'[s] testimony shall be received" in a BIIA 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." (Emphasis added.) The liberal construction mandate does not mean that we should ignore this express provision in favor of the worker.

Second, the sentence Young relies on from Otter has been abrogated. Otter was decided in 1941. The legislature amended the Industrial Insurance Act in 1949 to create the BIIA. LAWS OF 1949, ch. 219, § 2. This amendment gave the BIIA rulemaking power. LAWS OF 1949, ch. 219, § 3; RCW 51.52.020. In an exercise of that power, the BIIA adopted WAC 263-12-125, which states, "Insofar as applicable, and not in conflict with these rules, the statutes and rules regarding procedures in civil cases in the superior courts of this state shall be followed." See also 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."). We hold that BIIA cases are not subject to relaxed rules of procedure and evidence.

B. Exclusion Under CR 32(a)(5)(B)

Young argues that the BIIA and superior court improperly excluded his depositions under CR 32(a)(5)(B). CR 32(a)(5)(B) states:

> The deposition of a health care professional, even though available to testify at trial, taken with the expressly stated purpose of preserving the deponent's 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.) Young asserts that there is identical subject matter in his tort claim and his workers' compensation claim. He also argues that the Department and the tortfeasor share the same interest in opposing his claim for recovery, and that the Department is a successor in interest to the third party tortfeasor.

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." This includes a successor in interest, as specified in CR 32(a)(5)(B). There is no dispute that the Department did not receive notice of Young's May 2010 depositions.

For Young's depositions to be admissible, then, the Department must be a successor in interest to the third party tortfeasor.

However, the Department is not a successor in interest. The Department did not follow the tortfeasor in ownership or control, or acquire the tortfeasor's interest. Nor did it even share a common interest with the tortfeasor. Rather, the Department has a statutory lien against damages that injured workers recover in third party tort claims. RCW 51.24.030, .060. RCW 51.24.060(1) provides that if an injured worker seeks damages from a third party, the worker recovers 25 percent and the Department "shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department . . . for benefits paid." Thus, the Department's interest in the tort claim is derivative of Young's interest, not the driver's.

Furthermore, the Department is "authorized by law to act as trustee of a fund created, established, and maintained for the purpose of providing compensation to workers and their dependents for disabilities proximately caused by industrial accidents or occupational diseases." Chavez v. Dep't of Labor & Indus., 129 Wn. App. 236, 241, 118 P.3d 392 (2005). As a trustee, the Department owes the beneficiaries of the trust—injured workers—"'the highest degree of good faith, care, loyalty, and integrity.'" Id. (quoting Allard v. Pac. Nat'l Bank, 99 Wn.2d 394, 403, 663 P.2d 104 (1983)). A tortfeasor owes no such duty. A tortfeasor's interest is in contesting liability and limiting damages.

The tort claim and the workers' compensation claim also did not share all the same issues. The tort claim involved common law issues of duty and breach. Cameron v. Murray, 151 Wn. App. 646, 651, 214 P.3d 150 (2009). By contrast, workers' compensation is a statutory no-fault system. RCW 51.04.010. The issues presented in

Young's workers' compensation claim were whether his 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. This is distinct from a tort claim.

We hold that the Department was not a successor in interest to the third party tortfeasor. Nor did the two actions involve the same issues. Thus, Young's depositions were admissible under CR 32(a) only with notice to the Department. Because there was no notice, the BIIA and the superior court properly excluded Young's May 2010 depositions.[1]

C. Exclusion Under WAC Provisions

Young argues that the BIIA and the superior court wrongfully prevented him from presenting all evidence in his case-in-chief, because WAC 263-12-115 does not set forth any limitations on admissibility of medical testimony. Young further argues that the BIIA and superior court failed to consider the factors of WAC 263-12-117 before excluding his experts.

However, RCW 51.52.100 specifies that no witness's testimony may be admitted in a BIIA hearing unless it has "been taken by deposition according to the statutes and rules relating to superior courts of this state." As discussed above, CR 32(a) requires that depositions be taken with notice to the opposing party. Similarly, WAC 263-12-117(1) states that BIIA judges "may permit or require the perpetuation of testimony by deposition,

[1] Young argues that it creates bad policy to exclude perpetuation depositions like those he sought to admit here. However, the legislature, not this court, is in the best position to assess policy considerations. Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 109, 285 P.3d 34 (2012).

subject to the applicable provisions of WAC 263-12-115." WAC 263-12-115(4) then specifies that "[a]ll 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." These provisions plainly restrict the admissibility of medical testimony: it must conform to the Washington court rules and rules of evidence.

WAC 263-12-117(1) specifies that, in permitting or requiring parties to take perpetuation depositions, a BIIA judge must give "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." This provision governs the BIIA judge's initial decision to permit or require perpetuation depositions. It does not require these factors to be taken into account before excluding perpetuation depositions that violate the court rules. Therefore, we hold that the BIIA and superior court did not violate WAC 263-12-115 or WAC 263-12-117.[2]

D. Due Process

Young argues that exclusion of his medical expert depositions violated due process, because it denied him the opportunity to be heard. Applicants for workers' compensation benefits are entitled to due process. Buffelen Woodworking Co. v. Cook, 28 Wn. App. 501, 505, 625 P.2d 703 (1981). A fundamental requirement of due process

[2] Young also argues that the BIIA and superior court violated CR 32(c), because they did not give him a fair chance to rebut the Department's experts. CR 32(c) provides, "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." The purpose of CR 32(c) is to allow any party, including the offering party, to rebut statements made in a deposition. The rule does not mean that a party may introduce any rebuttal evidence, even it if violates other court rules or rules of evidence.

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 (1995)).

A workers' compensation applicant is denied due process if he or she is deprived all opportunity to introduce evidence at a benefits hearing. State ex rel. Puget Sound Navigation Co. v. Dep't of Transp., 33 Wn.2d 448, 489, 206 P.2d 456 (1949). Similarly, the BIIA violates due process by considering evidence not part of the record to support its conclusion that an applicant is not a credible witness. Robles v. Dep't of Labor & Indus., 48 Wn. App. 490, 494, 739 P.2d 727 (1987). An applicant must have the opportunity "to meet, explain, or rebut" the evidence. Id. at 495.

Young's due process argument is without merit. He was not denied the opportunity to present evidence rebutting the Department. Nor did the BIIA rely on evidence outside the record that Young did not have a chance to rebut. At the BIIA hearing, Young presented testimony from three lay witnesses, including himself. He also submitted the 2009 deposition of Dr. Sweet. The BIIA then gave him the opportunity to cure the deficiency with his two other expert depositions. Young could have taken new depositions. He did not do so. He could have called Bays and Jones to testify in person at the BIIA hearing. He did not do so. Young had ample opportunity to be heard.

