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DIVISION II

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STATE OF WASHINGTON

Case No. 52859-2-II

BY  DEPUTY

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

THERESA CONRADI,

Appellant,

v.

O'REILLY AUTO ENTERPRISES, LLC, and
WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. MOTION TO DISMISS APPEAL.....	1
III. RESPONSE ARGUMENT.....	3
A. Standard of Review.....	3
B. O'Reilly's Response to the Petition for Review was Sufficient to Properly Preserve all Objections Raised on the Cross-Appeal.	4
C. If the Superior Court Erred, such Error was Harmless, and a New Trial on the Pension Issue would not be Appropriate Relief.....	10
1. If the superior court abused its discretion, it amounts to harmless error.....	10
2. Claim of prejudice on pension verdict lacks merit.....	11
D. Attorney Fees	15
IV. CONCLUSION.....	16

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bender v. Seattle</i> , 99 Wn.2d 582, 664 P.2d 492 (1983).....	13
<i>Bennett v. Department of Labor & Indus.</i> , 95 Wn.2d 531, 627 P.2d 104 (1981).....	13
<i>Bulzomi v. Dep't of Labor and Indus.</i> , 72 Wn. App. 522, 864 P.2d 996 (1994).....	10, 11
<i>Citizens for Financially Responsible Gov't v. City of Spokane</i> , 99 Wn.2d 339, 662 P.2d 845 (1983).....	2
<i>Gildon v. Simon Prop. Group, Inc.</i> , 158 Wn.2d 483, 145 P.3d 1196 (2006).....	4, 9
<i>Emmerson v. Weilep</i> , 126 Wn. App. 930, 110 P.3d 214 (2005).....	4
<i>Escude v. King County Pub. Hosp. Dist. No. 2</i> , 117 Wn. App. 183, 69 P.3d 895 (2003).....	4, 6
<i>Intalco Aluminum v. Dep't of Labor and Indus.</i> , 66 Wn. App. 644, 833 P.2d 390 (1992).....	12
<i>Klickitat County Citizens Against Imported Waste v. Klickitat County</i> , 122 Wn.2d 619, 860 P.2d 390, <i>as amended</i> , 866 P.2d 1256 (1993).....	2
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006).....	4
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804, 947 P.2d 721 (1997).....	4, 6
<i>Randy Reynolds & Assocs. v. Harmon</i> , 193 Wn.2d 143, 437 P.3d 677 (2019).....	3

<i>Sacred Heart Med Ctr. v. Carrado</i> , 92 Wn.2d 631, 600 P.2d 1015 (1979).....	12
<i>Sorenson v. City of Bellingham</i> , 80 Wn.2d 547, 496 P.2d 511 (1972).....	3
<i>Spokane Research & Def. Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005)).....	1, 2
<i>Sue Jin Yi v. The Kroger Co.</i> , 2 Wn. App. 2d 395, 409 P.3d 1191 (2018) .	1
<i>Sweek v. Municipality of Metro. Seattle</i> , 45 Wn. App. 479, 726 P.2d 37 (1986).....	6, 7
<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	10
<i>Upjohn v. Russell</i> , 33 Wn. App. 777, 658 P.2d 27 (1983).....	6, 7, 8, 9
<i>Williams v. Virginia Mason Medical Center</i> , 75 Wn. App. 582, 880 P.2d 539 (1994).....	11, 14

STATUTES

RCW 51.08.160.....	14
RCW 51.52.104.....	4, 5, 7
RCW 51.52.110.....	5
RCW 51.52.115.....	12
RCW 51.52.130.....	16
RCW 51.52.140.....	3

RULES

RAP 17.4(d).....	1
RAP 18.9(c).....	1

RAP 18.1	3
RAP 18.9	3
WAC 263-12-145(6).....	9

I. INTRODUCTION

The superior court did not err in denying Theresa Conradi's motion to dismiss O'Reilly Auto Enterprises' ("O'Reilly") cross-appeal based on O'Reilly's proper preservation of all objections in its Response to the Petition for Review. Regardless of whether the superior court erred in denying Ms. Conradi's motion to dismiss, she is not entitled to a new trial as she was not prejudiced by the superior court's decision and has not challenged the jury's verdict on the pension issue.

