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

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THERESA CONRADI

Appellant,

v.

O'REILLY AUTOMOTIVE, INC, and

WASHINGTON STATE  
DEPARTMENT OF LABOR AND INDUSTRIES

Respondents.

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**BRIEF OF APPELLANT**

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Respectfully Submitted By:  
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## I. ASSIGNMENTS OF ERROR

### A. Assignment of Error

1. The trial court erred in denying Ms. Conradi's Motion to Dismiss O'Reilly's Cross-Appeal due to waiver based on O'Reilly's failure to file a Petition for Review with the Board of Industrial Insurance Appeals.

### B. Issues Pertaining to Assignments of Error

1. If an aggrieved party fails to file a Petition for Review with the Board of Industrial Insurance Appeals, may that party appeal further objections to superior court?
2. Did O'Reilly's filing of a Response to Petition for Review constitute a Petition for Review such that it will be deemed to have not waived its objections to the decision of the Board of Industrial Insurance Appeals?
3. Did the trial court's denial of Ms. Conradi's Motion to Dismiss O'Reilly's Cross-Appeal materially affect the outcome of her appeal on the issue of permanent total disability?

## II. STATEMENT OF THE CASE

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### **A. Statement of Procedure**

Ms. Conradi filed a workers' compensation claim for injury to her low back on or about May 17, 2012. The Department allowed the claim and paid benefits on and off throughout 2012 through 2015. CP 180-183. On September 2, 2015, the Department issued an order affirming a June 26, 2015 order closing the claim with time loss as paid through December 7, 2013 and with an award for permanent partial disability for dorso-lumbar and or lumbosacral impairments consistent with Category 2 of WAC 296-20-280. CP 94-95. In the next order, the Department directed Ms. Conradi to repay time loss compensation benefits for the period February 25, 2015 through February 26, 2015. CP 186. Ms. Conradi appealed both orders to the Board of Industrial Insurance Appeals ("Board"). CP 185. On appeal, she asked for time loss compensations benefits for the unpaid periods of December 8, 2013 through June 23, 2014 and from February 5, 2015 through September 2, 2015. She also sought a pension due to permanent total disability as of September 2, 2015. Alternative to a pension, Ms. Conradi sought an increased lumbosacral impairment award from a Category 2 to a Category 3. CP 118.

On March 28, 2017, the Industrial Appeals Judge issued a Proposed Decision and Order reversing the Department's orders, granting the additional time loss compensation benefits and permanent partial disability increase as requested by Ms. Conradi. The Industrial Appeals Judge denied Ms. Conradi's request for permanent total disability (i.e. a pension). CP 77-91. Ms. Conradi filed a timely Petition for Review on May 10, 2017. CP 66-72. On May 30, 2017, the Board granted the Claimant's Petition for Review. CP 17. O'Reilly's filed a Response to Petition for Review on June 12, 2017. CP 46-63.

On September 12, 2017, the Board issued a Decision and Order affirming the Proposed Decision and Order. CP 19-28. On October 6, 2017, Ms. Conradi filed an appeal and jury demand as to the denial of a pension to the Cowlitz County superior court. CP 1-2. On October 11, 2017, O'Reilly's filed a cross-appeal in the superior court on the issues of retroactive time loss benefits and the increased permanent partial disability award. CP 3-6.

On November 1, 2017, Ms. Conradi filed a Motion to Dismiss Defendant/Cross-Appellant's Cross-Appeal with the trial court. CP 7-14. On December 29, 2017, O'Reilly's filed Defendant's Response to Plaintiff's Motion to Dismiss Cross-Appeal. CP 811-834. On January 26,

2018, Ms. Conradi filed a reply brief. CP 836-840. Following oral argument on January 31, 2018, the trial judge denied Ms. Conradi's motion finding that O'Reilly's had not waived its objection to the record by failing to file a Petition for Review. CP 841-843; RP 1-9.