E. Exclusion as a Sanction

Young argues that the BIIA and superior court improperly employed the harshest sanction possible by excluding his expert depositions. He contends that such a sanction should be imposed only upon a showing of willful and deliberate wrongdoing, which the record does not support here. Young relies on Burnet v. Spokane Ambulance, 131 Wn.2d

484, 933 P.2d 1036 (1997), to make this argument. Under Burnet, before excluding evidence under CR 37 for violation of a discovery order, the trial court must (1) find that the party's violation was willful, (2) find that the violation substantially prejudiced the opposing party, and (3) consider, on the record, whether lesser sanctions would sufficiently address the violation. Id. at 494. Discovery sanctions that trigger Burnet include witness exclusion. Jones v. City of Seattle, 179 Wn.2d 322, 338, 314 P.3d 380 (2013).

Here, the BIIA and superior court did not exclude Young's witnesses. Rather, the BIIA and superior court excluded Young's defective expert witness depositions, because they were taken without notice to the Department. The BIIA gave Young the opportunity to call his experts as live witnesses or to stay the proceeding for depositions to be taken with proper notice. The superior court recognized that Young could have called his experts "in the Board proceedings to cure the deficiency of notice and opportunity to appear, but chose not to." Young was not sanctioned with witness exclusion. Rather, his witness depositions were properly excluded, because they violated CR 32(a). Burnet does not apply here and there was no error.

II. Substantial Evidence Supporting Termination of Benefits

Young argues that the BIIA and superior court erred in discontinuing further medical treatment, denying his further time loss, denying vocational rehabilitation, and denying his category 4 disability impairment. Young asserts that Sweet gave favorable opinions and those opinions must be given special consideration, because Sweet was Young's treating chiropractor. Specifically, Sweet stated that on December 5, 2008,

Young had restrictions in the cervical, thoracic, lumbar, and pelvic spine; decreased lumbar range of motion; back joint restrictions; and low back spasm.

An injured worker is entitled to proper and necessary medical treatment until he or she reaches maximum medical improvement. RCW 51.36.010; WAC 296-20-01002. Maximum medical improvement occurs when no fundamental or marked change in the accepted condition can be expected, with or without treatment. WAC 296-20-01002. Temporary total disability terminates as soon as the worker's condition becomes fixed and stable, or as soon as the worker is able to perform any kind of work. Hunter v. Bethel Sch. Dist., 71 Wn. App. 501, 507, 859 P.2d 652 (1993). Vocational rehabilitation may be provided if it is both necessary and likely to make the worker capable of gainful employment. RCW 51.32.095(2). Lastly, permanent partial disability is "any anatomic or functional abnormality or loss after maximum medical improvement (MMI) has been achieved." WAC 296-20-19000.

The Department's experts, Rutberg and Logan, examined Young as a joint panel on June 26, 2008. They reviewed Young's medical records, interviewed Young, and conducted a physical exam. They also examined an MRI (magnetic resonance imaging) of Young's spine that showed a small disc protrusion at L5-S1, but no encroachment on any neurological structures. They diagnosed Young as having suffered a neck sprain, a lumbosacral sprain, and a dislocated sacrum as a result of his industrial injury.

Rutberg and Logan concluded that these conditions had reached maximum medical improvement, so any further medical treatment would not be curative. They testified that Young was not physically restricted in his ability to work between September and December 2008. They both rated Young's permanent partial impairment level at

category 1 under WAC 296-20-280.[3] Category 1 means subjective complaints and/or sensory losses "may be present or absent." WAC 296-20-280. It is noncompensable. WAC 296-20-680(3).

We do not reweigh competing testimony. Rogers, 151 Wn. App. at 180-81. Based on Rutberg's and Logan's testimony, substantial evidence supports the superior court's findings that Young did not require further medical treatment and his residual impairment was category 1. The superior court's conclusions flow from those findings. We hold that the superior court did not err in affirming the termination of Young's benefits.

III. Attorney Fees

Young requests his attorney fees and costs under RCW 51.52.130. RCW 51.52.130 allows a person asserting workers' compensation rights to recover reasonable attorney fees on appeal if the BIIA's decision is "reversed or modified and additional relief is granted to a worker." Because we do not reverse or modify the BIIA's decision, we deny Young's request for attorney fees and costs.

We affirm.

Appelwick, J.

WE CONCUR:

Verellen, J.

Schindler, J.

[3] Young asserts that Logan and Rutberg failed to consider his muscle spasms in making their permanent partial disability rating. WAC 296-20-270 states that muscle spasms "shall be considered, in selecting the appropriate category, only insofar as productive of low back impairment." However, Logan stated that Young "didn't have any muscle spasm. Hypertonicity is not a muscle spasm."

APPENDIX B

APPENDIX B

Laws and Agency Rules

Laws and Agency Rules

Inside the Legislature

* Find Your Legislator
* Visiting the Legislature
* Agendas, Schedules and Calendars
* Bill Information

Outside the Legislature

* Congress - the Other Washington
* TVW
* Washington Courts
* OFM Fiscal Note Website

Access Washington
Official State Government Website

Washington State Constitution

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

Documents

PDF version of the Washington State Constitution (1.2 MB)

ARTICLE I
DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No

ARTICLE IV
THE JUDICIARY

SECTION 1 JUDICIAL POWER, WHERE VESTED. The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Court of appeals: Art. 4 Section 30.

SECTION 2 SUPREME COURT. The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum, and pronounce a decision. The said court shall always be open for the transaction of business except on nonjudicial days. In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time and may provide for separate departments of said court.

SECTION 2(a) TEMPORARY PERFORMANCE OF JUDICIAL DUTIES. When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court, and to authorize any superior court judge to perform judicial duties in any superior court of this state. [**AMENDMENT 38,** 1961 House Joint Resolution No. 6, p 2757. Approved November, 1962.]

SECTION 3 ELECTION AND TERMS OF SUPREME COURT JUDGES. The judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election at the times and places at which state officers are elected, unless some other time be provided by the legislature. The first election of judges of the supreme court shall be at the election which shall be held upon the adoption of this Constitution and the judges elected thereat shall be classified by lot, so that two shall hold their office for the term of three years, two for the term of five years, and one for the term of seven years. The lot shall be drawn by the judges who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the secretary of state, and filed in his office. The supreme court shall select a chief justice from its own membership to serve for a four-year term at the pleasure of a majority of the court as prescribed by supreme court rule. The chief justice shall preside at all sessions of the supreme court. In case of the absence of the chief justice, the majority of the remaining court shall select one of their members to serve as acting chief justice. After the first election the terms of judges elected shall be six years from and after the second Monday in January next succeeding their election. If a vacancy occur in the office of a judge of the supreme court the governor shall only appoint a person to ensure the number of judges as specified by the legislature, to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold the office for the remainder of the unexpired term. The term of office of the judges of the supreme court, first elected, shall commence as soon as the state shall have been admitted into the Union, and continue for the term herein provided, and until their successors are elected and qualified. The sessions of the supreme court shall be held at the seat of government until otherwise provided by law. [**AMENDMENT 89,** 1995 Substitute Senate Joint Resolution No. 8210, p 2905. Approved November 7, 1995.]

