

NO. 49725-5-II

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

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MICHAEL W. ALDRIDGE,

Appellant,

v.

WASHINGTON STATE DEPARTMENT  
OF LABOR AND INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR AND INDUSTRIES**

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## I. INTRODUCTION

As the initial appellate body for decisions of the Department of Labor and Industries, the Board of Industrial Insurance Appeals limits its review to whether the Department's decision is correct. And though the superior court reviews the Board's decision de novo, its review is likewise limited to the contents of the Department's order. Michael Aldridge asks this Court to abandon these core principles of appellate review and reach issues not properly before the Department, the Board, or superior court. This Court should decline to do so.

The superior court correctly dismissed both of Aldridge's workers' compensation appeals. In the first appeal, Aldridge sought to have his wage-replacement benefits reinstated on a certain date. But the superior court correctly dismissed his appeal because the Department correspondence that Aldridge appealed simply provided him with information and established no reinstatement date. And, in the second appeal, Aldridge prevailed at the Board, so the superior court correctly determined he was not an aggrieved party who could appeal.

The superior court correctly applied the law and this Court should affirm.

## II. STATEMENT OF THE ISSUES

1. The Industrial Insurance Act limits the Board to reviewing only issues decided by the Department. A claims manager for the Department wrote a message to Aldridge that gave him information about the claim and set no date for reinstating his benefits, but Aldridge appealed the message to the Board and asked for a specific reinstatement date. Was his request outside the Board's scope of review?
2. Under the Industrial Insurance Act, only an aggrieved party may appeal a Board decision. The Board reversed the Department order and lifted the suspension of his benefits. Was Aldridge aggrieved?

## III. STATEMENT OF THE CASE

### A. **In September 2013, Aldridge's Claims Manager Explained That Aldridge Would Have to Submit to Medical Examination to Comply with the Department Order Suspending His Benefits for Failure to Submit to Medical Examination**

In 2000, Aldridge filed a workers' compensation claim and began receiving benefits. In 2011, the Department suspended Aldridge's benefits "for failure to submit to and/or cooperate with a medical examination." 1AR 158.<sup>1</sup> The Industrial Insurance Act authorizes the Department to suspend a worker's benefits if the worker refuses to submit to medical examination or essential treatment. *See* RCW 51.32.110(2). The Department order suspending Aldridge's benefits stated, "The suspension will remain in effect until you submit to and cooperate with the

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<sup>1</sup> The certified appeal board record in Aldridge's superior court appeal contained two docket numbers from the Board. This brief cites the record from docket 13 22304 as "1AR" and the record from docket 14 15505 as "2AR."

examination, or until the claim is closed, whichever occurs first.” 1AR 158.

On July 25, 2013, Aldridge agreed to participate in an independent medical examination (IME). 1AR Tr. 10/27/14 at 12. Based on Aldridge’s physical conditions, the Department needed three different types of specialists on the IME panel: an orthopedist, a neurologist, and a chiropractor. 1AR Tr. 10/27/14 at 58. The Department scheduled an exam for all three doctors but the chiropractor’s flight was canceled, so the Department rescheduled the chiropractic examination. 1AR 155. The orthopedist and the neurologist examined Aldridge on September 17, 2013. 1AR Tr. 10/27/14 at 16. They requested a further test to complete their exam: magnetic resonance imaging (MRI). 1AR 154.

The next day Aldridge contacted the Department about the examination and his claim in a secure message. 1AR 152. The secure message system is a customer-service system that allows workers to communicate with Department claims managers electronically. 1AR Tr. 10/27/14 at 31. Aldridge told the claims manager that he wanted his benefits reinstated effective July 25, 2013. 1AR 152. The significance of the date was that Aldridge had notified the Department that he was available to participate in an IME as of that date. 1AR 154.

