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NO. 53094-5-II

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

WILLIAM A. DORN,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

A party may not receive a jury instruction on another party's litigation strategy. The Department of Labor and Industries is the legislatively appointed administrator of the Industrial Insurance Act. In appeals, the Department may participate in order to fulfill its legislatively assigned duty. Once the Department appears in superior court, it may take the position that best aligns with its interests.

William Dorn appealed a decision of the Board of Industrial Insurance Appeals reversing an order of the Department that held his claim open for more treatment. The Department defended its order at the Board. But then at superior court, the Department determined the Board's decision was correct and defended the Board's decision.

At trial, although Dorn sought a jury instruction to argue that the Department had "flipped its position," he did not object to the Department's defense of the Board's order. The court rejected Dorn's instruction and precluded argument about the Department's position. This was the correct decision because, contrary to Dorn's arguments, the only issue before the jury was whether the Board's decision was correct. The Department's historical approach to the issue on appeal was not relevant to the determination of correctness. This Court should affirm the jury's verdict to affirm the Board.

II. STATEMENT OF ISSUES

1. **A trial court does not abuse its discretion by refusing to give an irrelevant jury instruction. The only issue before the court is whether the Board’s decision that Dorn did not need treatment is correct. Dorn proposed a jury instruction to argue the Department had “flipped” its position. Did the court abuse its discretion by denying the proposed instruction?**
2. **A party waives an argument when it fails to object at trial. At the superior court, the Department argued in opening and closing statements that the Board’s decision was correct. Dorn did not object to the Department’s actions. Did Dorn waive any argument that the Department should not be permitted to argue in support of the Board in this appeal?**
3. **Under RCW 51.52.110, the Department is a necessary party in appeals to superior court involving the state fund. If the Board overturns an order of the Department and another party appeals to superior court, is the Department entitled to defend the decision of the Board when it determines the Board was correct?**

III. STATEMENT OF THE CASE

A. **The Department Issued an Order Holding Dorn’s Claim Open for Additional Treatment**

William Dorn was working for Colvico Electric when he slipped on rebar and fell out of the back of a work truck. CP 104-105. He applied for workers’ compensation benefits, and the Department allowed his claim. CP 46.

In July 2015, the Department issued an order in Dorn’s claim that cancelled a previous order and held Dorn’s claim open for additional

treatment. CP 37, 48. Colvico appealed the Department's order to the Board of Industrial Insurance Appeals ("the Board"). CP 49.

B. The Board Determined the Department's Order Was Incorrect

At the Board, Colvico had the burden to prove the Department order was incorrect. RCW 51.52.050. The Department, alongside Dorn, sought to defend the Department order. *See* CP 88, 116. Colvico presented the testimony of several doctors and one lay witness. CP 76, 127, 184, 229, 279, 326, 375. Dorn presented the testimony of himself, his wife, and several doctors. CP 89, 103, 393, 419. After reviewing the evidence, the Board issued an order reversing the Department's order and finding Dorn's claim should be closed because he was not in need of additional medical treatment. CP 10, 32-33. Dorn appealed the Board's decision to superior court. CP 1-2.

C. At Superior Court, the Department Defended the Decision of the Board

At superior court, Dorn had the burden to prove the decision of the Board was incorrect. RCW 51.52.115. Before trial, Colvico's attorney withdrew and Colvico did not participate in the trial. CP 474-76. When the Department reviewed the Board's decision, the weight of the evidence, including testimony not presented to the Department, was sufficient to convince the Department that it should support the Board's decision: which it did. RP 5/24/18 3-5.

Before trial, Dorn moved in limine to address various issues. CP 477-82. He did not ask the superior court to rule that the Department was not permitted to change positions at the superior court. *See* CP 477-82.

