NO. 94417-2

SUPREME COURT
OF THE STATE OF WASHINGTON

ANDREW AHRENS,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR & INDUSTRIES

ROBERT W. FERGUSON
Attorney General

Anastasia Sandstrom
Senior Counsel
WSBA No. 24163
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-6993

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Whether an issue of material fact exists to prevent summary judgment is a question of simple legal error that is insufficient to warrant this Court's extraordinary review. In any event, no error is present. To effectively administer workers' compensation claims, the Department of Labor and Industries relies on parties to timely articulate their basic disagreement with agency orders before the Department will revisit its decisions. In July 2013, the Department issued an order finding that Ahrens's industrial injury did not cause a low back condition. Two days later, it issued an order establishing Ahrens's wages at the time of his injury to determine his wage replacement benefits. Within the appeal period, Ahrens asked the Department to reconsider the low back order, providing reasons why the industrial injury caused the back condition and attaching a copy of the low back order. But the Department received no written communication from Ahrens within the appeal period that expressed disagreement with how the Department calculated his wages. The Court of Appeals properly applied summary judgment principles to hold that because Ahrens provided nothing that would put the Department on notice that he disagreed with the wage order, that order became a final determination. This Court should deny review.

II. ISSUE

Review is not warranted, but if it were granted, this case presents the following issue:

> For a party to contest a Department order, that party must timely request reconsideration by providing information that is reasonably calculated to put the Department on notice that the party disagrees with the challenged order. Ahrens's August 2013 letter disagreed with an order about his low back. Did this low back letter also express disagreement with a wage order?

III. STATEMENT OF FACTS

A. Statutory Background

A party may ask the Department to reconsider an industrial insurance order. RCW 51.52.050. This is commonly called a "protest" or a "protest and request for reconsideration." A party has 60 days from the day the Department communicated the order to either protest the order to the Department or to appeal the order to the Board. RCW 51.52.050, .060. If a party fails to timely contest the order, it becomes final. RCW 51.52.060. This is true even if the order contains an error. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994).

B. The Department Allowed Ahrens's Industrial Insurance Claim and Issued an Order Setting His Wages at the Time of Injury

Ahrens sustained a work injury in 2012 and the Department allowed his claim. CP 80. On July 3, 2013, the Department issued an order

finding that Ahrens did not sustain a lumbar—low back—strain as a result of his industrial injury. CP 130. On July 5, 2013, the Department issued an order setting Ahrens's wages at the time of his injury. CP 132. This was done in order to determine the amount of wage replacement benefits (*i.e.*, time loss compensation) that he should receive. RCW 51.08.178.

C. In August 2013, Ahrens Protested the Department's Order That the Industrial Injury Did Not Cause a Low Back Strain

On August 27, 2013, Ahrens submitted a "protest and request for reconsideration," asking the Department to find that the low back strain was causally related to his workplace injury. CP 135. Attaching the low back order, he identified the low back order as the subject of the protest:

> I am writing on behalf of the Claimant, Mr. Andrew Ahrens, to protest and request reconsideration of the Department of Labor & Industries Notice of Decision dated July 3, 2013, and which was received by the Claimant on July 8, 2013 (the "Order").

CP 135.

The letter argued that the July 3, 2013 low back order was incorrect "because Mr. Ahrens's lumbar sprain was caused by his industrial injury." CP 135. It alleged that the low back strain occurred while Ahrens participated in physical therapy for his workplace injury. CP 135. The letter asked the Department to reverse the low back order and to "issue a new order accepting Mr. Ahrens' lumbar strain . . . ." CP 135.

D. In October 2013, Ahrens Asked the Department to Reconsider the Order Setting His Wages

On October 15, 2013—more than 60 days after the wage order—Ahrens submitted a new protest and request for reconsideration, asking the Department to reconsider the July 5 wage order. CP 146. The Department issued a revised wage order on January 6, 2014. CP 164. Eight days later, the Department voided this order, finding that it did not have authority to issue it. CP 167. Instead, it found that it could not reconsider the July 5 wage order because it had not received a protest within 60 days. CP 169. Ahrens appealed to the Board of Industrial Insurance Appeals. CP 173-75.

