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DIVISION II

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STATE OF WASHINGTON

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NO. 48306-8-II

COURT OF APPEALS,  
DIVISION II

IN THE STATE OF WASHINGTON

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MONTE D. MOORE,  
*APPELLANT/PLAINTIFF*

v.

GORDON TRUCKING, INC.,  
*RESPONDENT/DEFENDANT.*

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SUPPLEMENTAL BRIEF OF APPELLANT

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## **ASSIGNMENTS OF ERROR**

### **Assignment of Error No. 1.**

The Superior Court erred when it affirmed the decision of the Board of Industrial Insurance Appeals in that Mr. Moore's December 18, 2014, document filed with the Department of Labor & Industries qualifies as a protest of the November 17, 2014, Order per RCW 51.52.050 or RCW 51.52.060.

### **Assignment of Error No. 2.**

The Superior Court erred when it affirmed the decision of the Board of Industrial Insurance Appeals that Mr. Moore's January 22, 2015, appeal of the Department of Labor & Industries' November 17, 2014, Order was not timely filed per RCW 51.52.060.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**No. 1.** Did the December 18, 2014, document filed with the Department of Labor & Industries qualify as a protest of the November 17, 2014, Order per RCW 51.52.050 or RCW 51.52.060?

**No. 2.** Was the January 22, 2015, appeal of the November 17, 2014, Order timely filed per RCW 51.52.060?

## STATEMENT OF THE CASE

On October 23, 2014, the Department of Labor & Industries issued an order closing Mr. Moore's claim because it determined the aggravation of his pre-existing right glenohumeral osteoarthritis was temporary and had returned to its pre-injury status. (Certified Appeal Board Record p. 39). On November 11, 2014, Mr. Moore filed with the Department a protest and request for reconsideration of the October 23, 2014, Order. On November 17, 2014, the Department issued an order affirming the October 23, 2014, Order. The November 17, 2014, Order did not alter, change, or add to the October 23, 2014, Order. (CABR p. 41). Mr. Moore's attorney received the November 17, 2014, Order on November 19, 2014. (CABR p. 97).

On December 18, 2014, Mr. Moore's attorney, on his behalf, filed a Notice of Appeal with the Board of Industrial Insurance Appeals and served it upon the Department of Labor and Industries. (CABR pp. 84-85). It was served on the Department via facsimile and was received the same day. (CABR p. 97). The December 18, 2014, document was received by the Department within 60 days of Mr. Moore's receipt of the November 17, 2014, Order. In that December 18, 2014, document, Plaintiff stated:

Mr. Moore is seeking a Board order reversing this decision. The evidence will show that on November 15,

2013 the Department ordered the Self-Insured Employer to accept responsibility for an aggravation of Mr. Moore's pre-existing right shoulder glenohumeral osteoarthritis. This was protested and affirmed by Department order dated February 14, 2014. This order is now final and binding.

It is anticipated that the evidence will show that prior to November 1, 2012 industrial injury, Mr. Moore had no symptoms or limitations arising from his pre-existing right shoulder arthritis. Following the injury, the evidence will show Mr. Moore has pain and significant range of motion loss. The final and binding aggravation order means the Self-Insured Employer is responsible for this aggravation.

It is anticipated the evidence will show that the independent medical examiners, who examined Mr. Moore in 2014, will testify that Mr. Moore still has range of motion loss related to his right shoulder arthritis. It is anticipated that Dr. Bowman, his attending orthopedic surgeon, will also testify that Mr. Moore continues to have limitations and clinical findings due to his right shoulder arthritis. It is anticipated that Dr. Bowman will testify these restrictions require further treatment and prevent Mr. Moore from returning to work.

Therefore, Claimant is requesting the order on appeal be reversed because there is no medical evidence that Mr. Moore's right shoulder has returned to its pre-injury status: no pain, symptoms, or limitations on use. So long as his shoulder has not returned to its pre-injury status, then any order that finds the aggravation was temporary is wrong. So long as the shoulder has not returned to its pre-injury status, then the aggravation is not temporary because it has not resolved. If the aggravation has not resolved, then the Department's order is incorrect and should be reversed by the Board.

