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NO. 72462-2-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent,

v.

BOARD OF INDUSTRIAL INSURANCE APPEALS OF THE STATE
OF WASHINGTON; MARK JAFFE, in his official capacity; JANET
WHITNEY, in her official capacity; CHARLES MCCULLOUGH, in his
official capacity,

Defendants,

TESORO REFINING & MARKETING COMPANY, LLC,
Intervenor/Appellant,

UNITED STEEL WORKERS OF AMERICA,
Intervenor.

**DEPARTMENT OF LABOR & INDUSTRIES
BRIEF OF RESPONDENT**

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I. INTRODUCTION

Now nearly four and a half years after a Tesoro refinery explosion killed seven workers, the Department of Labor and Industries asks to present all evidence supporting 45 citations for worker safety violations issued against Tesoro to an industrial appeals judge—a hearings officer for the Board of Industrial Insurance Appeals. The Department has statutory obligations to present its evidence supporting its orders. Distinct from any other state administrative body, the Board has a unique procedure called “colloquy,” which mandates that a party “shall be permitted” to obtain disputed testimony in question and answer form.

Presenting evidence in one proceeding complies with statutes and Board regulations, conserves time and money, spares witnesses from repeatedly testifying about the traumatic events that killed seven workers, and will avoid further delay in requiring Tesoro to abate the conditions that led to this catastrophe. Without discussing the Department’s statutory obligations, Tesoro simply asks that the colloquy procedure be ignored.

Recognizing that the Board’s failure to allow colloquy constituted legal error and that the Department had no right to appeal the IAJs’ decisions denying colloquy, the Skagit County Superior Court properly issued a writ of review ordering the Board and its IAJs to allow the Department to present its case. This Court should affirm.

II. ISSUES

1. Did the Board act illegally when it denied the Department's request to present evidence supporting its orders in colloquy, where statutes require the Department to present its case regarding the citations at a hearing and a Board regulation provides that colloquy "shall be permitted" unless the evidence is "clearly objectionable on any theory of the case"?
2. Did the superior court correctly conclude that the Department had no right to appeal the colloquy orders and therefore no other adequate remedy at law, where it would be pointless to raise the issue after the hearings without colloquy?
3. Is Skagit County the proper venue, where venue for the Board is Skagit County and where any appeal from the Board's decision and order will be in Skagit County Superior Court? If not, is dismissal the appropriate remedy, where case law holds that the proper remedy is transfer of venue?
4. Before granting the Department its requested relief, did the superior court have to (1) issue a writ, (2) obtain a certified copy of the record, and (3) hold a perfunctory hearing, when the underlying essential facts are undisputed and the parties briefed the sole legal issue?

III. STATEMENT OF THE CASE

A. **In April 2010, Heat Exchangers at Tesoro's Anacortes Refinery Exploded, Killing Seven Workers**

On April 2, 2010, seven Tesoro employees assisted in restarting one of two banks of heat exchangers used in processing gasoline by turning valves and using steam lances to put out fires caused by hydrocarbon leaks. CP 66-67. During startup, a carbon steel shell of a heat exchanger ruptured, releasing hot flammable hydrocarbon. CP 67.

The rupture resulted from a well-understood corrosion mechanism called high temperature hydrogen attack. CP 67. Upon contact with air, flammable hydrocarbon ignited, producing a massive explosion. CP 67. The explosion killed three workers immediately. CP 211-12. The other four died at the hospital.¹ CP 211-12.

B. After an Investigation, the Department Cited Tesoro for Violating Worker Safety Laws

The Department investigated Tesoro's safety practices and procedures. CP 64. The Department concluded that Tesoro violated worker safety laws and issued 45 citations. CP 64. The Department cited Tesoro for failing to have an adequate process hazard analysis (an organized and systemic effort to identify and analyze the significance of potential hazards associated with the processing or handling of highly hazardous chemicals), failing to inspect the heat exchangers in compliance with recognized and generally accepted good engineering practices, failing to timely correct deficient equipment, and failing to provide adequate personal protective equipment, among other things. CP 64-65.

The Department determined that Tesoro had acted willfully in 39 out of the 45 citations. CP 5, 64, 75, 382, 479. The citations resulted in

¹The precise cause of the explosion is not at issue here, nor disputed by the parties. But for background information, the U.S. Chemical Safety Board produced an animation detailing the mechanism of the explosion that can be found at <http://www.csb.gov/tesoro-refinery-fatal-explosion-and-fire/>.

penalties totaling \$2,393,000—to date the largest worker safety fine in state history. CP 64.

C. Tesoro Appealed to the Board, Which Has a Procedure Called Colloquy to Ensure That the Parties Can Adequately Develop the Administrative Record

Tesoro appealed to the Board, which assigned IAJ Mark Jaffe to the case. CP 64, 152. The Board, a separate agency from the Department, hears appeals from Department orders. RCW 51.52.010.² The IAJ takes the testimony and develops the record, providing a proposed decision, with the Board making the final decision. RCW 51.52.104 & .106. The civil rules apply to Board proceedings, unless those rules conflict with RCW 51.52 and WAC 263-12. RCW 51.52.140; WAC 263-12-125.

IAJs are not judicial officers, but “employee[s]” of the Board. *Stratton v. Dep’t of Labor & Indus.*, 1 Wn. App. 77, 79, 459 P.2d 651 (1969). They are akin to hearing examiners, in that after developing the record, IAJs draft proposed decisions. RCW 51.52.104; *Stratton*, 1 Wn. App. at 79. The Board does not have to accept an IAJ’s proposed decision, it may adopt the decision or issue its own, which becomes the final order. RCW 51.52.106; *Stratton*, 1 Wn. App. at 79.

² RCW 51.52 applies to proceeding in Washington Industrial Safety & Health Act (WISHA) cases under RCW 49.17.