Before the start of trial, Ms. Conradi renewed her motion to dismiss O'Reilly's cross-appeal, which was denied by the trial judge. CP 844-848; RP 23-30. The trial judge granted a continuing objection to the issues raised in Ms. Conradi's Motion to Dismiss. RP 30-31. Ms. Conradi again renewed her Motion to Dismiss the cross-appeal by way of a motion for directed verdict before submission of the case to the jury. RP 226. This was again denied by the trial judge. RP 226. Ms. Conradi also objected to jury instructions regarding the issues of retroactive time loss benefits and permanent partial disability. RP 216.

At conclusion of the jury trial, the jury returned a verdict affirming, in all respects, the Decision and Order of the Board. A judgment was entered by the trial court adhering to the verdict of the jury and awarding attorney fees and costs to Ms. Conradi because her right to relief following O'Reilly's cross-appeal was sustained by the jury. CP 971-975.

## **B. Statement of Facts**

Because the assignment of error on appeal is based on the procedural history, discussed *supra*, rather than the factual history of Ms. Conradi's workers' compensation claim, the Appellant will keep this section of the opening brief to a minimum.

Ms. Conradi, at the time of hearings, was a 68-year old woman who injured her low back while working as a merchandising specialist for O'Reilly's Auto Parts in Kelso, Washington. She completed school through the 10<sup>th</sup> grade and obtained her GED in 1981. She had begun developing some low back and leg pain in May of 2012 following some heavy work. On May 17, 2012, she had a sneezing episode while stocking shelves in a dusty area of the store that caused a far lateral L3-4 disc herniation that impinged on the left L3 nerve root per MRI. She saw an orthopedic surgeon, Dr. Fred Bagares, who diagnosed a lumbar strain/sprain complicated by a left L3 radiculitis with lumbar spondylosis and anterior thigh pain on the left. Ms. Conradi declined surgical intervention. She instead underwent injections, medication trials, and physical therapy. Her pain recurred. CP 80.

The undisputed portions of the medical record established that Ms. Conradi was restricted to lifting a maximum of 25-pounds from December 8, 2013 through September 2, 2015, although her medical providers put

additional restrictions on her. CP 41. When her claim closed on September 2, 2015, Ms. Conradi remained off work. CP 35.

### III. SCOPE OF REVIEW

The scope of this court's review on workers' compensation appeals is the same as in other civil matters. Groff v. Department of Labor and Industries, 65 Wn.2d 35, 395 P.2d 633 (1964). The court reviews questions of law de novo. Rose v. Department of Labor & Industries, 57 Wn.App. 751, 790 P.2d 201, *rev den* 115 Wn.2d 1010 (1990). Here, Ms. Conradi appeals the trial court's failure to dismiss O'Reilly's cross-appeal which requires de novo review.

### IV. ARGUMENT

The Industrial Insurance Act (IIA) provides "sure and certain relief for workers, injured in their work." RCW 51.04.010. The IIA provides the exclusive remedy for workers injured in the course of employment. RCW 51.04.010; Rushing v. ALCOA, Inc., 125 Wn. App. 837, 841, 105 P.3d 996 (2005). The IIA is to be liberally construed, resolving all doubts in the worker's favor. RCW 51.12.010; Dennis v. Department of Labor & Industries, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

**A. The Trial Court Erred By Failing to Dismiss O'Reilly's Cross-Appeal And By Requiring The Jury To Decide The Issues Of Temporary Total Disability and Permanent Partial Disability.**

Appeal to the superior court by a party aggrieved by an order of the Board is expressly authorized under RCW 51.52.110. Only those matters not waived may be reviewed by the superior court. Upjohn v. Russell, 33 Wn.App 777, 778, 658 P.2d 27 (1983).

**1. O'Reilly's Failed To File A Petition For Review To The Board's Proposed Decision And Order. As Such, It Has Waived Any Objections To The Record.**

A party is deemed to have waived any objections to the Board's decision not specifically detailed in its petition for review. RCW 51.52.104 states, in part:

Within twenty days,...any party may file with the board a written petition for review of the same. 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.