II. MOTION TO DISMISS APPEAL

Pursuant to RAP 17.4(d) and RAP 18.9(c), O'Reilly moves to dismiss this appeal as frivolous and moot. Ms. Conradi has appealed an issue on which she ultimately prevailed on the merits before the superior court. As such, the appeal is moot; there is no relief available to her under this appeal which would improve her position. The court should dismiss the appeal without considering the merits.

When the substantial questions in the trial court no longer exist, and a court cannot provide effective relief, an appeal is moot. *Sue Jin Yi v. The Kroger Co.*, 2 Wn. App. 2d 395, 408, 409 P.3d 1191 (2018) (citing *Spokane Research & Def. Fund v. City of*

Spokane, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005)). Mootness is a jurisdictional issue that can be raised at any time. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 631, 860 P.2d 390, *as amended*, 866 P.2d 1256 (1993); *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983).

Here, Ms. Conradi appeals only the lower court's denial of her motion to dismiss O'Reilly's cross-appeal on issues of temporary disability benefits and permanent partial disability. She did not appeal the judgment on the issue of permanent and totally disabled benefits, also referred to as pension benefits. Notice of Appeal, p 1; CP 48-50. While the superior court denied her motion to dismiss O'Reilly's cross-appeal, the jury found in Ms. Conradi's favor on the merits of those issues of temporary and permanent partial disability. She fully maintained her temporary disability payments and Category 3 rating, and was awarded her attorney fees and costs. CP 969-70; CP 971-74. This renders the question of whether O'Reilly waived the cross appeal a purely academic

question.¹ Ms. Conradi cannot obtain a better position on the issues; the court has no substantive relief to offer on point. *See e.g. Randy Reynolds & Assocs. v. Harmon*, 193 Wn.2d 143, 152, 437 P.3d 677 (2019). Indeed, she even received her attorney fees and costs for pursuing those issues through trial.

Since she has already prevailed on the merits of the cross-appeal issues at the lower court, and cannot improve her position on those issues, the assigned error is moot and academic. O'Reilly respectfully asks that the appeal be dismissed without consideration of the merits, and it be awarded its attorney fees and costs under RAP 18.1 and RAP 18.9.

III. RESPONSE ARGUMENT

A. Standard of Review

Pursuant to RCW 51.52.140, ordinary civil case practices apply to industrial insurance matters, including the right to appeal a superior court judgment to the Court of Appeals. A trial court's decision on a motion to dismiss is reviewed under an abuse of

¹ An exception to the mootness question exists when a strong public interest exists in a determinative ruling on an issue that frequently recurs, and the issue is one that, by its nature, is not likely to ever be ripe for review. *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). This is not such an issue, nor does Ms. Conradi argue it is such an issue.

discretion standard. *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190, 69 P.3d 895 (2003). The legal interpretations underlying such decision are reviewed *de novo*. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997); *Emmerson v. Weilep*, 126 Wn. App. 930, 935, 110 P.3d 214 (2005). Under the abuse of discretion standard, the appellate court reviews for decisions that are “manifestly unreasonable” or untenable. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). This occurs when the trial court “relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *Gildon* at 494.

B. O’Reilly’s Response to the Petition for Review was Sufficient to Properly Preserve all Objections Raised on the Cross-Appeal.

Under the Industrial Insurance Act, a dispute over a Department order granting or denying benefits such as permanent partial disability goes first to an industrial appeals judge. That judge issues a Proposed Decision and Order, which can then be appealed to the full Board of Industrial Insurance Appeals (hereinafter, “the Board”). Under RCW 51.52.104, within 20 days

after the Proposed Decision and Order, any party can petition the Board for review of the proposed decision. “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.” RCW 51.52.104. The Board then issues a final decision, which any aggrieved party can appeal to the superior court. *See* RCW 51.52.110.

In the present case, Ms. Conradi petitioned for Board review of the Proposed Decision and Order. CP 66-71. O’Reilly responded, and challenged issues of temporary disability and permanent partial disability. CP 46-62. The Board affirmed, providing additional discussion particular to its denial of the pension. CP 35-44. Both parties then filed appeals to the superior court. CP 1-2; CP 3-5. When Ms. Conradi moved to dismiss O’Reilly’s cross appeal, the superior court denied the motion. CP 7-10; CP 841-842.

