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

MICHAEL W. ALDRIDGE,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

DEPARTMENT'S BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

This is a workers' compensation case in which the injured worker, Mr. Aldridge, argues that the amount of money he contributes as his share of his employer-provided health coverage scheme is relevant to computation of his "wage" under RCW 51.08.178. Wage computation is a critical component in determining time-loss compensation for injured workers such as Mr. Aldridge.

In the proceedings below, the Department of Labor and Industries (Department), the Board of Industrial Insurance Appeals (Board), and the Superior Court each concluded in turn that only the value of the *employer's* contributions to health coverage, not the value of the health coverage contributions by the *worker*, are part of wage calculation under RCW 51.08.178. There is no merit to Mr. Aldridge's arguments to the contrary, and this Court should affirm the Superior Court decision below.

Mr. Aldridge also argues that the Board and the Superior Court made a variety of procedural and jurisdictional errors when they adjudicated two other appeals that he has filed. These arguments are similarly meritless.

II. COUNTERSTATEMENT OF THE ISSUES

- A. **Where there has been a "change of circumstances," RCW 51.28.040 provides prospective relief from the res judicata effect of an otherwise final and binding administrative**

or court order in a workers' compensation claim. Since the date of Mr. Aldridge's injury, his employer has continued to contribute at the same or a greater rate for Mr. Aldridge's health care coverage. Does the fact that Mr. Aldridge's contribution to his continued health care coverage has increased since his injury constitute a "change of circumstances" within the meaning of RCW 51.28.040 such that Mr. Aldridge's wage calculation under RCW 51.08.178 and his time loss compensation rate under RCW 51.32.090 should be increased?

- B. Was it error under RCW 51.52.070 for the Department to provide the Board with Mr. Aldridge's entire claim file, and, if so, was any such error prejudicial to Mr. Aldridge?
- C. Did the Superior Court err in concluding that the Board properly denied Mr. Aldridge's appeal from the Department's letter of November 9, 2006, when the November 9, 2006 letter indicated that the Department might suspend Mr. Aldridge's benefits in the future, but the letter did not make any decision regarding whether or not he was actually entitled to any benefits?
- D. Did the Superior Court err in concluding that it did not have jurisdiction to hear Mr. Aldridge's attempt at appealing the Board's failure to promptly grant his appeal from a Department letter of January 9, 2007 regarding vocational services, when the Board had not issued an appealable decision with regard to Mr. Aldridge's challenge to that order at the time that Mr. Aldridge filed his Superior Court appeal?

II. COUNTERSTATEMENT OF THE CASE

- A. Factual And Procedural History
 - 1. History Related To Appeal From May 3, 2006 Order That Denied Mr. Aldridge's Request For Change Of Circumstances Relief

Mr. Aldridge sustained an industrial injury on October 14, 2000, while he was employed by the Washington State Patrol. *See* CABR (06 16687 & 06 17481) Aldridge, at 10.¹ The Department of Labor and Industries (Department) allowed his claim. Richard Maki, the administrator of Budget and Fiscal Services for the Washington State Patrol, was called to testify regarding the benefits that Mr. Aldridge received both before and after the industrial injury. For the first six months following his industrial injury, the Washington State Patrol continued paying Mr. Aldridge his usual wages, even though he was not actually working. CABR (06 16687 & 06 17481) Maki, at 27-31. After that period of time, the Washington State Patrol ceased paying him his usual wages, and the Department began providing him with time-loss compensation. *See id.*

At the time of his industrial injury, Mr. Aldridge's employer provided him with health care benefits of \$436.16 a month, in addition to a monthly salary of \$4,572. *See* CABR (06 16687 & 06 17481), Exhibit (Ex.) 2. *See also* CABR (06 16687 & 06 17481) Aldridge, at 21. No witness testified that Mr. Aldridge's employer had stopped contributing this amount for his health care benefits at any time. Indeed,

¹ "CABR" refers to the Certified Appeal Board Record. Transcripts in the CABR will be cited by name of witness and page number. All other documents in the CABR will be cited by the Board-stamped number on the document.

the testimony of Mr. Maki strongly suggests that the Washington State Patrol continued paying *at least* \$436.16 a month for his health care benefits after he began receiving time-loss compensation. *See* CABR (06 16687 & 06 17481) Maki, at 27-31.

On February 15, 2002, the Department issued an order stating that Mr. Aldridge's "monthly wages" at the time of his industrial injury under RCW 51.08.178 were equal to a base salary of \$4,572 plus the value of his employer's contribution \$436.16 a month toward health care benefits. *See* CABR (06 16687 & 06 17481), Ex. 2. The Department's February 15, 2002 order further provided that if Mr. Aldridge's employer continued to pay its portion of his health care benefits his time-loss compensation rate would be \$3,173.24 per month, and that his time-loss compensation rate would become \$3,475.96 if his employer ceased providing him with health care benefits. *See id.*

Mr. Aldridge did not file an appeal from the February 15, 2002 order at any time, and he has not argued, at any time, that *any* of the information contained in that order was incorrect. Indeed, he specifically testified that he believed that the order was an accurate measure of the wages that he received at the time of his injury. *See* CABR (06 16687 & 06 17481) Aldridge, at 21.

However, both at the time of his injury, and since then, Mr. Aldridge had to pay a portion of the cost associated with his health care benefits. *See* CABR (06 16687 & 06 17481) Maki, at 27-31. Mr. Aldridge testified that he does not recall what amount he was required to contribute at the time of his injury, but he acknowledged that he had to contribute some amount at that time. *See* CABR (06 16687 & 06 17481) Aldridge, at 11. Mr. Aldridge introduced evidence that the amount that he has had to contribute to retain his health care benefits has increased over time. As of January 2004, the amount he contributed per month was \$80. *See* CABR, Ex. 3. As of December 2004, the amount he contributed per month was \$108. *See id.* Finally, as of December 2005, the amount he contributed per month was \$131. *See id.*

Mr. Aldridge wrote letters to the Department on December 16, 2005, January 6, 2006, and on February 15, 2006 requesting that it increase his time-loss compensation rate in order to reflect the increased amount that he was required to pay to retain his health care benefits. On February 27, 2006, the Department issued an order that found that Mr. Aldridge had not experienced a change of circumstances within the meaning of RCW 51.28.040. *See* CABR (06 16687 & 06 17481) 32. Therefore, the Department denied his request to increase his time-loss compensation rate. *See id.* Mr. Aldridge filed a timely protest from this

order, and the Department affirmed its decision on May 3, 2006. *See id.* at 33. Mr. Aldridge filed a timely appeal from the May 3, 2006 order with the Board of Industrial Insurance Appeals (Board).

Evidence was presented that is consistent with the above summary. Based on all of the evidence submitted, the Industrial Appeals Judge issued a Proposed Decision and Order that affirmed the Department's decision to deny Mr. Aldridge's request for change of circumstances relief.² *See* CABR 23-31. Mr. Aldridge filed a timely Petition For Review, and the three-member Board denied his petition, thereby adopting the Proposed Decision and Order as its own decision and order. *See* CABR 1.