(CABR pp. 84-85). However, that December 18, 2014, document included the typographical error that stated Plaintiff was appealing the October 23, 2014, Order, not the November 17, 2014, Order.

Despite the fact the Notice of Appeal was filed with the Department and the Board, no further action was taken by either agency regarding the November 17, 2014, Order<sup>1</sup>. Then on January 22, 2015, my office filed a Notice of Appeal to the November 11, 2014, order, which was otherwise identical to its December 18, 2014, appeal (except for correcting the typographical error). (CABR pp. 33-37). The Board accepting this new appeal as timely. (CABR pp. 43).

The Defendant challenged whether the January 22, 2015, appeal was timely with a Motion for Summary Judgment, which was initially denied. (CABR pp. 60-90; 107-112). The Industrial Appeals Judge's interlocutory order denying summary judgment stated:

I agree with the claimant that the December 18, 2014 Notice of Appeal can be two things. In Docket No. 14 25374, it was on its face an appeal to the Department's October 23, 2014 order. In this appeal, the claimant is arguing it was a writing putting the Department on notice that he disagreed with the November 27, 2014 Order affirming claim closure... Here, the fact that claimant disagreed with the closure of the claim could not be clearer. This is what matters.

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<sup>1</sup> The Board merely determined the Notice of Appeal was not valid vis-à-vis the October 23, 2014, Order. The legal effect of filing the Appeal on the Board is the companion issue originally raised in this appeal prior to consolidation by this Court. At issue here is, what was the legal effect of filing the Appeal with the Department.

(CABR p. 110).

The Defendant then sought and was granted interlocutory review. (CABR p. 115). This is an internal process within the Board where an Assistant Chief Industrial Appeals Judge reviews an interlocutory order issued by the assigned Industrial Appeals Judge. WAC 263-12-115(6). The Assistant Chief IAJ reversed the IAJ and granted Defendant's Motion for Summary Judgment stating:

The document filed with both the Board and the Department conformed to the provisions of RCW 51.52.060(1)(a) and was *manifestly* a notice of appeal. The Department did not need to treat it as though it were a request for reconsideration that should be communicated to the Board.

(CABR p. 130-131); (emphasis added).

On November 12, 2015, a Proposed Decision and Order was issued consistent with the decision of the Assistant Chief's Order. (CABR pp. 29-30). Plaintiff petitioned the Board to Review the PD&O on December 1, 2015. (CABR pp. 20-25). On December 16, 2015, the Board denied review. (CABR p. 3). Plaintiff then timely filed a Notice of Appeal to Clark County Superior Court.

In Clark County Superior Court, a bench trial was held on June 30, 2016. Later that same day, the Court emailed its ruling to the parties. (Clerks Papers Sub 20). The Court affirmed the Board of Industrial Insurance Appeals

without analysis. A final judgment was entered and Mr. Moore appealed to this Court.

### STANDARD OF REVIEW

“When reviewing the Board proceedings, [the appellate court] only examine[s] ‘the record to see whether substantial evidence supports the findings made after the superior court’s de novo review, and whether the court’s conclusions of law flow from the findings.’” *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36 (2015), quoting *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5-6 (1999). “However, statutory interpretation remains a question of law [the appellate court] determine[s] de novo.” *Gorre*, 184 Wn.2d at 36, citing *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 807 (2001).

As this matter was decided below on a Motion for Summary Judgment, this Court should employ the same standards in determining whether there is any genuine issue of material fact presented in this case. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 431 (1993). The purpose of summary judgment is to avoid a useless trial. *Preston v. Duncan*, 55 Wn.2d 678, 681 (1960). A motion for summary judgment must be granted if, after considering the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and reasonable

persons can reach but one conclusion. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690 (1999). A material fact is one on which the outcome of litigation depends. CR 56(c); *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618 (1996).