The Board can reject the IAJ's evidentiary rulings and weigh the evidence itself. RCW 51.52.106; *Rosales v. Dep't of Labor & Indus.*, 40 Wn. App. 712, 715, 700 P.2d 748 (1985); *Stratton*, 1 Wn. App. at 79. Since an IAJ only develops the record and proposes a decision, a Board regulation allows parties to place disputed evidence into "colloquy"—a procedure that allows parties to offer disputed testimony on the record. *Rosales*, 40 Wn. App. at 714-15; WAC 263-12-115(9).³ Such testimony is not considered unless it is taken out of colloquy, either by the IAJ when preparing the proposed decision, or by the Board when entering its decision, or by a court if relevant to review of the Board's decision. RCW 51.52.104, .106, .115; WAC 263-12-115(9),-145.

D. IAJs Refused to Allow the Department to Place Relevant Evidence Relating to Most of Its Citations in Colloquy

Tesoro moved for partial summary judgment, seeking dismissal of most of the citations. CP 64-129. The parties had not completed discovery, so the Department moved under CR 56(f) to continue the partial summary judgment motion to depose additional witnesses and receive responses from Tesoro on outstanding discovery requests. CP 137-49. The IAJ continued the Department's response deadline by a

³“Colloquy” as used in our procedure may be likened to an ‘offer of proof’ under Evidence Rule 103(a) and (b).” *In re Herman L. Goddard*, No. 95 1468, 1997 WL 316445 (Wash. Bd. Ind. Ins. App. April 24, 1997).

month, which was not enough time to complete discovery in this complex case.⁴ CP 151-52.

During briefing, Tesoro submitted the deposition transcript of the Department investigator and his investigation report, and the Department submitted a declaration from the investigator. CP 131-35, 225-32.

On September 5, 2013, nearly fourteen months after argument, the IAJ issued an interlocutory order that partially granted Tesoro's motion and purported to dismiss several citations. CP 502-18. The IAJ reasoned that the Department could not rely on impermissible hearsay and opinion evidence in the investigator's declaration and report submitted by Tesoro (though Tesoro could), and that the administrative rule defining penalties was invalid. CP 502-18. The IAJ reserved ruling on dismissing other citations for further briefing. CP 502-18.

The Department sought interlocutory administrative review of the IAJ's proposed order by a reviewing IAJ, which was denied. CP 523-47, 549. The IAJ then issued another interlocutory order vacating additional

⁴ The IAJ took a month and a half to consider the Department's CR 56(f) motion, then extended the Department's deadline by a month and kept the previously scheduled hearing date on the summary judgment. CP 151-52. The Department sought interlocutory review of this decision, asking that it be able to complete its discovery, but the reviewing IAJ denied review.

citations on November 26, 2013. CP 552-54. A reviewing IAJ again denied the Department's request for interlocutory review. CP 568.

These preliminary orders would leave 21 citations remaining for a maximum penalty of \$658,000. CP 7, 502-18. But even more important, Tesoro does not need to abate any unsafe conditions for the appealed citations, such as adopting proper process hazard analyses and to provide its workers adequate personal protective equipment. CP 7, 502-18.

The Department asked, consistent with the Board's regulations stated above, to present its evidence supporting the proposed-dismissed citations into colloquy, so that the Board or subsequent court could enter a final decision addressing the merits of all the citations if the Board or reviewing court rejects the proposed summary vacation of citation items. CP 580-83. The IAJ denied the Department's request, positing that there was no need for the Department to present further evidence on the vacated citations and that the record could become confusing if the Department were allowed to present evidence in colloquy. CP 585-86.

The Department sought interlocutory administrative review. CP 590-95. The reviewing IAJ denied review. CP 597. Under the Board's regulations, the Department could not seek further review of that decision. WAC 263-12-115(6), - 145. The Department then requested that the IAJ clarify the order denying colloquy and allow the Department to preserve

the testimony through perpetuation depositions, but that request was also denied. CP 601.

E. The Superior Court Ordered the Board and IAJs to Allow the Department to Present Its Full Case

The Department applied for a writ of review in Skagit County Superior Court, asking to reverse the IAJs' orders denying the use of colloquy and to order the IAJ to allow the Department to present its case. CP 1-18. The Board appeared, and Tesoro and the United Steel Workers of America intervened. CP 620-24.

Tesoro moved to dismiss the writ, which the Board joined. CP 641-46, 778-87. The Board and Tesoro argued that the Department had another right to appeal the colloquy decision, that the Department had no legal right to colloquy, and that venue was improper. CP 641-46, 782-87. The Board added its own argument that the writ was untimely. CP 644. There was no factual dispute, and the Department asked the superior court to grant the writ and award the requested relief. CP 670-74.

After briefing and oral argument, the superior court denied the motion to dismiss and granted the writ. CP 750-54. The court ruled that the Department had no right to appeal and that the Board and its IAJs "violated a rule of law to the prejudice of the Department when [they] concluded that the Department is not entitled to place its evidence into

colloquy, as required by rule, regulation, and statute.” CP 753. The court reversed the Board’s orders and ordered it to permit the Department to offer evidence in colloquy and present its evidence related to all citations on appeal. CP 753-54. Tesoro appeals.

IV. STANDARD OF REVIEW

A superior court may grant a writ of review when an inferior tribunal, board, or officer, exercising judicial functions, has acted illegally and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law. RCW 7.16.040. A writ of review is an extraordinary remedy, and this Court reviews the decision to grant a writ of review de novo. *Nichols v. Seattle Hous. Auth.*, 171 Wn. App. 897, 902-03, 288 P.3d 403 (2012). The issues raised here are questions of law which this Court reviews de novo, determining whether the decision below was contrary to law. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995); RCW 7.16.120(3).

V. ARGUMENT

A. The Board Acted Contrary to Statutes, Rules, and Regulations When It Denied Colloquy, So the Superior Court Correctly Granted the Writ

The Board, through its IAJs, acted illegally by violating statutes and the Board’s own regulations when it precluded the Department from presenting its evidence in colloquy. Unique to the Board, the statutes and

regulations mandate colloquy to place disputed testimony in the record for further Board and Court review. The failure to allow colloquy substantially altered the status quo and deprived the Department of its ability to comply with its statutory obligations to present its case. The result delays the Department's ability to quickly abate dangerous worker conditions, a result for which there is no adequate remedy at law. The superior court correctly granted the writ.