2. History Relating To Mr. Aldridge's Appeal From The Department's November 9, 2006 Letter

On November 9, 2006, the Department sent a letter to Mr. Aldridge indicating that it was the Department's understanding that Mr. Aldridge had refused to provide a copy of his grade transcripts from Kaplan University to the vocational counselor that was assigned to provide him with vocational services. CABR (06 21784) 10. The Department's

² Mr. Aldridge's appeal from the order denying his request for change of circumstances relief was consolidated with an appeal he filed from a Department letter that stated that he had not filed a timely dispute from a vocational determination. The Proposed Decision and Order determined that Mr. Aldridge *did* file a timely dispute from the vocational determination, and remanded it to the Department. No party has challenged the Board's decision with regard to the timeliness of the vocational dispute, and there is no issue before this Court regarding that part of the Board's decision.

letter stated that RCW 51.32.110 required Mr. Aldridge to cooperate with its efforts at providing him with vocational retraining, and that if he failed to cooperate, that the Department might suspend his time-loss compensation and other benefits, including vocational services. *See id.*

The letter also directed Mr. Aldridge to either send a copy of the grade transcripts to the vocational counselor by December 11, 2006, or send a letter to the Department by that date explaining why he had refused to provide the transcripts to the vocational counselor. *See id.* The letter indicated that if Mr. Aldridge showed that there was good cause for refusing to provide this information, the Department would consider continuing to provide him with time-loss compensation and other benefits despite his refusal to cooperate. *See id.*

On December 8, 2006, Mr. Aldridge filed an appeal with the Board from the Department's November 9, 2006 letter. *See id.* at 12-25. On January 3, 2007, the Board issued an order that denied Mr. Aldridge's appeal. CABR (06 21784) 9. The Board's order explained that the November 9, 2006 letter neither denied any benefits to Mr. Aldridge nor suspended his right to benefits. *See id.* Rather, the order warned that the Department *might* issue a further order, in the future, suspending benefits. Mr. Aldridge filed a Motion to Vacate the Order Denying Appeal.

See CABR (06 21784) at 5-8. The Board denied his motion. CABR (06 21784) at 1-2.

3. History Relating To Appeal From January 9, 2007 Letter

On January 9, 2007, the Department issued a letter stating that it was the Department's understanding that Mr. Aldridge had completed his vocational retraining plan, and that, when vocational services have ended, a worker is no longer eligible for time-loss compensation. *See* CP 21.

On March 8, 2007, Mr. Aldridge filed an appeal with the Board from the Department's January 9, 2007 letter. On May 9, 2007, while his Board appeal from the March 8, 2007 order was pending, Mr. Aldridge filed a Superior Court Appeal that identified two specific Board orders that he was appealing, and that also indicated that he was challenging the Board's "Violation of RCW 51.52.090 through its refusal to acknowledge/accept appeal filed March 8, 2007 pursuant to RCW 51.52.050 and .060." *See* CP 109. As of May 9, 2007, the Board had not issued any order regarding Mr. Aldridge's challenge to the January 9, 2007 letter, and it had neither accepted nor denied that appeal.

On June 21, 2007, the Board *granted* Mr. Aldridge's appeal from the January 9, 2007 letter on June 21, 2007. *See* CP 101. At that time, Mr. Aldridge was represented by an attorney, Christopher Cicierski.

See CP 75-79. Mr. Aldridge (by and through his attorney) and the Department agreed to resolve three of Mr. Aldridge's appeals, including his appeal from the January 9, 2007 letter, through an Order on Agreement of Parties, which was issued by the Board on February 5, 2008. *See* CP 75-79. The Order on Agreement of Parties reversed and remanded the January 9, 2007 letter to the Department for further consideration. *See id.* No party, including Mr. Aldridge, has filed a Motion to Vacate the Board's Order on Agreement of Parties at any time.

However, in the course of litigating his Superior Court appeal, Mr. Aldridge argued that his May 9, 2007 Notice of Appeal challenged the Board's handling of his appeal from the January 9, 2007 letter, and that, therefore, the Board lost jurisdiction to consider that appeal. *See* CP 9-13. Furthermore, Mr. Aldridge argued that the Board lacked the power to grant his appeal (which it did on June 21, 2007) or enter an Order on Agreement of Parties (which it did on February 8, 2008). Mr. Aldridge requested that the Superior Court hold the Order on Agreement of Parties void (at least, with regard to the January 9, 2007 letter) and that it direct the Board to grant his original appeal, and conduct further proceedings on the merits of that case. *See* CP 9-13.

4. History Relating To Mr. Aldridge's Superior Court Appeals

As noted above, Mr. Aldridge filed an appeal with the Thurston County Superior Court on May 9, 2007. *See* CP 109. The Notice of Appeal challenged 1) the Board's decision to affirm the May 3, 2006 Department order that denied Mr. Aldridge's request for change of circumstances relief; 2) the Board's decision to deny Mr. Aldridge's appeal from the November 9, 2006 letter based on its determination that that letter did not make any final decision regarding Mr. Aldridge's eligibility for benefits under the Industrial Insurance Act (Act); and 3) the Board's would-be "violation" of RCW 51.52.090 through its refusal to "acknowledge/accept" of his March 8, 2007 appeal. *See id.* The Notice of Appeal did not mention the Department's January 9, 2007 letter itself, nor did it identify any particular order that the Board had issued with regard to the March 8, 2007 appeal. *See id.* Moreover, at the time that this Superior Court appeal was filed, the Board had not actually entered any decision or issued any order regarding the March 8, 2007 appeal. *See id.*

The case was tried through a bench trial. The Superior Court rejected each of Mr. Aldridge's arguments. However, it did so through orders that did not contain any Findings of Fact or Conclusions of Law. Mr. Aldridge filed an appeal with this Court. This Court noted that

Mr. Aldridge's appeal was premature, as the Superior Court had not issued a judgment with findings of fact and conclusions of law, and the case was remanded for the entry of such a judgment.

On remand, the Superior Court entered three sets of Findings of Fact and Conclusions of Law (one regarding each of Mr. Aldridge's three Superior Court appeals), and, based on those findings and conclusions, it entered judgment in favor of the Department. *See* CP 110-122. Specifically, the Court decided 1) that the Department had properly denied Mr. Aldridge's request for change of circumstances relief; 2) that the Board had properly denied Mr. Aldridge's appeal from the November 9, 2006 letter, because that letter did not actually make any final decision regarding Mr. Aldridge's right to receive benefits under the Act; and 3) that the Court did not have jurisdiction to hear Mr. Aldridge's appeal from the Board's putative "violation" of RCW 51.52.090 regarding the January 9, 2007 Department letter. *See id.*

III. STANDARD OF REVIEW

This is an appeal under RCW 51.52.140 ("the practice in civil cases shall apply to appeals prescribed in this chapter").

Mr. Aldridge's appeal raises questions of law that this Court reviews de novo. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). Applying the de novo standard, this Court

should accord “substantial weight . . . to the agency’s legal interpretation if it falls within the agency’s expertise in a special area of law.” *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987 (1994). Constructions of RCW Title 51 by both the Department and the Board are entitled to deference. *See, e.g., Ackley-Bell v. Seattle School Dist. No. 1*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997); *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 137, 814 P.2d 629 (1991). This Court, therefore, should accord deference to both agencies’ administrative constructions of the Act.

IV. SUMMARY OF ARGUMENT

Mr. Aldridge has raised four arguments in this appeal, none of which have any merit.

First, he argues that he has had to pay an increased amount of money in order to retain his health care benefits subsequent to the date of his industrial injury, and that this is a “change of circumstances” as defined by RCW 51.28.040 which justifies making an adjustment to his time-loss compensation payments. However, *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 814-15, 16 P.3d 583 (2001) held that the amount that the employer contributed for its employee’s health care benefits is included in the calculation of the injured worker’s wages. Neither *Cockle*, nor any other case, has held that the amount that an injured worker pays for health care benefits is included in the calculation

of the worker's wages. Since the amount of money that Mr. Aldridge has to pay for health care benefits is irrelevant to the calculation of his wages at the time of his injury, a change in the amount that he must pay to receive those benefits is similarly irrelevant.

