FILED
Court of Appeals
Division II
State of Washington
9/24/2019 9:06 AM

NO. 53094-5-II

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

WILLIAM A. DORN,

Appellant.

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION 4

II. DISCUSSION 5

1. The Department's position in this matter is relevant and preventing the jury from knowing the Department position deprived Mr. Dorn of his right to have his appeal heard de novo. 5

2. Mr. Dorn did not waive any claim of error with regard to the Department's fluid litigation position. 6

3. The Department flipped its position in the Superior Court appeal without regard to the Department's fiduciary interest. 7

III. CONCLUSION 8

TABLE OF AUTHORITIES

STATE CASES

Hisle v. Todd Pac. Shipyards, 151 Wn.2d 853, 93 P.2d 108 (2002).....5

Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 618 P.2d 96 (1980).....5

Aloha Lumber Corp. v. Dep't of Labor & Indus., 77 Wn.2d 763,
466 P.2d 151 (1970) 7

I. INTRODUCTION

This matter is before the Court of Appeals following a jury trial in Pierce County, which in turn was an administrative appeal from a Board of Industrial Insurance Appeals ("BIIA") Proposed Decision and Order dated April 28, 2017, and a final Order Denying Petition for Review dated July 12, 2017. The BIIA affirmed a decision from the Department of Labor & Industries ("Department") that reversed a Department order that kept Mr. Dorn's claim open for benefits. The jury entered a verdict affirming the BIIA decision.

After the verdict, Mr. Dorn timely filed a Motion to Vacate Verdict and for a New Trial, on the basis of the trial court's exclusion from the jury an instruction that would have advised them that the Department shifted its litigation posture during the course of the appeal.

Despite case law and additional authority that caution against confusing jurors with the fluid posture the Department has taken over the course of this workers' compensation appeal, the trial court denied Mr. Dorn's motion. This improper exclusion prevented Mr. Dorn from arguing his theory of the case.

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II. DISCUSSION

1. The Department's position in this matter is relevant and preventing the jury from knowing the Department position deprived Mr. Dorn of his right to have his appeal heard de novo.

The Department argues in its brief that its own actions in adjudicating Mr. Dorn's claims are immaterial, including the issuance of its July 20, 2015, order that kept Mr. Dorn's claim open. In keeping with its strategy for taking opposing positions throughout the course of this litigation, the Department makes this post-trial allegation after submitting a pre-trial brief to the Superior Court that listed a number of Department actions in the section headed "STATEMENT OF THE FACTS." Included in that Statement of Facts is the Department's position on July 20, 2015, that Mr. Dorn's claim should remain open. CP at 593. Unless the Department genuinely finds it fruitful in presenting irrelevancies when briefing a court, the agency's trial brief shows that it agrees with Mr. Dorn on the relevancy of the Department's position.

Even if the Department is allowed to pivot from asserting that the Department's position on Mr. Dorn's claim is relevant to alleging that it is irrelevant, case law states that "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 93 P.3d 108 (2002), quoting *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 618 P.2d 96 (1980) The Department stated its

position on the claim by issuing an order on July 20, 2015, with that order commencing litigation. The outcome of this litigation clearly hinges on the Department's stance; to say otherwise is akin to declaring a marriage irrelevant to a dissolution action, or a car crash immaterial in a suit stemming from it for personal injuries.

2. Mr. Dorn did not waive any claim of error with regard to the Department's fluid litigation position.

The Department's assertion that Mr. Dorn waived any right to appeal the Department's shifting litigation stance because he did not make the argument at the superior court level is without merit.

Mr. Dorn properly raised the issue at the necessary stages of the superior court appeal, and timely appealed the trial court's May 24, 2018, order denying his motion in limine to preserve and present the Department's position; the trial court's order of May 31, 2018, denying Mr. Dorn's proposed jury instruction on the Department's position; and the trial court's order of May 31, 2018, denying Mr. Dorn the opportunity to discuss the Department's position in his closing arguments. Notice of Appeal, Exhibits A, B and C.

Beyond his appeal of these individual decisions, Mr. Dorn is entitled under RAP 2.2 (a) (9) to appellate review of the trial court's Order Denying Plaintiff's Motion to Vacate Verdict and for a New Trial (CP 555

– 564), with an appeal to the order contained in Mr. Dorn's Notice of Appeal.

3. The Department flipped its position in the Superior Court appeal without regard to the Department's fiduciary interest.

As has been pointed out, before Mr. Dorn pointed out the quandaries involved in shifts in the Department's litigation posture, the Supreme Court anticipated them in *Aloha Lumber Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 466 P.2d 151 (1970). As the Department acknowledges, the central holding of that case with regard to the instant matter is that "the Attorney General must, of course, be guided by the interests of his client in determining the extent of his participation in the appeal. We merely rule that the department remains his client, even though it is neither the appellant nor the prevailing party before the board." There is no duty of the Attorney General, fiduciary or otherwise, to "zealously defend" the orders issued by the Department, with the Supreme Court counseling that in situations such as *Aloha Lumber* or the instant matter, the Attorney General should play a "passive role" at superior court. *Ibid,* at 776.

The Department's brief underscores the findings from *Aloha Lumber Corp.* that in a Superior Court appeal such as this, its "participation will be guided by its interests." The Certified Appeal Board

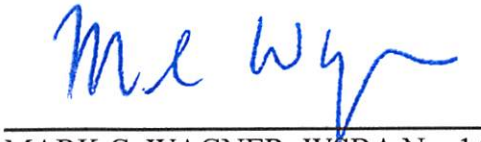
Record shows that the Department's main interest in this action was the injured worker, hence the July 20, 2015, order that kept Mr. Dorn's claim open. The Attorney General, however, acted in the employer's interests during the Superior Court appeal, with the Department's interests secondary. In doing so, it not only lent an unearned stamp of approval to the employer's case at Mr. Dorn's expense, but also carried the employer's water when the employer's attorneys withdrew.

III. CONCLUSION

Mr. Dorn respectfully requests that the Court of Appeals vacate the verdict in this matter and grant a new trial, allowing a jury to carry out its statutory duties of reviewing the board record de novo and with a proper understanding of the roles played by the injured worker, the employer, and the Department of Labor & Industries.

RESPECTFULLY SUBMITTED this 24th day of September, 2019.

LAW OFFICES OF MARK C. WAGNER



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September 24, 2019 - 9:06 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53094-5
Appellate Court Case Title:	William A. Dorn, Appellant v. Department of Labor & Industries, Respondent
Superior Court Case Number:	17-2-10147-3

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