1. Superior courts may grant writs of review when an inferior tribunal acts illegally

A superior court may grant a writ of review when an inferior tribunal, board, or officer acts illegally. RCW 7.16.040. To determine when an inferior tribunal, board, or officer acts illegally, courts have looked at RAP 2.3's discretionary review standards and case law. *City of Seattle v. Holifield*, 170 Wn.2d 230, 244-45, 240 P.3d 1162 (2010); *Nichols*, 171 Wn. App. at 903. Those standards provide discretionary review of an interlocutory decision by the appellate court when the trial court: (1) has committed an obvious error that renders further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an

appellate court. *Holifield*, 170 Wn.2d at 244-45; RAP 2.3. On the merits of the writ, the courts examine “[w]hether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.” RCW 7.16.120(3).

2. The IAJ acted illegally by preventing the Department from presenting its case consistent with statutes and regulations

The Board’s IAJ acted illegally when it denied the Department from fulfilling its unique statutory obligation to present its case. The Legislature mandated that the Department is entitled to present its case supporting its orders on appeal:

The department shall be entitled to appear in all proceedings before the board and introduce testimony in support of its order.

RCW 51.52.100. The Department thus has a special right to present testimony defending its orders on appeal, regardless of the preliminary decision of a Board IAJ. And all parties “shall present all his or her evidence with respect to the issues raised in the notice of appeal” at “the time and place fixed for hearing.” RCW 51.52.102. Although the civil rules do not preclude colloquy, as Tesoro contends, even if they did, these statutes would control. RCW 51.52.140. Tesoro never addressed these statutory obligations, neither at superior court in its many briefs nor in its opening brief.

The Department sought to introduce evidence supporting its order—the 45 citations and penalties against Tesoro. These were the issues identified in Tesoro’s notice of appeal, so the Department “shall be entitled . . . [to] introduce testimony in support of its order.” RCW 51.52.100. The Legislature intended that the Department should present testimony on disputed issues. The Board and its IAJs violated the statutory mandate by refusing to allow the Department to place all of its evidence into the record. Additionally, as a party at the Board, the Department “shall present all [its] evidence with respect to” those issues raised in the order and notice of appeal. RCW 51.52.102. The Board and its IAJs acted contrary to this statute as well.

Consistent with these statutes, the Board adopted a one-of-a-kind procedure to facilitate its ability to render a decision on the merits, even when the IAJ makes an erroneous proposed decision. The Board’s IAJs ordinarily follow the rules of evidence and civil rules, unless they conflict with applicable statutes and regulations. RCW 51.52.140; WAC 263-12-125. Even in the superior court, ER 103(a)(2) states that, to preserve the record for purposes of appeal, a party must make known to the court the evidence in dispute.

But the Board went beyond ER 103 and adopted WAC 263-12-115(9), which mandates that the Board shall permit a party to offer disputed evidence in question and answer form:

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.

WAC 263-12-115(9) (emphasis added). Colloquy is a specific type of offer of proof that ensures that the Board, as the ultimate administrative factfinder, and a reviewing court can render a decision on the merits without remand to an IAJ.⁵

By using “shall,” the Board directed that the regulation is mandatory. WAC 263-12-115(9). The rules of statutory construction apply to administrative rules just as they do statutes. *Dep’t of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). The regulation here mandates that disputed evidence in answer and question form “shall be permitted.” WAC 263-12-115(9). “The word ‘shall’ imposes a mandatory duty unless a contrary legislative intent is apparent.” *Venwest Yachts Inc. v. Schweickert*, 142 Wn. App. 886, 894, 176 P.3d 577 (2008)

⁵Colloquy saves time, even in a complicated case like this. For instance, in another complicated WISHA case, where the Board allowed the Department to present its evidence, it still took 10 years, with multiple appellate decisions, to reach a final affirmation of its citations. *See Dep’t of Labor & Indus. v. Morrison-Knudsen*, 130 Wn. App. 27, 121 P.3d 726 (2005). A subsequent unpublished decision occurred in 2011, which led to further action at the Board that finally resolved the case.

(citing *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993)). The legislative history and regulation language indicate no contrary intent, so the Department and Board must fulfill their mandatory obligations. The Board IAJ's denial of colloquy acts contrary to the mandatory statutes and regulations, and accordingly this Court should reject this interpretation. See *Mynatt v. Gordon Trucking, Inc.*, ___ Wn. App. ___, 333 P.3d 442, 445 (2014) ("no deference is due to an agency's interpretation if it conflicts with a statutory mandate"); *W. Telepage, Inc. v. City of Tacoma*, 95 Wn. App. 140, 146, 974 P.2d 1270 (1999), *aff'd sub nom, W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 998 P.2d 884 (2000). "It is well-settled law in Washington that public agencies must follow their own rules and regulations." *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 44, 202 P.3d 334 (2009). Unlike ER 103, WAC 263-12-115 specifically includes the mandatory language, showing the Board's intent to require colloquy.

For this reason, litigants regularly rely on colloquy in hearings before IAJs. As the superior court noted, a Westlaw search yielded 119 results where the Board or its IAJs allowed colloquy. RP 21. But here, the IAJ acted contrary to its own regulation requiring colloquy to be

permitted by denying the Department's request to present its full case.

The superior court correctly saw the legal error and granted the writ.

3. Placing evidence related to all of the Department's citations in colloquy is not "clearly objectionable to any theory of the case"

WAC 263-12-115(9) provides one limited exception to placing evidence in colloquy—when a "question is clearly objectionable on any theory of the case." The proposed evidence is the Department's theory of the case, so it is not clearly objectionable. And the IAJ's interlocutory orders purporting to grant partial summary judgment do not render the colloquy evidence clearly objectionable on any theory of the case. WAC 263-12-115(9); *see* App. Br. at 25-26.

