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

GARRY FOURRE,
LICENSED ON-SITE TREATMENT DESIGNER,

Appellant,

v.

BOARD OF ENGINEERS AND LAND SURVEYORS OF THE
WASHINGTON STATE BOARD OF LICENSING,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

A professional licensee who is disciplined for failing to meet the standard of care for his profession, who is subject to an order that requires him to take remedial action, and who does not appeal that order, must abide by the terms of the order. Failing to take the remedial action required by the order properly subjects the licensee to discipline, including revocation.

Mr. Fourre (Appellant) was a licensed on-site wastewater treatment designer regulated by the Board of Registration for Professional Engineers and Land Surveyors (Board). The Environmental Health Department of Thurston County (Health Department) complained to the Board about Appellant's failure to provide appropriate and accurate information to the County about four different proposed residential sewage systems. This complaint culminated in a full evidentiary hearing in 2008, and a 2009 Order (Original Order) finding Appellant failed to meet the professional standard of care expected of on-site wastewater treatment designers. The Original Order required Appellant to take remedial action. The Appellant did not seek review of the Original Order; neither did he comply with it.

The Board then filed a Statement of Charges alleging non-compliance with the Original Order. After a Brief Adjudicative

Proceeding (BAP), the Board revoked Appellant's license in a Final Order (Compliance Order). Appellant timely appealed the Compliance Order, but in his challenge to it seeks review of the Original Order. Contrary to his argument, the Board provided him due process at all stages of the disciplinary process. The only matter before this court is the Compliance Order, and the Board's decision therein is based on substantial evidence and is not arbitrary or capricious. The Board respectfully requests that this Court affirm the decision below.

II. COUNTERSTATEMENT OF THE ISSUES

- A. Did the Board give a licensed wastewater treatment designer due process when he was provided detailed information regarding the charges against him and the text of the regulation he was alleged to have violated, had a full evidentiary hearing with opportunity to call and cross examine witnesses, and was duly served with a final order finding him in violation of the regulation with which he was charged?
- B. Did the Board act appropriately and within its discretion in disciplining a wastewater treatment designer's license when the licensee failed to fulfill the conditions of the Board's Original Order, compliance with which would have demonstrated that he could practice his profession within the standard of care?
- C. Was the Board's Compliance Order supported by substantial evidence when Appellant has neither assigned error to the Findings of Fact nor contested the fact that he did not comply with the conditions of the Original Order?

III. COUNTERSTATEMENT OF THE CASE

Appellant was a licensed on-site wastewater designer regulated by the Board. AR 1.¹ In June of 2005, the Board received a complaint from Thurston County Department of Environmental Health (Health Department). CP 140. The Health Department complained that Appellant had consistently failed to provide adequate and accurate information on four different proposed building sites. *Id.*

The Health Department stated: "...we emphasize that it is our intent to address these types of issues at a local level. The Licensed Designer is responsible for knowing the minimum requirements and implementing them. The issues identified are not 'minor' professional disagreements. They are related to incomplete and inaccurate proposals that do not provide the necessary information needed to review proposals in a timely manner. The cases cited lack sufficient technical justification, they do not include the appropriate waiver processes, and they identify soil and site characteristics incorrectly. This occurs on a consistent basis with a majority of Mr. Foure's submittals. The time spent in writing revision letters, discussing the requirements with Mr. Foure, and

¹ For purposes of this brief, the administrative record prepared from the record before the Board and submitted in its entirety here shall be referred to as "AR". The documents filed with the Thurston County Superior Court following the filing of the Petition for Judicial Review shall be referred to as "CP."

discussing the cases with applicants that contact our department, is costly to all involved.” (Emphasis in original). CP 143.

On May 7, 2007, the Board served Appellant with a Statement of Charges, alleging unprofessional conduct based on the four proposed sewage projects. CP 145. Among other statutes and regulations, the Board alleged Appellant violated WAC 196-33-200 (1). This rule states that licensees are expected “to apply the skills diligence and judgment required by the professional standard of care.” CP 150. The text of the rule was appended to the Statement of Charges. *Id.* Appellant requested a full evidentiary hearing, and on October 28, 2008, such a hearing was held. Appellant had the opportunity to call and cross examine witnesses. CP 23.