Furthermore, *Cockle* recognized that the amount that the employer contributes for health care benefits is *not* included in the calculation of the claimant's wages for the purpose of calculating the time-loss compensation payments if the employer continues contributing to the claimant's health care benefits while the claimant is receiving time-loss compensation. *See id.* In this case, Mr. Aldridge's employer continued contributing to his health care benefits at all times relevant to this appeal. Therefore, he has not experienced a change of circumstances within the meaning of RCW 51.28.040 and is not entitled to an adjustment in his time-loss compensation payment amounts. *See id.*

Second, Mr. Aldridge argues that the Board's decision with regard to whether or not he experienced a change of circumstances was wrong as a matter of law because the Board had improperly been given access to his "entire" claim file at the time his appeal was filed. He apparently contends that the Superior Court should have reversed the Board's decision on this basis, regardless of whether or not the decision itself was correct.

This argument fails, because RCW 51.52.070 requires the Department to send its “original” claim file to the Board, and the Department must send its entire claim file to the Board in order for it to be able to send an “original” copy of its file. Furthermore, even if it is assumed that the Department should not have transmitted the entire claim file to the Board, this was harmless error, as the Board’s access to the information in the Department’s claim file did not have any impact on the Board’s decision.

Third, Mr. Aldridge argues that the Superior Court should have reversed the Board’s decision to deny his appeal from a November 2006 letter that warned him that his benefits might be suspended if he failed to cooperate with the Department’s efforts at rehabilitation. The Board denied his appeal from that letter because it concluded that the letter did not make a final decision regarding his right to receive benefits under the Act. Mr. Aldridge argues that the letter found him to be noncooperative and suspended his benefits, and that it did not simply warn him about a possible, future, suspension of benefits. However, a careful review of the November 2006 letter reveals that the letter did simply warn Mr. Aldridge that his benefits might be suspended if he failed to cooperate and that he did not have good cause, and it did not, in fact, suspend his right to receive

benefits, nor did it deny him any benefits. Therefore, the Superior Court properly affirmed the Board's decision to deny that appeal.

Fourth, Mr. Aldridge argues that the Superior Court should have concluded that the Board's failure to promptly *grant* his appeal from a January 7, 2007 Department letter indicated that the Board had implicitly denied that appeal, and that he had the right to appeal the Board's implicit denial of his appeal to Superior Court. However, the plain language of RCW 51.52.090 reveals that if the Board does not deny an appeal within 30 days that the appeal is implicitly *granted*. Therefore, at the time that Mr. Aldridge filed his Superior Court appeal, the Board had implicitly granted his appeal from the January 7, 2007 letter, and it had not made any decision regarding that matter that could properly be appealed to the Superior Court.

V. ARGUMENT

A. **The Superior Court Properly Concluded That The Increase In The Amount That Was Contributed By Mr. Aldridge To Continue Receiving Health Care Benefits Was Not A Change Of Circumstances Within The Meaning Of RCW 51.28.040 That Would Justify Adjusting The Amounts Of His Time-Loss Compensation Payments**

1. **Overview Of Wage Calculation And Time-Loss Compensation Statutes**

Time-loss compensation is a wage replacement benefit for injured workers who are temporarily unable to work due to an industrial injury or

an occupational disease. RCW 51.32.090(1). The time-loss compensation rate is a percentage of the worker's wage, with the percentage being determined by the worker's marital status and number of dependents. RCW 51.32.090(1); RCW 51.32.060(1).

An injured worker's monthly wage at the time of an industrial injury is calculated under RCW 51.08.178. Under that statute, the calculation of the injured worker's wages takes into account the cash wage provided by the worker's employer, plus the value of employer-provided board, housing, fuel, and consideration of like nature. *Id.*

In *Cockle*, 142 Wn.2d at 814-15, 16 P.3d 583 (2001), the Supreme Court held that employer-provided health care coverage is consideration "of like nature" to board, housing and fuel. *Cockle* also held that the value of such employer-provided health care coverage is not its fair market value, but, instead, the dollar amount of the *employer's* monthly contribution. *Id.* at 820-21.

2. RCW 51.28.040 Does Not Apply Because Mr. Aldridge's Employer Has Not Discontinued Any Benefit

The Department issued an order in February 2002 that calculated Mr. Aldridge's wages at the time of his industrial injury under RCW 51.08.178. *See* CABR (06 16687 & 06 17481), Ex. 2. The order stated that the Washington State Patrol was contributing \$436.16 per

month to the total cost of his health care benefits. *See id.* The order further stated that if the Department paid him any time-loss compensation in the future that it would use one of two possible time-loss compensation rates: it would pay him time-loss compensation of \$3,173.24 per month if his employer continued its contribution to health care benefits, while the Department would pay him time-loss compensation at a rate of \$3,475.96 per month if his employer *stopped* its contribution to health care benefits. *See id.*

The wage order's statement that Mr. Aldridge would receive time-loss compensation at one of two rates, depending on whether or not his employer continued to contribute to health care benefits after that wage order was issued, is consistent with *Cockle*, 142 Wn.2d at 814-15. *Cockle* recognized that the amount that an employer contributed for an injured worker's health care benefits is included in calculation of wages under RCW 51.08.178 *unless* the employer continued its contribution to health care benefits after the injured worker was put on time-loss compensation. *See id.* The *Cockle* Court reasoned that time-loss compensation should only reflect the injured worker's *lost* earning power, and that a worker who continues receiving the employer's contribution to health care

benefits after he has been put on time-loss compensation has not “lost” that compensation. *See id.*³

No protest or appeal was filed from the Department’s February 2002 wage order at any time. Therefore, the order became final and binding, and it is entitled to the same *res judicata* effect as would be given to a final and unappealed Superior Court judgment. *See Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 548, 886 P.2d 189 (1994); *see also VanHess v. Dep’t of Labor & Indus.*, 132 Wn. App. 304, 306, 130 P.3d 902 (2006).

Because the Department’s February 2002 wage order is final and binding, Mr. Aldridge can only receive an adjustment to the calculation of his wages if he can show that he experienced a change of circumstances within the meaning of RCW 51.28.040.⁴ *See Hyatt v. Dep’t of Labor & Indus.*, 132 Wn. App. 387, 396-97, 132 P.3d 148 (2006); *VanHess*, 132 Wn. App. at 314-15; *Lynn v. Dep’t of Labor & Indus.*, 130 Wn. App. 829,

³ *Cockle*’s discussion of whether a claimant may have the value of his or her health care benefits included in the calculation of his or her wages while the employer continues its contribution for those benefits was arguably *dicta*, since the Court noted that it need not decide that issue in that case. *See Cockle*, 142 Wn.2d at 814-15. However, in *Gallo v. Department of Labor & Industries*, 155 Wn.2d 470, 494-95, 120 P.3d 564 (2005), the Supreme Court specifically *held* that workers who continue receiving health care benefits after they have been put on time-loss compensation shall *not* have the value of their employer-provided health care benefits included in the calculation of their monthly wages until their employers cease providing those benefits.

⁴ RCW 51.28.040 provides: “If change of circumstances warrants an increase or rearrangement of compensation, like application shall be made therefore. Where the application has been granted, compensation and other benefits if in order shall be allowed for periods of time up to 60 days prior to the receipt of such application.”

834-35, 125 P.2d 202 (2005). In order to show a change of circumstances within the meaning of that statute, Mr. Aldridge would have to show that there has been a change in his individual, factual circumstances *after* the Department issued the February 2002 order and that the change in his circumstances is relevant to the proper calculation of his wages under RCW 51.08.178. *See Hyatt*, 132 Wn. App. at 396-97; *VanHess*, 132 Wn. App. at 314-15; *Lynn*, 130 Wn. App. at 834-35.