## ARGUMENT

The issue in this appeal is: what is the legal definition of a “written protest” as that term is used is used in RCW 51.52.050 and RCW 51.52.060? The corollary issue is whether a document can serve two functions? Inherent in both issues is whether the apparent application of a magic words doctrine was appropriate. Here, the Superior Court tersely affirmed the Board’s decision to dismiss Appellant’s appeal without analysis and minimal explanation. While this is technically an appeal of the decision of the trial court, Appellant’s argument is focused on the decision of and analysis by the Board of Industrial Insurance Appeals.

### **1. The December 18, 2014 document meets the statutory definition of a protests and requests for reconsideration.**

“All department orders ‘shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department ... or an appeal is filed with the board of industrial insurance appeals.’ *Shafer v. Dep’t of Labor & Indus.*, 166 Wn.2d 710, 717 (2009), citing RCW 51.52.050(1). There are two statutory

elements that must be satisfied to find a Department order has become final: a) communication of the order to all statutory parties; and b) no written protest filed with the Department within 60 days of communication of the order. Once an order becomes final, it can be voided only if it was void ab initio due to a lack of subject matter jurisdiction by the Department or if there are equitable reasons not to enforce its finality due to evidence such as fraud. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162 (1997); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533 (1994).

After extensive legal research, Appellant has not identified any Washington appellate decision that interprets what constitutes a protest. However, the Board of Industrial Insurance Appeals has designated as significant, per WAC 263-12-195, several of its decisions that address this question. According to the Board, a protest is any written document, timely filed, “which is reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with the decision of the Department.” *In re Mike Lambert*, BIIA Dec. 91 0107 (1991). “Magical words” are not required in a protest. *Id.* Furthermore, the Board does not impose any particular form requirements on protests and requests for reconsideration. *In re Charles Weighall*, BIIA Dec. 29,863 (1970).

To decide whether Plaintiff filed a protest of the November 17, 2014, Order, the Court must answer: does the following place the Department on notice that Appellant disagreed with the November 17, 2014, Order closing the claim?

It is anticipated the evidence will show that the independent medical examiners, who examined Mr. Moore in 2014, will testify that Mr. Moore still has range of motion loss related to his right shoulder arthritis. It is anticipated that Dr. Bowman, his attending orthopedic surgeon, will also testify that Mr. Moore continues to have limitations and clinical findings due to his right shoulder arthritis. It is anticipated that Dr. Bowman will testify these restrictions require further treatment and prevent Mr. Moore from returning to work.

Therefore, Claimant is requesting the order on appeal be reversed because there is no medical evidence that Mr. Moore's right shoulder has returned to its pre-injury status: no pain, symptoms, or limitations on use. So long as his shoulder has not returned to its pre-injury status, then any order that finds the aggravation was temporary is wrong. So long as the shoulder has not returned to its pre-injury status, then the aggravation is not temporary because it has not resolved. If the aggravation has not resolved, then the Department's order is incorrect and should be reversed by the Board.

(Appellant's December 18, 2014, Notice of Appeal; CABR p. 84-85). This more than notifies the Department that Mr. Moore is requesting action inconsistent with the November 17, 2014, order, which closed the claim based on the determination Appellant's condition had returned to its pre-injury status.

By affirming the October 23, 2014, Order, the November 17, 2014,

Order makes the following determinations:

- 1) The previously decided aggravation of Claimant's right shoulder glenohumeral arthritis has resolved (e.g. it has returned to its pre-injury status);
- 2) Claimant's claim-related medical condition is fixed (e.g. he does not need any further medical treatment); and
- 3) Claimant is able to work (e.g. his right shoulder, which did not cause any work restrictions prior to the accident, does not currently cause him to have any work restrictions).

(CABR p. 41). The December 18, 2014, document summarized above notifies the Department that Appellant believes:

- 1) The aggravation of his right shoulder glenohumeral arthritis has not resolved (e.g. not returned to its pre-injury status);
- 2) His right shoulder is not medically fixed and stable (e.g. it requires more treatment); and
- 3) He is not vocationally fixed (e.g. unable to work due to the current status of his right shoulder).

The December 18, 2014, document is a protest under the Board's own *Lambert* decision. It is a protest because Appellant clearly requested action inconsistent with the Department's decision.