On September 25, 2013, the claims manager responded to Aldridge's secure message, explaining that Aldridge needed to complete the medical examination for the Department to lift the suspension:

Time loss was suspended on your claim on 8/24/11. Lifting a suspension of time loss and resuming time loss are two separate issues. Once full cooperation is demonstrated, I can review lifting the suspension. Full cooperation would include completing the MRI that was recommended by the examiners, and attending the rescheduled chiropractic exam on 10/2/13. Paying time loss would be based on current medical opinion on ability to work such as the IME report and/or other medical received.

1AR 154.

**B. Aldridge Appealed the Claims Manager's Secure Message to the Board, Seeking Reinstatement of Benefits Effective July 25, 2013**

Aldridge appealed the secure message to the Board, asking for a reinstatement date of July 25, 2013, because he had stated his willingness to attend an IME on that date. 1AR 150-51. He also claimed that the Department had placed conditions on reinstating his benefits that did not comply with the Industrial Insurance Act. 1AR 150-51. The Department ultimately reinstated Aldridge's wage-replacement benefits (time-loss compensation) effective September 17, 2013, the date of the orthopedic and neurologic examinations, in an order dated March 5, 2014.

1AR Tr. 10/27/14 at 17.

The hearing judge issued a proposed decision that affirmed the secure message. “Procedurally, if Mr. Aldridge wanted to reach the effective date of reinstatement that appeal would properly have been to the orders that reinstated his time-loss compensation benefits effective to a certain date.” 1AR 24.

Aldridge petitioned for review to the Board. 1AR 5-16. The Board denied review and adopted the proposed decision as its final order. 1AR 3.

**C. In October 2014, Aldridge Appealed an Order Suspending His Benefits Because He Did Not Fill Out a Vocational Intake Form**

After the Department reinstated his benefits effective September 17, 2013, it later asked Aldridge to fill out a vocational services intake form. 2AR Tr. 6/11/15 at 46-47. When he did not do so, the Department suspended Aldridge’s time-loss benefits as of September 5, 2014, and reinstated them effective October 3, 2014, in an order dated October 16, 2014. 2AR 18.

Aldridge appealed the October 2014 order to the Board. 2AR 22-23.

**D. The Board Provided Security at the Hearings**

At the Board, Aldridge raised the issue that he believed the Board had instituted a practice of requiring security at all of his hearings and that he had concerns about this. 2AR 1/06/15 at 21. He wanted to know

whether the Board would provide security at his case's hearings.

2AR 1/06/15 at 21. The judge responded, "I do have a note in my file that in the past, Mr. Aldridge, you've been at least perceived as hostile and that security was necessary." 2AR 1/06/15 at 21.

The Department asked the Board to provide security for the hearings. 2AR 146-47. In support, the Department submitted a letter from an assistant attorney general reporting Aldridge's attempt to intimidate her during litigation of a different appeal. 2AR 160. After considering arguments, the hearings judge ordered security at the hearings. 2AR 262 ("A party requested security for hearings in this appeal. I will provide it.").

**E. The Board Ruled in Aldridge's Favor Regarding His Vocational Status, Agreeing that the Department Should Not Have Suspended His Benefits**

After an administrative hearing, the hearings judge issued a proposed decision reversing the October 2014 order. 2AR 13-16. He found that the Department had not given Aldridge 30 days in which to respond to a letter informing him of the possible suspension of benefits, as WAC 296-14-410(4)(b) requires. 2AR 15.

Though he prevailed, Aldridge petitioned the Board for review, citing the Board's "blatant racial bias against Mr. Aldridge through the requirement that armed security be present whenever he appears in person

...” 2AR 7. The Board denied the petition and adopted the proposed decision as its final decision. 2AR 3.

**F. Aldridge Appealed Both of the Board’s Orders To Superior Court, Which Granted the Department’s Motions To Dismiss**

Aldridge appealed the Board’s decision in both appeals to superior court. CP 6, 33.<sup>2</sup> The Department moved to dismiss under CR 12(b)(6), asserting that the remedies Aldridge sought were beyond the Board’s and the trial court’s scope of review. CP 133-45.