If Mr. Aldridge had shown that his employer was providing him with health care benefits as of the date the Department issued its wage order, and that his employer stopped providing, or had reduced its contribution for, those benefits at a later date, then he would have shown a change of circumstances within the meaning of the Act, and he would have been entitled to relief under that statute. *See Hyatt*, 132 Wn. App. at 396-97; *VanHess*, 132 Wn. App. at 314-15; *Lynn*, 130 Wn. App. at 834-35. However, the evidence in this case shows that Mr. Aldridge's employer contributed \$436.16 per month to provide him with health care benefits, and *that it has continued providing at least this amount per month at all times relevant to this appeal.*

Since Mr. Aldridge's employer neither discontinued nor decreased the amount that *it* contributed for his health care benefits, he is not entitled to have *any* portion of that benefit included in the calculation of his wages

at *any* time relevant to this appeal. *See Gallo*, 155 Wn.2d at 494-95; *Cockle*, 142 Wn.2d at 814-15. Therefore, he has not experienced any change in his individual circumstances that would justify making an adjustment to his time-loss compensation payment amounts. *See, e.g., VanHess*, 132 Wn. App. at 314-15.

Mr. Aldridge makes the unsupported argument that the legislature's intent in passing RCW 51.28.040 was to make it possible for an injured worker to receive an increase in his or her time-loss compensation payment amounts in order for the worker to be able to pay for subsequent increases in the worker's health care costs. AB at 18-19. There is no support in the statute, the legislature history, or the case law for Mr. Aldridge's assertion.

3. The Amount Paid By An Employee For Health Care Benefits Is Not A "Wage" Under RCW 51.08.178

Mr. Aldridge argues that he has experienced a change of circumstances within the meaning of RCW 51.28.040 because there was an increase in the amount that *he* had to pay to continue receiving his health care benefits. AB at 17-25. This argument fails because the amount that a worker contributes for his or her health care benefits is irrelevant to the calculation of the injured worker's wages for the purpose of calculating his or her time-loss compensation payment amounts. *See*

Cockle, 142 Wn.2d at 820-21. In order to receive an adjustment to his or her wages under the change of circumstances statute, an injured worker must show that there has been a change in his or her circumstances that is relevant to the proper calculation of his or her wages at the time of the injury. See RCW 51.28.040. Since the amount that is paid by Mr. Aldridge for his health care benefits is irrelevant to the proper calculation of his wages, a change in the amount contributed by Mr. Aldridge is similarly irrelevant to the correct calculation of his wages.

As noted above, *Cockle* held that the amount contributed by an employer to help pay for an injured worker's health care benefits on the date of the injury should be included in the calculation of the injured worker's wages under RCW 51.08.178. See *Cockle*, 142 Wn.2d at 820-21. Since it is only the amount that is paid by the employer for an employee's health care benefits that is included in the calculation of the injured worker's wages, it follows that the amount that the worker has to pay in order to continue receiving those benefits is not included in the calculation of the injured worker's wages. See *id.*

Mr. Aldridge argues that the Supreme Court's holding in *Cockle* requires the Department to include the amount that he pays for health care benefits in the calculation of his wages. See AB at 22, citing *Cockle*, 142 Wn.2d at 820-21. In support of this argument, Mr. Aldridge claims that

the *Cockle* decision contains a quotation that it does not actually have.

See id. Mr. Aldridge's brief asserts that the *Cockle* opinion states:

The "reasonable value" of a benefit that may be included in an injured worker's wage basis under RCW 51.08.178(1) for calculating time-loss benefits may be measured by the monthly premium actually paid by the worker to secure it or, in the case of a group plan, the worker's portion thereof.

See AB at 22. However, the *Cockle* opinion does not contain the above quote. *See Cockle*, 142 Wn.2d at 820-21.

Rather, what the *Cockle* opinion actually states on this issue is:

That said, we reject as unnecessary the Court of Appeals' requirement that the "reasonable value" of a benefit like health care coverage be measured by its hypothetical market value rather than simply by the monthly premium actually paid *by an employer* to secure it – or, in the case of a group plan, the workers' portion thereof.

Id. (Emphasis added). Thus, the *Cockle* opinion holds that it is the amount that *the employer* pays, rather than the amount that the worker contributes, which is included in the calculation of an injured worker's wages at the time of his or her industrial injury. *See id.*

Although the *Cockle* opinion refers to the "worker's portion thereof" when there is a payment for health care coverage to a "group plan", the only reasonable interpretation of this statement is that, when a claimant is a member of a group plan, the "portion" paid *by the employer* to the administrator of the group plan *for* that worker is the value that

should be assigned to the claimant's receipt of health care benefits for the purpose of calculating that injured worker's wages. *See id.* It would be illogical for the Supreme Court to use the amount paid *by the employer* to measure the value of employer-provided health care benefits when a claimant is *not* a member of a group plan, but use the amount paid *by the worker* when a claimant *is* a member of a group plan.⁵

Furthermore, the Supreme Court's holding in *Department of Labor & Industries v. Granger*, 159 Wn.2d 752, 755, 153 P.3d 839 (2007) lends additional support for the conclusion that it is only the *employer's* contributions for its workers' health care benefits that are included in the calculation of the workers' wages. In *Granger*, the injured worker was injured at a point in time when his employer was making payments to a health insurance carrier on his behalf, but the worker was not actually eligible for health care *coverage* at the time of his injury, because he was not working sufficient hours for health care coverage at that time. *See id.* However, the claimant's employer contributed \$2.15 for each hour that the claimant worked for medical benefits into a trust fund that was used to provide all of its employees with health care benefits. *See id.* *Granger* held that the amount that the employer paid on behalf of the claimant for

⁵ Thus, what the *Cockle* majority opinion was saying was that the value of health coverage that is provided in whole or in part by the employer is measured by the monthly premium paid by an employer to secure: (1) individual coverage for a particular worker, or (2) in the case of a group plan, the given injured worker's portion of coverage.

health care benefits must be included in the calculation of the injured worker's wages at the time of his injury, even though the worker did not actually derive any benefit from those payments at the time of his injury. *See id.*

Granger explained that the key issue was whether the employer was making payments for health care benefits at the time of the claimant's injury, rather than on whether the claimant actually had health care coverage at that time, and that, since such payments were being made on the claimant's behalf at the time of the industrial injury, those payments must be included in the calculation of the injured worker's wages. Thus, the *Granger* decision further supports the conclusion that it is only the amount that is paid by an employer for a claimant's health care benefits that may be included in the calculation of the claimant's wages at the time of an industrial injury. *See id.*

Moreover, fundamental logic and common sense dictates that an amount paid by an employer for health care benefits can constitute a component of an injured worker's "wages", but that a cost that is paid by an injured worker, whether for health care benefits or for anything else, is not a "wage" in any sense of the word, and that it cannot be part of a worker's wages as defined by RCW 51.08.178.

Mr. Aldridge's brief also asserts that the *Malang v. Department of Labor & Industries*, 139 Wn. App. 677, 685-86, 162 P.3d 450 (2007) and *Doty v. Town of South Prairie*, 155 Wn.2d 527, 541-42, 120 P.3d 941 (2005) cases stand for the proposition that a worker's wages at the time of his or her industrial injury include all "remuneration" or "consideration" that a worker receives "from the employer". See AB at 23-24. He also contends that this somehow supports his argument that the amounts that he has had to pay for his health care benefits must be included in the calculation of his wages under RCW 51.08.178. See AB at 23-24. This argument is meritless for at least two reasons.

