NO. 95718-5

SUPREME COURT OF THE STATE OF WASHINGTON

TERA L. HENDRICKSON,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

For nearly 75 years, the courts have required a worker seeking to reopen a closed workers' compensation claim to prove through objective findings that the worker's physical injury has worsened. *See Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 432, 858 P.2d 503 (1993); *Lewis v. ITT Cont'l Baking Co.*, 93 Wn.2d 1, 3, 603 P.2d 1262 (1979); *Dinnis v. Dep't of Labor & Indus.*, 67 Wn.2d 654, 656, 409 P.2d 477 (1965); *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956); *Kresoya v. Dep't of Labor & Indus.*, 40 Wn.2d 40, 45, 240 P.2d 257 (1952); *Cooper v. Dep't of Labor & Indus.*, 20 Wn.2d 429, 433–34, 147 P.2d 522 (1944); *Cooper v. Dep't of Labor & Indus.*, 188 Wn. App. 641, 648, 352 P.3d 189 (2015); *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657–58, 219 P.3d 711 (2009).

Tera Hendrickson's medical witness testified that her medical conditions had not objectively worsened since claim closure. The Court of Appeals properly applied longstanding requirements to require Hendrickson to show objective worsening. Hendrickson has not shown a conflict with Supreme Court case law or an issue of substantial public interest. RAP 13.4(b)(1), (4). This Court should deny review.

II. ISSUE

The Supreme Court should not accept review, but if it does, the issue would be:

> Hendrickson's doctor testified that there were no objective findings that showed Hendrickson's conditions had objectively worsened since the Department closed her claim. Did the trial court correctly find that Hendrickson failed to present a prima facie case of aggravation?

III. FACTS

A. Statutory Background

When a worker is injured, the Department opens a claim and provides treatment, wage replacement benefits, and vocational services. When a worker no longer requires treatment, the Department evaluates the claim to determine if there is a permanent disability and closes the claim. RCW 51.32.055; *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950). The worker cannot receive benefits while the claim is closed. A worker may seek to reopen a claim but this does not occur automatically; instead, a worker must show that "aggravation . . . of disability has taken place." RCW 51.32.160(1)(a).

To reopen a claim, an injured worker must prove objective worsening between two "terminal dates." *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995); RCW 51.32.160(1)(a). The first terminal date is the date of the last previous closure or denial of a

reopening application. *Grimes*, 78 Wn. App. at 561. The second terminal date is the date of the most recent closure or denial of a reopening application; practically speaking, it is the date of the Department order on appeal. *Grimes*, 78 Wn. App. at 561. Here, the first terminal date was May 10, 2012, the date of claim closure. CP 52. The second was September 8, 2014, the date the Department rejected Hendrickson's reopening application. CP 53.

B. The Department Accepted Hendrickson's Cervical and Low–Back Conditions and Provided Benefits Before Closing Her Claim

In October 2007 while working as a truck driver, Hendrickson stepped out of her truck and felt a pop in her middle and low back. CP 113-14. She sought treatment the next day and filed a claim with the Department. CP 52, 114.

Hendrickson received various medical treatments, including surgery, while her claim remained open. CP 117. At her last visit with Michael Martin, MD before her claim closed, Hendrickson "was having ongoing pain all over." CP 163. When treatment concluded, the Department closed her claim with a category 4 award for permanent low back impairment. CP 164, 173; WAC 296-20-280(4); *Franks*, 35 Wn.2d at 766-67 (permanent impairment awarded when treatment ends).

Hendrickson then moved to Hawaii and she lived there with her daughter, who was expecting a new baby. CP 124, 136, 138. Hendrickson returned to Washington in July 2013 and obtained work as a truck driver until 2014, when she obtained work as a night dispatcher. CP 118–19, 125. Hendrickson also attended school between May 2012 and September 2014. CP 118–19.

In 2013, Hendrickson applied to reopen her claim. CP 52. In 2014, the Department denied Hendrickson's reopening application because it found that the medical evidence showed no worsening of Hendrickson's industrially related conditions since the Department closed the claim in 2012. CP 53.

