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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 32237-8

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

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SHAWN ROBBINS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR AND INDUSTRIES**

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## I. INTRODUCTION

A photocopy is not a new document. In November 2008, Shawn Robbins gave the Department of Labor & Industries a photocopy of a previously filed July 2008 workers' compensation reopening application, along with supplementary medical information. Both the July 2008 application and the November 2008 photocopy alleged that Robbins's right arm condition worsened in June 2008. Robbins signed both documents in July 2008.

The superior court and Board of Industrial Insurance Appeals properly determined that the November 2008 document was a duplicate of Robbins's July 2008 reopening application. The court correctly found that the evidence of worsening submitted with the duplicate application was supplementary medical information that related to the July 2008 application. Substantial evidence supports these findings.

This Court should reject Robbins's claim that there were two separate applications. The superior court properly concluded that the November 2008 document did not put the Department on notice that this document was a new reopening application and that the 90-day limit to act on a proper reopening application was not applicable. This Court should affirm.

## II. ISSUES

1. Does substantial evidence support the superior court's finding that a November 2008 document was a second copy of Robbins's July 2008 reopening application, along with supplementary medical information, where this document was a photocopy of the July 2008 application, the photocopy listed the same June 2008 date of worsening previously reported by Robbins, and the supplementary medical information included no new date of worsening?
2. Did the superior court err by determining that the second copy of the July 2008 application did not adequately put the Department on notice that this document was a separate and distinct application to reopen Robbins's claim?

## III. STATEMENT OF THE CASE

### A. **After the Department Closed His Claim in September 2003, Robbins Applied to Reopen the Claim in November 2006**

In 2002, Robbins injured his right arm while working as an HVAC installer for Don Kruse Electric, Inc. CP 32, 163. The Department allowed his claim for workers' compensation benefits, provided benefits, and closed the claim. CP 32.

In November 2006, Robbins applied to reopen his claim, claiming his condition had become aggravated. CP 32. The Department denied this application on June 15, 2007. CP 32.

This June 2007 denial date is significant because Robbins later filed a second reopening application. When a worker seeks to reopen a claim, the Department compares the worker's current condition with his or her condition at a "first terminal date" to decide if reopening is justified.

The first terminal date is the date that the Department either previously closed the claim or previously denied an earlier reopening application.<sup>1</sup>

**B. Robbins Sought to Reopen his Claim for the Second Time in July 2008**

In late July 2008, the Department received a second reopening application from Robbins. CP 157. Robbins's attorney sent a letter asking the Department to reopen Robbins's claim. CP 157. Enclosed with the letter was a reopening application form signed and dated by Robbins on July 22, 2008. CP 158-159. Robbins identified his right arm as the part of his body that was affected by his industrial injury. CP 158. He indicated that his condition had worsened on June 17, 2008. CP 158. The "doctor's information" portion of the application form was blank. CP 159. However, enclosed with the application was a June 17, 2008 medical report in which Dr. Thomas Gritzka opined that Robbins's condition had worsened. CP 162-174.

On August 21, 2008, the Department denied Robbins's July 2008 reopening application. CP 160. The order explained that "the medical record shows the conditions caused by the injury have not worsened since

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<sup>1</sup> *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). If the Department ultimately denies the worker's new reopening application, this denial date is known as the "second terminal date." *Id.* A reviewing tribunal compares the worker's condition at the first terminal date and the second terminal date to determine if the Department correctly denied the worker's new reopening application. *Id.*

the final claim closure.” CP 160. Robbins appealed to the Board of Industrial Insurance Appeals. CP 32, 131.

**C. The Department Received a Duplicate of Robbins’s July 2008 Reopening Application in November 2008**

On November 3, 2008, while the case was pending at the Board, the Department received a photocopy of Robbins’s July 2008 reopening application. CP 178. As before, the application form was signed and dated by Robbins on July 22, 2008. CP 178. The November 2008 document identified Robbins’s right arm as the part of his body affected by his industrial injury and indicated that his condition had worsened on June 17, 2008. CP 178.