On appeal, Ms. Conradi assigns error to the trial court’s denial of her motion to dismiss. While the trial court’s underlying legal interpretations are given *de novo* review, the trial court’s determination to deny Ms. Conradi’s motion to dismiss on the

basis that O'Reilly properly preserved its objections at the Board level is reviewed under an abuse of discretion standard. *See Escude*, 117 Wn. App. at 190; *Nevers*, 133 Wn.2d at 809. The superior court did not misapply any law or otherwise make an untenable ruling.

Ms. Conradi relies on *Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (1983) to argue that O'Reilly waived its objections by not filing a petition for review to the Proposed Decision and Order. However, the *Upjohn* holding was not as narrow as Ms. Conradi claims. In *Upjohn*, the court clarified that an appeal cannot be dismissed based solely on the failure to file a petition for review, stating: "despite its failure to petition, [Upjohn] was not prohibited by statute from appealing." *Id.* at 782-83. Instead, it looked to whether the appealing party preserved its objections at the Board level. Objections not preserved are deemed waived, making dismissal appropriate. *Id.* To properly preserve an issue for appellate review, an objection must specify the particular grounds on which it is based. *Sweek v. Municipality of Metro. Seattle*, 45 Wn. App. 479, 485, 726 P.2d 37 (1986). The employer in *Upjohn* took no action to preserve its objections at the Board level. As such, the court in *Upjohn* had no choice but to find the employer

had waived its objections. *Upjohn* at 778-79. That decision did not address the circumstances of this case; namely, if a party who raises specific objections in a response to a petition for review has preserved them.

The record in this case shows O'Reilly did not waive its objections to the Proposed Decision and Order and did, in fact, expressly preserve its objections in its response to the petition for review filed with the Board. CP 46-47. In that response, O'Reilly specifically objected to findings of fact and conclusions of law addressing Ms. Conradi's entitlement to temporary disability and permanent partial disability benefits, the same issues O'Reilly appealed in its cross-appeal to the superior court. CP 46-62; CP 3-5. O'Reilly specified the particular basis for its objections in its response to the petition for review as required by *Sweek*. It took action to preserve its objections at the Board level; and therefore, the superior court was well within its grant of discretion to conclude O'Reilly did not waive those objections.

The purposes discussed in *Upjohn* support this result. The court recognized RCW 51.52.104 was ambiguous and required consideration of its purpose and the overall structure of the

Industrial Insurance Act.² As the court in *Upjohn* noted, administrative rules confirm the statute does not outline a strict waiver. It does not waiver objections to “irregularities” in the record, for example. *Upjohn* at 781-82. Contrary to Ms. Conradi’s argument, the statute and case law does not call for the strict interpretation she would impose.

The decision in *Upjohn* provides support for the superior court’s denial of the motion to dismiss in another, indirect manner by rejecting form over substance. While the worker in *Upjohn* challenged jurisdiction, and failed to formally raise the affirmative defense of waiver, the court understood her argument to be one of waiver and so affirmed on that basis. *Upjohn* at 782-83. The superior court reached a similar conclusion here. While O’Reilly may not have titled its document a “cross-petition” as Ms. Conradi

² Ms. Conradi appears to assert the statute is clear and unambiguous, and must be strictly applied, in contrast with the court’s ruling in *Upjohn*. She also contends liberal construction of the Industrial Insurance Act in favor of workers requires interpreting the statute to find waiver of objections raised in any manner except for a petition for review. If the parties’ roles were reversed, would Ms. Conradi then argue liberal interpretation requires finding a worker does not waive objections when outlined in a response to a petition for review? This general policy does not allow arbitrary application of a law depending on who will be favored or disfavored by the interpretation in a specific set of circumstances, as Ms. Conradi’s reasoning would seem to suggest.

points out, it clearly outlined its objections in its response to Ms. Conradi's petition. Ms. Conradi did not object to O'Reilly's raising objections in its response, or raise the issue of waiver at the Board level. RP 8-9. While she asserts the rules do not provide for such a mechanism, she also took no steps to request permission from Board to raise issues of waiver.³ As the trial judge noted, the Board made specific findings on the cross issues, signaling it did not view the issues as waived. RP 8-9. Just as the court in *Upjohn* considered the substance of argument over the form of the appeal, the superior court concluded O'Reilly met the requirement of preserving its objections in its response to Ms. Conradi's petition.