D. At Trial, Dorn Sought a Jury Instruction to Argue the Department Had “Flipped” Its Position

At trial, Dorn wanted to advise the jury that the Department defended its order to keep the claim open at the Board, but that at superior court it defended the Board’s decision to close the claim. RP 5/24/18 at 3. He proposed a jury instruction as a vehicle to argue, “that the Department, by siding with the absent employer, has flipped its position about whether Mr. Dorn’s claim should be left open.” CP 487. The proposed jury instruction reads:

This litigation commenced when the Department of Labor and Industries issued a remain-open order. The employer, Colvico, appealed that decision to the Board of Industrial Insurance Appeals. The Board of Industrial Insurance Appeals agreed with Colvico and found that Mr. Dorn wasn’t in need of further treatment as of July 20, 2015. I

CP 493. The Department objected to the argument and jury instruction as irrelevant and prejudicial. RP 5/24/18 at 4-5. The superior court denied the request for the instruction:

I’m going to deny the motion. I don’t think it’s relevant as to the Department’s particular position. The issue here is whether the Board was correct in their decision, and that’s really what’s in front of the jury.

I don't think even though the Department is here, there is no new evidence introduced. There is no ability to address the decision-making process, so I'm going to deny the motion.

RP 5/24/18 at 5. Dorn objected to the trial court's decision not to give the proposed instruction. RP 5/31/18 at 4.

Without objection, the trial court instructed the jury that

- The only evidence it was to consider was the testimony in the Board Record. Ins. 1, 3; CP 527, 530
- The Department's duty is to determine what benefits are to be provided to workers under the Industrial Insurance Act and to issue all orders related to claims under the Act. Ins. 2; CP 529
- The Board is a separate state agency that is independent of the Department and its function is to review Department determinations when a party appeals. Ins. 2; CP 529
- The only question before the jury was whether the Board's decision was correct that Dorn was not in need of medical treatment. Jury Ins. 17; CP 521.

The superior court permitted Dorn to discuss the procedural posture of the case in closing statements, including statements that the Department issued an order, the employer appealed to the Board, the Board found for the employer, and Dorn appealed; and Dorn did so. RP 5/31/18 at 7-8. The

content of the Department order was not introduced as evidence at the Board and was thus not presented to the jury.

In closing argument, Dorn told the jury that the employer had appealed the order:

The procedural posture of the case is a little weird. The Department issued an order. We know from the testimony that the employer was here. They put on witnesses. We know they appealed the Department order. Mr. Dorn didn't appeal the order. Mr. Dorn defended that order. The Board of Industrial Insurance Appeals agreed with the employer and said no, I don't think he needs treatment. We had to appeal, and we did.

RP 5/31/18 at 7.

E. The Trial Court Denied Dorn's Motion for a New Trial for Refusal to Give His Proposed Jury Instruction

The jury entered a verdict affirming the Board. CP 547. Dorn filed a motion for new trial under CR 59, arguing that the trial court erred by declining to give his proposed instruction and by not permitting him to advise the jury during closing arguments that the Department had changed position. CP 555-63. He argued that these were errors of law and that substantial justice had not been done. CP 561 *citing* CR 59. The superior court denied the motion for a new trial. CP 599-600. Dorn appeals.

IV. STANDARD OF REVIEW

In an industrial insurance case, the appellate court reviews the trial court's decision, not the Board's decision. *See Rogers v. Dep't of Labor &*

Indus., 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The Administrative Procedure Act does not apply and the normal civil practice does. *Id.* at 180; RCW 51.52.140.

This Court reviews a trial court's refusal to give a proposed instruction for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996); *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). "A trial court abuses its discretion if its decision was manifestly unreasonable, or if its discretion was exercised on untenable grounds or for untenable reasons." *Cooper v. Dep't of Labor & Indus.*, 188 Wn. App. 641, 648, 352 P.3d 189 (2015). Trial court error on jury instructions requires reversal only if it is prejudicial, that is, only if the error affects the trial's outcome. *Stiley*, 130 Wn.2d at 498-99.