On February 13, 2009, the Board entered a final order (Original Order). The Board carefully considered the evidence presented and found that clear, cogent, and convincing evidence established Appellant violated WAC 196-33-200(1) by failing “to apply the skills diligence and judgment required by the professional standard of care” when he “consistently failed at the outset to provide adequate information to support his designs.” AR 18. The Original Order stated that within thirty days of the date of the order, Appellant should submit a list of three peer reviewers to the Board. Within fifteen days, the Board staff would then approve or disapprove the

suggested peer reviewers. Respondent would then choose five on-site wastewater designs to submit to the peer reviewer within one year of the date the Board approved a peer reviewer. AR 19-20. The peer reviewer would approve and stamp the designs if they were adequate. AR 19-20. Appellant sent a request for reconsideration on February 26, 2009. He essentially complained that he could not or would not comply with the Original Order. AR 35. The request was denied. AR 5.

Rather than submitting a list of peer reviewers by March 17, 2009, Appellant waited until May 22, 2009, to communicate with the Board again regarding peer review. Appellant sent a letter on May 22, 2009, untimely again asking the Board to reconsider its final order and moving for modification of the imposed conditions on Appellant's license. AR 7-9. The timeline for reconsideration is 10 days, per RCW 34.05.470. Appellant never petitioned the Superior Court for review of the Original Order.

On June 1, 2009, the Board's Deputy Executive Director, Robert Fuller, sent Appellant a letter requesting that Appellant contact him at his earliest convenience. AR 6. Receiving no response to his June 1, 2009, letter, Mr. Fuller again sent Appellant a letter dated July 21, 2009. The July 21, 2009, letter informed Appellant that his untimely request for modification of the Board Order was denied, and again requested that

Appellant contact Mr. Fuller at his earliest convenience. AR 5. This convenience did not occur until August/September when Appellant telephoned the Board. AR 51. The Board requested Appellant to follow up with the call. This did not occur. *Id.* Having received no response by December 30, 2009, the Program sent Appellant a Statement of Charges regarding his failure to comply with the terms of the Board Order. AR 1–4.

Appellant responded to the charges, requesting a Brief Adjudicative Proceeding (BAP). AR 25–26. The Board scheduled a BAP, and delegated its authority to enter an initial order to a Presiding Officer, an Adjudicative Program Process Manager for the Business and Professions Division of the Department of Licensing. AR 27–29. The BAP scheduling letter informed Appellant of his ability to submit additional materials or request an extension. AR 27. Appellant, however, submitted no additional materials, and did not request an extension of the BAP hearing.

Consequently, the Presiding Officer issued an initial order on March 25, 2010, finding that the Board’s February order was final and valid. AR 35. The Presiding officer found that “Mr. Fourre neither identified three peer reviewers, nor worked with the Program to do so.” *Id.* The Presiding Officer further found that “[t]he Board has met its

burden of showing, by clear and convincing evidence, that Mr. Fourre has violated at least one time-defined term of the Board's Final Order [. . .], and has yet to comply with others." *Id.* In the next two paragraphs, the BAP officer found that Appellant did not timely raise his objections to the Original Order and those objections did not excuse his failure to comply with that order. *Id.*

Appellant timely requested administrative review of the BAP officer's initial order. AR 40–60. In his request for review, Appellant did not dispute his failure to identify three peer reviewers. Instead, he attacked the validity of the Original Order. For the first time in his request for administrative review of the Initial order, Appellant stated that he telephoned Mr. Fuller in late August or early September of 2009. AR 51. He asserted in his request for administrative review that he had complied with the February final order by attempting on numerous occasions to “work with the Program” by expressing to them his disagreement with the sanction of being compelled to participate in a peer review process for his on-site wastewater designs. AR 53.

On May 26, 2010, the Board issued its Final Order on Brief Adjudicative Proceedings (Compliance Order). The Board adopted the findings of fact and conclusions of law in the Presiding Officer's Initial Order. AR 72. The Board revoked Appellant's license to practice as an

On-Site Wastewater Treatment System Designer. AR 73. The Board's final BAP Order also set forth requirements for Appellant to reapply for a license. He may begin as early as June, 2011. *Id.*

Appellant sought judicial review of the Compliance Order. CP 6. The superior court affirmed the Board's Compliance Order. CP 188. Appellant timely filed this appeal. CP 190.

