

FILED
SUPREME COURT
STATE OF WASHINGTON
1/29/2018 3:36 PM
BY SUSAN L. CARLSON
CLERK

NO. 94241-2

**SUPREME COURT
OF THE STATE OF WASHINGTON**

ZBIGNIEW M. LASKOWSKI,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES,

Respondent.

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

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I. INTRODUCTION

A worker who appeals an administrative decision to an appellate court can only raise issues encompassed within that decision.

Zbigniew Laskowski has appealed a Board of Industrial Insurance Appeals order that granted him interest on time-loss benefits he received because of a prior appeal but makes no real attempt to show that the Board's interest award was erroneous. Instead, he asks this Court to decide issues that have no connection to the Board order he appealed. But since the Board addressed none of those issues they are not properly before this Court on appeal.

The superior court properly dismissed Laskowski's appeal and this Court should affirm.

II. STATEMENT OF THE ISSUE

Laskowski appealed a Board decision that granted him interest on time-loss compensation that he received because of a prior appeal. A court's scope of review of a Board decision is limited to the issues decided by the Board. Laskowski failed to establish that the Board's decision to pay him interest was incorrect. Did the superior court err when it dismissed Laskowski's appeal?

III. STATEMENT OF THE CASE

Laskowski has an allowed claim for a workplace injury. In a previous case, Laskowski appealed two decisions of the Department dated April 2012 and May 2012 to the Board and then to the superior court.

CP 96. Because of those appeals, the Department paid him some additional time-loss compensation. CP 96. When a worker receives additional time-loss compensation, RCW 51.52.135 provides for interest, which may be fixed by either the Department or the Board.¹

After the superior court order, the Department reported to the Board that it made additional time-loss compensation payments and the Board ordered the Department to pay Laskowski \$1,712.81 in interest and to pay his dependent(s) \$28.49 in interest. CP 18; App. 1.²

Laskowski appealed the Board's order awarding him interest to the superior court. CP 16-18.

Finding that the record did not provide the court with enough information to review the interest award, the trial judge directed the Board to explain how its interest calculation works. CP 92-93. The Board provided the trial court with an explanation. CP 95-103.

At the superior court, Laskowski argued that the Department had miscalculated a social security offset. CP 107-12. He suggested that the Board should have calculated interest based on the amount that Laskowski believed he should receive rather than the amount the Department paid

¹ When the Board issues an order fixing interest, it follows the procedures contained in WAC 263-12-160.

² The superior court forwarded six pages of the Certified Appeal Board Record as a supplement to the clerk's papers. The Department has attached a copy of those documents as Appendix 1.

because of the previous appeal. *See* CP 107. Laskowski did not argue that the Board made a mathematical mistake in calculating his interest based on the methodology that the Board reported it used to calculate interest. *See* CP 107-12.

The superior court dismissed his appeal. CP 127-28.

Laskowski appealed the superior court's dismissal of his case. CP 135-150.

IV. STANDARD OF REVIEW

In a workers' compensation matter involving an appeal from a superior court's decision, the ordinary civil standard of review applies. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009); RCW 51.52.140.³ An appellate court reviews the superior court's decision, not the Board's decision. *Rogers*, 151 Wn. App. at 180. On appeal of an order dismissing a worker's case, an appellate court engages in the same inquiry as the trial court reviews the facts in the light most favorable to the non-moving party, and upholds dismissal if it finds that the Department was entitled to judgment as a matter of law. *Butson v. Dep't of Labor & Indus.*, 189 Wn. App. 288, 296, 354 P.3d 924 (2015).

³ The Administrative Procedures Act does not apply to workers' compensation cases under RCW 51.52.140; normal civil practice does. *See Rogers*, 151 Wn. App. at 180.

The court conducts a de novo review of questions of law raised on appeal. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

V. ARGUMENT

A. **The Superior Court Properly Dismissed Laskowski's Appeal Because He Failed To Demonstrate That the Board's Interest Order Was Incorrect**

The Board awarded Laskowski interest because he received additional time-loss compensation from the Department because of a previous appeal. CP 18. Laskowski points to no cognizable error.

RCW 51.52.135 provides for interest in narrow circumstances

(1) When a worker or beneficiary prevails in an appeal by the employer to the board

(2) When a worker or beneficiary prevails in an appeal by the worker or beneficiary to the board or the court regarding a claim for temporary total disability, the worker or beneficiary shall be entitled to interest at the rate of twelve percent per annum on the unpaid amount of the award after deducting the amount of attorney fees.

(3) The interest provided for in subsections (1) and (2) of this section shall accrue from the date of the department's order granting the award or denying payment of the award. The interest shall be paid by the party having the obligation to pay the award. The amount of interest to be paid shall be fixed by the board or court, as the case may be.