At oral argument, when he addressed the vocational suspension appeal, Aldridge conceded, “[T]he sole issue . . . in that case is the issue of the requirement that armed security be present when I appear [at the Board].” RP 8/26/16 at 28. He accused the hearings judge of ruling in his favor so the superior court could not consider the allegedly racist practice of requiring security without explaining why the Board provided security. RP 8/26/16 at 29.

The trial court granted the Department’s motions in both appeals. The trial court agreed with the Board that the secure message did not determine a specific date that the Department should reinstate Aldridge’s benefits. RP 10/7/16 at 12. In the vocational suspension appeal, the trial

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<sup>2</sup> The superior court heard the two appeals together because Aldridge filed a notice of appeal from the Board’s decision on the secure message; he then amended the notice of appeal to include the Board’s decision on suspension and reinstatement of benefits rather than starting a new case. CP 6-7, 33, 63.

court decided that the Board decision did not aggrieve Aldridge. CP 224-26. Judge Mary Sue Wilson explained, “[T]his requires that there be an aggrieved party who is pointing to the outcome of the decision that is adverse . . . and that the remedy I can issue will direct the Department to make a different decision.” RP 10/7/16 at 16.

**G. The Trial Court Denied Aldridge’s Motion for a New Trial**

Aldridge moved for a new trial under CR 59. CP 234. Among other claims, he faulted Judge Wilson for not telling the parties that she had served as an assistant attorney general before taking the bench. RP 10/28/16 at 20-21.

Judge Wilson explained that during her first year on the bench, she informed parties in cases involving the State of her prior employment. RP 10/28/16 at 22. Judge Wilson found this unnecessary after a year. *Id.* She denied the motion for a new trial. CP 257. Aldridge appeals.

**IV. STANDARD OF REVIEW**

In a workers’ compensation case, the court reviews the superior court decision under the ordinary civil standard of review and, unlike review under the Administrative Procedure Act (which does not apply), does not review the Board decision directly. RCW 51.52.140;

RCW 34.05.030; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

This Court reviews a trial court's CR 12(b)(6) dismissal de novo. *Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998). Dismissal is proper when there is no basis for relief. *Id.* at 330.

## V. ARGUMENT

Aldridge makes many factual assertions unsupported by citation and not in the record. This Court should ignore them. *See* RAP 10.3(a)(5); *City of Moses Lake v. Grant Cty. Boundary Review Bd.*, 104 Wn. App. 388, 391, 15 P.3d 716 (2001) (disregarding facts not in the record).

Aldridge asks for relief this Court cannot provide. He seeks to have his benefits reinstated on a specific date (July 25, 2013) even though the message from the Department did not decide that issue. *See* Appellant's Opening Brief (AB) 15-16. Because appellate review is limited to issues that the Department decided and because the Department did not decide a date to reinstate benefits in the message, the trial court correctly dismissed his appeal.

The trial court also correctly dismissed the appeal in which Aldridge challenged security at the Board hearing because he obtained full relief in that appeal—reversal of the October 2014 order. 2AR 3;16. Only parties whom a final Board order aggrieves can appeal to the superior

court. RCW 51.52.110. Because the Board order did not aggrieve Aldridge, he could not appeal. CP 225-26.

**A. Aldridge Appealed a Message That Was Not Agency Action, Seeking Review of Matters Outside the Board's Scope of Review**

Customer-service communications do not create appealable orders that are within the scope of the Board's and superior court's review to consider. Aldridge argues that the Department's secure message decided an issue in his claim. AB 28-29. But the message explained only the claim's status. So Aldridge could not appeal, and the Board and superior court in turn could not consider, the issues he raised.

The Board's scope of review is limited to appealable orders. *See Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970); RCW 51.52.050, .060, .070., 100, .102, .104. Generally, the Department does not issue orders in secure messages. RCW 51.52.050(1); *Lee v. Jacobs*, 81 Wn.2d 937, 941, 506 P.2d 308 (1973).<sup>3</sup> “[I]nformal letters do not rise to the dignity of an appealable order.” *Id.*

An aggrieved party may appeal “an order, decision, or award of the department.” RCW 51.52.060(1)(a). RCW 51.52.050(2)(a) similarly allows an appeal when the Department has “taken any action or made any decision” about “administration” of the Industrial Insurance Act:

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<sup>3</sup> Secure messages do not have appeal language in them as required by RCW 51.52.050(1). 1AR 154.

Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker . . . may appeal to the board.

Taking action or making a decision necessarily results in something: the Department resolves an issue. “Action means “a thing done” or the “accomplishment of a thing . . .” *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/action>.

To accomplish something subject to appeal and within the Board’s scope of review, a Department determination “needs to be in writing and considered final on the matter determined.” *Colleen Aldridge*, No. 10 15903 (Bd. Indus. Ins. Appeals Feb. 16, 2011). Here, the Department did not finally decide anything. Instead, the secure message provided only information to Aldridge. It did not resolve legal rights about his claim; instead, it informed him about his claim’s status.

Contrary to Aldridge’s claims, the secure message neither (1) acted on a reinstatement date nor (2) imposed new conditions on him.

**1. The secure message did not decide the date for lifting the suspension or reinstating benefits**

The secure message provided only information about Aldridge’s claim and did not rule on a date to lift the suspension or a date to reinstate benefits. Aldridge notes that the Department may suspend his benefits “so long as” the noncooperation continues. AB 27 (quoting

RCW 51.32.110(2)).<sup>4</sup> From this, he argues any noncooperation stopped when he notified the Department of his willingness to participate in an IME and the Department should reinstate his benefits as of that date. AB 27, 29. The problem with this argument is that the Department did not pass on a date to lift the suspension or reinstate benefits in the secure message.

Because the secure message did not decide the date that the Department would lift the suspension order or reinstate benefits, the Department has not “taken any action or made any decision” on these issues. 1AR 154; RCW 51.52.050(2)(a). And so the Board could not review the issue.

The Board only has appellate authority and cannot address issues that the Department has not decided. *Lenk*, 3 Wn. App. at 982. The Board “review[s] the specific Department action” from which the party appealed, as limited by the notice of appeal. *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997); *Lenk*, 3 Wn. App. at 982.

This scope of review rule is based in statute. RCW 51.52.050, .060, .070, .100, .102, .104. The fundamental purpose in interpreting a statute is to give effect to the Legislature’s intent. *State v. Larson*, 184

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<sup>4</sup> RCW 51.32.110(2) provides that the Department “may suspend any further action on any claim of such worker *so long as* such refusal, obstruction, noncooperation, or practice continues . . . .”

Wn.2d 843, 848, 365 P.3d 740 (2015). The court discerns plain meaning from the ordinary meaning of the language, the language's context in the statute, related provisions, and the statutory scheme. *Id.* Chapter 51.52 RCW unambiguously limits the scope of the appeal to the Department order, as further limited by the notice of appeal:

- RCW 51.52.050(2)(a) allows a party to appeal only when the Department has “taken any action or made any decision.”
- RCW 51.52.060(1)(a) allows aggrieved parties to appeal only “an order, decision, or award.”
- RCW 51.52.070 requires the notice of appeal to dispute items in the “order, decision, or award.”
- RCW 51.52.100 directs the Board to consider “testimony in support of [the Department] order” and against it.
- RCW 51.52.102 directs the Board to consider issues raised in notice of appeal about the order.
- RCW 51.52.104 directs findings and conclusions on the “order based thereon.”

Under this statutory scheme, the Board commits reversible error if it decides issues outside the scope of review as set by the Department order. *See Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 800, 947 P.2d 727 (1997). The superior court in turn may review only what the Board could review. *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491, 288 P.3d 630 (2012); RCW 51.52.115.

Aldridge points to the doctrine of liberal construction to relieve him from scope of review principles. AB 27, 30, 33. But liberal construction applies to questions of ambiguous statutes, not questions of fact. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012). The statutes are unambiguous about the scope of review requirement.