C. Hendrickson's Conditions Did Not Objectively Worsen After Claim Closure

Hendrickson appealed the Department's decision to the Board of Industrial Insurance Appeals. CP 36–37. She presented the testimony of Dr. Martin, who saw Hendrickson in January 2014. CP 164. He testified that just as she had during her last visit before her claim was closed, "[s]he was again complaining of pain, quote, 'all over,' end quote." CP 164. Dr. Martin performed a physical examination that revealed some decreased sensation, but he did not testify that the examination revealed any objective findings. CP 165.

Dr. Martin ordered repeat magnetic resonance images (MRIs) of her cervical and lumbar spines. CP 166. MRIs are an objective test and the repeat MRIs "were essentially unchanged from the scans performed previously in the cervical spine in 2011 and the lumbar spine in 2012." CP 166, 175–76.

Dr. Martin disagreed with the denial of reopening, but his disagreement rested on a belief that subjective complaints may support reopening. *See* CP 170, 174. For example, Dr. Martin testified that he believed Hendrickson was worse because "she is feeling worse" and when asked whether he believes the evidence supports reopening of her claim, he responded, "I believe that she subjectively feels worse." CP 170, 174. He also testified that some of her symptoms fit with the findings on the new MRIs, but confirmed those MRIs were like the MRIs taken before her claim was closed. *See* CP 176.

Thus, Dr. Martin did not testify about any objective medical findings of worsening; instead, he agreed with the independent medical examiner that there were no objective medical findings to support reopening the claim. CP 172–75.

After Hendrickson's case, the Department moved to dismiss for failure to make a prima facie case. The Department argued that Hendrickson presented no medical testimony of any objective findings to

support worsening of Hendrickson's condition. CP 36, 60–66. The Board hearings judge dismissed the appeal and the Board adopted that decision. CP 17, 39.

D. The Superior Court Ruled that Hendrickson Failed to Present a Prima Facie Case for Reopening, and the Court of Appeals Affirmed

Hendrickson appealed to superior court. CP 1–4. The court affirmed the dismissal of Hendrickson's appeal for failing to make a prima facie case because "Hendrickson did not prove objective evidence of worsening of the conditions proximately caused by the October 9, 2007 industrial injury between May 10, 2012, and September 8, 2014." CP 219–20.

The Court of Appeals affirmed. *Hendrickson v. Dep't of Labor & Indus.*, 2 Wn. App. 2d 343, 358, 409 P.3d 1162 (2018). The Court of Appeals held that "[e]stablished case law requires the worker to present some objective medical evidence that the injury has worsened since the closure of the claim," and that "[s]ubstantial evidence supports finding Hendrickson did not present objective medical evidence that the injury worsened since the department closed the claim." *Id.* at 345.

IV. REASONS WHY REVIEW SHOULD BE DENIED

The parties do not dispute that, to reopen her claim, Hendrickson must show that her industrially related condition had worsened, at least in

part, based on objective medical findings. Here, because no objective findings proved that her condition had changed, this case does not warrant review by this Court under RAP 13.4(b).

Washington courts have long required objective evidence of worsening in aggravation cases involving physical injury. Hendrickson argues that one case, *Wilber*, holds that she need show only her subjective complaints could be supported clinically, even if there were no objective worsening in her condition since claim closure. Pet. 9 (citing *Wilber v. Dep't of Labor & Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963)). But as other Supreme Court cases make clear, *Wilber* did not change the requirement that Hendrickson show objective evidence of worsening. Thus, Hendrickson shows no conflict with this Court's cases. Nor does her attempt to evade stare decisis present this Court with an issue of substantial public interest that warrants review.

