

NO. 47375-5-II

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

AIRBORNE EXPRESS, INC.,

Appellant,

v.

JAMES GOODMAN,

Respondent.

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

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUE.....1

III. STATEMENT OF THE CASE2

 A. Before the Board, the Parties Disputed Whether the Industrial Injury Caused Goodman’s Carpal Tunnel Syndrome2

 B. Goodman Did Not Petition for Review the Finding That the Industrial Injury Caused the Carpal Tunnel Syndrome4

 C. Despite the Board’s Unchallenged Finding That the Industrial Injury Caused the Carpal Tunnel Syndrome, the Superior Court Found That the Industrial Injury Did Not Cause the Carpal Tunnel Syndrome5

IV. STANDARD OF REVIEW.....6

V. ARGUMENT7

 A. A Party Waives All Objections Not Specifically Set Forth in a Petition for Review at the Board.....9

 B. The Exhaustion of Remedies Requirement in the Industrial Insurance Act Is Grounded in the Belief that Courts Give Proper Deference to the Agency That Possesses the Expertise To Consider the Matter.....10

VI. CONCLUSION12

TABLE OF AUTHORITIES

Cases

<i>Allan v. Dep't of Labor & Indus.</i> , 66 Wn. App. 415, 832 P.2d 489 (1992).....	10
<i>Cantu v. Dep't of Labor & Indus.</i> , 168 Wn. App. 14, 277 P.3d 685 (2012).....	10
<i>Citizens for Mount Vernon v. City of Mount Vernon</i> , 133 Wn.2d 861, 947 P.2d 1208 (1997).....	11
<i>Cyr v. Dep't of Labor & Indus.</i> , 47 Wn.2d 92, 286 P.2d 1038 (1955)	6
<i>DuPont v. Dep't of Labor & Indus.</i> , 46 Wn. App. 471, 730 P.2d 1345 (1986).....	7
<i>Guiles v. Dep't of Labor & Indus.</i> , 13 Wn.2d 605, 126 P.2d 195 (1942).....	6
<i>Hill v. Dep't of Labor & Indus.</i> , 90 Wn.2d 276, 580 P.2d 636 (1978).....	9, 10
<i>Leuluaialii v. Dep't of Labor & Indus.</i> , 169 Wn. App. 672, 279 P.3d 515 (2012), <i>review denied</i> , 176 Wn.2d 1018 (2013).....	9, 10
<i>Matthews v. Dep't of Labor & Indus.</i> , 171 Wn. App. 477, 288 P.3d 630 (2012).....	11
<i>Merlino Const. v. City of Seattle</i> , 167 Wn. App. 609, 273 P.3d 1049 (2012).....	9, 10
<i>Miller v. Dep't of Labor & Indus.</i> , 200 Wash 674, 94 P.2d 764 (1939)	7
<i>Pybus Steel v. Dep't of Labor & Indus.</i> , 12 Wn. App. 436, 530 P.2d 350 (1979).....	7

<i>Robinson v. Dep't of Labor & Indus.</i> , 181 Wn. App. 415, 326 P.3d 744, <i>review denied</i> , 337 P.3d 325 (Wash. 2014)	6
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009)	6, 7
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999)	7
<i>Spring v. Dep't of Labor & Indus.</i> , 96 Wn.2d 914, 640 P.2d 1 (1982)	10
<i>Stratton v. Dep't of Labor & Indus.</i> , 1 Wn. App. 77, 459 P.2d 651 (1969)	11
<i>Williams v. Tilaye</i> , 174 Wn.2d 57, 272 P.3d 235 (2012)	7

Statutes

RCW 51.52.050(2)(a)	6
RCW 51.52.104	passim
RCW 51.52.106	11
RCW 51.52.115	passim
RCW 51.52.140	7

Regulations

WAC 296-20-01002	2, 7
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I. INTRODUCTION

Fundamental to administrative law is the requirement to exhaust administrative remedies. James Goodman failed to ask the Board of Industrial Insurances Appeals to determine whether his industrial injury caused carpal tunnel syndrome. Consistent with the Legislature's exhaustion requirement, Goodman's failure to raise that issue before the Board means that he could not raise the issue to superior court. RCW 51.52.104. The superior court erred when it acted contrary to that directive and considered the issue of causation, which was never raised in Goodman's petition for review. This Court should reverse the superior court decision and remand it to make a decision as to whether the Board correctly decided that the carpal tunnel syndrome was not fixed and stable at claim closure, such that closure of the claim was premature.