The superior court did not abuse its discretion in denying Ms. Conradi's motion to dismiss the cross-appeal. Since O'Reilly preserved its objections at the Board level, the superior court's ruling was not manifestly unreasonable or untenable. *Gildon* at 494. The superior court's ruling should be affirmed.

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³ WAC 263-12-145(6) permissively gives the parties the opportunity to submit statements, and also gives the Board the ability to outline briefing or arguments on any terms it prescribes. Nothing in the rules or statutes cited prohibit a party from objecting to an action or argument it deems improper.

C. If the Superior Court Erred, such Error was Harmless, and a New Trial on the Pension Issue would not be Appropriate Relief.

Even if this Court finds that the superior court abused its discretion in denying Ms. Conradi's motion to dismiss the cross-appeal, she is not entitled to a new trial. As claimant herself admits, she prevailed on the merits of the cross-appeal issues in full, including being awarded her attorney fees and costs for taking those issues to trial. Because she prevailed on the merits, any error in failing to grant the motion to dismiss was harmless and does not affect the ultimate outcome.

1. If the superior court abused its discretion, it amounts to harmless error.

Not every error of a trial court necessitates reversal or other relief. "Error is not prejudicial unless it affects or presumptively affects the outcome of the trial." *Bulzomi v. Dep't of Labor and Indus.*, 72 Wn. App. 522, 529-30, 864 P.2d 996 (1994) (citing *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983)). If the error is not prejudicial, it is not grounds for reversal. *See Thomas v. French*, 99 Wn.2d at 104. In *Bulzomi*, the Court of Appeals concluded a trial court's refusal to give a proposed jury instruction on permanent total disability was not prejudicial

because, in reaching its verdict, the jury implicitly addressed the issue, so any error did not affect the outcome of the trial. *Bulzomi* at 529-530. Similarly in *Williams v. Virginia Mason Medical Center*, 75 Wn. App. 582, 586, 880 P.2d 539 (1994), the court did not find a jury instruction telling the jury to (wrongly) compare temporary vs. permanent disability rather than total vs. partial disability, to require reversal in light of the other accurate instructions.

Here, any error in denying the motion to dismiss was harmless, because Ms. Conradi prevailed on the merits of those issues and recovered her attorney fees and costs. As outlined in the Motion to Dismiss, Section II *supra*, she cannot improve her position on the appealed issues, and there is no substantive relief to provide. She would not need a “new trial” on the appealed issues if the motion to dismiss were granted – she would simply have a favorable judgment entered without a trial.

2. Claim of prejudice on pension verdict lacks merit.

Ms. Conradi does not actually seek relief regarding the cross-appeal issues. Instead, she wants a second chance to change the jury verdict on her pension claim. Ms. Conradi did not appeal

the denial of her pension, assign error on appeal to the jury's determination on that issue, or offer any argument on appeal that substantial evidence does not support the jury's verdict.

Nonetheless, she asserts the presentation of the cross-issues to the jury caused it to "essentially 'split the baby'" in deciding to reject her pension claim. This is nothing more than pure conjecture, as highlighted by her failure to cite any evidence in support of her allegation or appeal the pension verdict. Regardless of whether the temporary disability and permanent partial disability issues were presented, the jury had admittedly correct instructions on permanent and totally disabled issue, and explicitly addressed the pension in its verdict.

Importantly, the jury reached the same conclusion on the pension as the Board and the industrial appeals judge before it. On an appeal from a Decision and Order, the Board's findings of fact and conclusions of law are considered prima facie correct. See RCW 51.52.115. A jury verdict upholding the Board's findings and decisions must also be presumed correct. *Intalco Aluminum v. Dep't of Labor and Indus.*, 66 Wn. App. 644, 653-654, 833 P.2d 390 (1992) (citing *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979)). Appellate courts do not second-

guess a jury's decision when sufficient evidence exists to substantiate the verdict. *See Bender v. Seattle*, 99 Wn.2d 582, 597, 664 P.2d 492 (1983); *Bennett v. Department of Labor & Indus.*, 95 Wn.2d 531, 534, 627 P.2d 104 (1981). Based on the evidence in this case, an industrial appeals judge concluded Ms. Conradi could perform gainful employment on a reasonably continuous basis as of September 2, 2015. CP 88. The full Board then reviewed the evidence and found "a number of jobs from which [Ms. Conradi] is not now physically restricted...." and denied the pension claim. CP 39. The jury affirmed the Board's decision. CP 969-967.