First, the *Malang* opinion specifically acknowledged that, under *Cockle and Gallo*, "wages do *not* consist of 'any and all' forms of consideration paid by the employer, but rather 'readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival.'" [Emphasis added]. See *Malang*, 139 Wn. App. at 686 n.5, citing *Gallo*, 155 Wn.2d at 482 and *Cockle*, 142 Wn.2d at 822.⁶ Therefore, to the extent that Mr. Aldridge is arguing that the *Malang* case held that *all* forms of consideration provided by an employer to an

⁶ Mr. Aldridge's quote from *Malang* at AB 23 misleadingly omits that quote's footnote 5, which explains that *Cockle* limited this Court's decision in *Rose v. Department of Labor & Industries*, 57 Wn. 751, 758, 790 P.2d 201 (1990).

employee at the time of his or her injury must be included in the calculation of his or her wages, he is incorrect, since the *Malang* opinion acknowledged that that is not true. *See id.*

Second, and more importantly, the amount of money that Mr. Aldridge must contribute in order to receive health care benefits is not “remuneration” or “consideration” that he received “from” his employer. Rather, it is an expense that he has had to *pay* in return for health care coverage. Therefore, even if *all* forms of “remuneration” provided *from* an employer to a claimant must be included in the calculation of the injured worker’s wages, this still would not support Mr. Aldridge’s assertion that his health care *costs* can somehow be included in the calculation of his wages at the time of his injury.

Mr. Aldridge also argues that the Board’s significant decision *In re Charles Stewart*, BIIA Dec. 96 3019 (1996) supports his claim that the increase in the amount that he had to pay for his health care coverage was a change of circumstances under RCW 51.28.040. *See* AB at 20. Mr. Aldridge relies on the *Stewart* decision’s statement that “[o]nce such a disabled worker has reported a change in the voluntary payment of wages or other compensation by the employer, then under RCW 51.28.040 the Department must adjust the worker’s rate of time-loss compensation up to sixty days prior to its receipt of the claimant’s request.” *See id.*

Stewart does not support Mr. Aldridge's argument, because Mr. Aldridge, unlike the claimant in *Stewart*, has *not* demonstrated that there has been a change in the voluntary payment of wages or other forms of compensation *by his employer* that took place after the Department issued its wage order. *See id.* Rather, Mr. Aldridge's employer has continued to provide him with health care benefits at all times relevant to this appeal, and there is no evidence that Mr. Aldridge's employer has ever decreased the amount that *it* has contributed for those benefits. Under *Stewart*, an injured worker's increased costs only constitute a change of circumstances if the increased costs were a result of the employer deciding to *stop* providing a benefit to the worker, something that has not happened in Mr. Aldridge's case. *See id.*

Finally, Mr. Aldridge argues that the doctrine of "liberal construction" requires this Court to conclude that the change in his health care costs somehow constitutes a change in his wages, and that this, in turn, shows that the Department must adjust his time-loss compensation payment amounts in order to compensate him for the change in his health care costs. AB at 24-25. While it is true that the Industrial Insurance Act is subject to liberal construction, this does not give a Court license to ignore the plain language of a statute, nor does it allow a Court to disregard the applicable case law. *Senate Republican Campaign Comm. v.*

Public Disclosure Com'n of State of Wash., 133 Wn.2d 229, 943 P.2d 1358 (1997) (holding that the doctrine of liberal construction does not justify adopting a strained or unrealistic interpretation of the language of the statute).

Under the plain language of the Act and all of the relevant case law, it is only an employer's *contribution* to health care benefits, and not the employee's health care *costs*, that may be included in a calculation of the injured worker's wages at the time of his or her injury. *See, e.g., Cockle*, 142 Wn.2d at 820-21; *see also* RCW 51.08.178; RCW 51.32.090. A change in an injured worker's *costs* that is irrelevant to the proper calculation of the injured worker's wages does not constitute a change of circumstances within the meaning of RCW 51.28.040, and it does not justify making an adjustment of either the calculation of the worker's wages or the calculation of the worker's time-loss compensation payments.

At bottom, Mr. Aldridge's request is for protection against the effect of inflation on one of his living expenses. The only protection that the legislature has provided against inflation is RCW 51.32.075, a statute

that provides for an annual adjustment to wage replacement benefits.⁷ However, neither RCW 51.32.075 nor any other statute directs the Department to increase an injured worker's time-loss compensation payments based on an increase in the injured worker's health care costs. Mr. Aldridge's argument that he should receive additional time-loss compensation to offset the impact of his increased health care costs is an argument that would be more properly presented to the legislature.

4. Mr. Aldridge's Arguments That He Is Entitled To Change Of Circumstances Relief Based On Res Judicata Are Meritless

Mr. Aldridge also argues that the doctrine of res judicata supports his assertion that he is entitled to have his time-loss compensation rate adjusted based on the increased amounts that he has had to pay for health care benefits. *See* AB at 17-19. Mr. Aldridge argues that the Department's February 2002 order "constructively determined" both that he was paying a portion of his health care coverage costs and that the payments that he made would be included in his time-loss compensation rate. AB at 17-19. He argues that since the February 2002 order is final

⁷ Under RCW 51.32.075, all injured workers' wage replacement benefits are adjusted July 1 of each year based on a comparison between the average salary (in Washington) at the time of the worker's injury with the average salary as of July 1 of that year. The adjustments to wage replacement benefits pursuant to this statute are often referred to as "cost of living adjustments" or "COLAs." However, this term is somewhat misleading, because the average "cost of living" at any given time does not have any impact on the calculation of any wage replacement benefits under that statute.

and binding, res judicata prevents the Department from asserting in this case that his payments for health care coverage should *not* be included in his time-loss compensation rate. AB at 17-19. This argument is meritless.

As noted above, a final and unappealed Department order is given the same res judicata effect as an unappealed superior court judgment. *Marley*, 125 Wn.2d at 548. However, a final and unappealed Department order, like a final and unappealed superior court judgment, is only res judicata as to the issues that were actually decided through that unappealed decision. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Furthermore, “[f]undamental fairness requires that a claimant be clearly advised of the issue” before the issue is barred by res judicata. *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84, 92, 52 P.3d 43 (2002) *modified on reconsideration*, 63 P.3d 800 (2003); *see also Lynn v. Dep’t of Labor & Indus.*, 130 Wn. App. 829, 836-37, 125 P.3d 202 (2005).

The Department’s February 2002 wage order did *not* purport to decide whether or not *Mr. Aldridge* was making any payments to secure his health care coverage at the time of his injury. *See* CABR, Ex. 2. Rather, the order established that *Mr. Aldridge’s employer* was contributing \$436.16 per month for health care benefits at the time of his injury. *See id.* The Department’s order further provided that the

Department would *not* include this amount in its calculation of his wages if his employer continued providing him with health care benefits, but that it *would* include this amount in the calculation of his wages if the employer stopped contributing this amount. *See id.*

Thus, while it is true that the February 2002 order was not protested or appealed and that the order is final and binding, the finality of that order does not, in any way, support Mr. Aldridge's assertion that res judicata precludes the Department from asserting in this case that the amounts that Mr. Aldridge has paid for his health care benefits should not be included in the calculation of his wages at the time of his injury. *See Loveridge*, 125 Wn.2d at 763. Indeed, if anything, the finality of the Department's February 2002 order precludes Mr. Aldridge from arguing that the amount he contributes *should* be included in his wage calculation, since the Department's February 2002 order did *not* include the value of Mr. Aldridge's payments for health care costs in the calculation of his wages. *See Hyatt*, 132 Wn. App. at 396-97; *VanHess*, 132 Wn. App. at 314-15; *Lynn*, 130 Wn. App. at 834-35.⁸

⁸ Mr. Aldridge also suggests that the finality of the Department's February 2002 order should have, somehow, precluded *his employer* from increasing the amount that it directed him to pay for his health care benefits. *See* AB at 18. This argument is unfounded and meritless for several reasons. First, as noted above, the Department's February 2002 order did not make any statement about what amount, if any, Mr. Aldridge was paying to receive health care benefits at the time of his industrial injury. *See* CABR, Ex. 2. Second, the Department's order did not purport to tell either Mr. Aldridge's employer or any other entity what amount it would be allowed to charge Mr. Aldridge for

B. The Superior Court Properly Rejected Mr. Aldridge's Argument That The Board's Decision Was Wrong As A Matter Of Law Based On The Mere Fact That The Board Had Been Provided With A Copy Of Mr. Aldridge's Claim File

Mr. Aldridge also argues that the Superior Court should have reversed the Board's decision with regard to the Department's denial of his request for an adjustment to his time-loss compensation rate under the change of circumstances statute, because the Board had been given access to information regarding the history of Mr. Aldridge's claim that it should not have had when it was deciding his appeal. *See* AB at 16-17. This argument is meritless.