Here, the Board's order granted Laskowski more interest than he was entitled to receive, not less. The Department did not appeal the Board's order granting interest and does not ask this Court to reduce his award. But, in hindsight, the Department reported more benefits to the Board than it should have, and that resulted in Laskowski receiving more interest than was warranted under RCW 51.52.135.

Subsection (3) explains that the interest provided for in subsection (2) "shall accrue from the date of the department's order granting the award or denying payment of the award." RCW 51.52.135(3). The interest begins accruing from the date of the Department order granting or denying the benefit to the date that the Department ultimately pays those benefits to the worker.

Here, because of an appeal from two Department orders dated April 2012 and May 2012, the Department paid Laskowski additional temporary total disability benefits for various periods addressed by those two orders. CP 95-103. The Department also paid Laskowski temporary total disability benefits for periods *after* the April 2012 and May 2012 orders, some as late as 2015. CP 95-103. But the Department should not have reported those payments to the Board regarding the April and May 2012 orders because the Department paid those disability benefits for periods outside those order's scope. RCW 51.52.135 only provides for

interest effective the date of the order under appeal that granted or denied the temporary total disability benefits. And the Board's regulation governing interest calculations, WAC 263-12-160, similarly provides for using the date of the Department order that was previously appealed.

Laskowski presents no specific argument regarding the calculation of interest but suggests that the Board wrongly focused on the Department's April and May 2012 orders in calculating interest instead of using November 2011, a date that Laskowski alleges was the first time that a calculation was done for a social security offset. *See* AB 7 (stating that the Board wrongly focused on the April 2012 and May 2012 orders), 11 (stating that November 2011 was the date of the first social security calculation). But Laskowski's argument fails because it is contrary to RCW 51.52.135 and because it lacks any support in the record.

First, RCW 51.52.135(3) unambiguously provides that interest on previously unpaid benefits accrues from the date of the Department order regarding time loss that was reversed on appeal, not some other date as Laskowski suggests.

Second, nothing in the record supports Laskowski's assertion that a social security offset calculation took place in November 2011. An unsupported factual assertion in an appellate brief is not evidence. *See Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

Laskowski also suggests that the Department issued the relevant order on November 2011, not April 2012 and May 2012. *See* AB 7. But the Board reported that the Department issued the relevant orders in April and May 2012, and nothing in the record contradicts this. *See* CP 96. In any event, the date that the Department performs a social security calculation (as opposed to the date it issues the order regarding time loss that is reversed on appeal) is irrelevant to the interest calculation.

Laskowski fails to establish that the Board order under appeal awarded him less interest than he should receive and the superior court properly dismissed his appeal from that order. This Court should affirm.

B. This Court's Scope of Review Is Limited To the Issues Encompassed in the Board Order Under Appeal and Not Other Issues That Laskowski Attempts To Raise

The only issue before this Court is whether the Board awarded too little interest to Laskowski since that is the only issue that the Board addressed in the order under appeal. An appellate court's scope of review in a worker's compensation matter is limited to considering the issues passed on by the administrative agency in the order under appeal.

Matthews v. Dep't of Labor & Indus., 171 Wn. App. 477, 491, 288 P.3d

630 (2012); *see also Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997).⁴

Here, the Board order under appeal took no action aside from granting interest to Laskowski based on him obtaining additional benefits because of a previous appeal. CP 18. The only issue before the trial court was whether the Board's order awarding interest was erroneous. *See Matthews*, 171 Wn. App. at 491.

But instead of focusing on the issue of whether the interest award was correct, Laskowski instead invites the Court to examine the question of whether the Department properly calculated a social security offset in Laskowski's case.⁵ AB 1-12. This is outside the Court's scope of review because the Board did not pass on it in the order under appeal. CP 18. *See Matthews*, 171 Wn. App. at 491. To pursue that issue, he would need to

⁴ In a worker's compensation case, the Department typically makes the initial decision, which is appealed to the Board and the courts. When a worker receives interest as a result of a prior appeal, however, either the Board or the Department can issue the initial order regarding interest, which is appealable to the courts. RCW 51.52.135. Here the Board issued the order regarding interest, which Laskowski appealed to the courts. CP 16-18. Because the Board rather than the Department issued the initial order regarding interest, the court's scope of review is limited to the issue passed on by the Board in its order. *See Matthews*, 171 Wn. App. at 491.