A. Washington Courts Have Long Required Objective Evidence of Worsening to Support Claims for Worsening of an Industrial Injury

RCW 51.32.160(1)(a) provides that a worker may apply to reopen a claim after a final closing order "if aggravation . . . of disability takes place." To show an "aggravation" of the disability and reopen a claim under this provision, workers must establish by medical testimony: (1) a causal relationship between the industrial injury and the later disability;

(2) evidence, "some of it based upon objective symptoms, that an aggravation of the injury resulted in increased disability"; (3) increased disability between the terminal dates; and (4) evidence, "some of it based upon objective symptoms" between the terminal dates, that the disability at the second terminal date "was greater than the [Department] found it to be." *Phillips*, 49 Wn.2d at 197; *see also Cooper*, 188 Wn. App. at 648; *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 20, 277 P.3d 685 (2012); *Eastwood*, 152 Wn. App. at 657–58. Objective findings "are those within the independent knowledge of the doctor, because they are perceptible to persons other than a patient." *Hinds v. Johnson*, 55 Wn.2d 325, 327, 347 P.2d 828 (1959). In contrast, "[s]ubjective symptoms are those perceived only by the senses and feelings of a patient." *Id*.

The courts have long held that workers cannot reopen claims with testimony based entirely on subjective symptoms. Instead, workers must provide medical testimony, based at least in part on objective medical findings, that their industrially related condition worsened since claim closure. *Tollycraft Yachts Corp.*, 122 Wn.2d at 432, 433 ("the burden is on the injured worker to produce some objective medical evidence, verified by a physician, that his or her injury has worsened *since* the initial closure of the claim" and the Department reopens a claim if "there has been objective worsening of the injured worker's condition"); *Lewis*, 93 Wn.2d

at 3 ("Medical evidence based at least in part on objective symptoms must show that an aggravation of the industrial injury resulted in increased disability."); *Dinnis*, 67 Wn.2d at 656 ("In an aggravation case, the burden of proving a claimed disability to be greater on the last terminal date than on the first terminal date is upon the claimant; and to prevail he must produce medical evidence to that effect based, at least in part, upon objective findings of a physician."); *Phillips*, 49 Wn.2d at 197; *White v. Dep't of Labor & Indus.*, 48 Wn.2d 413, 415, 293 P.2d 764 (1956); *Moses v. Dep't of Labor & Indus.*, 44 Wn.2d 511, 517, 268 P.2d 665 (1954); *Kresoya*, 40 Wn.2d at 45; *Cooper*, 20 Wn.2d at 433; *Cooper*, 188 Wn. App. at 648; *Cantu*, 168 Wn. App. at 20; *Eastwood*, 152 Wn. App. at 657–58; *Grimes*, 78 Wn. App. at 561.[1]

This rule was first set out in *Cooper*, in which the Court held that dismissal of the worker's appeal was appropriate because there was "no

[1] The objective worsening requirement applies when a worker seeks to reopen a claim for a physical condition that a doctor may measure by objective findings. *See Felipe v. Dep't of Labor & Indus.*, 195 Wn. App. 908, 919, 381 P.3d 205 (2016). In *Price v. Department of Labor and Industries*, 101 Wn.2d 520, 528–29, 682 P.2d 307 (1984), the Court clarified that the objective worsening rule does not apply to cases involving psychiatric disability, because symptoms of psychiatric conditions are "necessarily subjective in nature." The Court of Appeals recently applied the *Price* rule to a case involving psychiatric conditions because of post-concussive syndrome, because the symptoms of the injury—"headaches, dizziness, memory problems, fatigue, and depression"—were subjective and could not be "seen, felt, or measured by a physician." *Felipe*, 195 Wn. App. at 911, 919. Contrary to Hendrickson's claim, these cases do not mean that the court no longer requires objective worsening when objective findings are possible like the neck and back conditions here. Pet. 12.

evidence of even one objective symptom on which to base an opinion that since respondent's claim was closed his physical condition had become aggravated due to the injury for which he had already been compensated." *Cooper*, 20 Wn.2d at 433–34. The worker's testimony that he was worse and was suffering more pain was insufficient. *Id.* at 434.

Hendrickson's situation is also like the workers in *Phillips* and *Eastwood.* In *Phillips*, the worker had objective findings at the time of reopening order (the second terminal date), but the record did not establish if they were new objective findings and if they had worsened since claim closure (the first terminal date). 49 Wn.2d at 197-98. Because there was no medical testimony that the objective findings stemmed from a worsened condition, the Court held that the worker failed to prove his claim. *Id. Phillips* is like the case here because Hendrickson had an objective finding at the second terminal date, but that finding was not the result of worsening because she already had it at the first terminal date, when the Department closed her claim.