No letter from Robbins’s attorney accompanied the copy of the July 2008 application, but physician’s assistant “R. Barber, PAC” completed the second page. CP 179. PAC Barber indicated that his medical findings demonstrated a measurable worsening of Robbins’s condition. CP 179. He signed this document on October 28, 2008. CP 179.

**D. The Department Reopened Robbins’s Claim Based on Aggravation of His Injury Effective August 21, 2008**

In March 2009, the Department agreed to reopen Robbins’s claim based on an agreement with Robbins. CP 181-82. The parties stipulated that Dr. Gritzka would testify that Robbins’s right arm condition worsened and became aggravated between June 15, 2007, and August 21, 2008. CP

181. The parties agreed that, as of August 21, 2008, Robbins had a “permanent partial impairment consistent with 4 percent of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder.” CP 181. The Department and Robbins agreed that the Department’s August 21, 2008 order should be reversed and the claim remanded to the Department to award the increased permanent partial disability. CP 181-82.

In May 2009, the Board issued an Order on Agreement of Parties consistent with the parties’ agreement. CP 180. Consistent with the agreed order, in July 2009, the Department issued a ministerial order that reopened Robbins’s claim and then closed it with a permanent partial disability award for Robbins’s right arm effective August 21, 2008.<sup>2</sup> CP 184-85.

**E. In April 2012, Robbins Asserted For the First Time that the November 2008 Document Was Intended as a Separate and Distinct Reopening Application**

Robbins applied to reopen his claim again in December 2010. CP 186. The Department issued an order that extended the time for the Department to act in order to schedule a medical examination of Robbins. CP 186. In April 2011, the Department denied the reopening application,

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<sup>2</sup> Although this order stated that Robbins’s claim had been reopened effective June 17, 2008, the Department and Robbins agreed that the claim had been reopened and closed on August 21, 2008. CP 140.

explaining that the medical record indicated that Mr. Robbin's condition had not worsened. CP 187. The Department affirmed its order in September 2011. CP 188.

Robbins appealed the Department's order to the Board of Industrial Insurance Appeals. CP 41-42. At a March 2012 scheduling conference, the parties identified the issue on appeal as whether Robbins's condition "objectively worsened and became aggravated between July 6, 2009 and September 23, 2011." CP 61.

Then in April 2012, Robbins moved for summary judgment, arguing for the first time that the November 2008 photocopy was a separate reopening application. CP 67, 69-70. Robbins asserted that, because the Department had failed to act on this application within 90 days, his claim must be reopened as a matter of law. CP 69-70. The hearings judge denied Robbins's motion. CP 102-05.

**F. The Board Rejected Robbins's Argument that the November 2008 Document Was a New Reopening Application**

The hearings judge issued a proposed decision and order affirming the Department's order. CP 30-37. She determined that the November 2008 document was not a new reopening application but "another copy of the application to reopen claim form signed by Mr. Robbins on July 22, 2008, along with additional medical [information]." CP 36. She

concluded that this document “did not put the Department on notice that Shawn L. Robbins was seeking reopening of his claim separate and distinct from the same application previously received on July 28, 2008.” CP 37.

Robbins petitioned for review of the proposed decision and order. CP 25-26. The full three-member Board denied Robbins’s petition and adopted the proposed decision and order as its own decision. CP 24.

**G. The Superior Court Affirmed the Board’s Decision, Ruling the November 2008 Photocopy Did Not Provide Reasonable Notice to the Department of the Need To Take Additional Action**

Robbins appealed the Board’s decision to superior court. CP 189. Following a bench trial, the superior court issued a memorandum opinion affirming the Board. CP 13-16. The court explained that the ultimate question before it was “whether the department was reasonably on notice that it needed to respond to the November 3, 2008 filing.” CP 16. The court noted that “the record . . . reflects that the plaintiff submitted two of the same Application to Reopen Claim forms he signed on July 22, 2008—one received by the department on July 28, 2008 and the other as noted on November 3, 2008.” CP 14. Although the November 2008 document contained additional medical information, the court ruled that this information was merely supplementary and related solely to the July 2008 application. CP 9, 16. The superior court concluded that the

“November application is redundant on its face and offers no reasonable notice to the department of the need to take additional action.” CP 15.