The Department's theory of the case is that Tesoro committed all 45 violations. Evidence related to any or all of these citations is relevant to this theory of the Department's case. WAC 263-12-115(9). The Department is entitled to present testimony supporting its orders, and as a party, it must present all of its testimony at the IAJ stage of this proceeding, so that the Board gets a record from the IAJ that allows it to affirm or reject the IAJ's recommendations. RCW 51.52.100, .102. Until the Board itself enters an order dismissing the disputed citations, however, the Department "shall be permitted" to present its theory of the case and document this evidence. RCW 51.52.080, .100, .102, .106; WAC 263-12-

115(9). The IAJs erroneously concluded otherwise, committed legal error, and acted illegally to prevent the hearing from going forward as necessitated by statutes and Board rules.

The IAJ's interlocutory orders purporting to grant partial summary judgment are not final and can be revised at any time, so Tesoro's arguments about the import of partial summary judgment are wrong. App. Br. at 25-27. Within the context of the Board, the IAJ's interlocutory partial summary judgment orders do not have legal effect, as the final decision must come from the Board. An IAJ can only propose decisions after taking the evidence. RCW 51.52.104; *Rosales*, 40 Wn. App. at 714-15. The IAJ is a hearing officer, who cannot render a final judgment. *Rosales*, 40 Wn. App. at 714. The Board, on the other hand, is tasked with weighing the evidence and issuing the final judgment. RCW 51.52.106; *Rosales*, 40 Wn. App. at 715; *Stratton*, 1 Wn. App. at 79. The Board cannot delegate its duties to interpret the testimony and make a decision and order. RCW 51.52.020; *see Stratton*, 1 Wn. App. at 79. For that reason, the regulation at hand must be construed to require the IAJ to accept the colloquy.

It is for this reason that partial summary judgment is rare before the Board, while colloquy is not. A Westlaw search reveals that of the 30 decisions by the Board that involved partial summary judgment, only two

were appeals under WISHA. *See Mt. Baker Roofing, Inc.*, No. 05 W0549, 2006 WL 4046209 (Bd. Ind. Ins. App. Dec. 2006); *In re Longview Fibre Co.*, No. 04 W1297, 2006 WL 2989438 (Bd. Ind. Ins. App. May 2006). In neither case was colloquy even an issue. And as noted above, colloquy regularly occurs at the Board, and the record here includes one such order in another case where an IAJ allowed a witness to testify in colloquy, before ruling that the whole testimony would not be considered. *See supra*; CP 630-35.

The Board's rules can be compared to the superior court rules where a party may seek to present evidence related to claims dismissed in partial summary judgment. CR 54(b) provides that partial summary judgment decisions do not terminate the action and are subject to revision at any time:

[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all parties.

The Supreme Court explained that this rule means that the trial court has "the authority to modify the [partial summary judgment] order at any time prior to final judgment." *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246,

300, 840 P.2d 860 (1992) (reinstating at the end of the case a defendant that was dismissed on partial summary judgment).

Contrary to Tesoro's assertions, the record was incomplete for the interlocutory partial summary judgment order, where the IAJ cut short the Department's ability to conduct sufficient discovery to respond to the partial summary judgment motion (and then stated that citations should be dismissed because the Department relied on inadmissible hearsay testimony). But even if the record was complete for review of the interlocutory partial summary judgment orders, the record is incomplete for a reviewing body to determine the merits of the citations if it rejects the interlocutory partial summary judgment decision. Review of the merits upon rejection of an erroneous ruling is the entire point of the colloquy regulation.

The fatal flaw in Tesoro's argument is that it treats the IAJs as if they were superior court judges with control over the record and discretion to deny colloquy. IAJs lack that authority. A superior court's role is to hear evidence and to make a final decision—combining the role of the IAJ and the role of Board into one entity. In contrast, WISHA adjudications involve a division of functions between the IAJ and Board. An IAJ's partial summary judgment ruling is merely a recommendation to a future Board. It is not a ruling that the Board has reviewed or approved. As

such, the colloquy rule ensures the Board will be able to review a partial summary judgment and reverse, affirm, or even modify the partial ruling in order to exercise the power described in *Washburn* to reinstate claims erroneously dismissed earlier in a case. RCW 51.52.106.⁶

Even if the Board accepts the IAJ's proposed ruling, a further reviewing court might overturn the Board's decision. RCW 49.17.150(1) (superior court reviews Board decisions). Putting the disputed evidence in colloquy will conserve administrative, judicial, and litigation resources, and will prevent the inconvenience and expense of having to take that same testimony years from now if those interlocutory summary judgment orders are vacated at some future date. Evidence would go stale and witnesses will likely become unavailable. It also continues to postpone the Department's ability to seek abatement of the dangerous work conditions. *Contrast* RCW 49.17.140 *with* former RCW 49.17.140 (2008); Laws of 2011, ch. 91, § 1.

Nor is there any risk of confusion by allowing the evidence in colloquy as argued by Tesoro. App. Br. at 28. The Board and the

⁶The Board and reviewing courts will also benefit by the colloquy evidence as the Department intends to challenge the IAJ's denial of the Department's request under CR 56(f) to conduct further discovery. If the Department presents new evidence obtained through discovery, then the Department has a strong argument that it should have been allowed more time to obtain discovery. In fact, the Department still awaits responses from Tesoro on requests made before responding to the partial summary judgment motion. *See* CP 16, 149.

Department regularly work with evidence in colloquy. The Department can clearly identify when it intends to place evidence related solely to the citations discussed in the interlocutory orders granting partial summary judgment. RP 13-15. This routine use of colloquy will not add unnecessary confusion to this case.

4. Tesoro relies on inapposite cases that do not address proceedings before the Board nor colloquy at the Board

Tesoro relies on inapposite case law in arguing that the Department cannot present evidence in colloquy. App. Br. 26-27 (citing *Grill v. Meydenbauer Bay Yacht Club*, 57 Wn.2d 800, 803, 359 P.2d 1040 (1961); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 814, 828 P.2d 549 (1992); *Milligan v. Thompson*, 110 Wn. App. 628, 633, 42 P.3d 418 (2002)). None of these cases come from the Board or address RCW 51.52.100, RCW 51.52.102, or WAC 263-12-115(9). For this reason alone, the cases do not apply.