Original text -- Art. 4 Section 3 ELECTION AND TERMS OF SUPREME COURT JUDGES -- *The judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election at the times and places at which state officers are elected, unless some*

other time be provided by the legislature. The first election of judges of the supreme court shall be at the election which shall be held upon the adoption of this Constitution and the judges elected thereat shall be classified by lot, so that two shall hold their office for the term of three years, two for the term of five years, and one for the term of seven years. The lot shall be drawn by the judges who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the secretary of state, and filed in his office. The judge having the shortest term to serve not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and shall preside at all sessions of the supreme court, and in case there shall be two judges having in like manner the same short term, the other judges of the supreme court shall determine which of them shall be chief justice. In case of the absence of the chief justice, the judge having in like manner the shortest or next shortest term to serve shall preside. After the first election the terms of judges elected shall be six years from and after the second Monday in January next succeeding their election. If a vacancy occur in the office of a judge of the supreme court the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold the office for the remainder of the unexpired term. The term of office of the judges of the supreme court, first elected, shall commence as soon as the state shall have been admitted into the Union, and continue for the term herein provided, and until their successors are elected and qualified. The sessions of the supreme court shall be held at the seat of government until otherwise provided by law.

SECTION 3(a) RETIREMENT OF SUPREME COURT AND SUPERIOR COURT JUDGES. A judge of the supreme court or the superior court shall retire from judicial office at the end of the calendar year in which he attains the age of seventy-five years. The legislature may, from time to time, fix a lesser age for mandatory retirement, not earlier than the end of the calendar year in which any such judge attains the age of seventy years, as the legislature deems proper. This provision shall not affect the term to which any such judge shall have been elected or appointed prior to, or at the time of, approval and ratification of this provision. Notwithstanding the limitations of this section, the legislature may by general law authorize or require the retirement of judges for physical or mental disability, or any cause rendering judges incapable of performing their judicial duties. [**AMENDMENT 25,** 1951 House Joint Resolution No. 6, p 960. Approved November 4, 1952.]

SECTION 4 JURISDICTION. The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars ($200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof.

SECTION 5 SUPERIOR COURT -- ELECTION OF JUDGES, TERMS OF, ETC. There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election: **Provided,** That until otherwise directed by the legislature one judge only shall be elected for the counties of Spokane and Stevens; one judge for the county of Whitman; one judge for the counties of Lincoln, Okanogan, Douglas and Adams; one judge for the counties of Walla Walla and Franklin; one judge for the counties of Columbia, Garfield and Asotin; one judge for the counties of Kittitas, Yakima and Klickitat; one judge for the counties of Clarke, Skamania, Pacific, Cowlitz and Wahkiakum; one judge for the counties of Thurston, Chehalis, Mason and Lewis; one judge for the county of Pierce; one judge for the county of King; one judge for the counties of

Jefferson, Island, Kitsap, San Juan and Clallam; and one judge for the counties of Whatcom, Skagit and Snohomish. In any county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof, and whenever the governor shall direct a superior judge to hold court in any county other than that for which he has been elected, there may be as many sessions of the superior court in said county at the same time as there are judges therein or assigned to duty therein by the governor, and the business of the court shall be so distributed and assigned by law or in the absence of legislation therefor, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof. The judgments, decrees, orders and proceedings of any session of the superior court held by any one or more of the judges of such court shall be equally effectual as if all the judges of said court presided at such session. The first superior judges elected under this Constitution shall hold their offices for the period of three years, and until their successors shall be elected and qualified, and thereafter the term of office of all superior judges in this state shall be for four years from the second Monday in January next succeeding their election and until their successors are elected and qualified. The first election of judges of the superior court shall be at the election held for the adoption of this Constitution. If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Supreme court may authorize superior court judge to perform judicial duties in any superior court: Art. 4 Section 2(a).

SECTION 6 JURISDICTION OF SUPERIOR COURTS. Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days. [**AMENDMENT 87,** 1993 House Joint Resolution No. 4201, p 3063. Approved November 2, 1993.]

Amendment 65, part (1977) -- Art. 4 Section 6 Jurisdiction of Superior Courts -- *The superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser*

sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days. [**AMENDMENT 65,** part, 1977 Senate Joint Resolution No. 113, p 1714. Approved November 8, 1977.]

Amendment 65 also amended Art. 4 Section 10.

Amendment 28, part (1952) -- Art. 4 Section 6 JURISDICTION OF SUPERIOR COURTS -- *The superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one thousand dollars, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.* [AMENDMENT 28, part, 1951 Substitute House Joint Resolution No. 13, p 962. Approved November 4, 1952.]

Note: Amendment 28 also amended Art. 4 Section 10.

ORIGINAL TEXT -- ART. 4 Section 6 JURISDICTION OF SUPERIOR COURTS -- *The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand, or the value of the property in controversy amounts to one hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization, and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justice's and other inferior courts in their respective counties as may be prescribed by law. They shall be always open except on non-judicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and non-judicial days.*

SECTION 7 EXCHANGE OF JUDGES -- JUDGE PRO TEMPORE. The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the

parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement. [**AMENDMENT 94**, 2001 Engrossed Senate Joint Resolution No. 8208, p 2327. Approved November 6, 2001.]

Amendment 80 -- Art. 4 Section 7 EXCHANGE OF JUDGES -- JUDGE PRO TEMPORE -- *The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so. A case in the superior court may be tried by a judge, pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court and sworn to try the case. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.*[Amendment 80, 1987 Senate Joint Resolution No. 8207, p 2815. Approved November 3, 1987.]

ORIGINAL TEXT -- Art. 4 Section 7 EXCHANGE OF JUDGES -- JUDGE PRO TEMPORE -- *The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so. A case in the superior court may be tried by a judge, pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court and sworn to try the case.*

SECTION 8 ABSENCE OF JUDICIAL OFFICER. Any judicial officer who shall absent himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office: *Provided,* That in cases of extreme necessity the governor may extend the leave of absence such time as the necessity therefor shall exist.

SECTION 9 REMOVAL OF JUDGES, ATTORNEY GENERAL, ETC. Any judge of any court of record, the attorney general, or any prosecuting attorney may be removed from office by joint resolution of the legislature, in which three-fourths of the members elected to each house shall concur, for incompetency, corruption, malfeasance, or delinquency in office, or other sufficient cause stated in such resolution. But no removal shall be made unless the officer complained of shall have been served with a copy of the charges against him as the ground of removal, and shall have an opportunity of being heard in his defense. Such resolution shall be entered at length on the journal of both houses and on the question of removal the ayes and nays shall also be entered on the journal.