II. ISSUE

RCW 51.52.104 provides that a party waives any issue not raised in the petition for review of an industrial appeals judge's proposed decision to the Board. Did the trial court err in finding that industrial injury did not cause the carpal tunnel syndrome when Goodman did not object in the petition to the finding that it did cause it?

III. STATEMENT OF THE CASE

A. Before the Board, the Parties Disputed Whether the Industrial Injury Caused Goodman's Carpal Tunnel Syndrome

Goodman sustained an industrial injury in 2002, while driving for Airborne Express, Inc. CP 338.¹ His neck and shoulders were injured. CP 338. His industrial insurance claim was allowed and then closed in 2003. CP 117. It was reopened in 2004. CP 118. The Department again closed the claim in February 2011, awarding permanent partial disability for Goodman's neck and shoulder. CP 4, 106-07. Goodman appealed to the Board, arguing that he was permanently totally disabled. CP 5. In order to be permanently totally disabled a worker's condition must have reached maximum medical improvement ("fixed and stable") at the time of the closing order, here in February 2011. *See* WAC 296-20-01002 (defining proper and necessary treatment); CP 4-5.

At the Board, various doctors testified about his neck and shoulder conditions. Goodman had a cervical fusion and a shoulder decompression, and then developed carpal tunnel syndrome. CP 185-86, 699. In May 2011, a surgeon performed a left-sided carpal tunnel release. CP 186-87, 700.

¹ The Department submits this brief to discuss Goodman's waiver under RCW 51.52.104 regarding the causation of carpal tunnel syndrome and will discuss only the facts relevant to that issue.

Several doctors testified that his injury caused the carpal tunnel syndrome:

- Dr. Kevin Schoenfelder testified that the left-sided carpal tunnel syndrome was caused by double crush syndrome related to the injury. CP 699-700, 711. He found the neck injury caused the carpal tunnel syndrome. CP 711.
- Dr. Todd Larson believed the injury aggravated the carpal tunnel syndrome. CP 496-97, 503. He thought Goodman should have the carpal tunnel release and noted an improvement after the surgery. CP 496, 509-10.
- Dr. Stephen Settle agreed that the work injury proximately caused the carpal tunnel syndrome. CP 433-34.
- Dr. Richard Johnson also agreed that the injury caused the carpal tunnel syndrome. CP 252-53, 255.
- Dr. Carter Mauer agreed that the carpal tunnel syndrome was caused by the industrial injury on the basis of double crush syndrome. CP 754.

Two doctors testified that any carpal tunnel syndrome was not related to the industrial injury:

- Dr. Mark Manoso did not think that any carpal tunnel syndrome was caused by the injury. CP 657-58.

- Dr. D. Casey Jones also did not think that any carpal tunnel syndrome would be caused by the industrial injury. CP 591-92.

B. Goodman Did Not Petition for Review the Finding That the Industrial Injury Caused the Carpal Tunnel Syndrome

Besides the issue of carpal tunnel syndrome, the parties elicited other testimony about whether Goodman was permanently and totally disabled because of the industrial injury, which the Board's hearing judge, the industrial appeals judge, considered. CP 86-99. The industrial appeals judge reversed the Department order closing the claim. CP 99. In its finding of fact three, the industrial appeals judge found that the industrial injury caused the carpal tunnel syndrome:

The industrial injury of March 5, 2002, is the proximate cause of: a C5-6 disc herniation and surgery in the form of a C5-6 anterior cervical fusion; left-sided radiculopathy; *left-sided carpal tunnel syndrome*; a right shoulder sprain/strain; surgery in the form of a right shoulder subacromial decompression; and cardiomyopathy.

CP 98 (emphasis added). Because the carpal tunnel syndrome was not fixed and stable as evidenced by the need for surgery, the industrial appeals judge reversed the Department order and then remanded the case to the Department on the basis that closure was premature. CP 96, 99.