More than that, the cases do not support Tesoro's argument. In *Grill*, for instance, the Court explicitly stated that a "pre-trial order is not a final order" and that "it is not appealable." *Grill*, 57 Wn.2d at 803. The Court held that partial summary judgment decisions are not appealable until reduced to a final judgment. *Id.* at 805-06. That holding supports the

Department's argument that, until reduced to a final judgment, evidence related to all of the citations is admissible.

And while *Grill* quoted a dated treatise on federal practice that stated that partial summary judgment “*is merely a pre-trial adjudication that certain issues in the case shall be deemed established for the trial of the case,*” the immediately preceding clause states that “*partial summary judgment is not a final judgment.*” *Id.* at 804-05 (quoting 6 Moore’s Fed. Prac. 2311 (2d ed. 1958)(emphasis in originals)). The treatise added that partial summary judgment “is usually a misnomer, and that the more accurate term would be an interlocutory summary adjudication.” *Id.* “Such an adjudication is on a par with the preliminary order formulating issues.” *Id.* The *Grill* Court also explicitly held that pre-trial orders like summary judgment may be “*modified at the trial to prevent manifest injustice.*” 57 Wn.2d at 803 (emphasis in original). *Grill* thus supports the Department’s position that an IAJ’s proposed partial summary judgment decisions are not final and can be modified.

Similarly, in *Cowiche*, the Court held that a party could not rely on trial testimony for purposes of interpreting a statute’s terms, as statutory construction is a question of law. *Cowiche Canyon Conservancy*, 118 Wn.2d at 814. Since the summary judgment decision interpreted the statute, the evidence was inadmissible as irrelevant. *Id.* Here, the

disputed facts are those relevant to the citations, not evidence of the meaning of a statute. *Cowiche* is inapposite.

Milligan does not support Tesoro's position. The *Milligan* Court did hold that, for purposes of appellate review, this Court will consider only evidence and issues called to the attention of the trial court. *Milligan*, 110 Wn. App. at 633. *Milligan* did not hold that the trial court cannot revise its partial summary judgment decision after learning new evidence. *Id.* at 633-34. The Court never went so far because such a holding would conflict with CR 54(b) and the principle articulated in *Grill* that partial summary judgment decisions are not final. Tesoro's reliance on these cases fails.

5. Denying colloquy would require witnesses to testify repeatedly about the events that led to seven deaths and would delay Tesoro from abating the dangerous conditions, now years after the explosion

This case has already taken nearly four and a half years, and the evidentiary hearing has yet to occur. Tesoro (and possibly the Board) wish to further delay proceedings by denying colloquy. Absent colloquy, proceedings may need to occur years from now, when evidence is likely spoiled. Even if the witnesses were available years from now, they would have to relive the events surrounding this catastrophe. Colloquy thus develops a full record and allows the Board to give a final decision

without further delay or hardship to witnesses, and the courts to conduct judicial review with a lessened need for remand.

But not only does colloquy prevent delay in this litigation, the ultimate result of colloquy is that it can ensure that Tesoro abates the hazardous conditions for its employees as soon as possible. Under the law existing when the explosion occurred, Tesoro does not have to abate the hazardous conditions until after the Board's final decision. *Former RCW 49.17.140 (2008)*. With a full record through colloquy, the Board or any reviewing court can decide the merits of all of the Department's citations and quickly require Tesoro to abate the dangerous conditions. Without colloquy, the Board and reviewing courts lack that ability. This potentially keeps workers' lives at risk.⁷

The Department's construction of the regulations and statutes is consistent with WISHA's and the Board's objectives to resolve appeals involving worker safety efficiently, so that the Department can prevent further similar accidents from occurring. WISHA is a remedial act, designed to assure "safe and healthful working conditions for every man and woman working in the state." RCW 49.17.010; *Prezant Assoc., Inc. v. Dep't of Labor & Indus.*, 141 Wn. App. 1, 7-8, 165 P.3d 12 (2007).

⁷It is for this reason it is better to have the additional month of testimony now rather than waiting until later, when witnesses might be unavailable. Hearing the testimony now will avoid further delay in abating the hazardous conditions.

WISHA and its corresponding regulations are liberally construed to carry out this its purpose, and the court has long recognized the “remedial” purpose of WISHA. *E.g. Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 146, 750 P.2d 1257 (1988) RCW 49.17.140(3). Consistent with the underlying policy concerns, the superior court correctly granted the writ and hastened the Department’s ability to abate hazardous working conditions. This Court should affirm the superior court’s writ, allow the Department to present its evidence in colloquy, and more expeditiously authorize abatement of dangerous conditions.

B. The Superior Court Correctly Issued the Writ Because the Illegal Rulings Substantially Altered the Status Quo and Limited the Department’s Freedom to Act

The Board and its IAJs substantially altered the status quo and limited the Department’s freedom to act. *See Holifield*, 170 Wn.2d at 244-45; *cf.* RAP 2.3. Neither the Board nor Tesoro disputed this below. The IAJs’ failure to allow colloquy prevents the Department from presenting all of its evidence and preserving its record at the administrative level. As explained above, the effect is that witnesses can be called to testify repeatedly, assuming they continue to be available. The IAJs’ decisions not only prevented the Department from presenting its case, it alters the status quo by delaying the Department’s overall objective of increasing

worker safety and prolonging the time Tesoro's workers remain at risk to dangerous conditions found in a final ruling.

The Court should reject Tesoro's argument that the Department's status quo was not substantially altered. Despite having the opportunity to raise this argument to the superior court, Tesoro failed to do so. The argument is thus not properly preserved for appellate review and the Court should not review it. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-100, 217 P.3d 756 (2009) (explaining standards for preservation).