Under RCW 51.52.070, the Department is directed to transmit a copy of its "original file" to the Board when an appeal has been filed with the Board from a Department order. Mr. Aldridge argues that, under that statute, the Department should only send the Board the documents in the Department's file that are relevant to that appeal, and that the Department, in his case, sent the Board its entire claim file. AB 16-17. Mr. Aldridge argues, further, that the Board's access to the Department's entire claim file somehow prejudiced it against him, and that this prejudice, in turn, somehow rendered its decision in this case wrong as a matter of law. *Id.*

health care benefits. Third, the Department does not have the legal authority under the Act to tell any organization what amount it may charge an injured worker for health care coverage, and any attempt by the Department to attempt to do so would be void.

Mr. Aldridge's argument fails for at least two reasons. First, it is proper, under RCW 51.52.070, for the Department to send its entire claim file to the Board when an appeal has been filed. Second, even if it is assumed that the Department should have sent the Board only the information in its claim file that the Department deemed relevant to his appeal, any error was harmless.

1. The Department Properly Transmitted Its Entire Claim File To The Board In Response To Mr. Aldridge's Appeal

RCW 51.52.070 provides in pertinent part that when the Department receives a notice of appeal it "shall promptly transmit its original record, or a legible copy thereof produced by mechanical, photographic, or electronic means, in such matter to the board." Mr. Aldridge argues that the statute's inclusion of the phrase "in such matter" indicates that the Department should only transmit the portions of its claim file that are relevant to that appeal. AB at 16.

However, the statute also states that the Department is to send its "original file" to the Board when it has received the appeal. The Department's practice, which is at least indirectly acknowledged by RCW 51.28.070, is to maintain a "claim file" for an injured worker's claim. The claim file contains all of the orders that the Department has

issued on that claim, as well as all pleadings, correspondence, and other documents that the Department has received with regard to that claim.

If the Department were to pick through its claim file and only send a *portion* of the records in its file to the Board when it received an appeal, then the Department would not be sending its “original” file to the Board. Rather, it would be sending the Board a new, abridged, version of its file. Therefore, if the Department were to do what Mr. Aldridge argues it should have done, it would be violating RCW 51.52.070 by failing to provide its original file to the Board.

Furthermore, if the Department were to attempt to send only the relevant portions of its claim file to the Board when an appeal has been filed from one of its orders, there would likely be differences of opinion between the Department, the Board, and the other parties to the appeal as to which of the documents in the Department’s file were “relevant” to the appeal. This problem would be compounded by the fact that if the Department only sent certain portions of its claim file to the Board, the Board would not be able to make an informed decision about whether there was any relevant information that it had *not* received. The Board would also be stymied from meeting its responsibility under RCW 51.52.080 to summarily grant relief, when appropriate, based on *ex parte* review of the Department record.

Moreover, common sense dictates that it is preferable for the Board, an agency that operates independently of the Department, to be the agency that is charged with reviewing the Department's claim file and to determine *which* of the documents in the file are relevant to determining whether or not the Board had jurisdiction to hear that the appeal. Since the Department is the very agency whose decision has been appealed, a party who appealed a decision of the Department would likely be skeptical that the Department would be completely impartial when it decided which portions of its file should be sent to the Board. Indeed, there would be *more* potential for a party being prejudiced by the Department's transmittal of its file to the Board if the Department were to employ the practice that Mr. Aldridge appears to be advocating in this appeal.

2. Any Error That The Board May Have Committed By Having Access To Mr. Aldridge's Claim File Was Harmless, Because Its Decision Was Not Affected By Its Access To This Information

Even if it is assumed *arguendo* that the Department erred when it sent its claim file to the Board (and that the Board erred when it reviewed it) any "error" that may have been committed was harmless error, because the Board's access to this information did not have any impact on its decision to affirm the Department order on appeal, and because the evidentiary record amply supported the findings and conclusions that the

Board entered. *See, e.g., Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 445-48, 191 P.3d 879 (2008) (holding error harmless).

In general, if a trial court commits a procedural or evidentiary error but the error has no impact on the trial court's actual decision, the error is harmless, and a trial court's decision cannot be reversed based on that harmless error. *See id.* Specifically, it is harmless error for a superior court to consider evidence that it should *not* have considered if there was also an abundance of other, nonobjectionable, evidence that would have allowed the court to reach the same findings and conclusions. *See id.*

In this case, there is no reason to assume that the Board's decision would have been different if the Board had *not* had access to the Department's entire claim file.⁹ Indeed, the Board concluded that the amount that Mr. Aldridge paid for his health care benefits was irrelevant to the proper calculation of his wages *as a matter of law*, and that, therefore, he was not entitled to an adjustment to his time-loss compensation payment amounts based on this alleged change of circumstances. CABR 1, 23-31. The Board did not rely on any

⁹ Indeed, Mr. Aldridge does not actually argue that the Board's decision would have been different if it had *not* received a copy of the claim file. Rather, he appears to argue that the mere fact that the Board even had access to the information in the Department's claim file renders the Board's decision wrong as a matter of law even if it didn't rely on this information when it made its decision.

information that it learned as a result of its access to the Department's claim file in reaching this legal conclusion.

Furthermore, the Board's conclusion that Mr. Aldridge's employer continued providing him with health care benefits at all times relevant to this appeal was well supported by all of the evidence that was submitted to it through the hearing. Since the Board's findings regarding Mr. Aldridge's appeal were supported by essentially all of the evidence, any error that may have been committed as a result of the Board having access to the information in Mr. Aldridge's claim file was harmless. *Brundridge*, 164 Wn.2d at 445-48.

Finally, the issue of whether the Board committed error when it reviewed the Department's claim file is moot, because the Superior Court conducted a *de novo* review of the Board's decision based exclusively on the *evidence* that was presented to the Board at hearing, and the Superior Court concluded that the Board's findings were supported by a preponderance of the evidence in the record. *See* RCW 51.52.110. The Superior Court, unlike the Board, did *not* have access to the Department's entire claim file, so the Superior Court's decision could not have been tainted by the *Board's* access to that data.