Goodman petitioned the Board for review of the proposed decision. CP 64-71. He did not assign error to finding of fact three, which found that the industrial injury caused the carpal tunnel syndrome, nor did

he argue it in his petition. CP 65-71. The Board accepted review and it observed that “Mr. Goodman does not dispute our industrial appeals judge’s determination to allow his left carpal tunnel condition under the claim.” CP 44. It did not consider the question of causation because Goodman had not asked it to consider it. CP 44. The Board agreed that the case needed to be remanded to the Department because Goodman’s carpal tunnel syndrome was not fixed and stable at the time of claim closure. CP 44, 46.

C. Despite the Board’s Unchallenged Finding That the Industrial Injury Caused the Carpal Tunnel Syndrome, the Superior Court Found That the Industrial Injury Did Not Cause the Carpal Tunnel Syndrome

At the superior court, the employer Airborne Express argued that the court could not consider the question whether the injury caused the carpal tunnel condition because Goodman had not disputed that below, in the petition for review. CP 906. Nonetheless, the superior court found that the industrial injury “is not the proximate cause of . . . left-sided carpal tunnel syndrome” CP 1030. It then decided that Goodman was permanently totally disabled. CP 1031. Airborne Express appealed. CP 1033.

IV. STANDARD OF REVIEW

When Goodman appealed the Department's decision to the Board, he had the burden of showing, by a preponderance of the evidence, that the Department's order was incorrect. RCW 51.52.050(2)(a); *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942). A claimant must provide strict proof of each element of his or her claim for benefits under the Act. *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955); *Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744, *review denied*, 337 P.3d 325 (Wash. 2014).

On appeal to superior court, the Board's decision is *prima facie* correct and the burden of proof is on the party challenging the decision. RCW 51.52.115; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). The superior court may only consider issues raised at the Board and reviews the Board decision *de novo* on the evidence in the certified appeal board record. RCW 51.52.115. The superior court may substitute its own findings and decision if it finds, from a fair preponderance of the evidence, that the Board's findings and decision are incorrect. *Rogers*, 151 Wn. App. at 180.

In an industrial insurance case, it is the decision of the trial court that the appellate court reviews, not the Board decision. *See Rogers*, 151 Wn. App. at 180. The ordinary standard of civil review applies to this

Court's review of the superior court's decision. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *see Rogers*, 151 Wn. App. at 180-81. If this were a substantial evidence case, the court would limit its review to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and determine whether the court's conclusions of law flow from the findings. *See Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). However, the primary question here is a question of law, specifically whether a trial court may enter a finding that contradicts a finding uncontested at the Board. Questions of law are reviewed de novo. *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012).

V. ARGUMENT

The Department cannot close a worker's claim if the worker has not yet reached maximum medical improvement, namely when the worker's condition becomes "fixed and stable." WAC 296-20-01002 (definition of proper and necessary treatment); *Miller v. Dep't of Labor & Indus.*, 200 Wash 674, 679, 94 P.2d 764 (1939); *Pybus Steel v. Dep't of Labor & Indus.*, 12 Wn. App. 436, 439, 530 P.2d 350 (1979); *DuPont v. Dep't of Labor & Indus.*, 46 Wn. App. 471, 477, 730 P.2d 1345 (1986). Here, the Board decided that Goodman required treatment in the form of

surgery for his carpal tunnel syndrome. This means that the condition was not at maximum medical improvement, in other words it was not fixed and stable. If the condition is not fixed and stable (meaning further treatment was required) at the time of claim closure and the industrial injury caused the condition, then the claim needs to be remanded to the Department for further action. Thus, this case turns on whether the carpal tunnel syndrome was related to the industrial injury or not. If related, the question is whether the condition was fixed and stable at claim closure and whether the Board properly reversed the claim closure because of the need for surgery at that time.

The Industrial Insurance Act, consistent with well-established principles of exhaustion of administrative remedies, requires a party to contest an issue at the Board in order for the issue to be raised in a judicial appeal. RCW 51.52.104, .115. Goodman waived the question of whether the industrial injury proximately caused the carpal tunnel syndrome when he did not contest the industrial appeals judge's causation finding at the Board. Accordingly, the trial court's decision on proximate cause was a prejudicial error of law and this Court must reverse its decision.