If the argument were properly preserved, it lacks merit. After holding that an appellant failed to show probable error, *Howland* discussed in dicta the requirement for discretionary review in RAP 2.3(b) that a party show that the status quo was altered or that a decision limited a party's freedom to act. *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014). The Court stated that discretionary review is not appropriate where a trial court's action merely alters the status of litigation or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous. *Howland*, 180 Wn. App. at 207. The Court did not address whether and how this analysis applies to writs of review.

Even if *Howland* applied to writs of review, the IAJs' interlocutory orders impact more than just the litigation before the Board—they also

affect the safety of Tesoro's workers. As discussed above, the IAJs' interlocutory orders prevent the Department from satisfying its statutory obligations to present its case and as the agency tasked with promoting worker safety. The interlocutory orders denying colloquy prolong the time workers remain at risk to unabated, dangerous conditions. While the Court should not address this unpreserved argument, it nonetheless fails.

C. The Department Had No Right to Appeal the Board's Interlocutory Colloquy Orders, So the Superior Court Correctly Granted the Writ

A writ of review is available if there is no appeal, nor plain, speedy, and adequate remedy at law. RCW 7.16.040. If a party has a statutory right to appeal, then a writ should not issue. *Coballes v. Spokane Cnty.*, 167 Wn. App. 857, 865-67, 274 P.3d 1102 (2012).

The Department, however, has no statutory or other plain, speedy, and adequate remedy to appeal the orders denying use of the colloquy. The Board does not review interlocutory orders, so the Department cannot petition the Board to review the interlocutory colloquy orders at this point. RCW 51.52.106; WAC 263-12-115(6)(a).

The Department cannot fairly raise the colloquy issue after the IAJ takes remaining evidence. The opportunity to present evidence at the hearing and present a complete record to the Board would be gone. The Department would have to wait until the IAJ issues a proposed decision

and order, which would occur after the remaining evidence has been received. *See* WAC 263-12-145(1) (petition for review must be filed within 20 days from the communication of the proposed decision and order). By that time, the opportunity for colloquy would have disappeared. While the Board could very well reverse the IAJ's colloquy order and remand to take the disputed testimony, that would deny the Department and public the ability to have the Board review the colloquy evidence in order to affirm the WISHA rulings. Instead, the case will need to be remanded to the IAJ to accept evidence.

The issue would likely evade review. The Board may conclude it is unnecessary to address whether the IAJ should have allowed colloquy. And in the event that the Board agrees with the interlocutory partial summary judgment orders, it again would make no sense to address the colloquy orders then, as the Board would have issued a final decision on those citations. Since the colloquy orders are unreviewable in either scenario, the Department has no right to appeal from the denial of presenting and preserving its case.

Tesoro mistakenly relies on *Commanda v. Cary*, which actually supports the Department's position. *Commanda v. Cary*, 143 Wn.2d 651, 23 P.3d 1086 (2001). There, DUI defendants filed writs of review challenging the DUI sentencing scheme before being convicted (or

sentenced). *Commanda*, 143 Wn.2d at 653-54. Explaining that the defendants agreed that they could make the same arguments on appeal from a final judgment, the Supreme Court held that the defendants had an adequate remedy at law, so a writ of review was not appropriate. *Commanda*, 143 Wn.2d at 657. Immediately after the Court stated that “[t]he fact that an appeal will not lie directly from an interlocutory order is not a sufficient basis for a writ of review if there is an adequate remedy by appeal from the final judgment,” the Court added that interlocutory orders in district courts are reviewable on appeal from the ultimate judgment. *Id.* at 656 (internal citations omitted). The Court thus held that if a party has the ability to present the issue on appeal, the writ should not issue. *Id.* at 656-57.

The contrast between the facts in *Commanda* and those presented here, combined with the *Commanda* Court’s reasoning, demonstrate why the superior court properly granted the writ. Unlike the defendants in *Commanda*, the Department cannot now appeal the interlocutory colloquy orders to the Board, nor can it challenge those orders meaningfully after the hearing, when the Department has lost its opportunity to present its case in one record, either through the hearing or the parts in colloquy. *See* RCW 51.52.106; WAC 263-12-115(6)(a). Following the Court’s

reasoning in *Commanda*, the Department has no plain, speedy, or adequate remedy with regard to the denial of taking evidence in colloquy.

Contrary to Tesoro's parade of horrors, a writ of review would not be available for a party to challenge any interlocutory ruling by a court or administrative tribunal. *See* App. Br. at 4. As explained above, the Department has no plain, speedy, or adequate right to appeal the colloquy orders because of the limited and divided responsibilities of the IAJ and the Board. This case is limited to the statutes and regulations imposing the duty on the Board to allow colloquy, in a case that is unique itself. RCW 51.52.100, .102; WAC 263-12-115(9). The superior court correctly determined that the Board committed an extraordinary legal error that required an extraordinary remedy, so it correctly granted the writ.

D. Venue Lies in Skagit County Because That Is Where the IAJ Sits as an IAJ

Venue lies in Skagit County because that is the venue for the underlying Board case. RCW 4.12.020 provides that actions against public officers for acts "done by him or her in virtue of his or her office" "shall be tried in the county where the cause, or some part thereof, arose."

The IAJ acted in his official capacity as an IAJ assigned to a Board appeal in Skagit County. Venue for the Board proceedings is the county "where the injury occurred, at a place designated by the board." RCW

51.52.100. Any person aggrieved by a Board order “may obtain a review of such order in the superior court for the county in which the violation is alleged to have occurred.” RCW 49.17.150(1).

