Supreme Court No. 96189-1
COA No. 76324-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL WEAVER,

Respondent,

v.

THE CITY OF EVERETT,

Petitioner,

THE DEPARMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Petitioner.

MEMORANDUM OF AMICUS CURIAE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF THE PETITIONS FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Building Industry Association of Washington ("BIAW") is made up of 8,000 member companies involved in the residential homebuilding industry. BIAW's member companies employ tens of thousands of employees who are covered by Washington's Industrial Insurance Act ("IIA"), Title 51 RCW.

As a safety incentive and service to its state fund members, BIAW also sponsors one of the oldest and largest retrospective rating groups in Washington state, authorized under RCW 51.18. BIAW provides safety training & services as well as claims management to its group participants.

BIAW, as the group sponsor, is directly financially responsible to the Department for any additional premium that may become due and owing in the event that the group's losses exceed the group's premiums in a particular valuation period. RCW 51.18.

BIAW regularly appears before the Board of Industrial Insurance Appeals (BIIA) as a party in appeals related to specific claims as well as appeals involving its own contractual relationship with the Department. At any given time, BIAW and its counsel are managing a caseload of approximately 60 active appeals before the BIIA.

II. ISSUE OF CONCERN TO AMICUS CURIAE

Amicus Curiae BIAW is familiar with, and joins in, the arguments made by Petitioners City of Everett and Department of Labor & Industries as well as Amici Curiae Washington Self-Insurers Association *et al.*

This memorandum is focused on only two procedural issues which were misunderstood and/or misrepresented in the opinion of the Court of Appeals: 1) An industrial insurance appeal is different from other administrative appeals; and 2) a worker's potential universe of benefits is not defined by the four corners of his or her application for benefits.

III. ADDITIONAL REASONS TO GRANT REVIEW

In addition to the arguments made by Petitioners and Amici identified herein, BIAW argues that the Court of Appeals' opinion was in part informed by false impressions regarding the BIIA itself, as well as the function of the application for benefits.

A. The Court of Appeals misunderstands the Board of Industrial Insurance Appeals.

The Court of Appeals' decision begins by describing an "explosion of executive branch quasi-judicial decision-making" – a system that it describes as being born with a tendency toward imperfect results. The

BIIA decision below, the Court of Appeals reasoned, fell into an ultimately inevitable "fruit salad of injustice." *Weaver v. City of Everett*, 4 Wash. App.2d 303, 308, 421 P.3d 1013 (Div. 1, 2018).

Peppered throughout the decision are mistaken references to the "administrative law judge (ALJ)" and "administrative appeal." But the Washington Administrative Procedure Act (APA) does not apply to BIIA proceedings. RCW 34.05.030(2)(a),(c). The APA states that "the presiding officer in an administrative hearing shall be an administrative law judge." RCW 34.05.425(1)(c). The IIA, on the other hand, at RCW 51.52.104, provides that evidence is to be presented at hearings conducted by an *industrial appeals judge* (IAJ). The rules of evidence apply during hearings at the BIIA. WAC 263-12-115.

Title 51 also provides "the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court *as in other civil cases.*" RCW 51.52.140.

A superior court's review of a BIIA decision is de novo, however, the trial court is "not permitted to receive evidence or testimony other than, or in addition to, that offered before the Board or included in the record filed with the Board. . . . even though the trial court may rule

independently on evidentiary questions, as an appellate tribunal, it can only pass upon those matters that have first been presented to the Board and preserved in the Board's record for review." *Seppich v. Department of Labor & Indus.*, 75 Wash.2d 312, 316, 450 P.2d 940 (1969). See also RCW 51.52.115.

Courts in our state have made clear that there is a distinction between industrial insurance appeals and other administrative appeals.

> This statutory review scheme results in a different role for the Court of Appeals than is typical for appeals of administrative decisions pursuant to, for example, the Administrative Procedure Act, where we sit in the same position as the superior court. . . We do not review the trial court's factual determinations de novo, much less place ourselves in the position of the Department physicians who evaluate medical records in the first instance.

Rogers v. Dep't of Labor & Indus., 151 Wash.App. 174, 180-181, 210 P.3d 355, *review denied,* 167 Wash.2d 1015, 220 P.3d 209 (Div. 1, 2009).

In addition to addressing the issues addressed by the parties and other employer organizations, this Court should take this opportunity to correct the repeated mischaracterizations of the unique administrative appeal process of the BIIA.

B. A worker's potential universe of benefits is not determined by the four corners of his or her application for benefits.

The Court of Appeals is also mistaken in its conclusion that a worker's initial application conclusively defines the value of the benefits at issue. " . . . [T]hat Weaver had less than $10,000 in benefits at stake during his application . . . informs our inquiry." *Weaver* at 318. While this is presented as "fact," in the opinion, it is simply an inaccurate characterization of the benefit application process. Title 51 outlines a process by which an injured worker may apply to the Department for compensation (what is commonly referred to as "filing a claim"). This initial application does not limit the worker's potential benefits. RCW 51.28.020. Claims are allowed for either injuries (RCW 51.08.100) or occupational diseases (RCW 51.08.142). Once a claim is allowed, the worker is entitled to all benefits under the statute, including, for example, vocational benefits if he/she cannot return to the job of injury and needs to be retrained (RCW 51.32.095); medical treatment (RCW 51.36.010); time loss compensation if he/she had to miss work (RCW 51.32.090); and permanent partial disability benefits (RCW 51.32.080), among others. The statute is simply not designed to limit the universe of potential

benefits at the time the initial application is filed.

The Court of Appeals' interpretation of the application for benefits as a document that identifies a specific set of benefits – therefore assigning a value to Mr. Weaver's claim - is inaccurate.

Practically speaking, the effect of filing of a claim can range from the cost of a single doctor office visit (value of $200) or a permanent disability pension claim (more than $1 million). The filing is simply a claim for benefits provided for in the statue, which the worker is entitled to if he or she establishes a right to the benefits: "[W]hen the right of a claimant to the benefits claimed under the act is challenged at the joint board level, that right must be established. This has long been the rule when the supervisor has determined that a claimant is not entitled to relief and the claimant appeals to the joint board." *Olympia Brewing Co. v. Dep't of Labor & Indus. of State*, 34 Wash. 2d 498, 505, 208 P.2d 1181, 1185 (1949), *overruled in part (on other grounds)* by *Windust v. Dep't of Labor & Indus.*, 52 Wash. 2d 33, 323 P.2d 241 (1958).

IV. CONCLUSION

For the reasons stated herein, as well as the reasons outlined by Petitioners, the Court should grant review under RAP 13.4(b)(1-2).

Respectfully submitted this 12 day of October, 2018.

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MICHAEL WEAVER, Appellant, v. CITY OF EVERETT and DEPARTMENT OF LABOR & INDUSTRIES, Respondents.	)	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I caused a true and correct copy of the MEMORANDUM OF AMICUS CURIAE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF THE PETITIONS FOR REVIEW to be served on the following in the manner indicated below:

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