**2. The December 18, 2014, document can and did serve multiple functions.**

The Court should recognize the *Order Granting Interlocutory Review* is the actual opinion of the Board. (CABR p. 130-131). The assigned

IAJ's Interlocutory Order denying Summary Judgment reflects his opinion that the Board has jurisdiction over this appeal. Due to the Board's procedural rules, the IAJ was required to write a Proposed Decision and Order, the outcome of which he did not agree with. This can be seen by the terseness of the decision. The Board then denied Plaintiff's Petition for Review.

The Board's *Order Granting Interlocutory Review* held the December 18, 2014, document was "manifestly" an appeal. (CABR p. 131, ln. 18). The Board concluded it was legal for the Department to treat it as such and not also as a protest. (CABR p. 131). The Board's legal position that a document can only be one thing and not two things simultaneously is inconsistent with its own prior significant decisions.

Since 1970, the Board has held that an Application to Reopen a claim filed within 60 days of a closing order shall be construed as a protest of the closing order. *In re Charles Weighall*, BIIA Dec. 29,863 (1970); see also, *In re Valerie Rye*, BIIA Dec. 89 3010 (1990); *In re Ronald Leibfried*, BIIA Dec. 88 2274 (1990); *In re Carmel Smith*, BIIA Dec. 95 1795 (1996); *In re Thomas Hull*, BIIA Dec. 09 10455 (2010). The Department has a form called an "Application to Reopen Claim." It is used to reopen closed claims per RCW 51.32.160. Using the Board's logic from this case, an Application

to Reopen is manifestly an Application to Reopen. Filing an Application to Reopen can only be considered an Application to Reopen. Therefore, if one is filed with the Department within 60-days of a closing order, the Department can only decide whether to reopen the claim per RCW 51.32.160. It cannot also have the dual purpose of being a protest of the closing order per RCW 51.52.050. This makes no sense and is manifestly contrary to the Board's well-established, well-reasoned definition of a protest.

But, the Board's inconsistency in this appeal goes further. The Board has held that a medical chart note issued by a doctor asking for more treatment should be treated as protest of a Department order closing the claim. *In re Jerry D. Bartlett*, Dckt. No. 08 11051, *et. al.* (February 19, 2009). It is not even necessary the chart note be generated after the date of the order, so long as a copy of the chart note is received by the Department after the issuance of its order. *Id.* While *Bartlett* has not been designated significant by the Board, it has been cited to and followed in a subsequent decision, *In re Michele A. Somes*, Dckt. No. 10 23707 (December 28, 2011).

Again, if the Board's reasoning in the present appeal were applied to these earlier decisions, these documents were manifestly only medical chart notes. These documents cannot serve two purposes or be two things

simultaneously. Therefore a chart note is merely a chart note and can never be used to protest an order. Again, this makes no sense.

The Board's analysis of what constitutes a protest in *Lambert*, *Weighall*, *Rye*, *Leibfried*, *Hull*, *Bartlett*, and *Somes* is correct. The Board's analysis in this case is wrong. It is wrong because the author's intent does not matter. What matters is does the document suggest, request, or state that the Department take a course of action contrary to one of its orders.

This is the crux of this issue: what role does intent (stated or implied) play in whether a document should be construed as a protest? Up until this case, the Board has consistently held intent plays no role. That chart note in *Bartlett* was created before there was an order denying further treatment. The doctor could not have known about this order when he wrote that chart note. It was manifestly not his intent that his chart note be used as a protest. Yet it was.

Mr. Moore's intent and his attorney's intent in creating the December 18, 2014, document is irrelevant. The Court must look at the four corners of that document and decide: does it put the Department on notice that Mr. Moore or his attorney disagree with any decisions issued in the prior 60 days? That disagreement can be explicit and implicit. Here we have a circumstance where there were two, functionally identical orders

issued by the Department in the 60 days prior to receipt of the December 18, 2014, document. The Court should find that December 18, 2014, document was a protest and/or appeal to the November 17, 2014, Order.