⁵ RCW 51.32.220 and RCW 51.32.225 authorize the Department to reduce a worker's disability benefits if the worker is also receiving benefits under the federal Social Security Act. Such reductions in worker's compensation benefits are known as social security offsets.

appeal a Department order regarding the social security offset rather than a Board appeal addressing only interest.⁶

Furthermore, even leaving aside that Laskowski's arguments go outside this Court's scope of review, there is nothing in the record supporting any of Laskowski's arguments regarding the social security offset. The court does not consider arguments unsupported by the record. *Estate of Lint*, 135 Wn.2d 518, 531-33, 957 P.2d 755 (1988). This is another reason to affirm.

VI. CONCLUSION

Laskowski appealed a Board order that awarded him interest but failed to show that the Board erred in doing so. Instead of focusing on whether the Board's decision was incorrect, Laskowski asks this Court to consider issues not passed on by the Board in the order under appeal and not addressed by any evidence in the record. The superior court properly dismissed his appeal and this Court should affirm.

⁶ While this is not addressed in the record, it should be noted that the Department has issued orders regarding various issues related to Laskowski's social security offset, and Laskowski has appealed those orders to the Board and to superior court. Thus, it is unnecessary for the Court to consider those arguments here to ensure that Laskowski has an opportunity to raise them before a court, as Laskowski has already received that opportunity and is already exercising it.

RESPECTFULLY SUBMITTED this 29th day of January, 2018.

ROBERT W. FERGUSON
Attorney General

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

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APPENDIX



94241-2

STATE OF WASHINGTON
BOARD OF INDUSTRIAL INSURANCE APPEALS

2430 Chandler Ct SW, PO Box 42401 • Olympia, WA 98504-2401 • (360) 753-6823 • www.biia.wa.gov

January 15, 2016

Thurston County Superior Court
2000 Lakeridge Dr. SW #2
Olympia WA 98502-6001

In Re: ZBIGNIEW M. LASKOWSKI VS. DEPT OF LABOR AND INDUSTRIES

Docket Nos. 12 17055 & 12 17056
Claim No. AB-17747
Cause No. 15-2-02798-34

Dear Clerk:

Enclosed is the certified copy of our record in this case. After conclusion of the appeal, the parties should send us a conformed copy of your judgment WAC 263-12-171.

If you need any further information, please contact the Superior Court Section at (360) 753-6823.

Enclosure

c: Zbigniew M. Laskowski
Air Van Lines, Inc.
The Office of the Attorney General

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: ZBIGNIEW M. LASKOWSKI) DOCKET NOS. 12 17055 & 12 17056
2)
3)
4 CLAIM NO. AB-17747) ORDER FIXING INTEREST PURSUANT TO
5) ORDER OF COURT

6 On July 16, 2015, the Court of Appeals of the State of Washington entered an Order of
7 Dismissal.
8

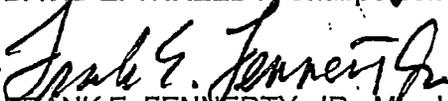
9 The claimant and dependent(s) prevailed in these appeals. The claimant and dependent(s)
10 are entitled to interest on the unpaid amount of benefits paid as a result of the court's order.
11 RCW 51.52.135 and WAC 263-12-160.
12

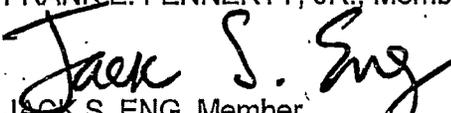
13 The Department is ordered to pay the claimant, Zbigniew M. Laskowski, interest in the sum
14 of \$1,712.81, and the dependent(s) interest in the sum of \$28.49. These amounts shall be paid in
15 full to the claimant and dependent(s).
16

17 Dated: November 19, 2015
18

19 BOARD OF INDUSTRIAL INSURANCE APPEALS

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21 DAVID E. THREEDY, Chairperson
22

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24 FRANK E. FENNERTY, JR., Member
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JOHN BARNES, AAG
OFFICE OF THE ATTORNEY GENERAL
LABOR & INDUSTRIES
PO BOX 40121
OLYMPIA, WA 98504-0121

In re: ZBIGNIEW M LASKOWSKI
Docket No. 12 17055 12 17056

10-24-15

page 1

CERTIFICATION OF BENEFITS

Claimant: **ZBIGNIEW M. LASKOWSKI** Appeal filed by: **Claimant**
Claim No: **AB-17747** Docket No: **12 17055, 12 17056**

1. Date your office received the Board (Court) order: 12-05-14

2. List delayed time-loss payments: (For periods prior to Board order, but pd after Brd order)

From	To	Amount	Date Paid
4-10-14	12-17-14	1300.28	12-22-14
7-12-13	4-09-14	1858.38	12-23-14
1-01-13	5-20-13	932.40	1-05-15
8-03-12	12-31-12	885.78	1-06-15
3-02-12	6-21-12	1153.60	1-07-15