IV. ARGUMENT

A. Standard of Review

This case appeal presents questions that make the standard of review particularly relevant to this case. There are three standards of review at issue in this case. The matter arises under the Administrative Procedure Act (APA) RCW 34.05. The final agency order is deemed to be prima facie correct and Appellant bears the burden of proving otherwise. RCW 34.05.570(1)(a). *Pub. Util. Dist. No. 1 of Pend Oreille Cnty. v. Dep't of Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002).

Judicial review of a final agency order is pursuant to RCW 34.05.570(3), under which the court shall grant relief only if it determines that Petitioner "has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d). Under RCW 34.05.570(3)(a), (e), (i), the court shall grant relief from the agency order if the agency's order

violates the constitution, is not supported by substantial evidence, or is arbitrary or capricious.²

In this case the Appellant challenges the Board's actions on three grounds. First, the Appellant alleges that the Board violated Appellant's procedural due process rights. Second, the Appellant argues that the Board acted arbitrarily and capriciously in disciplining him for failure to comply with the Original Order. Third, the Appellant states that the Board's findings are not supported by substantial evidence.

Appellant contends the Board violated his procedural due process rights. This raises a question of law. Questions of law are reviewed under the error of law standard. The court determines, *de novo*, whether the agency has erroneously interpreted or applied the law. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993); *Franklin Cnty. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106, 103 S. Ct. 730, 74 L. Ed. 2d 954 (1983). A court accords substantial weight to the agency's view of the law it administers. *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 844, 894 P.2d 1352, as amended (1995).

Appellant also argues that the Board's action was arbitrary and capricious because its Compliance Order has no connection to the

² The court shall also grant relief in other specific circumstances not presented in this case. RCW 34.05.570(3)(a)-(i).

unprofessional conduct found in the Original Order. Appellant alleges that the Board's Compliance Order is therefore arbitrary and capricious. In reviewing an order alleged to be arbitrary or capricious the scope of review "is narrow, and the challenger carries a heavy burden." *Keene v. Bd. of Accountancy*, 77 Wn. App. 849, 859, 894 P.2d 582 (1995), *review denied*, 127 Wn.2d 1020, 904 P.2d 300 (1995). The question calls for the court to determine whether the Board has engaged in "willful and unreasoning action, without consideration and in disregard of facts and circumstances." *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d 433, 909 P.2d 1294 (1995), *cert. denied*, 518 U.S. 1006 (1996).

Appellant lastly contends that the Compliance Order is not supported by substantial evidence. This appears to run counter to the fact that Appellant has assigned no error to the Findings of Fact. Unchallenged findings are verities on appeal. *Tapper*, 122 Wn.2d at 407.

When there has been no specific assignment of error to findings of fact, "the findings become the established facts and our review must be limited to whether they support the conclusion of law and judgment." *Brown v. Dep't of Health*, 94 Wn. App. 7, 972 P.2d 1010 (1999), *citing to In re Perry*, 31 Wn. App. 268, 269, 641 P.2d 178 (1982). However the Board will demonstrate that its findings are supported by substantial evidence in the record. This standard is satisfied if the Commissioner's

record contains evidence in sufficient amount to persuade a fair-minded person of the truth of the finding. *Heinmiller*, 127 Wn.2d at 607; *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 542-43, 869 P.2d 1045 (1994). "Substantial evidence" is more than a mere scintilla, but less than preponderance. RCW 34.05.570 (3)(e); *Heinmiller* 127 Wn.2d at 607.

B. The Board furnished due process to Appellant in the original action.

Appellant was provided notice, a full evidentiary hearing and was ultimately found to have violated the regulation with which he was charged. In the original action, the Board charged Appellant with failing to act within the standard of care for his profession. WAC 196-33-200(1).

Appellant had notice from the outset that the Health Department complained about the dilatory nature of his design work. Appellant knew he was alleged to have unreasonably delayed providing required design information to the Health Department. The Statement of Charges included a detailed description of the nature of the complaint against him and the text of the regulation he was alleged to have violated. Appellant was given a full evidentiary hearing with the opportunity to offer exhibits, present witnesses, and cross examine witnesses against him.