Jury instructions are sufficient if they (1) allow each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Raum v. City of Bellevue*, 171 Wn. App. 124, 142, 286 P.3d 695 (2013).

A trial court does not abuse its discretion in refusing to give an irrelevant jury instruction. *Bell v. State*, 147 Wn.2d 166, 178, 52 P.3d 503 (2002). *See also La Vera v. Dep't of Labor & Indus.*, 45 Wn.2d 413, 415, 275 P.2d 426 (1954). A party has no right to a misleading jury instructions. *Jaeger v. Cleaver Constr., Inc.*, 148 Wn. App. 698, 716, 2017

P.3d 1028 (2009). The court abuses its discretion in refusing to give a jury instruction when it adopts a position that no reasonable person would have taken. *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn. App. 279, 322, 284 P.3d 749 (2012).

V. ARGUMENT

In appeals under the Industrial Insurance Act, the focus is on the correctness of the Department's order. The outcome of the case is determined by the weight assigned to the competing evidence presented at the Board. Collateral issues such as the Department's position on the issue on appeal are not relevant to a determination of correctness. Dorn's proposed jury instruction was irrelevant to the only issue before the jury – whether the Board's decision was correct.

Refusal to give an irrelevant jury instruction is not an abuse of discretion. The trial court did not abuse its discretion by refusing to give Dorn's proposed jury instruction. The court reasonably determined that the Department's prior actions were irrelevant to the issue before the court and argument about the Department's position risked prejudice by inviting the jury to consider the Department's thought process. Dorn was not precluded from arguing the Board's decision was incorrect and he was not precluded from presenting the procedural posture of the appeal to the jury. There was no abuse of discretion.

The Department argued in opening and closing statements that the decision of the Board was correct. While Dorn now contends that in appeals to the superior court the Department should continue to defend its order or take no position at all, he made no objections to the Department's participation below. Dorn has waived this argument.

The Department may defend the decision of the Board in appeals to the superior court. The Legislature entrusted the Department with the administration of the Industrial Insurance Act. The Department is a necessary party when a state fund claim is appealed, RCW 51.52.100, .110. Neither the Legislature nor the courts have limited the Department's ability to participate once an appeal is started. On appeal from a decision of the Board, the Department is an independent party and will take the position that best advances its interests.

A. The Trial Court Did Not Abuse Its Discretion by Refusing to Give Dorn's Proposed Jury Instruction Because the Department's Position in the Litigation Is Irrelevant to the Issue on Appeal

The trial court did not abuse its discretion by refusing to give an irrelevant jury instruction. Dorn wanted a jury instruction that "would have advised them that the Department shifted its litigation posture during the course of the appeal." Appellant's Br. (AB) 5. Even without an instruction, he wished to argue to the jury about the Department "flip-

flopping.” AB 19. The trial judge properly rejected his proposed instruction and proposed argument because the Department’s litigation position was not relevant to whether Dorn needed medical treatment: the only issue before the jury. RP 5/24/18 at 5.

1. The Department’s position during the litigation is irrelevant to Dorn’s need for additional treatment

Dorn wants to argue that the Department “flipped” (his words) its position in the case. AB 17. Although he has not explained why this change in position is probative, presumably he wishes the jury to infer that the act of changing positions somehow entitles him to win. AB 17. But this argument ignores what is really relevant here: the correctness of the Department’s order—not collateral issues such as the deliberative processes, mental processes, or litigation position of the Department.

a. The focus of an appeal under the Industrial Insurance Act is the correctness of the Department order

The whole focus of the Industrial Insurance Act’s appeal provisions is on the correctness of the Department’s order. This case arises under the Industrial Insurance Act. The Legislature entrusted the Department of Labor and Industries to administer the Act. *See* RCW 43.22.030. Whenever the Department makes a decision in a workers’ compensation claim, “the worker, beneficiary, employer, or other person aggrieved” may appeal to the Board. RCW 51.52.050(2)(a).