Removal, censure, suspension, or retirement of judges or justices: Art. 4 Section 31.

SECTION 10 JUSTICES OF THE PEACE. The legislature shall determine the number of justices of the peace to be elected and shall prescribe by law the powers, duties and jurisdiction of justices of the peace: *Provided,* That such jurisdiction granted by the legislature shall not trench upon the jurisdiction of superior or other courts of record, except that justices of the peace may be made police justices of incorporated cities and towns. Justices of the peace shall have original jurisdiction in cases where the demand or value of the property in controversy is less than three hundred dollars or such greater sum, not to exceed three thousand dollars or as otherwise determined by law, as shall be prescribed by the legislature. In incorporated cities or towns having more than five thousand inhabitants, the

justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use. [**AMENDMENT 65,** part, 1977 Senate Joint Resolution No. 113, p 1714. Approved November 8, 1977.]

Amendment 65 also amended Art. 4 Section 6.

Amendment 28, part (1952) -- Art. 4 Section 10 JUSTICES OF THE PEACE -- The legislature shall determine the number of justices of the peace to be elected and shall prescribe by law the powers, duties and jurisdiction of justices of the peace: Provided, *That such jurisdiction granted by the legislature shall not trench upon the jurisdiction of superior or other courts of record, except that justices of the peace may be made police justices of incorporated cities and towns. Justices of the peace shall have original jurisdiction in cases where the demand or value of the property in controversy is less than three hundred dollars or such greater sum, not to exceed one thousand dollars, as shall be prescribed by the legislature. In incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use.* [AMENDMENT 28, part, 1951 Substitute House Joint Resolution No. 13, p 962. Approved November 4, 1952.]

Note: Amendment 28 also amended Art. 4 Section 6.

Original text -- Art. 4 Section 10 JUSTICES OF THE PEACE -- *The legislature shall determine the number of justices of the peace to be elected in incorporated cities or towns and in precincts, and shall prescribe by law the powers, duties and jurisdiction of justices of the peace;* Provided, *That such jurisdiction granted by the legislature shall not trench upon the jurisdiction of superior or other courts of record, except that justices of the peace may be made police justices of incorporated cities and towns. In incorporated cities or towns having more than five thousand inhabitants the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use.*

SECTION 11 COURTS OF RECORD. The supreme court and the superior courts shall be courts of record, and the legislature shall have power to provide that any of the courts of this state, excepting justices of the peace, shall be courts of record.

SECTION 12 INFERIOR COURTS. The legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this Constitution.

SECTION 13 SALARIES OF JUDICIAL OFFICERS -- HOW PAID, ETC. No judicial officer, except court commissioners and unsalaried justices of the peace, shall receive to his own use any fees or perquisites of office. The judges of the supreme court and judges of the superior courts shall severally at stated times, during their continuance in office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election, nor during the term for which they shall have been elected. The salaries of the judges of the supreme court shall be paid by the state. One-half of the salary of each of the superior court judges shall be paid by the state, and the other one-half by the county or counties for which he is elected. In cases where a judge is provided for more than one county, that portion of his salary which is to be paid by the counties shall be apportioned between or among them according to the assessed value of their taxable property, to be determined by the assessment next preceding the time for which such salary is to be paid.

Authorizing compensation increase during term: Art. 30 Section 1.

Increase or diminution of compensation during term of office prohibited
county, city or municipal officers: Art. 11 Section 8.
public officers: Art. 2 Section 25.
state officers: Art. 3 Section 25.

SECTION 14 SALARIES OF SUPREME AND SUPERIOR COURT JUDGES. Each of the judges of the supreme court shall receive an annual

salary of four thousand dollars ($4,000); each of the superior court judges shall receive an annual salary of three thousand dollars ($3,000), which said salaries shall be payable quarterly. The legislature may increase the salaries of judges herein provided.

Compensation of legislators, elected state officials, and judges: Art. 28 Section 1.

SECTION 15 INELIGIBILITY OF JUDGES. The judges of the supreme court and the judges of the superior court shall be ineligible to any other office or public employment than a judicial office, or employment, during the term for which they shall have been elected.

SECTION 16 CHARGING JURIES. Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

SECTION 17 ELIGIBILITY OF JUDGES. No person shall be eligible to the office of judge of the supreme court, or judge of a superior court, unless he shall have been admitted to practice in the courts of record of this state, or of the Territory of Washington.

SECTION 18 SUPREME COURT REPORTER. The judges of the supreme court shall appoint a reporter for the decisions of that court, who shall be removable at their pleasure. He shall receive such annual salary as shall be prescribed by law.

SECTION 19 JUDGES MAY NOT PRACTICE LAW. No judge of a court of record shall practice law in any court of this state during his continuance in office.

SECTION 20 DECISIONS, WHEN TO BE MADE. Every cause submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof; *Provided,* That if within said period of ninety days a rehearing shall have been ordered, then the period within which he is to decide shall commence at the time the cause is submitted upon such a hearing.

SECTION 21 PUBLICATION OF OPINIONS. The legislature shall provide for the speedy publication of opinions of the supreme court, and all opinions shall be free for publication by any person.

SECTION 22 CLERK OF THE SUPREME COURT. The judges of the supreme court shall appoint a clerk of that court who shall be removable at their pleasure, but the legislature may provide for the election of the clerk of the supreme court, and prescribe the term of his office. The clerk of the supreme court shall receive such compensation by salary only as shall be provided by law.

SECTION 23 COURT COMMISSIONERS. There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

SECTION 24 RULES FOR SUPERIOR COURTS. The judges of the superior courts, shall from time to time, establish uniform rules for the government of the superior courts.

SECTION 25 REPORTS OF SUPERIOR COURT JUDGES. Superior judges, shall on or before the first day of November in each year, report in writing to the judges of the supreme court such defects and omissions in the laws as their experience may suggest, and the judges of the supreme court shall on or before the first day of January in each year report in writing to the governor such defects and omissions in the laws as they may believe to exist.

SECTION 26 CLERK OF THE SUPERIOR COURT. The county clerk shall be by virtue of his office, clerk of the superior court.

SECTION 27 STYLE OF PROCESS. The style of all process shall be, "The State of Washington," and all prosecutions shall be conducted in its name and by its authority.

SECTION 28 OATH OF JUDGES. Every judge of the supreme court, and every judge of a superior court shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state.