This case does not present a case of first impression. Homemakers Upjohn, an employer, presented this issue to Division II back in 1983. Upjohn v. Russell, 33 Wn.App 777 (1983). In Upjohn, the Board issued a

proposed and order in favor of the injured worker, Sharon Russell. The Department filed a petition for review, but the employer did not. Id., at 778. Presumably, the Department and Homemakers Upjohn were aligned as defendants. The Board denied the petition for review and affirmed the proposed decision and order. Id. Homemakers Upjohn then filed an appeal to superior court on the same factual grounds as set forth in the Department's petition for review. Id., at 779. This court ultimately held that Homemakers Upjohn had waived all errors sought on review and dismissed its appeal. Id., at 783.

In analyzing the relevant statutes relating to appeal of a Board decision, this court found the statutory language ambiguous, and proceeded to analyze the issues through tools of statutory construction. Id., at 780. That is, this court held that the IIA should be read as a whole and a meaning given to it that avoids strained or absurd consequences; and the spirit and intent of the law should prevail over of the letter of the law. Id. "To our mind, the Legislature's intent was that every party who was aggrieved by a hearing examiner's proposed decision and order and who thereafter might wish to contest such order would in fact file a petition." Id., 780-81. Where such an aggrieved party fails to file a petition for review, it waives its objections to the record. Id.

In Upjohn, the employer hypothesized a scenario wherein a party does not file a petition for review and the Board subsequently changes the proposed decision and order. Id., at 781. The court held that such a circumstance requires a different analysis:

“If a party who is satisfied with the hearing examiner’s proposal does not petition, he has waived nothing. Having no complaint, he has no objection. Thus, for example, we look at an employee who claimed full disability, but is awarded 50 percent disability. If he does not petition and the employer does, and if the Board would decrease the award to 25 percent, the employee would not have waived the right to appeal up to a 50 percent award, but he would have waived the right to appeal for more than that.” Id., at 781.

In Ms. Conradi’s case, had the Board awarded permanent total disability benefits as she requested in her Petition for Review, O’Reilly’s would not have waived the right to appeal to superior court on the sole issue of permanent total disability because it was not aggrieved on this issue in the original proposed decision and order. This outcome is supported by the plain language of WAC 263-12-145(1), which states that a non-aggrieved party to a proposed decision and order has waived nothing.

A finding of waiver in this case is also supported by this court’s holding in Rose v. Department of Labor & Industries., 57 Wn.App 751

(1990). In Rose, the Board issued a proposed decision and order establishing time loss compensation based on wages of \$45.49 per day. Id., at 754. The employer filed a petition for review as to the wage rate. Rose also filed a petition for review but on other grounds unrelated to the wage issue. The Board reversed the proposed decision and order and based Rose's wages on \$1 per day. Id. Rose appealed to the superior court. The trial court and this court held that "Rose only waived his right to seek a wage base higher than that set by the Industrial Appeals Judge..." Id., at 757. That is, by failing to file a petition for review asking for a wage rate above \$45.49, he had waived his right to seek such a higher rate in superior court. Similarly, here, O'Reilly's failed to file a petition for review objecting to the issues of retroactive time loss benefits and a Category 3 permanent impairment award. It has, thus, waived the right to argue those issues in superior court. O'Reilly's is a self-proclaimed non-aggrieved party as to findings of the March 28, 2017 proposed decision and order.