Presumably, Ms. Conradi did not appeal the verdict on the pension because she recognized it has substantial evidentiary support. The jury's denial of the pension is not confirmation that Ms. Conradi was prejudiced by having more than one issue before the jury.

The superior court's ruling on the motion to dismiss does not change the evidence presented to the jury on the pension claim. Ms. Conradi argues that if the pension issue was the only issue before the jury "her inability to work since 2013 would be persuasive evidence that she has an ongoing inability to work," but cites no law or evidence to support that conclusion. Appellant's Brief at 16. Assuming for the sake of argument that the pension

issue was the only issue before trial court, Ms. Conradi would still have to prove total and permanent disability rather than something less. RCW 51.08.160. The jury would be presented with the same evidence addressing Ms. Conradi's age, education, permanent restrictions, loss of earning capacity, and relevant labor market to determine whether she was permanently unable to perform or obtain gainful employment – including the evidence that her disability was partial or temporary. Both concepts of permanent total disability and permanent partial disability, for example, involve these same elements. *Williams*, 75 Wn. App. 582, 586. The jury would still have had to address the legal standard for whether Ms. Conradi was permanent and totally disabled, regardless of whether or not it also addressed temporary disability and/or permanent partial disability. As in *Williams*, because the jury had to reach the issue and had proper instructions on the standard for a pension⁴, any error in giving other instructions is harmless and not reversible. *Id.* at 587-88.

While Ms. Conradi had the opportunity to appeal that portion of the superior court's judgment, she chose not to do so.

⁴ Ms. Conradi does not assign error to the jury instructions or jury verdict on the pension issue.

Instead, she challenges the motion to dismiss in an apparent attempt to circumvent the system and get a second trial with a new jury on the pension issue. Regardless of the correctness of the superior court's denial of Ms. Conradi's motion to dismiss the cross-appeal, the consequence would not be a new trial on the separate, un-appealed jury verdict and judgment on a pension. Ms. Conradi should not be granted the opportunity to relitigate that issue simply because she was not satisfied with the result of the first litigation. If the superior court abused its discretion in denying Ms. Conradi's motion to dismiss the cross-appeal, it would amount to harmless error at best.

D. Attorney Fees

As outlined above, Ms. Conradi brings a moot appeal or raises a harmless error in an attempt to circumvent the system and obtain a new trial because she was dissatisfied with the first jury's verdict. The sole issue on appeal is the trial court's denial of her motion to dismiss O'Reilly's cross-appeal on temporary and permanent partial disability issues. Ms. Conradi prevailed on the merits of both those issues before the trial court and was awarded attorney fees and costs. If, instead, she should have prevailed on her motion, this would not give her a new trial – she would not

have to go to trial because a judgment would be entered in her favor on those issues. RCW 51.52.130 grants attorney fees when an order is reversed *and* additional relief is granted a worker. It does not allow for attorney fees and costs where an injured worker appeals issues on which she already prevailed on the merits and gets no additional benefits. Even should she prevail, no attorney fees should be awarded.

IV. CONCLUSION

For the reasons stated above, the superior court did not abuse its discretion in denying Ms. Conradi's motion to dismiss the cross-appeals. However, if this Court finds the superior court did abuse its discretion in denying the motion to dismiss, the Court should deny Ms. Conradi's request for a new trial as it was harmless error and there is substantial evidence to support the jury's verdict on the pension claim. For the foregoing reasons, O'Reilly asks the Court to either dismiss this appeal as moot and

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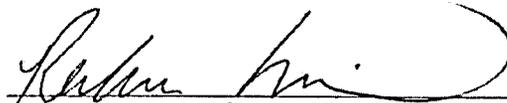
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frivolous or affirm the judgment in this case and deny the request
for attorney fees.

Dated: July 3, 2019

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Rebecca A. Watkins", written over a horizontal line.

Rebecca A. Watkins, WSBA No. 45858
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this date, I efiled a copy of

RESPONDENT'S BRIEF via the Washington State Appellate Courts

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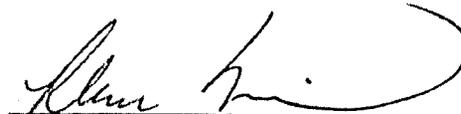
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