**3. The Court should reject the Board's new use of the magic words doctrine.**

Despite *Lambert's* rejection of the magic words doctrine (the requirement that parties use specific phrases or words to invoke a tribunal's jurisdiction), the Board applied that doctrine to the December 18, 2014, document. Stating that document was "manifestly" an appeal because it stated the words Appeal is an invocation of the magic words doctrine. Insisting the document could only be an appeal and not also a protest, is a further indictment of the Board.

It is an indictment because Washington Courts have broadly rejected application of a magic words doctrine. *Wolf v. Scott Wetzel Servs.*, 113 Wn.2d 665 (1989) (suing a worker's compensation claims manager for outrageous conduct); *Weatherspoon v. Dep't of Labor & Indus.*, 55 Wn. App. 439 (1989) (experts do not need to use a "magic" phrase to provide legally sufficient opinions). The *Weatherspoon* Court's rejection of magic words was itself evocative: "We do not require the vocalization of thaumaturgical words in order to establish the necessary causal relation

between the original injury and the aggravation.” Id. at 442, quoting *Venezelos v. Dep’t of Labor & Indus.*, 67 Wn.2d 71, 74 (1965), which cites *Dayton v. Dep’t of Labor & Indus.*, 45 Wn.2d 797 (1954) and *Stampas v. Dep’t of Labor & Indus.*, 28 Wn.2d 48 (1951). Here, the Board is insisting that Claimant use of the word “appeal” only evokes the jurisdiction of the Board, but cannot also be a protest of a Department order. The Board is wrong.

Instead of magic words, the Court should look at the December 18, 2014, document to determine what it asserts: disagreement with closure of the claim. It is not necessary, per RCW 51.52.050 or .060, that any specific order be identified. Chart notes act as protest without identifying any specific order. What is necessary is the written expression of disagreement, with a claims processing decision, received by the Department within 60 days after an order is issued.

To the extent that any particular order is Identified is assistive, but it should not be necessary. To the extent the document self-Identifies itself as a protest is assistive, but it should not be necessary. The December 18, 2014, document, sent to the Department, was a protest of the November 17, 2014, Order. A document can serve two purposes; this is the fundamental error of the Board.

**4. The Board has jurisdiction to hear this appeal.**

Respondents have focused upon Appellant's January 22, 2015, Notice of Appeal by characterizing it as an untimely appeal. On its face, the January 22, 2015, appeal was filed with the Board outside of the 60-day window created by the November 17, 2014, Order. But Respondent's analysis depends entirely on the Court deciding the December 18, 2014, document had no effect whatsoever upon the November 17, 2014, Order. Stated differently, if the December 18, 2014, document does not meet the statutory definition of a protest of the November 17, 2014, Order, then Respondents are correct the January 22, 2015, appeal was not timely. If the January 22, 2015, appeal was not timely, then the Board does not have jurisdiction to hear this appeal.

Assuming the Court agrees the December 18, 2014, document is a protest to the November 17, 2014, Order, it must then decide whether the Board has jurisdiction to hear Appellant's January 22, 2015, appeal or if the matter must be remanded to the Department for further action. The Court should be mindful that the November 17, 2014, Order was clear that the Department was not going to further reconsider its decision. The Order states parties may only file an appeal with the Board. (CABR p. 41). In

contrast, the October 23, 2014, stated parties may either file a protest with the Department or an appeal with the Board. (CABR p. 39).

Again, this is not a scenario that Plaintiff has found addressed in appellate case law. However, the Board has addressed this scenario in at least two significant decisions. The first, *In re Thomas Houlihan*, BIIA Dec. 67,414 (1985) arose when a representative of an injured worker filed a Notice of Appeal only with the Department. The Board noted RCW 51.52.060, which states:

That failure to file notice of appeal with both the Board and the Department shall not be ground for denying the appeal if the notice of appeal is filed with either the Board or Department.

The current version of this provision is found at RCW 51.52.060(1)(b). After noting the document filed with the Department could only reasonably be construed as a protest, the Board then held:

Employees of the Department, who are experienced in matters of this kind, should have recognized those documents as intended appeals and forwarded them to this Board for processing. Failure of the Department to do so must not result in the appealing party being left without a remedy.