SECTION 29 ELECTION OF SUPERIOR COURT JUDGES. Notwithstanding any provision of this Constitution to the contrary, if, after the last day as provided by law for the withdrawal of declarations of candidacy has expired, only one candidate has filed for any single position of superior court judge in any county containing a population of one hundred thousand or more, no primary or election shall be held as to such position, and a certificate of election shall be issued to such candidate. If, after any contested primary for superior court judge in any county, only one candidate is entitled to have his name printed on the general election ballot for any single position, no election shall be held as to such position, and a certificate of election shall be issued to such candidate: *Provided,* That in the event that there is filed with the county auditor within ten days after the date of the primary, a petition indicating that a write in campaign will be conducted for such single position and signed by one hundred registered voters qualified to vote with respect of the office, then such single position shall be subject to the general election. Provisions for the contingency of the death or disqualification of a sole candidate between the last date for withdrawal and the time when the election would be held but for the provisions of this section, and such other provisions as may be deemed necessary to implement the provisions of this section, may be enacted by the legislature. [**AMENDMENT 41,** 1965 ex.s. Substitute Senate Joint Resolution No. 6, p 2815. Approved November 8, 1966.]

SECTION 30 COURT OF APPEALS. (1) *Authorization.* In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.
(2) *Jurisdiction.* The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute.
(3) *Review of Superior Court.* Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute.
(4) *Judges.* The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of appeals shall be as provided by statute.

(5) *Administration and Procedure.* The administration and procedures of the court of appeals shall be as provided by rules issued by the supreme court.
(6) *Conflicts.* The provisions of this section shall supersede any conflicting provisions in prior sections of this article. [**AMENDMENT 50,** 1967 Senate Joint Resolution No. 6; see 1969 p 2975. Approved November 5, 1968.]

Reviser's note: This section which was adopted as Sec. 29 is herein renumbered Sec. 30 to avoid confusion with Sec. 29, supra.

SECTION 31 COMMISSION ON JUDICIAL CONDUCT. (1) There shall be a commission on judicial conduct, existing as an independent agency of the judicial branch, and consisting of a judge selected by and from the court of appeals judges, a judge selected by and from the superior court judges, a judge selected by and from the limited jurisdiction court judges, two persons admitted to the practice of law in this state selected by the state bar association, and six persons who are not attorneys appointed by the governor.
(2) Whenever the commission receives a complaint against a judge or justice, or otherwise has reason to believe that a judge or justice should be admonished, reprimanded, censured, suspended, removed, or retired, the commission shall first investigate the complaint or belief and then conduct initial proceedings for the purpose of determining whether probable cause exists for conducting a public hearing or hearings to deal with the complaint or belief. The investigation and initial proceedings shall be confidential. Upon beginning an initial proceeding, the commission shall notify the judge or justice of the existence of and basis for the initial proceeding.
(3) Whenever the commission concludes, based on an initial proceeding, that there is probable cause to believe that a judge or justice has violated a rule of judicial conduct or that the judge or justice suffers from a disability which is permanent or likely to become permanent and which seriously interferes with the performance of judicial duties, the commission shall conduct a public hearing or hearings and shall make public all those records of the initial proceeding that provide the basis for its conclusion. If the commission concludes that there is not probable cause, it shall notify the judge or justice of its conclusion.
(4) Upon the completion of the hearing or hearings, the commission in open session shall either dismiss the case, or shall admonish, reprimand, or censure the judge or justice, or shall censure the judge or justice and recommend to the supreme court the suspension or removal of the judge or justice, or shall recommend to the supreme court the retirement of the judge or justice. The commission may not recommend suspension or removal unless it censures the judge or justice for the violation serving as the basis for the recommendation. The commission may recommend retirement of a judge or justice for a disability which is permanent or likely to become permanent and which seriously interferes with the performance of judicial duties.
(5) Upon the recommendation of the commission, the supreme court may suspend, remove, or retire a judge or justice. The office of a judge or justice retired or removed by the supreme court becomes vacant, and that person is ineligible for judicial office until eligibility is reinstated by the supreme court. The salary of a removed judge or justice shall cease. The supreme court shall specify the effect upon salary when it suspends a judge or justice. The supreme court may not suspend, remove, or retire a judge or justice until the commission, after notice and hearing, recommends that action be taken, and the

supreme court conducts a hearing, after notice, to review commission proceedings and findings against the judge or justice.
(6) Within thirty days after the commission admonishes, reprimands, or censures a judge or justice, the judge or justice shall have a right of appeal de novo to the supreme court.
(7) Any matter before the commission or supreme court may be disposed of by a stipulation entered into in a public proceeding. The stipulation shall be signed by the judge or justice and the commission or court. The stipulation may impose any terms and conditions deemed appropriate by the commission or court. A stipulation shall set forth all material facts relating to the proceeding and the conduct of the judge or justice.
(8) Whenever the commission adopts a recommendation that a judge or justice be removed, the judge or justice shall be suspended immediately, with salary, from his or her judicial position until a final determination is made by the supreme court.
(9) The legislature shall provide for commissioners' terms of office and compensation. The commission shall employ one or more investigative officers with appropriate professional training and experience. The investigative officers of the commission shall report directly to the commission. The commission shall also employ such administrative or other staff as are necessary to manage the affairs of the commission.
(10) The commission shall, to the extent that compliance does not conflict with this section, comply with laws of general applicability to state agencies with respect to rule-making procedures, and with respect to public notice of and attendance at commission proceedings other than initial proceedings. The commission shall establish rules of procedure for commission proceedings including due process and confidentiality of proceedings. [**AMENDMENT 97,** 2005 Senate Joint Resolution No. 8207, pp 2799, 2800. Approved November 8, 2005.]

Removal by legislature: Art. 4 Section 9.

Amendment 85 (1989) -- Art. 4 Section 31 COMMISSION ON JUDICIAL CONDUCT -- *(1) There shall be a commission on judicial conduct, existing as an independent agency of the judicial branch, and consisting of a judge selected by and from the court of appeals judges, a judge selected by and from the superior court judges, a judge selected by and from the district court judges, two persons admitted to the practice of law in this state selected by the state bar association, and six persons who are not attorneys appointed by the governor.*
(2) Whenever the commission receives a complaint against a judge or justice, or otherwise has reason to believe that a judge or justice should be admonished, reprimanded, censured, suspended, removed, or retired, the commission shall first investigate the complaint or belief and then conduct initial proceedings for the purpose of determining whether probable cause exists for conducting a public hearing or hearings to deal with the complaint or belief. The investigation and initial proceedings shall be confidential. Upon beginning an initial proceeding, the commission shall notify the judge or justice of the existence of and basis for the initial proceeding.
(3) Whenever the commission concludes, based on an initial proceeding, that there is probable cause to believe that a judge or justice has violated a rule of judicial conduct or that the judge or justice suffers from a disability which is permanent or likely to become permanent and which seriously interferes with the performance of judicial duties, the commission shall conduct a public hearing or hearings and shall make public all those records of the initial proceeding that provide the basis for its conclusion. If the commission concludes that there is not probable cause, it shall notify the judge or justice of its conclusion.
(4) Upon the completion of the hearing or hearings, the commission in open session shall either dismiss the case, or shall admonish, reprimand, or censure the judge or justice, or shall censure the judge or justice and recommend to the supreme court the suspension or removal of the judge or justice, or shall recommend to the supreme court the retirement of the judge or justice. The