The Board would have erred to rule that “reinstatement of benefits was required . . . effective July 25, 2013,” as Aldridge continues to urge. AB 27. Instead, as the hearings judge correctly pointed out, “Procedurally, if Mr. Aldridge wanted to reach the effective date of reinstatement that appeal would properly have been to the orders that reinstated his time-loss compensation benefits effective to a certain date.” The Department reinstated Aldridge’s time-loss benefits effective September 17, 2013, after Aldridge appealed Department orders that did decide a date for reinstatement of benefits. 1AR Tr. 10/27/14 at 17.

The Board and superior court applied well-established principles of appellate review and correctly declined to review the date to lift the suspension or to reinstate benefits.

**2. The secure message did not place new conditions on lifting the suspension or reinstating benefits**

The secure message imposed no new conditions on Aldridge, and the Department has not “taken any action or made any decision” on new conditions. RCW 51.52.050(2)(a). Aldridge argues the Department added conditions on the reinstatement of his benefits that did not appear in the August 2011 order that originally suspended his benefits. AB 31. As alleged new conditions, he points to (a) the information that the IME includes an MRI and (b) the need for the claims manager to determine if his medical condition justifies wage-replacement benefits (time-loss compensation). AB 16, 30-31. Neither imposed new conditions.

**a. The MRI was part of the IME**

The secure message provided information about the status of Aldridge's claim only and did not add new conditions when noting that Aldridge needed to attend the examiner-requested MRI. *Contra* AB 16, 30-31. The secure message explains that attendance at the MRI is part of the 2011 order requiring cooperation with a medical examination; the message did not itself order an MRI.

Aldridge does not dispute that he must submit to examination under the 2011 order. 1AR 158; RCW 51.32.110(1); *see Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994) (An unappealed order is a final order, precluding relitigation of its issues.); *LeBire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 417-18, 128 P.2d 308

(1942) (unappealed judgment conclusively decides the issues). The secure message echoed the 2011 order and explained that the required medical examination included an MRI. 1AR 154. An IME includes required tests. WAC 296-23-347(3)(a); RCW 51.36.070. If the worker requires more tests, the Department routinely authorizes them as part of the IME. *See id.* When IME examiners request an MRI, it is the Department's policy to have the injured worker schedule the MRI. 1AR Tr. 10/27/14 at 56.

Aldridge's remedy is the same as above. If he wishes to challenge the reinstatement date (i.e. the date he complied with all the terms of the 2011 order including the MRI), he needed to appeal an order that directly addresses a reinstatement date. He could then argue that the date should have been before he took the MRI.<sup>5</sup> By following that procedure, Aldridge succeeded in having his benefits reinstated on September 17, 2013, the date the neurologist and the orthopedist performed their portions of the IME. 1AR Tr. 10/27/14 at 17.

Aldridge argues in passing that requiring him to schedule the MRI was retaliatory and a violation of his due process rights. AB 31. No evidence supports this and the court does not consider constitutional arguments made without citation to authority. *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). In any event, Aldridge cannot now

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<sup>5</sup> Aldridge does not appear to dispute that the Department can require him to submit to an MRI under RCW 51.36.070 and RCW 51.32.110.

undermine the 2011 order by criticizing a customer-service explanation of the status of his claim. Mere information creates no appealable order because it does not “take[] any action or [make] any decision.” RCW 51.52.050(2)(a). Because there was no agency action, there was nothing for the Board and superior court to review.

**b. Receiving time-loss compensation is a separate issue from lifting the suspension**

The claims manager’s discussion of the need for medical verification of his condition to reinstate time-loss compensation does not add new conditions to the order. *Contra* AB 16. The 2011 order provided that “The suspension will remain in effect until you submit to and cooperate with the examination, or until the claim is closed, whichever occurs first.” 1AR 158. Under this, it only discusses removal of the suspension, not the provision of future benefits.