Similarly, in *Eastwood*, the court upheld denial of the reopening application because "neither of Ms. Eastwood's experts supplied opinions reflecting comparisons that were based upon objective medical evidence of a worsening . . . ." *Eastwood*, 152 Wn. App. at 665. One of her doctors testified that her shoulder condition had worsened, yet that opinion "was

not based on any comparisons that included an assessment or comparison of objective medical findings over the relative period of time." *Eastwood*, 152 Wn. App. at 660. The doctor testified to significant MRI findings, but the Court held that they did not satisfy the objective worsening requirement because the findings did not worsen between the two MRIs. *Id.* Here, like *Eastwood*, there was no worsening between the MRIs. CP 176.

Contrary to Hendrickson's arguments, *Wilber* did not dispense with the objective-worsening requirement and this Court's later decisions confirm that workers must show objective worsening. *See* Pet. 9-12. In *Wilber*, the worker had suffered a ruptured disk. *Wilber*, 61 Wn.2d at 441, 446. When his claim was originally closed, his doctors advised him to get the disk surgically repaired, but "he declined because of conflicting medical opinion respecting its success." *Id*. at 441. The worker's doctor testified that unless a ruptured disc was surgically corrected, the disability would progress; and it did progress. *Id*. at 442. Wilber's "application to reopen was provoked by a flare-up or acute symptoms which totally incapacitated [him] from any gainful employment." *Id*. at 449. Wilber's complaints were the "classical manifestations uniformly found in cases of unrepaired ruptured intervertebral discs." *Id*. at 446.

In ruling to reopen the claim, the *Wilber* Court did not say that a worker need not present objective evidence of worsening. *See id*. at 450–51. Hendrickson argues that there were no increased objective findings in *Wilber*. Pet. 11. The Court of Appeals, however, noted that the examining physician for the Department in *Wilber* testified the "'left Achilles reflex was decreased'" and "'is a significant finding in case of ruptured intervertebral discs,'" and Wilber's complaints of pain were "'substantially objective.'" *Hendrickson*, 2 Wn. App. 2d at 357 (quoting *Wilber*, 61 Wn.2d at 443). Here, as the Court of Appeals correctly concluded, Hendrickson's subjective complaints of increased pain are unsupported by any objective medical findings that her condition changed after the Department closed her claim. *Id.* Dr. Martin's undisputed testimony establishes her symptoms remained the same and there was no change between the MRI scans taken before her claim closed and those taken after Hendrickson filed her application to reopen.

Nor is there any support for Hendrickson's singular reliance on *Wilber*. That case does not change the objective worsening requirement. After *Wilber*, this Court again reiterated the requirement of objective worsening to support an aggravation claim. For example, *Dinnis* held that it was not enough for the worker to have evidence that he could not work; instead, to show aggravation, he must show worsening of objective

findings. 67 Wn.2d at 656. The Court again confirmed this rule in *Tollycraft*, 122 Wn.2d at 432, and in *Lewis*, 93 Wn.2d at 3.[2]

Hendrickson points to liberal construction of the Industrial Insurance Act to urge that *Wilber* has somehow changed the longstanding rule that requires objective worsening. Pet. 20. But the case law does not support this argument and the statute is not ambiguous so it needs no construction.

Hendrickson also argues that *Kresoya* allows her to rely on a mixture of subjective and objective complaints. Pet. at 14. But her objective findings were the same when she sought reopening as they were at claim closure. Nothing in *Kresoya* or later case law dispenses of the requirement to show worsened objective findings, not the same objective findings. *See Kresoya*, 40 Wn.2d at 45; *see Tollycraft*, 122 Wn.2d at 432; *Lewis*, 93 Wn.2d at 3; *Dinnis*, 67 Wn.2d at 656.