commission may not recommend suspension or removal unless it censures the judge or justice for the violation serving as the basis for the recommendation. The commission may recommend retirement of a judge or justice for a disability which is permanent or likely to become permanent and which seriously interferes with the performance of judicial duties.
(5) Upon the recommendation of the commission, the supreme court may suspend, remove, or retire a judge or justice. The office of a judge or justice retired or removed by the supreme court becomes vacant, and that person is ineligible for judicial office until eligibility is reinstated by the supreme court. The salary of a removed judge or justice shall cease. The supreme court shall specify the effect upon salary when it suspends a judge or justice. The supreme court may not suspend, remove, or retire a judge or justice until the commission, after notice and hearing, recommends that action be taken, and the supreme court conducts a hearing, after notice, to review commission proceedings and findings against the judge or justice.
(6) Within thirty days after the commission admonishes, reprimands, or censures a judge or justice, the judge or justice shall have a right of appeal de novo to the supreme court.
(7) Any matter before the commission or supreme court may be disposed of by a stipulation entered into in a public proceeding. The stipulation shall be signed by the judge or justice and the commission or court. The stipulation may impose any terms and conditions deemed appropriate by the commission or court. A stipulation shall set forth all material facts relating to the proceeding and the conduct of the judge or justice.
(8) Whenever the commission adopts a recommendation that a judge or justice be removed, the judge or justice shall be suspended immediately, with salary, from his or her judicial position until a final determination is made by the supreme court.
(9) The legislature shall provide for commissioners' terms of office and compensation. The commission shall employ one or more investigative officers with appropriate professional training and experience. The investigative officers of the commission shall report directly to the commission. The commission shall also employ such administrative or other staff as are necessary to manage the affairs of the commission.
(10) The commission shall, to the extent that compliance does not conflict with this section, comply with laws of general applicability to state agencies with respect to rule-making procedures, and with respect to public notice of and attendance at commission proceedings other than initial proceedings. The commission shall establish rules of procedure for commission proceedings including due process and confidentiality of proceedings. [AMENDMENT 85, 1989 Substitute Senate Joint Resolution No. 8202, p 3000. Approved November 7, 1989.]

Amendment 77 (1986) -- Art. 4 Section 31 COMMISSION ON JUDICIAL CONDUCT -- REMOVAL, CENSURE, SUSPENSION, OR RETIREMENT OF JUDGES OR JUSTICES -- PROCEEDINGS -- *There shall be a commission on judicial conduct consisting of a judge selected by and from the court of appeals judges, a judge selected by and from the superior court judges, a judge selected by and from the district court judges, two persons admitted to the practice of law in this state selected by the state bar association, and four persons who are not attorneys appointed by the governor and confirmed by the senate.*
The supreme court may censure, suspend, or remove a judge or justice for violating a rule of judicial conduct and may retire a judge or justice for disability which is permanent or is likely to become permanent and which seriously interferes with the performance of judicial duties. The office of a judge or justice retired or removed by the supreme court becomes vacant, and that person is ineligible for judicial office until eligibility is reinstated by the supreme court. The salary of a removed judge or justice shall cease.
The supreme court shall specify the effect upon salary when disciplinary action other than removal is taken. The supreme court may not discipline or retire a judge or justice until the commission on judicial conduct recommends after notice and hearing that action be taken and the supreme court conducts a hearing, after notice, to review commission proceedings and findings against a judge or justice.
Whenever the commission receives a complaint against a judge or justice, it shall first conduct proceedings for the purpose of determining whether sufficient reason exists for conducting a hearing or hearings to deal with the accusations. These initial proceedings shall be confidential, unless confidentiality is waived by the judge or justice, but all subsequent hearings conducted by the commission shall be open to members of the public.
Whenever the commission adopts a recommendation that a judge or justice be removed, the judge or justice shall be suspended immediately, with salary, from

his or her judicial position until a final determination is made by the supreme court.
The legislature shall provide for commissioners' terms of office and compensation. The commission shall establish rules of procedure for commission proceedings including due process and confidentiality of proceedings. [AMENDMENT 77, 1986 Senate Joint Resolution No. 136, p 1532. Approved November 4, 1986.]

Amendment 71 (1980) -- Art. 4 Section 31 JUDICIAL QUALIFICATIONS COMMISSION -- REMOVAL, CENSURE, SUSPENSION, OR RETIREMENT OF JUDGES OR JUSTICES -- *There shall be a judicial qualifications commission consisting of a judge selected by and from the court of appeals judges, a judge selected by and from the superior court judges, a judge selected by and from the district court judges, two persons admitted to the practice of law in this state selected by the state bar association, and two persons who are not attorneys appointed by the governor and confirmed by the senate.*
The supreme court may censure, suspend, or remove a judge or justice for violating a rule of judicial conduct and may retire a judge or justice for disability which is permanent or is likely to become permanent and which seriously interferes with the performance of judicial duties. The office of a judge or justice retired or removed by the supreme court becomes vacant, and that person is ineligible for judicial office until eligibility is reinstated by the supreme court. The salary of a removed judge or justice shall cease.
The supreme court shall specify the effect upon salary when disciplinary action other than removal is taken. The supreme court may not discipline or retire a judge or justice until the judicial qualifications commission recommends after notice and hearing that action be taken and the supreme court conducts a hearing, after notice, to review commission proceedings and findings against a judge or justice.
The legislature shall provide for commissioners' terms of office and compensation. The commission shall establish rules of procedure for commission proceedings including due process and confidentiality of proceedings. [AMENDMENT 71, 1980 Substitute House Joint Resolution No. 37, p 652. Approved November 4, 1980.]

RCW 51.12.010
Employments included — Declaration of policy.

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

[1972 ex.s. c 43 § 6; 1971 ex.s. c 289 § 2; 1961 c 23 § 51.12.010. Prior: 1959 c 55 § 1; 1955 c 74 § 2; 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) 1923 c 128 § 1, part; RRS § 7674a, part.]

RCW 51.04.010
Declaration of police power — Jurisdiction of courts abolished.

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and 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, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

[1977 ex.s. c 350 § 1; 1972 ex.s. c 43 § 1; 1961 c 23 § 51.04.010. Prior: 1911 c 74 § 1; RRS § 7673.]

RCW 51.24.030
Action against third person — Election by injured person or beneficiary — Underinsured motorist insurance coverage.