The Board found that his failure to provide the information at the outset, without the County having to repeatedly extract the information

was a violation of the standard of care. Appellant argues that the Statement of Charges did not adequately advise him that his dilatory conduct violated the standard of care. To the contrary, the Statement of Charges clearly advised Mr. Fourre that among the charges were that he had failed to comply with the standard of care, and that among his failings were the failure to provide adequate information to support designs. Appellant contends that his failure to meet the standard of care “at the outset” is a violation of a new regulation with which he was never charged. He is incorrect. His tardiness in responding to the Health Department was the heart of the case, the source of his unprofessional conduct that fell below the standard of care. The Board was uniquely suited to make that determination.

In cases where the agency is interpreting the law it administers, courts give substantial weight to the agency’s interpretation. *Renton Educ. Ass’n v. Pub. Emp’t Relations Comm’n*, 101 Wn.2d 435, 443, 680 P.2d 40 (1984). And courts will give substantial weight to the agency’s interpretation of its own rules. *Federated Am. Ins. Co. v. Marquardt*, 108 Wn.2d 651, 656, 741 P.2d 18 (1987). *Lang v. Dep’t of Health*, 138 Wn. App. 235, 243, 156 P.3d 919 (2007).

As a regulator of on-site wastewater designers, the Board was in the best position to determine what conduct fell below the standard of

care. Its decision was appropriate and provided due process to Appellant. When reviewing matters within agency discretion, “the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” RCW 34.05.574(1). *See Clausing v. State*, 90 Wn. App. 863, 870–1, 955 P.2d 394 (1998) *review denied* 136 Wn.2d 1020, 969 P.2d 1063 (1998) (court affirmed findings drawn from evidence in the record that petitioner claimed the agency improperly considered, holding that evidentiary decisions made in adjudicative proceedings lie within the agency’s discretion and were exercised in accordance with the APA and applicable agency rules, citing RCW 34.05.574(1)).

There is no evidence that Appellant missed receiving notice of the complaint against him or that he was unable to attend or prevented from participating in the evidentiary hearing. Procedural due process requires notice and an opportunity to be heard prior to final agency action. *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 612, 70 P.3d 947 (2003).

The Original Order was not obtained at the expense of Appellant’s due process rights and it is therefore not “void”. Appellant never sought review of the Original Order, and the jurisdictional time for seeking review ended in March of 2009.

C. The only order on appeal is the Compliance Order disciplining Appellant's license for failure to comply with the Original Order.

Appellant did not timely appeal the Original Order that found he “failed to meet the expectation of his profession contained in WAC 196-33-200(1) and ‘to apply the skills diligence and judgment required by the professional standard of care.’” The Original Order is final, and Respondent may not re-litigate it. If Appellant wished to challenge the Original Order, he was required to file a petition for review within the timeframe set by the Administrative Procedure Act, which “establishes the exclusive means of judicial review of agency action” with very few exceptions not applicable in this case. RCW 34.05.510. Appellant had thirty days to petition for judicial review of the Original Order. RCW 34.05.542. He did not. Therefore, the Original Order is final and binding.

Just as the findings and conclusions of the Original Order are final, so too is the remedial action of the peer review process, which the Board held to be an appropriate sanction that addressed the violation of the standard of care. Because Appellant did not appeal the Original Order, the sanction set forth in the Original Order may not now be challenged. Therefore, the only question before this Court is whether the Compliance Order revoking Appellant's license for failure to comply with the terms of the sanction of the Original Order is legally sufficient and supported by substantial evidence.

D. The Board's discipline of Appellant's license in light of his non-compliance was a reasonable and considered decision.

There is a logical connection between the action the Board took in the Compliance Order and Appellant's behavior. There is no evidence in the record that Appellant could not timely and appropriately provide information about his proposed designs. Appellant contends that the Compliance Order is arbitrary and capricious because there is no relation between the Compliance Order and the Original Order. This contention is not persuasive as the Original Order required Appellant to provide a list of peer reviewers to the Board within thirty days of the order so that the peer reviewer could approve and stamp five projects of his design. It was hoped that this would cause Appellant to improve his work and cease acting in a dilatory fashion. Appellant did not meet the conditions of the Order, never providing a list of peer reviewers to the Board as required by the Order. As was the case with his design work, he could not provide appropriate information to the Board. Appellant was unable to show that he could practice wastewater design in an appropriate manner. Further, he demonstrated an unwillingness to engage with the Board charged with regulating his professional activities. In light of this, it was reasonable for the Board to issue a revocation.