On appeal to the Board, the only issue before the Board is whether the Department's order is correct. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997). At the Board, a hearing is conducted de novo limited to review of the specific Department action appealed. RCW 51.52.050; *Kingery*, 132 Wn.2d 162 at 171. The appealing party must prove by a preponderance of the evidence that the Department's order is incorrect. *Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 200, 378 P.3d 139 (2016). All parties have a chance to present new evidence not previously considered by the Department. RCW 51.52.100. After review of the evidence, an industrial appeals judge issues a proposed decision that the Board either adopts as its decision or declines to adopt, in which case it issues its own decision and order. RCW 51.52.104, .106; WAC 263-12-150, -155. A party may appeal the decision of the Board to superior court. RCW 51.52.110.¹

When an order of the Board is appealed to superior court, the superior court reviews the Board's decision de novo based on the Certified Appeal Board Record. RCW 51.52.140. "The trial court is not permitted to receive evidence or testimony other than, or in addition to, that offered before the Board or included in the record filed by the Board." *Sepich v.*

¹ While a worker, employer, or other interested party may appeal a decision of the Board on an issue of fact or law, RCW 51.52.110 limits the Department's right to appeal a decision of the Board to issues of law.

Dep't of Labor & Indus., 75 Wn.2d 312, 316, 450 P.2d 940 (1969). The plaintiff bears the burden of proving, by “a fair preponderance of credible evidence,” that the decision of the Board is incorrect. *McClelland v. ITT Rayonier*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). When a party requests a jury, the jury is instructed on the “exact findings of the board on each material issue before the court.” RCW 51.52.115. Thus, the issue here is the correctness of the Department’s order—not collateral issues.

b. Deliberative and mental processes of the Department are not relevant to the correctness of the Department order

Applying this principle, the court has emphasized that the deliberative process (including development of positions) in a case and that mental processes (which would include its motives for positions in a case) of the governmental agency are not relevant to the question of correctness of an agency position. *See McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001); *Nationscapital Mortg. Corp. v. State Dep't of Fin. Inst.*, 133 Wn. App. 723, 762-63, 137 P.3d 78 (2006) (citing *United States v. Morgan*, 313 U.S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429 (1941)).

In appeals arising under the Industrial Insurance Act, the Department’s decision-making process is not used to inform the jury about what position to take. *McDonald*, 104 Wn. App. at 623. In *McDonald*, a worker appealed the Department’s order denying an application to reopen

the claim. Before issuing the ultimate order denying reopening, the Department had issued an order reopening the claim, which it later reversed. 104 Wn. App. at 620. At trial, the worker sought to argue that the Department's temporary reopening of his claim was an admission of a party opponent. *Id.* at 622-23. On appeal, the worker claimed error to a jury instruction stating: "No action in opening or closing the claim has any effect on your decision. You are to determine whether the decision of the Board of Industrial Insurance Appeals was correct." *Id.* at 622. The court held that the superior court properly gave this instruction because the jury's sole responsibility was to determine whether the Board's decision was correct and the limiting instruction was necessary to avoid confusing the issues and misleading the jury. *Id.* at 623.

In appeals of administrative decisions generally, it is inappropriate to probe the decision making of the agency. "Courts should not probe the mental processes of administrative officials in making a decision." *Nationscapital Mortg. Corp.*, 133 Wn. App. at 762-63 (citing *Morgan*, 313 U.S. at 422) (district court erred in permitting opponents of an agency decision to depose the agency head and probe his reasons for issuing orders). As the United States Supreme Court has explained, "[j]ust as a judge cannot be subjected to such a scrutiny . . . , so the integrity of the administrative process must be equally respected." *Morgan*, 313 U.S. at

422 (citation omitted). Without evidence to the contrary, courts should “presume public officers perform their duties properly, legally, and in compliance with controlling statutory provisions.” *Ledgering v. State*, 63 Wn.2d 94, 101, 385 P.2d 522 (1963).