A. A Party Waives All Objections Not Specifically Set Forth in a Petition for Review at the Board

The Industrial Insurance Act requires parties to raise issues to the Board itself in order to gain further judicial review. RCW 51.52.115. RCW 51.52.104 provides that a party waives any issue not raised in the petition for review:

Such petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.

Washington courts have held on numerous occasions that under RCW 51.52.104, a party waives legal arguments that are not presented to the Board in its petition for review. *See Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279-80, 580 P.2d 636 (1978) (holding claimant waived argument of Board chairman's potential disqualification by failing to present argument to Board); *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012) (holding claimant waived argument that closing order was not final because she failed to raise it in her appeal to the Board or petition for review of the Board's decision), *review denied*, 176 Wn.2d 1018 (2013); *Merlino Const. v. City of Seattle*, 167 Wn. App. 609, 616 n.3, 273 P.3d 1049 (2012) (holding claimant waived argument that a police officer was an independent contractor by failing to present argument to the Board or trial court); *Allan v. Dep't of*

Labor & Indus., 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (holding claimant waived objection on grounds of insufficient notice because it was not set out in her petition for review to the Board).

Just like the claimants in *Hill*, *Leuluaialii*, *Merlino*, and *Allan*, Goodman failed to contest an issue at the Board in his petition. The trial court therefore erred in deciding the issue of causation contrary to RCW 51.52.104. This error was not harmless but was prejudicial and the trial court decision should be reversed and remanded. See *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 921, 640 P.2d 1 (1982); *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 24, 277 P.3d 685 (2012). This matter must be remanded to the superior court to consider whether the Board correctly decided that Goodman's condition was not fixed and stable as of February 2011, such that the case should be remanded to the Department.

B. The Exhaustion of Remedies Requirement in the Industrial Insurance Act Is Grounded in the Belief that Courts Give Proper Deference to the Agency That Possesses the Expertise To Consider the Matter

RCW 51.52.104 and RCW 51.52.115 are grounded in well-established principles underlying the requirement to exhaust administrative remedies. A superior court in an industrial insurance case has authority to “decide only those matters that the administrative tribunals previously determined.” *Matthews v. Dep't of Labor & Indus.*,

171 Wn. App. 477, 491, 288 P.3d 630 (2012). Although a fact-finder considers de novo a Board decision, the Legislature provides that the Board decision is prima facie correct. RCW 51.52.115. By design the Legislature provides that the Board must apply its special expertise to an issue before the superior court may consider it.

The exhaustion of remedies principle “is founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges.” *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). This requirement allows development of a factual record, facilitates the exercise of administrative expertise, allows an agency to correct its own errors, and prevents the circumvention of administrative procedures through resort to the courts. *Id.*

Here, it was a contested fact as to whether the carpal tunnel syndrome was related to the industrial injury or not. The Board is the ultimate fact-finder in a Board proceeding. RCW 51.52.106; *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 79, 459 P.2d 651 (1969). If a petition has been granted, as was here, the Board issues “findings and conclusions as to each contested issue of fact and law.” RCW 51.52.106. The Board could have applied its expertise to the question of causation, but Goodman accepted the determination that his injury caused his carpal

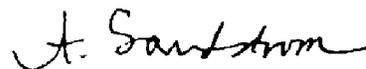
tunnel syndrome, so the Board had no need to weigh the credibility of the witnesses or evaluate the evidence regarding this matter. The superior court circumvented the clear requirements in the Industrial Insurance Act that the Board address any contested issues first before judicial review. Its decision must be reversed and remanded.

VI. CONCLUSION

RCW 51.52.104 plainly provides that a party waives any objection not raised in the petition to the Board. Here, Goodman did not contest in the Board petition the finding that the industrial injury caused the carpal tunnel syndrome and the superior court erred in finding otherwise. This case must be remanded to the trial court to determine the only issue properly before it whether the Board correctly decided to remand for further treatment because the condition was not fixed and stable as of February 2011.

Respectfully submitted this 3rd day of February, 2015.

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DEPARTMENT OF LABOR AND
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CERTIFICATE OF
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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Brief of Respondent and this Certificate of Service in the below described manner:

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