The Court of Appeals discussed what is necessary to prove an arbitrary and capricious sanction in *Brown*, 94 Wn. App. at 17. In that case, dentist Brown's license was suspended for five years because of his criminal convictions and findings that he failed to meet the standard of care in his treatment of patients. Brown argued that the sanction was arbitrary and capricious because it was too harsh. The court responded that "[t]he 'harshness' of an agency's discipline or sanction is not the test for arbitrary and capricious action." *Brown*, 94 Wn. App. at 17, citing *Heinmiller*, 127 Wn.2d at 609, 903 P.2d 433. The *Brown* court expressed judicial reluctance to "enter the allowable area of [agency] discretion" in fashioning remedies, stating that agencies need not fashion identical remedies. *Brown*, 94 Wn. App. at 17, citing *Shanlian v. Faulk*, 68 Wn. App. 320, 328, 843 P.2d 535 (1992).

In order to prove that the Board's order was arbitrary and capricious, Appellant must prove that the Board engaged in unreasoning action without considering the facts and circumstances of the case. The question calls for the court to determine whether the Board has engaged in "willful and unreasoning action, without consideration and in disregard of facts and circumstances." *Heinmiller*, 127 Wn.2d at 609. The standard is that where there is "room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been

reached.” *Id.* When a party claims an action is arbitrary and capricious, the scope of review is narrow and the challenger carries a heavy burden. *Brown*, 94 Wn. App. at 16, quoting *Keene*, 77 Wn. App. at 859. See also *Washington Indep. Telephone Ass’n v. Washington Util. and Transp. Comm’n*, 148 Wn.2d 887, 64 P.3d 606 (2003).

“Action taken after giving [a party] ample opportunity to be heard, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary or capricious.” *Heinmiller*, 127 Wn.2d at 609–10; *Keene*, 77 Wn. App. at 859–60, citing *Washington Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 483, 663 P.2d 457 (1983).

Here, the Board sets forth in its final order all of the materials it reviewed: the Petition for Administrative Review of Initial BAP Order; Findings of Fact, Conclusions of Law and Initial Order of Brief Adjudicative Proceeding; Request for BAP & Supporting Documents sent in by Respondent; Delegation of Authority & BAP Schedule Letter; 12/30/2009 Statement of Charges & Supporting Documents sent in by Program; and copy of Final Board Order (dated 2/17/09).

The Board was willing to entertain additional information. The Brief Adjudicative Proceeding gave Appellant the opportunity to supplement his materials or request a continuance, but he did not. There is

no evidence that the Board engaged in willful or heedless conduct when it revoked Appellant's license due to his failure to comply with the Original Order. Appellant is not permanently revoked and may begin the reapplication process starting June 2011.

E. The Compliance Order is supported by substantial evidence and its findings are not challenged in this appeal.

While the burden of proof applied in this case was clear and convincing evidence, it does not follow that the standard of review is also "clear and convincing evidence", as argued by the Appellant.

The standard of review for courts reviewing questions of fact under the APA remains the "substantial evidence" standard. RCW 18.130.100; *see also* RCW 34.05.570(3)(e). As this Court has stated in a medical licensing matter, "we decline [Appellant's] invitation to use the Supreme Court's opinion in *Nguyen* [*citation omitted*] as an opportunity to fashion a new and higher standard of review for appeals.... *Nguyen* clarified the standard of proof, but does not address the standard of appellate review, which is established by the legislature. Appellant provides no persuasive argument that the *Nguyen* case has any effect upon the standard of appellate review. Appellate courts do not reweigh the evidence, but are limited to assessing whether that evidence was adequate to satisfy the applicable burden of proof below." *Ancier v. Dep't of Health*, 140 Wn.

App. 564, 573 fn. 12, 166 P.3d 829 (2007). Mr. Fourre offers no authority for the hybrid standard he proposes of whether there is a sufficient amount of “unequivocal.” App. Br. at 26. Accordingly, in order to prevail, Mr. Fourre must show that substantial evidence does not support the Board’s factual findings.

Appellant does not challenge the findings that he failed to submit a list of three peer reviewers to the Board within the timeframe required by the Original Order. In fact, Appellant admits that he did not identify three peer reviewers and submit five designs to the Board, as required by the Original Order. As stated previously, unchallenged findings are verities on appeal.