*In re Thomas Houlihan.*

In that same year, the Board decided *In re Donzella Gammon*, BIIA Dec. 70,041 (1985) where the Department, like in *Houlihan*, issued an order

pursuant to RCW 51.52.060 (e.g. containing only appeal language). But in *Gammon*, the injured worker filed a “protest” of that appealable only order. The Department forwarded this protest to the Department after the 60 days from when the order had elapsed. The Board held this delay was “inconsequential to the claimant’s rights herein.” *In re Donzella Gammon*. The Board found the manifest protest must be considered an appeal.

Taken together, the *Houlihan* and *Gammon* decisions stand for the proposition that once the Department issues an “appealable only” order and a written document is filed that disagrees with that order, jurisdiction to hear that dispute generally resides with the Board. So long as the Court has not applied the disfavored magic words doctrine, then it must find the December 18, 2014, document was a source of disagreement with the November 17, 2014, Order requiring further action by the Department.

That action is governed by RCW 51.52.060(3) and (4). The Department can ask for further evidence. RCW 51.52.060(3). The Department can issue a further order. RCW 51.52.060(4). The Department is time limited from taking these actions to either 60 days from the Order (RCW 51.52.060(3)) or 30 days from receipt of the appeal (RCW 51.52.060(4)). The Department may grant itself extensions. Yet, here the Department did not take either action within these statutory time periods,

nor did the Department forward this protest/appeal to the November 17, 2014, Order to the Board as suggested it should in the *Houlihan* and *Gammon* decisions.

With the Department taking no action, Plaintiff filed another Notice of Appeal with the Board. (CABR pp. 33-37). If the Court finds the December 18, 2014, document is not a protest, then this appeal was filed outside of the 60-day time period provided for in RCW 51.52.060(3) & (4). However, if the Court finds the December 18, 2014, document was a protest of the November 17, 2014, then this appeal was timely. This appeal was Plaintiff's attempt at notifying the Board of the Department's delay and inaction towards the December 18, 2014, protest. Plaintiff's rights should not be harmed because of the Department's inaction.

Therefore, with the December 18, 2014, document putting the Department on notice Plaintiff disagreed with the contents of its November 17, 2014, decision to close his claim, the Board had the jurisdiction to hear Plaintiff's dispute. The Board's decision to the contrary is wrong. This Court should remand this matter to the Board with instructions to schedule hearings on the issues raised by Plaintiff.

**5. If the Court finds RCW 51.52.050 and/or .060 ambiguous as to the definition of a protest or appeal, then it must apply the Liberal Construction doctrine to broadly define what it means to file a protest or appeal.**

RCW 51.52.050 and .060 could be construed as ambiguous because the statute does not provide a definition of what constitutes a protest. “If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373 (2007). In other words, if “both parties offer reasonable, conflicting interpretations of the text and purpose of the statutory scheme at issue,” then the Court must find the statute ambiguous. *Crabb v Dep't of Labor & Indus.*, 181 Wn. App. 648, 657 (2014), rev. den. 181 Wn.2d 1012 (2014).

The Legislature mandated courts liberally construe the Act in favor of the injured worker. RCW 51.12.010. This means, “All doubts as to the meaning of the Act is to be resolved in favor of the injured worker.” *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584 (1996). The recent *Crabb* decision further explained what this requirement means:

The Supreme Court has commanded that this legislative directive requires that we resolve all reasonable doubt in favor of the injured worker. Because *Crabb* makes at least a reasonable case for his entitlement to the higher benefit rate,

we must resolve the Department's appeal in his favor, despite the canons of construction invoked by the Department.

*Crabb*, 181 Wn. App. at 658 (emphasis added, citations omitted). The Industrial Insurance Act must be interpreted by the Court to further, not frustrate, this purpose. *Bostain v. Food Express*, 159 Wn. 2d 700, 712 (2007) (interpreting Title 49 RCW, which has a similar liberal construction requirement).