**2. A Response To Petition for Review Is Not A Petition For Review And Does Not Cure Waiver of O'Reilly's Objections To The Record.**

At the trial court level, O'Reilly's argued that by filing a response to petition for review, it had avoided waiver contemplated by Upjohn. If the legislature had intended a response to a petition for review to suffice as a petition for review, it would have stated so explicitly. "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* -specific inclusions exclude implication." Washington Natural Gas Co. v. Public Utility Dist. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

A response or reply to petition for review can be filed after a petition for review is granted. WAC 263-12-145(6). This code provision governs a permissive reply to petition for review, and states in part: "Any party may, within ten days of receipt of the board's order granting review, submit a reply to the petition for review, a written brief, or a statement of position regarding the matters to which objections were made..." This code language is consistent with the language contained on the Board's letter acknowledging receipt of the Claimant's Petition for Review and on the Board's Order Granting Petition for Review. CP 16-17. WAC 263-12-145(6) was enacted using past-tense language: "regarding matters to which objections *were* made.." This contemplates no further objections in

a responsive pleading, but rather concludes all objections to the record were already made in the Petition for Review.

In this case, O'Reilly's filed a response to petition for review only after the Board had granted Claimant's petition for review. It is undisputed that the O'Reilly's included within its response a request for the Board to deny retroactive time loss benefits and reduce the permanent partial disability award. Nonetheless, by the time O'Reilly's submitted these requests in its brief, the petition for review deadline had passed and the Board had already issued a formal order granting only the Claimant's Petition for Review. It would lead to an absurd result to allow any aggrieved party to miss a statutory objection deadline, but then be able to resurrect their objections through a reply brief only after the Board had granted review.

Even if a party argues that it will only pursue objections should the other party petition, it must still file a petition for review. Take for instance the worker in Department of Labor and Industries v. Moser, 35 Wn.App. 204, 665 P.2d 926 (1983)(involving an appeal to a Department order removing a worker from the pension rolls). "Although the decision was mainly favorable to Moser, he petitioned for review because, he says, he disagreed with some of the examiner's findings and conclusions and

wanted to preserve his right to challenge them in the event the Department were to file a petition for review within the time period allowed by RCW 51.52.104.” Id., at 207. If O’Reilly’s wanted to preserve its right to argue for reversal of the proposed decision and order, it had to file a petition for review just like Moser, and not wait to reply to claimant’s petition for review only after the Board granted review.

Ms. Conradi was not required to, nor does the law allow any mechanism to, file further briefing with the Board following a reply to petition for review, absent the Board asking for further briefing. The Washington Administrative Code does not allow for a “reply to a reply” to a petition for review. Such requirement that the original party filing a petition for review waives any objection to the reply runs afoul of the plain language of WAC 263-12-145(6) as any permissive responsive pleadings must be filed within 10 days of receipt of the board’s order granting review. The originally petitioning party would not have time to file a “reply to a reply to a petition for review.”

**3. The IIA Is To Be Liberally Construed With All Doubts Resolved In The Worker’s Favor.**

The court in UpJohn found the relevant statutes involved in this case ambiguous, discussed *supra*. “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, 173 P.3d 228 (2007). But the Legislature has already mandated courts to liberally construe the Act in favor of the injured worker. RCW 51.12.010. This means that all doubts as to the meaning of the Act are to be resolved in favor of the injured worker. Clauson v. Department of Labor & Industries, 130 Wn.2d 580, 586, 925 P.2d 624 (1996).

As RCW 51.12.010 reminds us, the purpose of the Act is to reduce to a minimum the economic harm and suffering experienced by injured workers. RCW 51.04.010 also states the purpose of the Act is to provide sure and certain relief to injured workers and their families. 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, 153 P.3d 846 (2007) (interpreting Title 49 RCW, which has a similar liberal construction requirement).

**B. Ms. Conradi’s Permanent Total Disability Case Was Materially Affected By The Trial Court’s Failure to Dismiss O’Reilly’s Cross-Appeal.**

It is undisputed that Ms. Conradi ultimately prevailed on the two issues involved in Respondent's Cross-Appeal. She was, nonetheless, prejudiced by having to present these issues to the jury. Had the trial court properly dismissed the cross-appeal, Ms. Conradi would have been able to argue to the jury that they must accept as true that Ms. Conradi had sustained a Category 3 level of permanent partial impairment and that she was "unable to perform or obtain gainful employment on a reasonably continuous basis from December 8, 2013 through June 23, 2014, and from February 5, 2015 through September 2, 2015, due to the residuals of the industrial injury and taking into account her age, education, work history, and preexisting conditions." CP 25 (citing Board's Finding of Fact No. 5). The only question for the jury should have been whether on that same day, September 2, 2015, she was permanently unable to perform or obtain gainful employment.