E. The Board, Superior Court, and Court of Appeals Agreed That the Low Back Letter Did Not Protest the Wage Order

On summary judgment, the Board determined that Ahrens's August letter did not put the Department on notice that Ahrens disagreed with the wage order, and that his October letter was not within the 60-day appeal window. CP 18. The superior court affirmed the Board, ruling that no genuine issue of material fact existed as to whether Ahrens timely appealed the wage order. CP 358-59.

On Ahrens's appeal, the Court of Appeals held that the August letter about the low back claim did not reasonably notify the Department that Ahrens contested the wage order, and affirmed. *Ahrens v. Dep't of*

Labor & Indus., No. 48390-4-II, slip op at 7, 9. (Wash. Ct. App. Mar. 14, 2017) (unpublished).

IV. ARGUMENT

A. Ahrens Shows No Conflict with Appellate Cases by Alleging That There Was a Material Issue of Fact

Ahrens claims the Court of Appeals' decision conflicts with this Court's decisions and other Court of Appeals' decisions because he claims the standards used by the Court of Appeals to determine summary judgment conflicted with previous decisions. Pet. 1; RAP 13.4(b)(1), (2). No conflict exists.

The Court of Appeals applied the following standard:

> A summary judgment motion will be granted only if after viewing all the pleadings, affidavits, depositions, admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party, it can be said that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment as a matter of law. *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014).

Slip op. at 6. This is the correct standard to determine summary judgment and shows no conflict with any of the cases cited by Ahrens. *See* Pet. 1-2.

His remaining claim is that the Court of Appeals incorrectly applied the summary judgment standard to his case by not finding an issue of material fact. Pet. 4. But such a claim alleges at most only legal error,

not something that warrants review. In the absence of any other reason under RAP 13.4(b) to take review, this Court should decline to do so.

B. Ahrens's Arguments on the Merits Fail Because Summary Judgment Was Proper

Nothing supports Ahrens's claim of legal error.

1. A protest that contests a low back order does not contest a wage order

Orders become final 60 days after the Department communicates them to a party unless a party files a written request for reconsideration with the Department or appeals to the Board. RCW 51.52.050, .060. Ahrens did not submit a written document that mentioned the wage order within the order's 60-day appeal window. Yet Ahrens argues that the Department should have construed his August low back letter as notifying the Department that he also disputed the wage order. Pet. at 5. Nothing in this letter even referenced Ahrens's wages.

A request for reconsideration occurs only when "the Department receives a written document, filed within the time allowed by law, which is reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with the

decision of the Department." *In re Mike Lambert*, No. 91 0107, 1991 WL 11008451, *1 (Wash. Bd. Ind. Ins. App. January 29, 1991).[1]

Although the August letter was a written document filed within the time allowed by law, it was not reasonably calculated to put the Department on notice that Ahrens disagreed with how the Department calculated his wages. The August letter did not reference the July 5 wage order. CP 135. It made no reference to Ahrens's wages, and he did not attach a copy of the wage order to the protest. CP 135. Nothing in the August letter reasonably put the Department on notice that Ahrens challenged the decision setting his wage rate. The letter only addressed, and requested reconsideration of, the Department's decision to find that the industrial injury did not cause any low back strain. The Court of Appeals correctly affirmed the trial court's decision that Ahrens did not contest the wage order.

2. Irrelevant facts do not create an issue of material fact

Ahrens theorizes that there is a material issue of fact because his attorney thought the low back protest put the Department on notice about the wage order. Pet. at 5. The self-serving impression of a worker's counsel does not create a material issue of fact. *See Green v. A.P.C. (Am.*

[1] This Court has looked to Board decisions as persuasive authority, giving "great deference" to the Board's interpretation of the Industrial Insurance Act. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

Pharm. Co.), 136 Wn.2d 87, 100, 960 P.2d 912 (1998) ("Argument of counsel does not constitute evidence").