The claims manager correctly informed Aldridge that reinstatement of benefits and establishing eligibility for time-loss compensation are two distinct concepts. The Department suspended Aldridge’s benefits because he failed to cooperate. Once the Department lifted that suspension, then the Department could decide benefits eligibility, including temporary total disability (time-loss compensation). *See* RCW 51.32.090(1), .110.

To receive time-loss compensation, a worker must prove that he or she is incapable of any reasonably continuous gainful employment. *Hunter v. Bethel Sch. Dist.*, 71 Wn. App. 501, 509-10, 859 P.2d 652 (1993); *see also* WAC 296-20-01002 (definition of total temporary disability). The Department does not automatically reinstate time-loss compensation without medical certification. In the two years since the suspension of Aldridge's time-loss compensation, his physical condition could have improved so that he was able to work. RCW 51.32.090(1) ("When the total disability is only temporary, the [time-loss compensation is paid], so long as the total disability continues."). The Department needed to determine if Aldridge could work before awarding time-loss compensation.

The secure message merely provided information about how to obtain time-loss compensation and did not set new conditions. The Board and trial court correctly decided that this and all the issues Aldridge raised were outside their scope of review.

**B. Because the Board Agreed with Aldridge Regarding His Vocational Status, He Was Not an Aggrieved Party**

The Board decision in the vocational case did not aggrieve Aldridge because he prevailed. The Board agreed with Aldridge that the

Department's order was incorrect. Because Aldridge prevailed, the Board decision did not aggrieve him and he could not appeal to superior court.

The party who wins the case is not aggrieved. *See Paich v. N. Pac. Ry. Co.*, 88 Wash. 163, 165-66, 152 P. 719 (1915). The Industrial Insurance Act provides: “[W]ithin thirty days after the final decision and order of the board upon such appeal has been communicated . . . such worker, beneficiary, employer or other person *aggrieved* by the decision and order of the board may appeal to the superior court.” RCW 51.52.110 (emphasis added). On the other hand, if a decision does not aggrieve a party, the party cannot to appeal to superior court. *Peterson v. Dep’t of Labor & Indus.*, 22 Wn.2d 647, 651, 157 P.2d 298 (1945).

Although the Industrial Insurance Act does not define “aggrieved,” the general rule is a decision must affect some personal right or pecuniary interest for it to aggrieve a party. *See* Chapter 51.08 RCW; *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690 (1949).

The only “right” at issue in a workers’ compensation case is the correctness of the Department order. RCW 51.52.050, .060, .070, .100, .102, .104; *Lenk*, 3 Wn. App. at 982. Aldridge seeks reversal of the Board’s decision to provide security at the hearings, claiming discrimination motivated the Board. AB 40 (citing RCW 49.60.030

freedom from discrimination).<sup>6</sup> But redress for discrimination is not something for which the Industrial Insurance Act provides as a remedy. RCW 51.04.010; *Goodman v. Boeing Co.*, 127 Wn.2d 401, 407, 899 P.2d 1265 (1995) (remedies in Industrial Insurance Act do not address discrimination claims). Workers' compensation remedies are statutory and concern whether the Department should provide industrial insurance benefits like treatment, wage-replacement benefits, vocational services, and disability awards. *Denning v. Quist*, 160 Wash. 681, 685-86, 296 P. 145 (1931); see *Davis v. Dep't of Labor & Indus.*, 159 Wn. App. 437, 441, 245 P.3d 253 (2011); see also RCW 51.04.010.

Because the Board considered the only right at issue—the correctness of the Department order about vocational benefits—nothing remained to review at superior court. The Board's reversal provided full relief to Aldridge. The Board decision did not aggrieve him.

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<sup>6</sup> Although the merits of the security issue are not before the Court, courts may impose security measures for the safety and protection of the court officers, parties, and the public. *State v. Hartzog*, 96 Wn.2d 383, 396, 635 P.2d 694 (1981). The record establishes that the Board routinely orders security at hearings. 2AR 159. Aldridge does not offer any legal authority refuting the Board's authority or discretion to order security. AB 40. Nor is the presence of security personnel inherently prejudicial. *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). "[I]f the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Id.* at 572. Here, the grant of security is not inherently prejudicial and Aldridge failed to show actual prejudice, even if he could raise the issue.