(1) If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

(2) In every action brought under this section, the plaintiff shall give notice to the department or self-insurer when the action is filed. The department or self-insurer may file a notice of statutory interest in recovery. When such notice has been filed by the department or self-insurer, the parties shall thereafter serve copies of all notices, motions, pleadings, and other process on the department or self-insurer. The department or self-insurer may then intervene as a party in the action to protect its statutory interest in recovery.

(3) For the purposes of this chapter, "injury" shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.

(4) Damages recoverable by a worker or beneficiary pursuant to the underinsured motorist coverage of an insurance policy shall be subject to this chapter only if the owner of the policy is the employer of the injured worker.

(5) For the purposes of this chapter, "recovery" includes all damages except loss of consortium.

[1995 c 199 § 2; 1987 c 212 § 1701; 1986 c 58 § 1; 1984 c 218 § 3; 1977 ex.s. c 85 § 1.]

Notes:

Severability -- 1995 c 199: See note following RCW 51.12.120.

RCW 51.24.050
Assignment of cause of action — Disposition of recovered amount.

(1) An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative.

(2) If an injury to a worker results in the worker's death, the department or self-insurer to which the cause of action has been assigned may petition a court for the appointment of a special personal representative for the limited purpose of maintaining an action under this chapter and chapter 4.20 RCW.

(3) If a beneficiary is a minor child, an election not to proceed against a third person on such beneficiary's cause of action may be exercised by the beneficiary's legal custodian or guardian.

(4) Any recovery made by the department or self-insurer shall be distributed as follows:

(a) The department or self-insurer shall be paid the expenses incurred in making the recovery including reasonable costs of legal services;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the recovery made, which shall not be subject to subsection (5) of this section: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the compensation and benefits paid to or on behalf of the injured worker or beneficiary by the department and/or self-insurer; and

(d) The injured worker or beneficiary shall be paid any remaining balance.

(5) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance. Thereafter, such benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as

though no recovery had been made from a third person.

(6) When the cause of action has been assigned to the self-insurer and compensation and benefits have been paid and/or are payable from state funds for the same injury:

(a) The prosecution of such cause of action shall also be for the benefit of the department to the extent of compensation and benefits paid and payable from state funds;

(b) Any compromise or settlement of such cause of action which results in less than the entitlement under this title is void unless made with the written approval of the department;

(c) The department shall be reimbursed for compensation and benefits paid from state funds;

(d) The department shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the self-insurer in obtaining the award or settlement; and

(e) Any remaining balance under subsection (4)(d) of this section shall be applied, under subsection (5) of this section, to reduce the obligations of the department and self-insurer to pay further compensation and benefits in proportion to which the obligations of each bear to the remaining entitlement of the worker or beneficiary.

[1995 c 199 § 3; 1984 c 218 § 4; 1983 c 211 § 1; 1977 ex.s. c 85 § 3.]

Notes:

Severability -- 1995 c 199: See note following RCW 51.12.120.

Applicability -- 1983 c 211: "Sections 1 and 2 of this act apply to all actions against third persons in which judgment or settlement of the underlying action has not taken place prior to July 24, 1983." [1983 c 211 § 3.] "Sections 1 and 2 of this act" consist of the 1983 amendments of RCW 51.24.050 and 51.24.060.

Severability -- 1983 c 211: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 211 § 4.]

RCW 51.52.100
Proceedings before board — Contempt.

Hearings shall be held in the county of the residence of the worker or beneficiary, or in the county where the injury occurred, at a place designated by the board. Such hearing shall be de novo and summary, but no witness' testimony shall be received unless he or she shall first have been sworn to testify the truth, the whole truth and nothing but the truth in the matter being heard, or unless his or her testimony shall have been taken by deposition according to the statutes and rules relating to superior courts of this state. The department shall be entitled to appear in all proceedings before the board and introduce testimony in support of its order. The board shall cause all oral testimony to be stenographically reported and thereafter transcribed, and when transcribed, the same, with all depositions, shall be filed in, and remain a part of, the record on the appeal. Such hearings on appeal to the board may be conducted by one or more of its members, or a duly authorized industrial appeals judge, and depositions may be taken by a person duly commissioned for the purpose by the board.

Members of the board, its duly authorized industrial appeals judges, and all persons duly commissioned by it for the purpose of taking depositions, shall have power to administer oaths; to preserve and enforce order during such hearings; to issue subpoenas for, and to compel the attendance and testimony of, witnesses, or the production of books, papers, documents, and other evidence, or the taking of depositions before any designated individual competent to administer oaths, and it shall be their duty so to do to examine witnesses; and to do all things conformable to law which may be necessary to enable them, or any of them, effectively to discharge the duties of his or her office.

If any person in proceedings before the board disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered so to do, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take oath as a witness, or after having the oath refuses to be examined according to law, the board or any member or duly authorized industrial appeals judge may certify the facts to the superior court having jurisdiction in the place in which said board or member or industrial appeals judge is sitting; the court shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same

conditions as if the doing of the forbidden act had occurred with reference to the proceedings, or in the presence, of the court.

[1982 c 109 § 8; 1977 ex.s. c 350 § 79; 1963 c 148 § 4; 1961 c 23 § 51.52.100. Prior: 1957 c 70 § 60; 1951 c 225 § 11; prior: 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.]

WAC 263-12-117

Agency filings affecting this section

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.

(2) The industrial appeals judge may require that depositions be taken and published within prescribed time limits. The time limits may be extended by the industrial appeals judge for good cause. Each party shall bear its own costs except when the industrial appeals judge allocates costs to parties or their representatives.

(3) The party filing a deposition must submit the deposition in a written format as well as an electronic format in accordance with procedures established by the board. Exhibits to the deposition do not have to be filed electronically but a legible hard copy must accompany the paper transcription of the deposition. If the deposition is not transcribed in a reproducible format it may be excluded from the record.

(4) **Procedure at deposition.** Unless the parties stipulate or the industrial appeals judge determines otherwise all depositions permitted to be taken for the perpetuation of testimony shall be taken subject to the following conditions: (a) That all motions and objections, whether to form or otherwise, shall be raised at the time of the deposition and if not raised at such time shall be deemed waived; (b) that all exhibits shall be marked and identified at the time of the deposition and, if offered into evidence, appended to the deposition; (c) that the deposition be published without necessity of further conference or hearing at the time it is received by the industrial appeals judge; (d) that all motions, including offers to admit exhibits and objections raised at the time of the deposition, shall be ruled upon by the industrial appeals judge in the proposed decision and order; and (e) that the deposition may be appended to the record as part of the transcript, and not as an exhibit, without the necessity of being retyped into the record.