A court's mistaken information given to a jury can be deemed to materially affect the outcome of trial. "The trial court's refusal to correct the Board's scrivener's error materially affected the outcome of trial." Clark County v. McManus, 188 Wash.App. 228, 245, 354 P.3d 868 (2015); *reversed on other grounds*, Clark County v. McManus, 185 Wash.2d 466, 372 P.3d 764 (2016). Instructions are sufficient if they permit a party to argue his or her theory of the case, are not misleading,

and, when read as a whole, properly inform the jury of the applicable law. Id., at 240.

“Juries may choose whether to accept or reject an argument of counsel. By contrast, juries may not choose whether to follow the law – they are required to do so.” Id., at 247 (concurring and dissenting opinion). Given this, had the trial court properly dismissed O’Reilly’s cross-appeal, Ms. Conradi would have correctly been able to require the jury to follow the law of the case, that is, that Ms. Conradi was not employable up through September 2, 2015. The sole question would then be whether this inability to work was permanent as of September 2, 2015. There would be no option for the jury to essentially “split the baby” and her inability to work since 2013 would be persuasive evidence that she has an ongoing inability to work.

**C. Ms. Conradi Is Entitled To Attorney Fees And Costs On Appeal.**

The trial court entered Judgment, which includes fees and costs for time spent in superior court. Under RCW 51.52.130, Ms. Conradi is entitled to fees and costs on appeal if the employer’s appeal is dismissed, which sustains her right to relief on issues she did not appeal. See, Brand v. Department of Labor & Industries, 139 Wn.2d 659, 989 P.2d 1111

(1999)(awarding full attorney fees to the claimant without any exclusion for work done on unsuccessful claims).

Under the Industrial Insurance Act and RCW 51.52.130, attorney fees are payable where an employer's appeal is dismissed. If such instance occurs early in the case, attorney fees will be minimal. If, as in this case, Ms. Conradi must go through an entire jury trial and then to appellate court, the full amount of attorney fees to sustain the workers' right to relief are payable. See, Boeing v. Lee, 8 P.3d 1064 (2000) (holding that claimant's attorney is properly awarded fees and costs following employer's voluntary dismissal of appeal on the first day of trial).

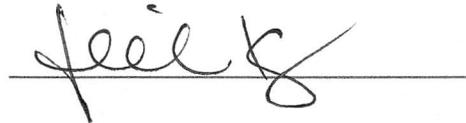
Given the adverse material effect on Ms. Conradi's trial court appeal, Ms. Conradi should be granted a new trial solely on the issue of permanent and total disability. As such, further superior court attorney fees and costs for such retried case would be based on whether she prevails in reversing the Board's decision and can include the time spent on this appeal. Clark County v. McManus, at 245.

Should this court affirm the trial court's decision, then fees and costs as ordered by the trial court should be affirmed under RCW 51.52.130 as Ms. Conradi's right to relief, following an employer appeal, was nonetheless sustained by the jury verdict.

## V. CONCLUSION

Ms. Conradi respectfully requests this court find that O'Reilly's waived its objections to the Board record and its cross-appeal to superior court must be dismissed. Further, she asks that this court find that the trial court erred in denying her motion to dismiss, which materially affected her claim for permanent total disability and should result in a new trial on the sole issue of permanent total disability. Lastly, Ms. Conradi asks for attorney fees on appeal.

Respectfully submitted this 2<sup>nd</sup> day of May, 2019.

A handwritten signature in black ink, appearing to read "Jill A. Karmy", is written over a horizontal line.

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