NO. 97389-0

SUPREME COURT OF THE STATE OF WASHINGTON

ASPLUNDH TREE EXPERT, CO.,
Petitioner,

vs.

LUCIANO M. GALVEZ and
DEPARTMENT OF LABOR AND INDUSTRIES,
Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Asplundh Tree Expert, Co., the Self-Insured Employer, petitions for review of a Court of Appeals decision which affirmed a Benton County Superior Court order denying the Self-Insured Employer's Motion (to Reverse Board of Industrial Insurance Appeals Denial of CR 35 Examinations and Petition for Interlocutory Review) and dismissing the action "because the superior court lacks general jurisdiction, and has only limited appellate jurisdiction per RCW 51.04.010 and 51.52.110." Clerk's Papers [CP] 598-99. The Self-Insured Employer appealed an order of the Board of Industrial Insurance Appeals [Board] denying interlocutory review rather than waiting to appeal the Board's final decision as mandated by RCW 51.52.110. The Self-Insured Employer seeks to create jurisdiction where it is lacking. Alternatively, it seeks to create a new superior court procedure for remand to the Board to "receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court . . ." - in contravention of RCW 51.52.115.

The Court of Appeals decision to affirm the Superior Court's dismissal for lack of jurisdiction is wholly consistent with the published decisions of this Court and the Court of Appeals, and with the provisions of the Industrial Insurance Act, Title 51, RCW. There is no basis to review the

Court of Appeals' decision under RAP 13.4(b). The Court of Appeals correctly determined that the Superior Court had no jurisdiction to consider an interlocutory administrative order. Further, the Court of Appeals' decision is consistent with the published decisions on the issue and, therefore, substantial public interest is absent. Accordingly, Respondent Luciano M. Galvez, an injured worker, respectfully requests that this Court deny the Self-Insured Employer's Petition.

II. COUNTER-STATEMENT OF THE ISSUES

As discussed below, the issues raised in the Self-Insured Employer's Petition for Review are not appropriate for this Court's discretionary review under RAP 13.4(b). However, if the Court does accept review, the issue presented would be:

> Did the Superior Court have jurisdiction to consider an appeal from an Industrial Appeals Judge's interlocutory administrative decision prior to a final order of the Board of Industrial Insurance Appeals?
>
> Under Washington law, the answer is: No.

III. REASONS WHY REVIEW SHOULD BE DENIED

This matter does not meet any consideration for review under RAP 13.4(b) because there is no conflict with any published appellate decision and no substantial public interest is involved.

Rule of Appellate Procedure 13.4(b) sets forth the criteria governing this Court's acceptance of review of a Court of Appeals decision. The Self-Insured Employer cites RAP 13.4(b)(1), (2), and (4) as authority for considerations warranting review. But this matter does not meet any of the considerations for review.

The Self-Insured Employer fails to show that there is conflict between the Court of Appeals decision and any published appellate decision. RAP 13.4(b)(l), (2). Neither criteria applies here. There is no issue of first impression here. Nor does this matter involve a significant question of an issue of substantial public interest. RAP 13.4(b)(4). Rather, this case involves a straight-forward application of RCW 51.52.110 - the statute authorizing Superior Court appeals under the Industrial Insurance Act. Citing RCW 51.52.110, the Court of Appeals correctly reiterated that "[a]n appeal to the Superior Court lies only if the BIIA has made a final decision." The Self-Insured Employer's disagreement with the outcome, and discontent with the express statutory language, does not transform this into a matter of substantial public interest appropriate for review.

The Court of Appeals decision below is consistent with the sole published decision from this Court on the issue - *Ivey v. Dep't of Labor & Indus*., 4 Wn.2d 162, 164, 102 P.2d 683 (1940). The holding in *Ivey* is well

established law - namely, that the superior court "jurisdiction is limited by the statute to reviewing the evidence already taken" and "[t]he court could not remand the case for the taking of additional evidence." *Ivey*, 4 Wn.2d at 164.

The Self-Insured Employer's reliance on a rebuttal case - *Surina v. Dep't of Labor & Indus*., 34 Wn.2d 839, 210 P.2d 403 (1949), is misplaced. There, the court explained that a remand did not conflict with *Ivey* but was distinguishable because the Board did not provide "the claimant an opportunity to present rebuttal evidence, which opportunity the claimant should have had before the joint board passed upon the merits of her claim." *Id*., at 844. In *Surina*, there was a procedural irregularity. Here, there was no procedural irregularity save that created by the Self-Insured Employer's premature appeal to superior court from an interlocutory order. In the instant case, the Self-Insured Employer was not "inadvertently deprived" of a full and complete hearing, but merely failed to present good cause to justify or compel involuntary, invasive, and inconvenient medical examinations under CR 35.

The Self-Insured Employer's claim that the decision of the Court of Appeals here conflicts with *Dep't of Labor & Indus. v. Bd. of Indus. Ins. Appeals*, 186 Wn.App. 240, 347 P.3d 63 (2015), is unfounded. Aside from the fact that *BIIA* involved the extraordinary remedy of a writ of review,

consideration is not warranted because no conflict exists. The Court of Appeals here correctly noted that "our cases recognize that there is no appeal from a decision by an IAJ." In *BIIA*, the Court of Appeals concluded that the Superior Court should not have issued a statutory writ of review because the Department had an adequate remedy by petition for review of the proposed decisions and by appeal from the Board's final order. *Id.*, at 246-48.

The Industrial Insurance Act, Title 51, RCW, was enacted in 1911 and created a no-fault compensation system designed to provide "sure and certain relief for workers, injured in their work." RCW 51.04.010. In an exercise of police powers, the Act abolished all other civil actions, remedies and jurisdiction under common law. *Id*. The intent of the Act is not served by creating jurisdiction in contravention of RCW 51.52.110 because a Self-Insured Employer does not agree with an interlocutory decision and does not want to wait for a final decision and order of the Board. Moreover, providing Self-Insured Employers another action, remedy, and jurisdiction is a potential floodgate, inconsistent with "sure and certain relief for workers."

It is only an issue of substantial public interest if the Court accepts the Self-Insured Employer's invitation to roll back to 1910 and carve out an exception to RCW 51.52.110 for Superior Court appeal from an interlocutory decision and carve out an exception to RCW 51.52.115 to grant the superior

court authority to reopen the evidence or testimony before the Board. The legislative history of RCW 51.52.115 dates, in part, well beyond the turn of the last century. As a statute, it is settled law: "the court shall not receive evidence or testimony other than, or in addition to, that offered before the board . . . ." RCW 51.52.115. This case does not present a matter of substantial public interest. The Court should deny review.

IV. CONCLUSION

The Court of Appeals properly decided that the Superior Court lacked jurisdiction to consider an interlocutory administrative order. This decision did not conflict with any published appellate decisions. Nor is it a matter of substantial public interest that the Self-Insured Employer disagrees with the operative statute. The Court should deny the Petition for Review.

Respectfully submitted this 4th day of September, 2019.

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PROOF OF SERVICE

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