3. List delayed liens. Specify which one: OSE, OFR, RO1, RO2, RO3, RO4

Type of Lien	From	To	Amount	Date Paid
<u>OSE</u>				

4. List LEP, PPD, or Pension: (Complete only if employee)

Type of Award	From	To
<u>OSE</u>		

5. If your file indicates there may be unpaid benefits, but add indicate the date by which you expect to advise the Board of

1300.28 Pend After
1858.38 Orig T
932.40 " "
885.78 " "
1153.60 " "
U.S. Discrepancy Pgl

I certify that the information provided above concerning benefits paid (or not paid) in this claim is true and correct

Alicia Marmley 10-23-15 Alicia Marmley CM 509-454-3748
Signature Date Printed Name/Title Phone

NOTE: See reverse side for WAC 263-12-160

Return form to: FAX: (360) 586-5611 or 1-855-586-5611

Board of Industrial Insurance Appeals
PO Box 42401 MS 2401
Olympia WA 98504-2401

CERTIFICATION OF BENEFITS

Claimant: **ZBIGNIEW M. LASKOWSKI** Appeal filed by: **Claimant**
 Claim No: **AB-17747** Docket No: **12 17055, 12 17056**

1. Date your office received the Board (Court) order: 12-05-14

2. List delayed time-loss payments: (For periods prior to Board order, but pd after Brd order)

From	To	Amount	Date Paid
11-25-11	3-01-12	865.94	1-23-15
1-01-13	5-20-13	455.48	1-28-15
1-01-15	1-14-15	100.94	1-29-15
4-10-14	1-14-15	31.92	1-30-15
8-03-12	5-20-13	154.80	2-02-15

3. List delayed liens. Specify which one: OSE, OFR, RO1, RO2, RO3, RO4

Type of Lien	From	To	Amount	Date Paid
OSE				

4. List LEP, PPD, or Pension: (Complete only if emplo

Type of Award	From	To
OSE		

865.94 Orig T
 455.48 " " " "
 100.94 Periodic
 31.92 " " " "
 154.80 Orig T
 y.s. Discrepancy pg 2

5. If your file indicates there may be unpaid benefits, but indicate the date by which you expect to advise the Board

I certify that the information provided above concerning benefits paid (or not paid) in this claim is true and correct.

Alicia Marmolgo 10-23-15 Alicia Marmolgo CM 509-454-3748
 Signature Date Printed Name/Title Phone

NOTE: See reverse side for WAC 263-12-160

Return form to: FAX: (360) 586-5611 or 1-855-586-5611

Board of Industrial Insurance Appeals
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Page 3

CERTIFICATION OF BENEFITS

Claimant: **ZBIGNIEW M. LASKOWSKI**
Claim No: **AB-17747**

Appeal filed by: **Claimant**
Docket No: **12 17055, 12 17056**

1. Date your office received the Board (Court) order: 12-05-14

2. List delayed time-loss payments: (For periods prior to Board order, but pd after Brd order)

From	To	Amount	Date Paid
3-16-12	8-2-12	329.28	2-03-15
7-02-13	4-09-14	33.84	2-05-15
5-21-13	7-01-13	375.79	2-06-15
12-23-11	3-01-12	7.32	2-09-15
3-02-12	3-16-12	1.68	2-10-15

3. List delayed liens. Specify which one: OSE, OFR, RO1, RO2, RO3, RO4

Type of Lien	From	To	Amount	Date Paid
--------------	------	----	--------	-----------

OSE			329.28	Orig
			33.84	"

4. List LEP, PPD, or Pension: (Complete only if emp)

Type of Award	From
---------------	------

OSE	
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375.79 "

7.32 "

1.68 "

U.S. Disregard !! P93

5. If your file indicates there may be unpaid benefits, but indicate the date by which you expect to advise the Board

I certify that the information provided above concerning benefits paid (or not paid) in this claim is true and correct.

Alicia Marmora 10-23-15 Alicia Marmora CM 509-454-3748
Signature Date Printed Name/Title Phone

NOTE: See reverse side for WAC 263-12-160

Return form to: FAX: (360) 586-5611 or 1-855-586-5611

Board of Industrial Insurance Appeals
PO Box 42401 MS 2401
Olympia WA 98504-2401

ATTORNEY GENERALS' OFFICE, L&I DIVISION, OLYMPIA

January 29, 2018 - 3:36 PM

Transmittal Information

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Appellate Court Case Title: Zbigniew M. Laskowski v. State of Washington, Department of Labor and Industries
Superior Court Case Number: 15-2-02798-8

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