Ahrens also posits that a material dispute exists because after he sent his October letter asking that the low back protest be considered a protest of the wage order, the Department's claims manager first mistakenly issued an amended wage order before vacating the same order a little more than a week later. CP 164, 167, 1679; Pet. at 5. Contrary to Ahrens's claims, this fact is irrelevant and immaterial as it goes to the Department's deliberative process.

The courts reject workers' compensation claimant's attempts to introduce the Department's deliberative process as evidence. *See McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001); *see also Nationscapital Mortg. Corp. v. Dep't of Fin. Inst.*, 133 Wn. App. 723, 762, 137 P.3d 78 (2006) ("Courts should not probe the mental processes of administrative officials in making a decision"). In *McDonald*, the court held that "the processes L&I employed in reaching its ultimate decision denying the application to reopen are irrelevant." *Id.* There, on appeal of a Department's denial of a request to reopen a claim, the court rejected the claimant's contention that the Department's initial decision to reopen his claim should be treated as an admission of a party opponent. *Id.* The only question before the Court of Appeals was whether

the final order was correct, therefore the court held the Department's thought process regarding previous orders to be irrelevant. *Id.*

Here, the Department's deliberative processes, including the claims manager's subjective impressions in issuing an amended wage order, were irrelevant in determining whether there was a timely protest in the first place. As the *McDonald* Court held, when the Department has reason to reconsider an aspect of claim adjudication, it is permitted to issue a new order. The earlier order is then not an admission, but a nullity. *See McDonald*, 104 Wn. App. at 623-24. The claims manager's earlier order thus is a nullity and is irrelevant to the legal issue. An irrelevant fact cannot be a material fact upon which the outcome of the litigation depends, in whole or in part. *See Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004). The outcome is not dependent on the speculative subjective thoughts of a Department staff person. The Court of Appeals correctly affirmed.

//

//

//

//

//

V. CONCLUSION

Ahrens establishes no reason to merit review, as he only reargues his argument on the merits. Not only does this not establish a reason for review, but his appeal is devoid of merit: a protest about a low back issue says nothing about a wage rate issue. This Court should deny review.

RESPECTFULLY SUBMITTED this 14th day of June, 2017.

ROBERT FERGUSON
Attorney General

A. Sandstrom

Anastasia Sandstrom
Senior Counsel
WSBA No. 24163
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-7740

NO. 94417-2

SUPREME COURT OF THE STATE OF WASHINGTON

ANDREW AHRENS, Petitioner, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Answer to Petition for Review and this Certificate of Service in the below described manner:

Via E-filing to:

Susan L. Carlson
Supreme Court Clerk
Supreme Court
415 12th Avenue S
Olympia, WA 98504

//

//

//

//

//

Via First Class United States Mail, Postage Prepaid to:

Jason Hoeft
Patrick Reddy
Emery Reddy, PLLC
600 Stewart Street, Suite1100
Seattle, WA 98101

RESPECTFULLY SUBMITTED this 14th day of June, 2017.

SHANA PACARRO-MULLER
Legal Assistant
Office of the Attorney General
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

June 14, 2017 - 2:20 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94417-2
Appellate Court Case Title:	Andrew R. Ahrens v. Department of Labor and Industries
Superior Court Case Number:	15-2-06271-4

The following documents have been uploaded:

- 944172_Answer_Reply_Plus_20170614141435SC938985_2919.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  Certificate of Service
  The Original File Name was 170614_DeptAnswerToPFR.pdf

A copy of the uploaded files will be sent to:

- jason@emeryreddy.com
- katyd@atg.wa.gov
- reddyp@emeryreddy.com

Comments:

Answer to Petition for Review and Certificate of Service

Sender Name: Shana Pacarro-Muller - Email: shanap@atg.wa.gov
Filing on Behalf of: Anastasia R. Sandstrom - Email: anas@atg.wa.gov (Alternate Email:)

Address:
800 Fifth Avenue, Ste. 2000
Seattle, WA, 98104
Phone: (206) 464-7740

Note: The Filing Id is 20170614141435SC938985