The superior court largely adopted the Board’s findings of fact and conclusions of law, explaining that a preponderance of evidence supported these findings and that the Board had properly construed and applied the applicable law. CP 9-10, 16. The court found the November 2008 document was another copy of Robbins’ July 2008 application, “along with supplementary medical [information].” CP 9. As did the Board, the court concluded that this document did not put the Department on notice that Robbins was seeking reopening of his claim “separate and distinct” from his July 2008 application. CP 10, 37. Robbins appeals. CP 1.

#### **IV. STANDARD OF REVIEW**

In an appeal from a superior court’s decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep’t of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). This Court reviews the decision of the superior court rather than the Board’s decision. *See Rogers v. Dep’t of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. The Court limits its review to examining if substantial evidence supports the superior court’s findings and if the court’s conclusions of law flow from the findings. *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570

(1999). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

Robbins asserts that because courts must liberally construe the Industrial Insurance Act, all doubts must be “resolved in favor of the injured worker.” App. Br. at 28 (citing *Michaels v. CH2M, Inc.*, 171 Wn.2d 587, 598, 257 P.3d 532 (2011)). Relying on this principle, he argues that this Court must resolve all doubts in his favor when examining whether substantial evidence supports the superior court’s findings. App. Br. at 29. However, liberal construction “does not apply to questions of fact but to matters concerning the construction of the statute.” *Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Hastings v. Dep’t of Labor & Indus.*, 24 Wn.2d 1, 13, 163 P.2d 142 (1945). Contrary to Robbins’s assertion, an appellate court does not resolve doubts in a worker’s favor when reviewing the superior court’s findings of fact. Instead, this Court applies the ordinary substantial evidence standard of review. *Ruse*, 138 Wn.2d at 5.

## VI. ARGUMENT

### A. **Where the Department Is Not Adequately Put on Notice That a Claimant Is Seeking To Reopen a Claim, a Reopening Application Cannot Be “Deemed Granted”**

Well accepted principles provide that a party seeking reopening of a workers' compensation claim must clearly apprise the Department of the intent to seek reopening. *See Donati v. Dep't of Labor & Indus.*, 35 Wn.2d 151, 153-54, 211 P.2d 503 (1949); *In re Wallace Hansen*, No. 90 1429, 1991 WL 246462 at \*4 (Wash. Bd. of Indus. Ins. Appeals Jun. 19, 1991).

The standards governing reopening applications are well established. After a workers' compensation claim has been closed for 60 days or longer, a worker may seek to reopen the claim for further benefits by establishing an “aggravation” of his or her disability.<sup>3</sup> *See* RCW 51.32.160(1)(a); WAC 296-14-400. Such application must be in writing and include objective medical evidence that the worker's condition worsened. WAC 296-14-400. To demonstrate worsening, a medical

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<sup>3</sup> Proof of aggravation requires: (1) medical testimony that establishes the causal relationship between the industrial injury and the subsequent disability; (2) medical testimony, some of it based upon objective symptoms, that an aggravation of the injury resulted in increased disability; (3) medical testimony that the increased aggravation occurred between the terminal dates of the aggravation period; (4) medical testimony, some of it based upon objective symptoms which existed on or prior to the closing date, that the worker's disability on the date of the closing order was greater than the supervisor found it to be. *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657-58, 219 P.3d 711 (2009) (citing *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956)).

provider must compare the claimant's current condition with his or her prior condition at the "first terminal date." See *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 658-59, 219 P.3d 711 (2009). As explained above, the first terminal date is the date that the Department either previously closed the claim or previously denied an earlier reopening application. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995).

The Department has 90 days to issue an order denying a reopening application or the application shall be "deemed granted." RCW 51.32.160(1)(d). This rule exists to protect injured workers from arbitrary and unpredictable bureaucratic delay. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 434, 858 P.2d 503 (1993).