[2] Showing worsening by objective finding is black letter law in workers' compensation cases. The Board routinely applies the standard. *Jerrol E. McFarland*, No. 16 13868, 2017 WL 3427916 (Wash. Bd. Indus. Ins. Appeals July 3, 2017) (no objective worsening); *Jared A. Watkins*, No. 15 17065, 2017 WL 2625622 (Wash. Bd. Indus. Ins. Appeals May 22, 2017) (no objective worsening); *Robert C. McNally, Jr.*, No. 16 12013, 2017 WL 2625682 (Wash. Bd. Indus. Ins. Appeals May 19, 2017) (no objective worsening); *John F. Hall*, No. 15 22463, 2017 WL 2625641 (Wash. Bd. Indus. Ins. Appeals) (no objective worsening); *Richard A. Myrick*, No. 16 12096, 2017 WL 1842410 (Wash. Bd. Indus. Ins. Appeals. 12, 2017) (no objective worsening); *Maria T. Dubon*, No. 16 12848, 2017 WL 1842412 (Wash. Bd. Indus. Ins. Appeals Apr. 4, 2017) (no objective worsening); *Chad G. Gessner*, Nos. 15 25256 & 16 13459, 2017 WL 1378041 (Wash. Bd. Indus. Ins. Appeals Mar. 8, 2017) (objective worsening). These are just a handful of cases at the Board; there are many more.

Thus, case law establishes that the Court has never altered the requirement to establish objective findings of worsening for conditions not susceptible to objective measurement. As a result, the alleged conflict does not exist.

B. No Issue of Substantial Public Interest Is Presented by Following Decades of Case Law

Stare decisis requires workers to present objective evidence of worsening due to the many cases holding that a worker must provide such evidence in order to reopen a claim. Although this Court could only adopt Hendrickson's argument by overruling multiple decisions, Hendrickson does not recognize that this is true, nor does she claim that this Court should abandon that binding precedent. The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before the court abandons it. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239, 236 P.3d 182 (2010). The objective worsening rule is correct and not harmful under the statutory language and scheme.

The Industrial Insurance Act allows reopening of a claim for "aggravation" of "disability." RCW 51.32.160(1)(a). Although the objective-worsening requirement is not explicitly in the statute, it is implicitly part of the requirement to show aggravation of disability. RCW 51.32.160 allows for reopening only "if *aggravation* . . . of *disability* takes

place . . . .” (emphasis added). “Aggravation” does not lightly occur: it is “an increase in seriousness or severity . . . .” and “an act or circumstance that intensifies or makes worse . . . .” *Webster’s Third New International Dictionary* 41 (2002). The use of the term “disability” is also significant because courts require workers to prove “disability” by objective findings in other contexts in the Industrial Insurance Act. *E.g.*, *Harper v. Dep’t of Labor & Indus.*, 46 Wn.2d 404, 406–07, 281 P.2d 859 (1955) (claim for increased permanent partial disability must be supported by medical testimony about objective findings); *Oien v. Dep’t of Labor & Indus.*, 74 Wn. App. 566, 569, 874 P.2d 876, 877 (1994) (claim for temporary total disability must be supported by medical testimony about objective facts). The courts apply the meaning of terms consistently throughout an act. *See State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013).

By using the term “disability,” which under the Industrial Insurance Act includes objective findings, in conjunction with the term “aggravation,” which requires an increase in severity, the Legislature intended for objective findings to show worsening. This intent is confirmed by the Legislature’s decision not to change the objective-worsening requirement derived from the statute for nearly 75 years. By not amending the statute, the Legislature has adopted the interpretation given

the statute by the court. *See City of Fed. Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009).

Hendrickson argues that the categories for permanent partial disability support her theory that she need not show worsened objective findings. Pet. 15-17. But because a doctor bases the ratings in the categories on objective findings, any subjective findings are subsumed in the rating. WAC 296-20-19030. The objective-findings-based ratings do not eliminate the need for an objective basis for worsening.