Inviting the jury to consider the Department’s position at the various stages of this appeal would be inviting it to consider the Department’s mental processes regarding the administration of Dorn’s claim and weight of the evidence presented. Where the sole issue on appeal is the correctness of the Board’s order, Dorn’s argument about the Department’s prior position is irrelevant and risks confusing the jury.

Further, the Supreme Court has said that a Department order is not proof of correctness. *Olympia Brewing Co. v. Dep’t of Labor & Indus.*, 34 Wn.2d 498, 506, 208 P.2d 1181 (1949), *overruled on different grounds Windust v. Dep’t of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958); *McDonald*, 104 Wn. App. at 623-24. In *Olympia Brewing Co.*, a woman applied for a widow’s pension when her husband died after being found unconscious at work. 34 Wn.2d at 490. The Department allowed her claim and her husband’s employer appealed to the Board. *Id.* at 500. At the Board, the employer presented evidence that the husband’s death was not work related; the Department and the claimant did not introduce evidence. *Id.* at 500. After the superior court affirmed an order dismissing the

appeal, the employer appealed, asking whether the Department must show the claimant was eligible for benefits under the act when an employer challenges the Department's decision. 34 Wn.2d at 500. The court ruled that a claimant's eligibility for benefits must be established through evidence presented at the Board. *Id.* at 505-06. ("The ruling of the supervisor is before the joint board, but it is not evidence and there is no presumption that it is correct.").

Here, Dorn attempted to place the prior actions of the Department before the jury in an attempt to demonstrate that its current actions were incorrect. But neither the Department's order nor the Department's prior conduct is proof of correctness. The trial court properly declined Dorn's invitation to put the Department on trial instead of the Board's decision.

c. The Department's position is not a material fact of this case

Dorn argues that the Department's position is a material fact of this case of which the jury should have been informed. AB 10. "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). The outcome of this case turned on how the jury weighed the competing medical evidence, not on the Department's initial decision.

Dorn relies on *Gaines v. Department of Labor & Industries* for the proposition that the jury should be instructed on findings beyond those enumerated by the Board. 1 Wn. App. 547, 463 P.2d 269 (1969). In *Gaines*, the court addressed whether it was error for the trial court to refuse to instruct the jury on a finding of the Board commenting on the credibility of the claimant as a witness. 1 Wn. App. at 548. Under RCW 51.52.115, “the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court.” The *Gaines* court held that, to fulfill the legislative preference for a de novo review on the Board record, “findings” in the statute is construed to mean “findings of ultimate fact” defined as “ultimate facts upon the existence or nonexistence of which the outcome of the litigation depends.” *Id.* at 551-52. The court reasoned that on appeal the findings of the Board are prima facie correct. *Id.* at 550. Instructing the jury on “findings” of the Board that are evidentiary or argumentative risks impeding the ability of the appealing party to obtain a de novo review. *Id.* at 551.

While the jury should be instructed on the material findings of the Board necessary to conduct a de novo review, it should not be instructed on collateral and immaterial facts. Even if the Department’s position appeared within the findings of the Board’s decision, which it does not, the jury would not be instructed on it because it would not a “finding of

ultimate fact” as the *Gaines* Court directs. The outcome of the litigation in Dorn’s claim depends on the weight assigned to the competing medical testimony presented at the Board. The Department’s position does not speak to the weight of the medical evidence and is therefore not material to the outcome of the litigation.

2. Argument on the Department’s position would be misleading and improper

Because the Department’s position is immaterial to the correctness of the Board’s decision, there are only two purposes to the proposed instruction and proposed argument. First, Dorn apparently wishes to argue that by issuing an order holding the claim open that that proves that his condition was not a maximum medical improvement. But as noted above, the Supreme Court has said that a Department order is not proof of correctness. *Olympia Brewing*, 34 Wn.2d at 506; *McDonald*, 104 Wn. App. at 623-24. Second, Mr. Dorn apparently wishes to assail the character of the Department in the eyes of the trier of fact by using prejudicial language like “flipping positions.”