Tesoro’s refinery explosion occurred in Anacortes, which is in Skagit County. Venue for the Board and any subsequent “review” of a Board order is in Skagit County. As a result, the only way that the IAJs could act in their official capacity in entering the interlocutory orders is in Skagit County, where the injury or alleged violation occurred. RCW 49.17.150(1); RCW 51.52.100. Venue for the writ lies in Skagit County.⁸

Even if Tesoro’s argument had any merit, both statutes and case law require transfer of venue rather than dismissal is the proper remedy for improper venue. RCW 4.12.030(1); *ZDI Gaming Inc. v. Wash. St. Gambling Comm’n.*, 173 Wn.2d 608, 268 P.3d 929 (2012); *Dougherty v. Dep’t of Labor & Indus.*, 150 Wn.2d 310, 319-20, 76 P.3d 1183 (2003) (“[f]iling an appeal from a decision of the Board in the wrong county does not defeat subject matter jurisdiction and can be cured by a change of

⁸If this argument had any legal merit, there is still a factual problem. It was Tesoro’s burden to support its venue argument by competent evidence. *See Unger v. Cauchon*, 118 Wn. App. 165, 172, 73 P.3d 1005 (2003) (challenging party failed to provide evidence showing the need for change in venue). Neither the Board nor Tesoro presented sworn testimony that the IAJs were in King or Thurston County when they issued their interlocutory orders. Having failed to establish this fact below, Tesoro cannot now claim it.

venue”). Assuming Tesoro’s argument had any weight, dismissal is not appropriate as the case would be transferred to another venue.

E. The Superior Court Properly Granted the Writ Allowing the Department to Present Its Case Because No Factual Dispute or Other Legal Argument Exists

Tesoro obtained accelerated review of this case and now argues that the case should be remanded for the superior court to receive a certified record containing the same, undisputed material facts before issuing the same order granting the writ. App. Br. at 31-32. The Court should reject Tesoro’s hurried request to delay the proceedings.

In the briefing and oral argument before the superior court, the Department argued that modern case law allowed the superior court to grant the writ at that point, but if the court had any concern about needing to receive a certified copy of the record, it could issue the writ, review the record, confirm the undisputed factual assertions, and then grant the relief. RP 12-13. As the superior court concluded, it was unnecessary to go through the formalities of obtaining a certified record and conducting further hearings to rehash the same arguments. RP 23; CP 753-54. The Department provided the lengthy, relevant portions of the Board record under oath. CP 52-604, 627-40. The Board and Tesoro had the opportunity to provide additional parts of the record they believed relevant (and the Board took the opportunity to supplement the record). CP 734-

36. The Board appeared, so it could have offered the certified record at any time. CP 620. Either the Board or Tesoro could have objected on the ground that the record was incomplete—they did not.

Aside from Tesoro's procedural arguments, the only issue remaining is the legal question whether the Department has a right to colloquy. Tesoro has not presented any argument that could not have been made without the certified record. There can be no argument that the Board or Tesoro did not have the opportunity to be heard or present evidence, where all of the parties submitted multiple briefs and had an opportunity to orally argue their position. It makes no sense to expend more time and resources to require the Board to needlessly certify its record and to have a perfunctory hearing to rehash the same arguments.

It is for this reason that courts now treat RCW 7.16.040 as the ultimate arbiter of whether the writ should issue. *See Nichols*, 171 Wn. App. 897; *Mansour v. King Cnty.*, 131 Wn. App. 255, 262, 272-73, 128 P.3d 1241 (2006). In both of these cases, the court appeared to grant a writ without formally undertaking all the mechanical steps required in RCW 7.16. This is because of the inherent overlap between RCW 7.16.040 and RCW 7.16.120, development of Washington's liberal pleading doctrine, and conservation of judicial resources. Consistent with modern jurisprudence, the superior court properly avoided wasting time

and judicial resources by deciding the legal issue at hand and granting the requested relief.

VI. CONCLUSION

The Board, through its IAJs, acted contrary to statutes and its regulations when it denied the Department's requests for colloquy. If not corrected, these decisions will delay the Department's ability to present all of its evidence (assuming the evidence would be available years from now on remand). These decisions also would delay the Department's ability to require that Tesoro abate the dangerous conditions. The superior court correctly recognized this legal error and these concerns, granting the writ of review. The superior court correctly concluded that the Board acted illegally and the Department had no other right to appeal. The Court should reject Tesoro's arguments and affirm.

RESPECTFULLY SUBMITTED this 27th day of October, 2014.

ROBERT W. FERGUSON
Attorney General



PAUL M. CRISALLI
Assistant Attorney General
WSBA No. 40681
Office Id. No. 91018

Appendix A

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STATE OF WASHINGTON
SKAGIT COUNTY SUPERIOR COURT

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Plaintiff,

v.

BOARD OF INDUSTRIAL
INSURANCE APPEALS OF THE
STATE OF WASHINGTON; MARK
JAFFE, in his official capacity; JANET
WHITNEY, in her official capacity;
CHARLES MCCULLOUGH, in his
official capacity,

Defendants.

NO. 14-2-01333-0

ORDER ON WRIT OF REVIEW
~~[PROPOSED]~~

This matter having come before the Court on the Plaintiff's Application for Writ of Review. The Court, having reviewed the motion, declaration, and exhibits, hereby makes the following:

1. Defendants Board of Industrial Insurance Appeals, Industrial Appeals Judge Mark Jaffe, Chief Industrial Appeals Judge Janet Whitney, and Senior Assistant Chief Industrial

1 Appeals Judge Charles McCullough, either individually or collectively constitute an inferior
2 tribunal, board or officer.

3 2. When entering the Order Denying Review of Interlocutory Appeal dated April 10,
4 2014, the Defendants exercised a judicial function.

5 3. Defendants committed probable error in entering its Order Denying Review of
6 Interlocutory Appeal dated April 10, 2014.

7 4. The Order Denying Review of Interlocutory Appeal dated April 10, 2014 substantially
8 altered the Plaintiff's status quo and limited the Plaintiff's freedom to act.

9 5. Plaintiff has no other right to administrative appeal from the Order Denying Review of
10 Interlocutory Appeal dated April 10, 2014. Plaintiff also has no other plain, speedy, or
11 adequate remedy.

12 6. Plaintiff has met the statutory requirements found in RCW 7.16.040.

13 7. The Court has analyzed the questions provided in RCW 7.16.120 and has determined
14 that the defendants violated a rule of law to the prejudice the Department when the defendants
15 concluded that the Department is not entitled to place its evidence into colloquy, as is required
16 by rule, regulation, and statute.

17
18 Based on the foregoing Findings of Fact and Conclusions of Law, the Court **ORDERS:**

19 1. The Court grants the Plaintiff's Application for Writ.