Obviously, the Court must still ensure the Plaintiff's reading of the statute does not lead to an absurd result. *Crabb*, 181 Wn. App. at 658-59. To state the obvious: reasonable and absurd are polar opposites. This Court can only find the statute ambiguous if it is susceptible to two reasonable readings. If one of those interpretations is absurd, it cannot be reasonable. Therefore, for this Court to conclude RCW 51.52.050 and/or RCW 51.52.060 are ambiguous, it must have already decided there are more than one reasonable reading.

The *Crabb* Court's application of the Liberal Construction doctrine was clear: it compels the Court to find in favor of the interpretation resulting in broader rights, even if other statutory canons suggest a contrary outcome. The *Crabb* decision does not attempt to balance between various canons when interpreting the Act. It holds Courts shall only use the liberal

construction mandate when an injured worker's rights or benefits are at issue.

If the Court finds RCW 51.52.050 and .060 ambiguous, Plaintiff urges this Court to adopt a broader interpretation than the Board as to what constitutes a protest or an appeal. The standard should be: any written document, timely received on or after the date of the order or orders, which reasonably puts the Department on notice that a party disagrees with the order or orders; the document suggests a party is requesting action inconsistent with the order or orders; and/or the document contains factual information inconsistent with the order or orders. While the time limits for filing a protest are strictly enforced, what constitutes a timely protest should be liberally construed in favor of claimants to ensure benefits are completely and accurately awarded.

#### **6. Reasonable Attorney Fees.**

If the Court of Appeals finds in favor of Mr. Moore he is entitled to reasonable attorney fees and costs pursuant to RCW 51.52.130. RAP 18.1. This case involves a Self-Insured Employer, which means there is no requirement this appeal affect the State's accident fund. *Johnson v. Tradewell Stores*, 95 Wn.2d 739 (1981). Furthermore, the *Brand* Court held that it does not matter whether or not the injured worker prevailed on all issues.

So long as he prevailed on at least one issue on appeal, all attorney fees are payable. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 674 (1999).

In *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 577 (2006), the Supreme Court awarded attorney fees where an injured worker appealed the trial court's grant of summary judgment. Like the present case, it involved a self-insured employer. Also, it resulted in the appeal being remanded to the trial court for a new trial.

Then there is the case of *Chynk & Conley/Quad-C v. Bray*, 156 Wn. App. 246 (2010), where the injured worker appealed over failure to give a jury instruction. This case also involved a self-insured employer. The Court of Appeals agreed the failure to give the instruction was prejudicial error and remanded the case for a new trial. *Id.* at 248. The Court awarded the injured worker attorney fees, per RCW 51.52.130, for prevailing on appeal. *Id.* at 256.

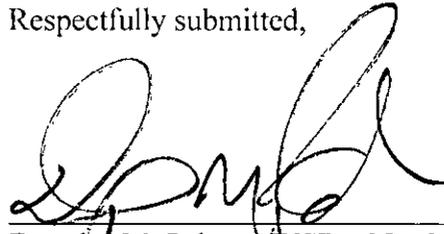
## CONCLUSION

The December 18, 2014 document informed the Department that Claimant believed his right shoulder glenohumeral arthritis had not abated, he needed more treatment, and sought more time loss benefits. Each of these assertions are inconsistent with the November 17, 2014 order, which affirmed an October 23, 2014, order that held Claimant's right shoulder glenohumeral arthritis had abated, he did not need more treatment, and he was able to work.

By dismissing his appeal, this decision is effectively overturning *Lambert's* prohibition against using "magic words" to determine whether a document is a protest. The Court should reject the formalism imposed by the Board of Industrial Insurance Appeals. The Court should find Plaintiff's appeal timely and remand this matter to the Board of Industrial Insurance Appeals for the taking of evidence.

Dated: October 5, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Palmer', written over a horizontal line.

Douglas M. Palmer, WSBA No. 35198  
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5 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is  
6 true and correct.

7 Dated: October 5, 2016.



8  
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10 Attorney for Monte Moore,  
11 Appellant/Plaintiff  
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