It would have been misleading to the jury and an error of law to give the instruction and to allow Dorn to argue that the Department has switched positions because the jury could have thought that it could reverse the Board decision based on the changed position of the

Department. Such an instruction would have prejudiced the Department because it could cause the jury to rely on an immaterial theory and not decide whether the Board was correct.

Dorn himself is aware of the power of a jury instruction on the Department's role to mislead and prejudice jurors. AB 21. Dorn points to the Washington State Supreme Court Committee on Jury Instructions comment for WPI 155.04 that states, "the committee deleted language about the Department's role as a trustee for the funds collected pursuant to the Act. The language is extraneous to the issues before the jury and could cause confusion or cause jurors to give undue weight to the Department's position." AB 21, (WPI 155.04, 6th ed.). As the comment states, the committee removed language about the Department's role as trustee to prevent the jury from giving undue weight to the Department's position. Though Dorn argues that information on the Department's litigation strategy is necessary to provide clarity to the jury, Dorn's desire to instruct the jury that the Department has "flipped its position" is an attempt to give weight to the Department's first decision and undermine the position taken by the Department on appeal and an attempt to have the jury give undue weight to his own position.

3. Dorn suffered no prejudice by exclusion of his instruction because the procedural posture of this appeal was before the jury

Dorn was not prejudiced by the denial of his proposed jury instruction and rejection of his proposed argument because the procedural posture of this appeal was before the jury and Dorn was not precluded from arguing the decision of the Board was incorrect.

Dorn argues that the procedural posture of the case should have been put to the jury. AB 12. But he did that and no jury instruction was necessary. The Court allowed Dorn to recite the procedural facts in his closing arguments. In closing statements, counsel for Dorn argued:

The Department issued an order. We know from the testimony that the employer was here. They put on witnesses. We know they appealed the Department order. Mr. Dorn' didn't appeal the order. Mr. Dorn defended that order. The Board of Industrial Insurance Appeals agreed with the employer and said no, I don't think he needs treatment. We had to appeal, and we did."

RP 5/31/18 at 7.

While Dorn argues that he was prevented from arguing his theory of the case, Dorn was not precluded from arguing that the decision of the Board was incorrect. Dorn suffered no prejudice by the exclusion of an irrelevant case theory when the facts in his proposed instruction were before the jury.

B. Dorn Waived any Argument About the Department's Support of the Board's Decision

Dorn appears to argue that when a Department order is reversed by a decision of the Board and a party other than the Department appeals, the Department must continue to defend its order or take no position at all.

AB 14. At trial, the Department participated as a defendant in Dorn's appeal, participating in voir dire, submitting jury instructions, and making opening and closing arguments in support of the Board's decision.

RP 5/24/18 at 12-16 and RP 5/31/18 at 8-15. Dorn made no objection to the Department's actions at the superior court and therefore waives any claim of error.

The appellate courts typically decline to consider non-constitutional arguments not first presented to the superior court. *State v. McFarland*, 127 Wn. 2d 322, 333, 899 P.2d 1251 (1995); RAP 2.5. A party waives the party's claim to error resulting from the conduct of opposing counsel unless the party objects at trial unless the alleged misconduct was so flagrant and prejudicial that it could not have been corrected. *Hogenson v. Service Armament Co.*, 77 Wn.2d 209, 216-17, 461 P.2d 311 (1969).