As *Ruse v. Department of Labor & Industries*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999) explains, this Court reviews the findings of the

Superior Court, not the findings of the Board, and this Court's review is limited to determining whether the Superior Court's findings are supported by substantial evidence. If this Court concludes that they were, as it must in this case, it is required to adopt the Superior Court's findings, even if it would not have made the same findings had it been in the position of the Superior Court. *See id.* Because this Court reviews the findings of the Superior Court, the question of whether the Board should have had access to that information is moot. *See id.*

C. The Superior Court Properly Affirmed The Board's Denial Of Mr. Aldridge's Appeal From The November 9, 2006 Letter That Warned Him That The Department Might Suspend His Benefits In The Future, Because That Letter Did Not Make Any Final Decision Regarding Mr. Aldridge's Right To Receive Benefits Under The Act

The Superior Court properly affirmed the Board's denial of Mr. Aldridge's appeal from the Department's November 9, 2006 letter, because the November 9, 2006 letter did not make any decision regarding Mr. Aldridge's right to receive benefits under the Act. Under RCW 51.52.050, a party may file an appeal from an order if he or she was "aggrieved" by that decision. Since the November 9, 2006 letter provided Mr. Aldridge with notice that the Department *might* issue an order that suspended his right to receive benefits in the future *if* he failed to cooperate with his vocational counselor and *if* he did not have good cause

for failing to cooperate, but did not actually suspend Mr. Aldridge's right to receive any benefits, he was not aggrieved by that order, and could not properly file an appeal from it.

RCW 51.32.110 provides that if an injured worker fails to cooperate with the Department's efforts to provide the worker with vocational rehabilitation, the Department may "with notice to the worker", suspend the claimant's right to receive any industrial insurance benefits so long as the noncooperation continues. The statute also provides that the Department may not suspend a claimant's benefits for noncooperation if the claimant had "good cause" for refusing to cooperate. *See id.* RCW 51.32.110 does not identify the precise type of "notice" that the Department must give in that situation.

The Department adopted WAC 296-14-410 in order to clarify the "notice" it would give a worker *before* it issues an order that suspends the claimant's benefits based on its finding that the claimant has failed to cooperate. WAC 296-14-410 provides that the Department will send a letter that informs the worker that the Department may suspend his or her benefits if it determines that the claimant is not being cooperative. WAC 296-14-410 further provides that this letter will give the worker 30 days to provide a written response. If the injured worker fails to respond to the Department's letter within 30 days, or if the injured worker

responds but the explanation does not convince the Department that the injured worker has good cause, then the Department may issue a further order that suspends the claimant's benefits for noncooperation.

It should also be noted that if the Department issues an order that actually suspends the worker's benefits based on its conclusion that the worker failed to cooperate and did not have good cause for failing to do so, the suspension order, like any other Department order, must provide the parties with the notice that is required by RCW 51.52.050. In other words, the suspension order must inform the claimant that he or she has 60 days to either file a protest with the Department or an appeal with the Board. The worker would, of course, have the right to appeal the order that actually suspended his or her benefits. *See* RCW 51.52.050.

In this case, the Department's November 9, 2006 letter provided Mr. Aldridge with the notice required by RCW 51.32.110 and by WAC 296-14-410. The letter informed him that the Department *might* suspend him for noncooperation *in the future* if he continued to refuse to provide his transcripts *and* if he failed to demonstrate that he had good cause for not doing so. However, it did not actually suspend Mr. Aldridge's eligibility to receive benefits. Rather, it gave him 30 days to *either* begin cooperating with the Department (by allowing Kaplan University to send his transcripts to his vocational counselor) *or* to explain

why he had good cause for refusing to provide this information to his vocational counselor.

Mr. Aldridge argues that the November 9, 2006 letter did, in fact, find him to be noncooperative, and that the letter did, in fact, suspend his benefits. AB at 29-38. Mr. Aldridge argues that the fact that the letter gave him 30 days to explain why he was being noncooperative shows that it had already decided to suspend his benefits for noncooperation, because there would be no reason for the Department to demand that he explain *why* he was being noncooperative unless it had, in fact, determined that he was failing to cooperate and that his benefits should be suspended. *See id.*

Mr. Aldridge's argument ignores the fact that the Department's letter gave him 30 days to *either* cooperate with the Department (i.e., agree to provide the grade transcript to his vocational counselor) *or* explain why he had "good cause" to refuse to provide this information to the counselor. Furthermore, Mr. Aldridge ignores the fact that the letter stated that *if* he failed to cooperate with the Department that this "*could* result in the suspension of future benefits, which *may* include vocational services, medical treatment, and compensation benefits".

Moreover, Mr. Aldridge's argument ignores the fact that WAC 296-14-410 requires the Department to inform a worker that the Department believes that he or she is failing to cooperate *before* the

Department may issue an order that actually suspends the injured worker's benefits. WAC 296-14-410 also requires that the Department's letter give the worker 30 days to provide a written response that either indicates that he or she intended to cooperate or that explained why the claimant had good cause for not cooperating with the Department's request. Therefore, the fact that the November 9, 2006 letter "demanded" a written explanation from Mr. Aldridge within 30 days actually proves that that letter did *not* actually suspend his benefits, and that the letter merely provided him with notice of a possible, future suspension.

Mr. Aldridge also argues that his right to due process would be impaired unless he is allowed to appeal the Department's November 9, 2006 letter. AB at 33-34. Mr. Aldridge argues that if he cannot appeal the November 9, 2006 letter, then his only recourse would be to send a written response to the Department and hope that the Department employee who reviewed this request would give his explanation the care that it deserved. *See id.* He suggests that if he provided a written response explaining why he was not cooperating with the Department's request, and if the Department did not think he had good cause for failing to cooperate, that he would never receive an opportunity to appeal the Department's decision to suspend his benefits. *See id.*

To the extent that this is what Mr. Aldridge is arguing, his argument is misplaced. Mr. Aldridge would unquestionably have the right to appeal an order that actually suspended his benefits for noncooperation. However, no such order has been issued in his case.

Mr. Aldridge also makes the baseless assertion that the Department denied him time-loss compensation and stopped providing him with vocational services after November 9, 2006 based on its issuance of that letter. *See* AB at 38. However, the record does not support his claim that the Department suspended his right to receive any sort of benefits at any time, let alone support the idea that the basis for anything that the Department did or did not do was the Department's issuance of the November 9, 2006 letter.

D. The Superior Court Properly Concluded That It Did Not Have Jurisdiction To Consider Mr. Aldridge's Challenge To The Department's January 9, 2007 Letter Where That Matter Was Still Pending At The Board

Mr. Aldridge argues that the Superior Court erred when it concluded that it did not have jurisdiction to consider his appeal from the Board's *failure* to promptly grant his appeal from a January 9, 2007 Department letter. AB at 25-29. On March 8, 2007, Mr. Aldridge filed an appeal from the January 9, 2007 letter to the Board. While his appeal at the Board from that letter was still pending, and before the Board had

issued any orders regarding that particular appeal, Mr. Aldridge filed a Notice of Appeal with the Thurston County Superior Court that indicated that he was challenging the Board's "violation" of RCW 51.52.090 with regard to that Board appeal. CP 109.

After he filed his Superior Court appeal, the Board subsequently granted his appeal from the January 9, 2007 letter, and the Board ultimately issued an Order on Agreement of Parties that, among other things, resolved his appeal from the January 9, 2007 letter. CP 75-79. Mr. Aldridge argues that when he filed a Superior Court appeal this deprived the Board of jurisdiction to take any further action regarding his appeal from the January 9, 2007 letter, and that, therefore, the Order on Agreement of Parties that the Board issued was void. AB at 25-29. Mr. Aldridge's argument is meritless, as it is directly contrary to the plain language of the Act.