20 2. The Board's Interlocutory Order Denying Department's Request to Place Evidence in
21 Colloquy [sic], dated March 27, 2014, is reversed.

22 3. The Board's Order Denying Review of Interlocutory Appeal, dated April 9, 2014, is
23 reversed.

1 4. The Board is ordered to permit the Department to make offers of proof, per ER
2 103(a)(2) and WAC 263-12-115(9).

3 5. The Board is ordered to allow the Department to present evidence related to all
4 citations on appeal.

5 DATED: 9/11/14

6 
7 _____
8 JUDGE

9 Presented by:

10 ROBERT W. FERGUSON
11 Attorney General

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13 PAUL M. CRISALLI
14 Assistant Attorney General
15 WSBA No. 40681
16 Counsel for the Department
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Appendix B

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STATE OF WASHINGTON
SKAGIT COUNTY SUPERIOR COURT

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DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Plaintiff,

v.

BOARD OF INDUSTRIAL
INSURANCE APPEALS OF THE
STATE OF WASHINGTON; MARK
JAFJE, in his official capacity; JANET
WHITNEY, in her official capacity;
CHARLES MCCULLOUGH, in his
official capacity,

Defendants.

NO. 14-2-01333-0

ORDER DENYING MOTION TO
DISMISS

~~PROPOSED~~

This matter having come before the Court on Tesoro's Motion to Dismiss. The Court,
has reviewed the motion, declaration, and exhibits, and listed to oral argument. The Court
hereby denies the Motion to Dismiss.

DATED: WMS 9/11/14



JUDGE

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Presented by:

ROBERT W. FERGUSON
Attorney General

PAUL M. CRISALLI
Assistant Attorney General
WSBA No. 40681
Counsel for the Department

Appendix C

RCW 7.16.040

Grounds for granting writ.

A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

[1987 c 202 § 130; 1895 c 65 § 4; RRS § 1002.]

Notes:

Intent -- 1987 c 202: See note following RCW 2.04.190.

Appendix D

RCW 7.16.120

Questions involving merits to be determined.

The questions involving the merits to be determined by the court upon the hearing are:

(1) Whether the body or officer had jurisdiction of the subject matter of the determination under review.

(2) Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.

(3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.

(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.

(5) Whether the factual determinations were supported by substantial evidence.

[1989 c 7 § 1; 1957 c 51 § 6; 1895 c 65 § 12; RRS § 1010.]

Appendix E

RCW 49.17.150**Appeal to superior court — Review or enforcement of orders.**

(1) Any person aggrieved by an order of the board of industrial insurance appeals issued under RCW 49.17.140(3) may obtain a review of such order in the superior court for the county in which the violation is alleged to have occurred, by filing in such court within thirty days following the communication of the board's order or denial of any petition or petitions for review, a written notice of appeal praying that the order be modified or set aside. Such appeal shall be perfected by filing with the clerk of the court and by serving a copy thereof by mail, or personally, on the director and on the board. The board shall thereupon transmit a copy of the notice of appeal to all parties who participated in proceedings before the board, and shall file in the court the complete record of the proceedings. Upon such filing the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings and the record of proceedings a decree affirming, modifying, or setting aside in all or in part, the decision of the board of industrial insurance appeals and enforcing the same to the extent that such order is affirmed or modified. The commencement of appellate proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the board of industrial insurance appeals. No objection that has not been urged before the board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board or hearing examiner where the board has denied a petition or petitions for review with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, the court may order such additional evidence to be taken before the board and to be made a part of the record. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact are supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and the judgment and decree shall be final, except as the same shall be subject to review by the supreme court. Appeals filed under this subsection shall be heard expeditiously.

(2) The director may also obtain review or enforcement of any final order of the board by filing a petition for such relief in the superior court for the county in which the alleged violation occurred. The provisions of subsection (1) of this section shall govern such proceeding to the extent applicable. If a notice of appeal, as provided in subsection (1) of this section, is not filed within thirty days after service of the board's order, the board's findings of fact, decision, and order or the examiner's findings of fact, decision, and order when a petition or petitions for review have been denied shall be conclusive in connection with any petition for enforcement which is filed by the director after the expiration of such thirty day period. In any such case, as well as in the case of an unappealed citation or a notification of the assessment of a penalty by the director, which has become a final order under subsection (1) or (2) of RCW 49.17.140 upon application of the director, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the citation and notice of assessment of penalty and shall transmit a copy of such decree to the director and the employer named in the director's petition. In any contempt proceeding brought to enforce a decree of the superior court entered pursuant to this subsection or subsection (1) of this section the superior court may assess the penalties provided in RCW 49.17.180, in addition to invoking any other available remedies.

[1982 c 109 § 1; 1973 c 80 § 15.]

Appendix F

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.]

Appendix G

RCW 51.52.102**Hearing the appeal — Dismissal — Evidence — Continuances.**

At the time and place fixed for hearing each party shall present all his or her evidence with respect to the issues raised in the notice of appeal, and if any party fails so to do, the board may determine the issues upon such evidence as may be presented to it at said hearing, or if an appealing party who has the burden of going forward with the evidence fails to present any evidence, the board may dismiss the appeal: PROVIDED, That for good cause shown in the record to prevent hardship, the board may grant continuances upon application of any party, but such continuances, when granted, shall be to a time and place certain within the county where the initial hearing was held unless it shall appear that a continuance elsewhere is required in justice to interested parties: AND PROVIDED FURTHER, That the board may continue hearings on its own motion to secure in an impartial manner such evidence, in addition to that presented by the parties, as the board, in its opinion, deems necessary to decide the appeal fairly and equitably, but such additional evidence shall be received subject to any objection as to its admissibility, and, if admitted in evidence all parties shall be given full opportunity for cross-examination and to present rebuttal evidence.

[2010 c 8 § 14013; 1963 c 148 § 5; 1961 c 23 § 51.52.102. Prior: 1951 c 225 § 12.]

Appendix H

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.]