At trial, Dorn sought to argue that the Department had changed its position but Dorn did not argue that the Department could not change its

position. RP 5/31/18 at 4-5. Dorn sat silently by while counsel for the Department made opening and closing arguments asking the jury to find the decision of the Board was correct. RP 5/24/18 at 12-16 and RP 5/31/18 at 8-15. Dorn did not object to the arguments made by the Department or otherwise seek to limit the Department's participation. *Id.* Even if the Department's conduct was incorrect, there was nothing so wrong about this conduct that it could not have been corrected at trial. Dorn cannot now assert that the Department should be prohibited from defending the order of the Board.

Because Dorn did not object to the Department's participation in the superior court, he has waived any argument about the Department's ability to defend the decision of the Board.

C. As the Administrator of the Industrial Insurance Act and Trustee of the State Fund, the Department Is a Necessary Party in Appeals to Superior Court and Its Participation Will Be Guided by Its Interests

1. The Department is an independent party

The Department is an independent party and represents neither the worker nor the employer. It then may take the position that advances its independent interest in a superior court trial. Dorn argues that the Department could not defend the Board's decision when it conflicts with the Department order. But the facts do not remain static after a Department decision—instead a record was created in a de novo hearing

and the Board issued a carefully reasoned decision based on that record. The Department, as an independent party, had a right to rely on that decision. This accords with its role as a separate party. Despite Dorn's desires to cling to a moment in time when there was no adversarial relationship between himself and the Department, times have changed.

The Legislature entrusted the Department of Labor and Industries with the administration of the Industrial Insurance Act. *See* RCW 43.22.030; *Mills v. Dep't of Labor & Indus.*, 72 Wn. App. 575, 578, 865 P.2d 41 (1994) ("The Department's primary responsibility is to administer a social insurance system . . .). The Department shall exercise "all the powers and perform all the duties prescribed by law with respect to the administration of workers' compensation and medical aid in this state."; RCW 43.22.030. The Department serves as a fiduciary over funds held in trust for workers' compensation purposes. *VanHess v. Dep't of Labor & Indus.*, 132 Wn. App. 304, 311, 130 P.3d 902 (2006).

To carry out its responsibilities, the Department may appear in appeals to the Board and to superior court. RCW 51.52.100, .115. The Department is "entitled to appear in all proceedings before the board and introduce testimony in support of its order." RCW 51.52.100. When a state fund claim is appealed to the superior court, the Department is a necessary party. RCW 51.52.110; *Aloha Lumber Corp. v. Dep't of Labor*

& Indus., 77 Wn.2d 763, 776, 466 P.2d 151 (1970). RCW 51.52.110 allows the Department to participate in “any proceedings.” The word “any” means “every” and “all.” *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

Once the Department appears in superior court, the Supreme Court has held that its participation will be guided by its interests. *Aloha Lumber*, 77 Wn.2d at 775-76. In *Aloha Lumber*, the Supreme Court addressed the question of the Department’s participation in appeals to the superior court where the Department is neither the appellant nor the prevailing party at the Board. The procedural posture of *Aloha* mirrors the procedural posture of this appeal: the Board reversed the Department’s order and a party other than the Department appealed the Board’s decision to superior court. *Id.* at 774. At the superior court, the Attorney General, in his capacity as the representative of the Department, defended the order of the Board. *Id.* The Supreme Court ruled that in this situation the Department remains the client of the Attorney General and that the Attorney General must be guided by the client’s interest in determining the scope of participation. *Id.* at 776.

Dorn argues that *Aloha Lumber* suggests that once a party appeals to superior court, the Department must continue to defend the Department’s order on appeal or take no position. AB 14. *Aloha Lumber*

put no such limits on the Department's involvement. The Court observed that the Department may choose to be passive but "The Attorney General must, of course, be guided by the interests of his client in determining the extent of his participation in the appeal." *Id.* at 776. The Court reasoned that the Legislature placed no limits on the Department's level of participation in a superior court appeal when it allowed the Department to participate as a party under RCW 51.52.110. *Id.* at 775.