**C. Aldridge Did Not Show Trial Court Bias**

The trial judge correctly did not grant a new trial based on her prior employment with the State, contrary to Aldridge's claims. AB 24.

Parties may ask judges to recuse themselves for prejudice but a party must file a motion and a supporting affidavit before the judge makes a ruling. RCW 4.12.040, .050(1); *State v. Cameron*, 47 Wn. App. 878, 883-84, 737 P.2d 688 (1987).<sup>7</sup> If the moving party fails to request recusal before the judge rules, the party must show actual bias by the judge. *Id.* at 884. The moving party must show this bias because the court never presumes bias by an elected judicial officer. *Williams & Mauseth Ins. Brokers, Inc. v. Chapple*, 11 Wn. App. 623, 628, 524 P.2d 431 (1974) (prior business dealings between judge's family members and one of the parties did not compel recusal in absence of evidence of bias). All courts agree that recusal lies within the "sound discretion" of the trial court. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995).

Aldridge failed to ask for Judge Wilson's recusal before she ruled on his appeals, so the law requires that he provide evidence of bias.<sup>8</sup>

Aldridge offers only the timing of the court's decision on the

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<sup>7</sup> The Legislature recently amended RCW 4.12.040 and .050 but did not change the requirement of filing before the judge makes discretionary rulings in the case. S.S.B. 5277, 65th Leg., Reg. Sess. (2017).

<sup>8</sup> Aldridge concedes that Thurston County posts Judge Wilson's former employment as an assistant attorney general on the Thurston County Superior Court website. AB 23 n.15.

Department's motion as evidence of the court's bias against him. AB 24.

Taking time to decide shows no bias.

And Aldridge showed no evidence that Judge Wilson's work history as an assistant attorney general affected the fairness of the proceedings. She exercised sound discretion in denying the motion for a new trial.

**D. Aldridge's Remaining Arguments Have No Merit**

Aldridge assigns error to the award of the \$200 statutory attorney fee to the Department as the prevailing party. AB 13, 15. He claims the Department sought costs as a continuation of the retaliation it had started by requesting security at Board hearings, but cites no evidence of retaliation or any authority contradicting the Department's entitlement to costs. So the Court should decline to consider the argument. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate court only considers assignments of error supported by argument, citation to authority, and references to the record).

The Department may receive the \$200 statutory attorney fee as the prevailing party. *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 557, 933 P.2d 1025 (1997) (the court may award costs under RCW 4.84.030 in a workers' compensation case); *Allan v. Dep't of Labor & Indus.*, 66 Wn.

App. 415, 422-23, 832 P.2d 489 (1992) (same); RCW 4.84.010(6), .030, .080; RCW 51.52.140.

Finally, Aldridge asks for fees without citation to authority or including the request in a separate section. AB 41. The court does not consider a fee request if it is unsupported by citation to authority and made in a separate section as required by RAP 18.1(b); *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 676-77, 303 P.3d 1065 (2013). Aldridge's request for fees and costs appears only in the brief's conclusion section without citation to authority.

In any event, pro se litigants may not receive attorney fees for their work representing themselves. *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597, 608, 277 P.3d 670 (2011).

## VI. CONCLUSION

The trial court correctly dismissed Aldridge's workers' compensation appeal because he sought relief unavailable to him under the Industrial Insurance Act. This Court should affirm.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of July, 2017.

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NO. 49725-5-II

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

MICHAEL ALDRIDGE,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES, STATE OF  
WASHINGTON,

Respondent.

DECLARATION OF  
MAILING

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

Michael W. Aldridge  
PO Box 237  
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DATED this 31st day of July, 2017, in Tumwater, WA.

Natashua Roberts  
NATASHIA ROBERTS  
Legal Assistant 3

**OFFICE OF THE ATTORNEY GENERAL**

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