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Division II
State of Washington
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No. 52859-2-II

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

THERESA CONRADI

Appellant,

v.

O'REILLY AUTOMOTIVE, INC, and

**WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES**

Respondents.

APPELLANT'S REPLY BRIEF

Respectfully Submitted By:
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I. ANSWER TO MOTION TO DISMISS APPEAL

Pursuant to RAP 17.4(d), Conradi files this Answer to O'Reilly's Motion to Dismiss. The issues and ramifications of those issues are neither moot nor frivolous. Under RAP 10.3(g), the appellate courts will review a claimed error "which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." In Conradi's Opening Brief, she clearly and unequivocally assigned error to the lower court's rulings at issue here, and then clearly and unequivocally listed the material affect the erroneous ruling had on the issue of permanent total disability. See, AB at 1. Further, throughout Conradi's Opening Brief, she consistently raised the issue of a new trial on the sole issue of permanent and total disability. See, AB 14-16. Logically, if this court holds that the employer's cross-appeal should have been dismissed, and was improperly before the jury, Ms. Conradi is entitled to a new trial on the sole issue of permanent and total disability. The Notice of Appeal, while pointing to the specific legal error contained in O'Reilly's cross-appeal, nonetheless was an appeal to the entirety of the trial court's judgment. A dismissal based on mootness is "to avoid the danger of an erroneous decision caused by the failure of parties, who no longer have an existing interest in the outcome of a case, to zealously

advocate their position." Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). This is not an issue present here. Based on RAP 10.3(g), O'Reilly's Motion to Dismiss must be denied.

II. REPLY ARGUMENT

A. De novo review is the standard of review applicable to a trial court's conclusions of law.

The question as to whether O'Reilly's cross-appeal should have been dismissed is a question of law subject to de novo review. Potter v. Dept. Of Labor & Indus., 172 Wn. App. 301, 310, 289 P.3d 727 (2012). The abuse of discretion standard proposed by O'Reilly's is not applicable. Regardless, Conradi contends the trial court did abuse its discretion in submitting O'Reilly's issues to the jury because it presumptively affected the outcome of the trial, discussed *infra*.

B. O'Reilly's incorrectly asserts that a Response to Petition for Review preserves objections to a Proposed Decision & Order.

It is undisputed that O'Reilly's did not file a Petition for Review. What is disputed is O'Reilly's statement that "the Board made specific findings on the cross issues, signaling it did not view the issues as waived." RB at 9. The Board made no mention that it was reconsidering the cross issues when it granted review of the Proposed

Decision and Order and issued its own Decision and Order. In fact, the Board's Decision and Order specifically states:

“Ms. Conradi filed a timely Petition for Review. We agree with our industrial appeals judge's holdings but grant review to further explain why we deny the pension.” CP at 19.

Despite not asking the Board to review its objections, O'Reilly's asks this court to hold that it did constructively file a Petition for Review. For the reasons outlined below, O'Reilly's argument should fail.

1. The *Sweek* case relied on by O'Reilly's is not on point.

In arguing that it did preserve its objections for superior court, O'Reilly's relies on *Sweek v. Municipality of Metro, Seattle*, 45 Wn. App. 479, 485, 726 P.2d 37 (1986); RB 6-7. *Sweek* is a case wholly unrelated to workers' compensation administrative proceedings. In *Sweek*, the court held that objections made during trial were not preserved for an appellate record without stating the grounds for which the objections were made. *Id.* In Conradi's case, this court is asked to address a very specific process by which aggrieved parties can seek review of a decision of the Board of Industrial Insurance Appeals. *Sweek* is not on point.

2. O'Reilly's Response to Petition for Review cannot be considered a Petition for Review.

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, emphasis added. O'Reilly's argues, in its brief, that a response to petition for review suffices for purposes of preservation of objections. RB at 7. This argument fails under the WAC 263-12-145(2), which holds:

"A petition for review must be filed separately. A petition for review must be filed separately from any other pleading or communication with the board and must note "PETITION FOR REVIEW" prominently on the first page of the submission."

This code provision makes clear that in order to file a petition for review, which preserves objections, one must file a petition for review. This is not a narrow interpretation put forth by Conradi; this is the language of the law.

C. The trial court's ruling was not harmless error because it presumptively affected the outcome of the trial.

As O'Reilly's itself points out, "error is not prejudicial unless it affects or presumptively affects the outcome of a trial." RB at 10; citing Bulzomi v. Dept. Of Labor & Industries, 72. Wn. App. 522, 529-30, 864 P.2d 996 (1994); Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). The erroneous trial court ruling presumptively affected the outcome of the trial.

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.

O'Reilly's incorrectly asserts that Conradi did not address whether substantial evidence supported the pension verdict. Conradi did, in

fact, address the material affect mistaken information given to a jury had on the sole issue to be decided. AB 14-16. As discussed in the Appellant's Opening Brief, 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). "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).

In the French case cited by O'Reilly's, the Supreme Court found such presumptive affect necessitated a new trial. After holding that the admission of a letter at trial was in error, and no limiting instruction given, the court held that "because there is no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983).

Similarly, it is impossible for Conradi to argue whether substantial evidence supported the jury's verdict because the jury was not given

correct information about the case and was presented with issues that should not have been presented to them. Rather, Conradi argues that the trial court's error presumptively affected the outcome of her pension case.

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

Conradi relies on the arguments contained in her Opening Brief in support of attorney fees and costs as O'Reilly's has not raised new issues on this topic in its responsive brief.

III. 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 23rd day of August, 2019.

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) **SERVICE**
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 O'REILLY AUTOMOTIVE, INC. and)
 WASHINGTON STATE)
 DEPARTMENT OF LABOR AND)
 INDUSTRIES,)
)
 Respondents.)
)
)

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Appellant's Reply Brief and this Certificate of Service in the below described manner:

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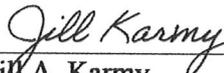
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