Dorn's reading of *Aloha Lumber* contradicts the Department's legislatively assigned responsibility to administer the Industrial Insurance Act as a fiduciary. *VanHess*, 132 Wn. App. at 310-11. By mandating its participation in appeals, the Legislature intended for the Department to fulfill its duty to act in the state fund's best interests once a claim had left its jurisdiction. And as the Supreme Court notes in *Aloha Lumber*, RCW 51.52.100 does not commit the Department to a position after filing its notice of appearance in superior court. *See Aloha Lumber*, 77 Wn.2d at 775-76.

RCW 51.52.110 granted the Department party status, and as a party it could take whatever position best advanced its interests. Neither the Legislature nor the courts have restricted the Department's ability to participate in appeals to the superior court. To fulfill its legislative duty as the administrator of the Industrial Insurance Act, the Department must be

able to heed information presented at the Board when deciding what position to take in superior court.

2. The jury was not misled because an adversarial relationship currently exists between the parties

The jury was not misled that an adversarial relationship exists between Dorn and the Department about the issue on appeal because an adversarial relationship does exist. Dorn argues his proposed jury instruction was necessary to cure the prejudice caused when the jury was misled into thinking an adversarial relationship exists between the parties. AB 12. While the Department at one point sought to defend its order alongside Dorn, following Dorn's appeal to superior court, the Department, as an independent party, had a duty to take the position that best aligned with its interests, and it has done just that.

3. The Attorney General's office represents the Department of Labor and Industries

Dorn argues the employer's withdrawal in the matter, "triggered within the AG a duty to assail the Department's actions on behalf of the employer" and that the Attorney General's Office acted as de facto counsel for the employer. AB 14. But the Attorney General's Office represents the Department of Labor and Industries. RCW 51.52.110. The Attorney General's Office did not appear as counsel for the Board of Industrial Insurance Appeals and did not appear as counsel for the

employer. While Dorn wishes to divorce the actions taken by the Attorney General's Office in this case from the position of the Department on the issue on appeal, the Attorney General's Office remains counsel for the Department and participated in accordance with its interest.

Dorn argues the employer got a "free ride" in this appeal because the Department defended the order of the Board on appeal. AB 16. Dorn cites *Blue Chelan v. Department of Labor & Industries*. 101 Wn.2d 512, 681 P.2d 233 (1984). In *Blue Chelan*, the employer appealed the decision of the Board to superior court. After the superior court entered an adverse judgement, the employer appealed and the Department joined the employer in its appeal. *Id.* at 516. In dicta, the court commented that on appeal the Department was shouldering a disproportionate responsibility. *Id.* In *Blue Chelan*, the Department was not independently authorized to appeal the decision of the superior court. Here, the Department's actions at trial were taken in support of its own interests. Unlike the facts of *Blue Chelan*, the Department is not the appealing party. After review of the evidence and decision of the Board, the Department stands in agreement with the Board. It is Dorn who has appealed.

VI. CONCLUSION

The trial court did not abuse its discretion in refusing to give Dorn's jury instruction because it was irrelevant to the issue on appeal.

Dorn suffered no prejudice from this refusal because the procedural posture of this case was before the jury.

Dorn waived any argument about the Department's participation in this appeal when he did not object at trial. But as the fiduciary of the workers' compensation funds, the Department may elect to defend the order of the Board in appeals to the superior court. When the Department elects to do so, other parties are not entitled to a jury instruction informing the jury that the Department has "flipped its position" because such an argument is irrelevant and prejudicial. Substantial justice does not require a new trial based on the exclusion of Dorn's irrelevant case theory.

RESPECTFULLY SUBMITTED this 26th day of August, 2019.

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NO. 53094-5-II

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

WILLIAM A. DORN,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

**DECLARATION OF
SERVICE**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Respondent and this Declaration of Service to all parties on record as follows:

Via Email and First Class U.S. Mail, Postage Prepaid to:

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DATED this 26th day of August, 2019, at Tumwater, Washington.



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