[Statutory Authority: RCW 51.52.020. WSR 10-14-061, § 263-12-117, filed 6/30/10, effective 7/31/10; WSR 04-16-009, § 263-12-117, filed 7/22/04, effective 8/22/04; WSR 03-02-038, § 263-12-117, filed 12/24/02, effective 1/24/03.]

WAC 263-12-115

Agency filings affecting this section

Procedures at hearings.

(1) **Industrial appeals judge.** All hearings shall be conducted by an industrial appeals judge who shall conduct the hearing in an orderly manner and rule on all procedural matters, objections and motions.

(2) **Order of presentation of evidence.**

(a) In any appeal under either the Industrial Insurance Act, the Worker and Community Right to Know Act or the Crime Victims Compensation 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.

(b) In all appeals subject to the provisions of the Washington Industrial Safety and Health Act, the department shall initially introduce all evidence in its case-in-chief.

(c) After the party with the initial burden has presented his or her case-in-chief, the other parties may then introduce the evidence necessary to their cases-in-chief. In the event there is more than one other party, they may either present their cases-in-chief successively or may join in their presentation. Rebuttal evidence shall be received in the same order. Witnesses may be called out of turn in contravention of this rule only by agreement of all parties.

(3) **Objections and motions to strike.** Objections to the admission or exclusion of evidence shall be in short form, stating the legal grounds of objection relied upon. Extended argument or debate shall not be permitted.

(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.

(5) **Interlocutory appeals to the board - Confidentiality of trade secrets.** A direct appeal to the board shall be allowed as a matter of right from any ruling of an industrial appeals judge adverse to the employer concerning the confidentiality of trade secrets in appeals under the Washington Industrial Safety and Health Act.

(6) **Interlocutory review by a chief industrial appeals judge.**

(a) Except as provided in subsection (5) of this section interlocutory rulings of the industrial appeals judge are not subject to direct review by the board. A party to an appeal or a witness who has made a motion to quash a subpoena to appear at board related proceedings, may within five working days of receiving an adverse ruling from an industrial appeals judge request a review by a chief industrial appeals judge or his or her designee. Such request for review shall be in writing and shall be

accompanied by an affidavit in support of the request and setting forth the grounds for the request, including the reasons for the necessity of an immediate review during the course of conference or hearing proceedings. Within ten working days of receipt of the written request, the chief industrial appeals judge, or designee, may decline to review the ruling based upon the written request and supporting affidavit; or, after such review as he or she deems appropriate, may either affirm or reverse the ruling, or refer the matter to the industrial appeals judge for further consideration.

(b) Failure to request review of an interlocutory ruling shall not constitute a waiver of the party's objection, nor shall an unfavorable response to the request preclude a party from subsequently renewing the objection whenever appropriate.

(c) No conference or hearing shall be interrupted for the purpose of filing a request for review of the industrial appeals judge's rulings; nor shall any scheduled proceedings be canceled pending a response to the request.

(7) **Recessed hearings.** Where, for good cause, all parties to an appeal are unable to present all their evidence at the time and place originally set for hearing, the industrial appeals judge may recess the hearing to the same or a different location so as to insure that all parties have reasonable opportunity to present their respective cases. No written "notice of hearing" shall be required as to any recessed hearing.

(8) **Failure to present evidence when due.** If any party is due to present certain evidence at a hearing or recessed hearing and, for any reason on its part, fails to appear and present such evidence, the industrial appeals judge may conclude the hearing and issue a proposed decision and order on the record, or recess or set over the proceedings for further hearing for the receipt of such evidence.

(9) **Offers of proof in colloquy.** When an objection to a question is sustained an offer of proof in question and answer form shall be permitted unless the question is clearly objectionable on any theory of the case.

[Statutory Authority: RCW 51.52.020. WSR 08-01-081, § 263-12-115, filed 12/17/07, effective 1/17/08; WSR 03-02-038, § 263-12-115, filed 12/24/02, effective 1/24/03; WSR 00-23-021, § 263-12-115, filed 11/7/00, effective 12/8/00; WSR 91-13-038, § 263-12-115, filed 6/14/91, effective 7/15/91; WSR 84-08-036 (Order 17), § 263-12-115, filed 3/30/84. Statutory Authority: RCW 51.41.060(4) and 51.52.020. WSR 83-01-001 (Order 12), § 263-12-115, filed 12/2/82. Statutory Authority: RCW 51.52.020. WSR 82-03-031 (Order 11), § 263-12-115, filed 1/18/82; Order 9, § 263-12-115, filed 8/8/75; Order 7, § 263-12-115, filed 4/4/75; Order 4, § 263-12-115, filed 6/9/72; General Order 3, Rule 7.5, filed 10/29/65; General Order 2, Rule 7.4, filed 6/12/63; General Order 1, Rule 5.10, filed 3/23/60. Formerly WAC 296-12-115.]

RULE 32
USE OF DEPOSITIONS IN COURT PROCEEDINGS

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any purpose permitted by the Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(5) The deposition of an expert witness may be used as follows:

(A) The discovery deposition of an opposing partys rule 26(b)(5) expert witness, who resides outside the state of Washington, may be used if reasonable notice before the trial date is provided to all parties and any party against whom the deposition is intended to be used is given a reasonable opportunity to depose the expert again.

(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.

(b) Objections to Admissibility. Subject to the provisions of rule 28(b) and subsection (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Effect of Taking or Using Depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subsection (a)(2) of this rule. 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.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the

deposition.

(C) Objections to the form of written questions submitted under rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

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RULE CR 1
SCOPE OF RULES

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.

[Adopted effective July 1, 1967; amended effective September 1, 2005.]

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RULE 102. PURPOSE AND CONSTRUCTION
West's Revised Code of Washington Annotated Part I Rules of General Application *(Approx. 1 page)*

West's Revised Code of Washington Annotated
Part I Rules of General Application
Washington Rules of Evidence (Er)
Title I. General Provisions

Washington Rules of Evidence, ER 102

RULE 102. PURPOSE AND CONSTRUCTION

Currentness

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

ER 102, WA R REV ER 102
Current with amendments received through 5/1/14

End of Document

DECLARATION OF SERVICE

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

DOCUMENTS:
1. PETITION FOR DISCRETIONARY REVIEW with appendices A and B; and
2. DECLARATION OF SERVICE

ORIGINAL TO:
Via hand delivery

Richard D. Johnson, Clerk of the Court
Washington State Court of Appeals, Division I
600 University St
One Union Square
Seattle, WA 98101-1176

COPIES TO:

Attorneys for Department of Labor and Industries:
Office of Attorney General
Attn: Michael J. Throgmorton
7141 Cleanwater Dr. SW
Olympia, WA 98504-0121
[✓]Via hand delivery

DATED this 6th day of August, 2014, at Lacey, Washington.

Shannon Toppen
Litigation Paralegal