It is well settled that a Superior Courts only has jurisdiction to hear an appeal from an industrial insurance matter in response to an appeal from a final decision of the Board. *See* RCW 51.52.060. *See also Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982-87, 478 P.2d 761 (1970); *Bergman v. Dep't of Labor & Indus.*, 44 Wn.2d 117, 120-21, 265 P.2d 293 (1954) (no court appeal may be filed from an interlocutory Board order); *Wiles v. Dep't of Labor & Indus.*, 34 Wn.2d 714, 722-24, 209 P.2d

462 (1949) (same). RCW 51.52.110 provides that a party may file an appeal with a Superior Court from 1) a Board order that denied the party's appeal; 2) a Board order that denied the party's Petition For Review from a Proposed Decision and Order; or 3) the Board's Decision and Order.

In Mr. Aldridge's case, the Board had not issued *any* order of any sort with regard to his appeal from the January 9, 2007 letter at the time that he filed his Superior Court appeal. Since the Board had not issued any order – let alone a final order – at the time that he filed that appeal, his appeal was premature, and the Board, rather than the Superior Court, properly retained jurisdiction over that dispute. *See* RCW 51.52.060; RCW 51.52.110; *see also Lenk*, 3 Wn. App. at 982-87.

Mr. Aldridge argues that the Board's failure to *grant* his appeal from the January 9, 2007 order within 30 days led to it being implicitly *denied*, and that the Superior Court should have granted his appeal from the Board's implicit denial of that appeal. AB at 25-28. However, the plain language of RCW 51.52.090 states, "If the appeal is not denied within thirty days after the notice is filed with the board, the appeal shall be deemed to have been *granted*." RCW 51.52.090 (emphasis added). Thus, under the plain language of the statute, the Board's failure to take any action with regard to an appeal will result in the appeal being deemed *granted*, rather than it being implicitly denied. Since the Board had

effectively *granted* Mr. Aldridge's appeal from the January 9, 2007 Department letter at the time that he attempted to file his Superior Court appeal, and since the Board had not issued any order of any sort with regard to that appeal at that time, Mr. Aldridge's Superior Court appeal did not deprive the Board of jurisdiction to consider that issue. *See* RCW 51.52.060; RCW 51.52.090; RCW 51.52.110.

Indeed, it is apparent that the legislature contemplated the possibility of the Board failing to issue an order that either granted or denied an appeal within 30 days, and that the legislature determined that the correct resolution, in that instance, is to conclude that the Board has granted the appeal. *See* RCW 51.52.090. Thus, the legislature has indicated, through the language that it employed through that statute, that when the Board fails to immediately grant an appeal, the Board, rather than a Superior Court, continues to have jurisdiction over that dispute. If this Court were to hold that the Board's failure to grant Mr. Aldridge's appeal led to the appeal being implicitly denied, then it would be undermining the plainly expressed intent of the legislature.

Mr. Aldridge also argues that the *Giles v. Department of Social & Health Services, Indian Ridge Treatment Center*, 90 Wn.2d 457, 583 P.2d 1213 (1978) opinion somehow supports his argument that his Superior Court appeal deprived the Board of jurisdiction over his case.

See AB 26-27. However, this argument is misplaced, as the *Giles* Court actually *rejected* an argument by an appellant that is extraordinarily similar to the argument that Mr. Aldridge makes here. *See Giles*, 90 Wn.2d at 459-460.

In *Giles*, a civil service employee filed a timely appeal from an adverse employment decision with the Personnel Board. *See id.* The Personnel Board ultimately conducted a hearing to decide that appeal, but it held the hearing nine months later than it was required to have held one according to the statute governing such appeals. *See id.* The Personnel Board ultimately concluded that the employer had properly dismissed the employee. *See id.* The employee appealed the Personnel Board's decision to a Superior Court, and it affirmed the Personnel Board. *See id.*

The employee then argued to the Supreme Court that the Personnel Board's failure to conduct a hearing within the time frame proscribed by the statute deprived it of jurisdiction to conduct a hearing, and that its lack of jurisdiction rendered its decision void. *See id.* at 460. From this, he argued that the Superior Court should have reversed the Board's decision without considering the merits of the appeal. *See id.* The Supreme Court *rejected* this argument, and concluded that the Personnel Board's lack of promptness in conducting the hearing *did not* render the Personnel Board's decision void. *See id.* The Supreme Court

noted that the “important point” was that the employee *had been granted a hearing* by the Personnel Board – albeit a tardy one – and that the employee had not demonstrated that he was prejudiced by the Personnel Board’s tardiness in conducting that hearing. *See id.* Therefore, the Supreme Court concluded that the Personnel Board retained jurisdiction to conduct a hearing, even though it held the hearing nine months later than it was supposed to have held it, and that its decision was *not* void. *See id.*

What the *Giles* opinion shows, broadly speaking, is that a decision of a board that conducts administrative hearings is *not* necessarily wrong as a matter of law simply because the board failed to comply with one or more of the procedural timelines that govern such appeals. *See id.* Since Mr. Aldridge’s position in this case is that the Board’s alleged violation of RCW 51.52.090 rendered its decision wrong as a matter of law, his reliance on *Giles* – a case that rejected a very similar argument – is not only misplaced, but somewhat baffling. *See id.*

The appellant in *Giles* argued that the Personnel Board’s failure to promptly *conduct* a hearing deprived it of jurisdiction to issue a decision, while Mr. Aldridge argues that the Board’s failure to promptly *grant* his appeal allowed him to deprive the Board of jurisdiction and rendered its decision void. *Compare Giles*, 90 Wn.2d at 460-61, *with* AB at 26-27.

Just as the *Giles* Court rejected the appellant's argument, this Court should reject the similar argument advanced by Mr. Aldridge. *See id.* Mr. Aldridge, like the appellant in *Giles*, has failed to show that the Board's delay in processing his appeal was prejudicial to his rights in any way. *See Giles*, 90 Wn.2d at 460.

Indeed, Mr. Aldridge's argument has even less merit than the one advanced by the appellant in *Giles*, because the applicable statute in *Giles* apparently did not indicate *what* would happen in the event that the Personnel Board failed to conduct a timely hearing, while the applicable statute in Mr. Aldridge's case specifically indicates that the Board is deemed to have granted an appeal (thus *acquiring* jurisdiction over the case) if it does not deny the appeal within 30 days. *See id.* *See also* RCW 51.52.090.

Finally, it should be noted that Mr. Aldridge does not point to any legal or equitable defect with regard to the Board's Order on Agreement of Parties other than his hyper-technical – and legally incorrect – argument that his Superior Court appeal deprived the Board of jurisdiction to issue any further orders regarding that appeal. Mr. Aldridge does not argue that the settlement was fundamentally unfair, nor does he contend that his attorney entered into that agreement without having been authorized by Mr. Aldridge to do so. In short, Mr. Aldridge offers no legitimate reason

why this Court should vacate a settlement to which he knowingly and voluntarily agreed by and through his attorney.

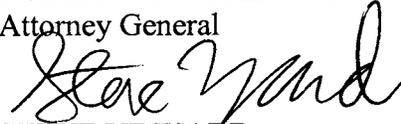
VI. CONCLUSION

The Department therefore requests that this Court affirm the Superior Court decision, as it was correct in all regards.

RESPECTFULLY SUBMITTED this 2 day of June, 2009.

ROBERT M. MCKENNA

Attorney General

A handwritten signature in cursive script that reads "Steve Vinyard".

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COURT OF APPEALS
DIVISION II

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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

MICHAEL W. ALDRIDGE,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR
AND INDUSTRIES,

Respondent.

DECLARATION OF
MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent to all parties on record by depositing postage prepaid envelopes in the U.S. mail addressed as follows:

Original and Copies To:

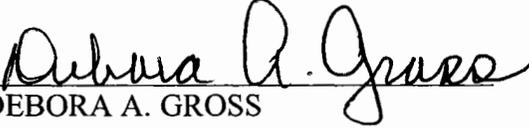
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DATED this 2 day of June, 2009.


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