When there has been no specific assignment of error to findings of fact, “the findings become the established facts and our review must be limited to whether they support the conclusions of law and judgment.” *Brown*, 94 Wn. App. at 13, *citing Perry*, 31 Wn. App. at 269.

The facts found by the Board are contained in the Initial order.

The Initial order states:

The record presented by the Board supports the conclusion that, prior to March 27, 2009, Mr. Fourre neither identified three peer reviewers, nor worked with the Program to do so. Failing in this first necessary step in the Board’s Final Order, Mr. Fourre has consequently also failed, to date, to comply with the other two core requirements of the Final Order.

AR 35. Appellant has not challenged either this conclusion or any of the facts supporting it. The findings and conclusions of the initial order were adopted by the second Board order, currently under review. Even if Appellant had assigned error, the record is replete with the documents and other information considered by the Board including Appellant's own statements that he did not comply with the order. There is enough evidence to "persuade a fair-minded person of the truth of the finding". The Compliance Order is supported by substantial evidence.

F. Appellant is not eligible for funds under the Equal Access to Justice Act.

Appellant requests his fees and costs under the Equal Access to Justice Act, RCW 4.84.350, but has not demonstrated that he is a qualified party under this statute. First, Appellant must show that he is a "prevailing party." Appellant has not prevailed in this action on any point. By contrast, in *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 227, 173 P.3d 885 (2007), the court denied fees after finding the party did not "substantially prevail" because the party gained only four of the 14 months of service credit sought through judicial review. Similarly, in *Herbert v. Pub. Disclosure Comm'n*, 136 Wn. App. 249, 268, 148 P.3d 1102 (2006), the court denied recovery under the EAJA because the party failed to prevail on any significant issue. *See also Citizens for Fair Share*

v. Dep't of Corr., 117 Wn. App. 411, 436, 72 P.3d 206 (2003) (no fees were awarded when the private litigant prevailed on one minor public disclosure violation).

In addition, even if Mr. Fourre were to prevail in this appeal, in order to obtain fees and costs under the statute, he must also show that agency action was not “substantially justified.” An agency action is substantially justified if it has a reasonable basis in law and fact. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 154 P.3d 891 (2007). In *Silverstreak*, the court denied fees to certain employers despite the fact that the agency’s position in the enforcement action against them was contrary to the agency’s prior interpretation of law. The court noted that the agency’s new interpretation of the prevailing wage law was in accord with that of the Supreme Court and that the agency was required to liberally construe the law in favor of workers. *Silverstreak*, 159 Wn.2d at 892–93. The court found the relevant factors in the substantially justified analysis to be “the strength of the factual and legal basis for the action, not the manner of the investigation and the underlying legal decisions.” *Id.* at 892.

In this case the Board’s action in revoking Appellant’s license was substantially justified due to his failure to comply with the Original Order. As such, Appellant is not entitled to fees and costs.

V. CONCLUSION

The Board respectfully requests this Court deny Mr. Foure's appeal.

RESPECTFULLY SUBMITTED this 17th day of July, 2011.

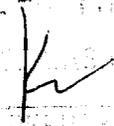
ROBERT M. MCKENNA
Attorney General

Handwritten signature of Susan L. Pierini in black ink, written over a horizontal line. The signature is stylized and includes the number "#26473" written to the right of the main signature.

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NO. 41614-0

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

11 JUL 20 11 21 AM '09
STATE OF WASHINGTON
BY 

GARRY FOURRE,
LICENSED ON-SITE TREATMENT
DESIGNER

Appellant,

v.

BOARD OF ENGINEERS AND LAND
SURVEYORS OF THE
WASHINGTON STATE BOARD OF
LICENSING,

Respondent.

DECLARATION OF
SERVICE

I, Kathryn Riske, certify that I caused a copy of **Brief of Respondent** to be served on all parties or their counsel of record on the date below:

Via US Mail via Consolidated Mail Service:

Evy McElmeel
520 East Denny Way
Seattle, WA 98122

Court of Appeals, Division II
David Ponzoha, Clerk
950 Broadway
Ste 300 MS TB-06
Tacoma, WA 98402-4454

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 7 day of July, 2011.


KATHRYN RISKE, Legal Assistant