Because the objective-worsening requirement furthers the Legislature's intent regarding worsening, there is no public interest to be served by entertaining Hendrickson's arguments to dilute it. First, the objective-worsening requirement prevents workers from being subjected to unnecessary and potentially harmful medical procedures. *See, e.g.*, *Eastwood*, 152 Wn. App. at 652. In *Eastwood*, for example, the worker's doctor wanted to reopen a claim to perform a third shoulder surgery but provided no objective evidence that worker's condition had worsened, exposing the worker to the risks of surgery. *Id.*

Second, the objective-worsening requirement protects the workers' compensation trust funds from workers who mistakenly believe their industrially related conditions have worsened. *See Kresoya*, 40 Wn.2d at

45–46. The *Kresoya* Court made this purpose clear when it explained the reasoning behind the requirement:

> The rule that an expert medical witness may not base his opinion upon subjective symptoms alone is designed to protect the industrial insurance fund against unfounded claims of aggravation. If such claims could be established by the testimony of a physician who based his opinion entirely upon what the worker told him, it would open the door to fraudulent claims, *as well as those mistakenly made in good faith. A [worker] might honestly believe his subsequent condition arose out of his original injury, but this is a medical question and an opinion thereon must be derived from sources other than the claimant's statement.*

Kresoya, 40 Wn.2d at 45–46 (emphasis added). Hendrickson argues that she satisfies this purpose because she had objective findings when she sought reopening. Pet. 14. But she again overlooks that her objective findings were the same at the time of claim closure as they were when she sought reopening. Thus, they do not show worsening. *Phillips*, 49 Wn.2d at 197. Because there are no increased objective findings of worsening, her request for reopening necessarily depends entirely on her subjective complaints. CP 172–75.

Third, the objective-worsening requirement is necessary because the Department closes a claim only after significant work at the agency levels and the Department should only reopen a claim when the circumstances show the worker's condition has significantly changed in severity since closing. When a claim is open, the Department provides all

necessary medical treatment, vocational services, temporary wage replacement benefits, and then determines whether to award permanent disability. RCW 51.32.055, .090, .095, .099; RCW 51.36.010. The Department does not lightly close a claim with a finding of partial disability, as here, but does so after determining no further treatment is necessary and the worker can perform and obtain work. RCW 51.32.055; *Franks*, 35 Wn.2d at 766-67; *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 815, 872 P.2d 507 (1994).

After claim closure, the finding that the worker needs no further treatment and has the disability determined by the order is binding and may be overcome by only a finding of worsening. *See White*, 48 Wn.2d at 414–15. The Legislature chose not to undo the finality of a closing order lightly, so the worker has the burden to show increased disability to reopen. RCW 51.52.050(2)(a).

Finally, the objective-worsening requirement is necessary not only because of the need to overcome finality and the importance of not reopening claims based solely on the worker's statements but because the Department has already compensated the worker's disability at the time of claim closure through the order that closed the claim. If a worker's condition worsens, the Department may reopen the claim for an additional award or for more medical treatment. RCW 51.32.160(1)(a). If the

condition remains the same, there is no reason to reopen the claim because no additional compensation is due since the Department already compensated the worker for the existing impairment with necessary treatment. *See Cooper*, 20 Wn.2d at 433 (worker must show how condition worsened beyond those present at claim closure, "for which he had already been compensated").

For nearly 75 years, a worker has had to show objective worsening to obtaining a reopening of the worker's claim. *Cooper*, 20 Wn.2d at 433. The Petition provides no good reason to revisit or disturb this longstanding rule.

V. CONCLUSION

This case involved the routine application of well-established law to the facts here. Hendrickson did not present testimony that showed worsening of her objective findings and so she established no aggravation. This Court should affirm.

RESPECTFULLY SUBMITTED this 5th day of June 2018.

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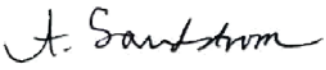

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SUPREME COURT OF THE STATE OF WASHINGTON

TERA HENDRICKSON, Appellant, v. DEPARTMENT OF LABOR AND 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 of Labor & Industries' Answer to Petition for Review and this Certificate of Service in the below described manner:

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DATED this 5th day of June, 2018.

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