The 90-day time limit does not apply where a worker has filed an appeal of an earlier closure order or order denying a previous reopening application. WAC 296-14-400. The Department cannot act on a new reopening application until the dispute regarding the worker's condition at the first terminal date is resolved. See *Reid v. Dep't of Labor & Indus.*, 1 Wn.2d 430, 437, 96 P.2d 492 (1939) (holding that it is a "condition prerequisite" to the reopening of a claim for aggravation that there be a final determination as to the worker's disability at closing). "[U]ntil a final determination of the claimant's condition at the first terminal date (T1) is

made, it is premature to adjudicate an application to reopen the claim for aggravation occurring subsequent to T1.”<sup>4</sup> *In re Betty Wilson*, Nos. 02 21517 & 03 12511, 2004 WL 1901021 at \*3 (Wash. Bd. of Indus. Ins. Appeals Jun. 15, 2004).

Finally, the 90-day time limit is only applicable where an “application to reopen” has been filed. RCW 51.32.160(l)(d). A reopening application must give notice to the Department that there is a request to reopen the claim. *See Donati*, 35 Wn.2d at 153-54; *Hansen*, 1991 WL 246462 at \*4. In *Donati*, our Supreme Court held that a letter containing multiple reopening requests by 18 different claimants was not a proper reopening application. *Donati*, 35 Wn.2d at 153-54. The Court explained that the aggravation statute does not contemplate “en masse but individual applications for reopening.” *Donati*, 35 Wn.2d at 154. A proper reopening application must: (1) be in writing; (2) be individualized in nature; and (3) provide the Department with “some information as to the reason for the application.” *Donati*, 35 Wn.2d at 154.

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<sup>4</sup> The Board has ruled that once the appealed order becomes final, RCW 51.32.160(1)(d) requires that the Department act on any new reopening application that was received during the pendency of the appeal. *In re Edwin Fiedler*, No. 90 1680, 1990 WL 10022052 at \*2 (Wash. Bd. of Indus. Ins. Appeals Apr. 20, 1990). The 90 days begins to run when the Department receives a copy of an order from the superior court or the Board that affirms the Department’s order. *See In re Greg Ackerson*, No. 94 1135, 1995 WL 312490 at \*5 (Wash. Bd. of Indus. Ins. Appeals Apr. 13, 1995); *In re Margaret Casey*, No. 90 5286, 1992 WL 160678 at \*2 (Wash. Bd. of Indus. Ins. Appeals May 11, 1992).

The Board's significant decision on this issue is *In re Wallace Hansen*.<sup>5</sup> Applying *Donati*, the Board explained that a reopening application is sufficient where "the document filed contains an individual's name and claim number, medical substantiation of apparent worsening of the industrially related condition, and a proposed course of treatment or other activity regarding that condition . . . ." *Hansen*, 1991 WL 246462 at \*4. The Board determined that such information "adequately puts the Department on notice that the claimant is seeking reopening of his claim." *Hansen*, 1991 WL 246462 at \*4.

**B. The November 2008 Document Did Not Put the Department on Notice that this Document Was a New Application to Reopen Robbins's Claim**

The Department's receipt of the November 2008 document did not put the Department on notice that Robbins wanted to reopen his claim. As the trial court properly found, this document was a second copy of Robbins's July 2008 reopening application, along with supplementary medical information, and not a separate and distinct application.

Many of Robbins's arguments focus on his contention that the November 2008 document satisfies the technical requirements of *Donati* and *Hansen*. App. Br. at 14, 18-22. These arguments miss the point. The

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<sup>5</sup> This Court considers the Board's significant decisions to be persuasive but not binding authority. *Stone v. Dep't of Labor & Indus.*, 172 Wn. App. 256, 268, 289 P.3d 720 (2012) (citing *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991)).

superior court did not affirm the Department's order denying reopening because the November 2008 document contained a technical deficiency. Instead, the court affirmed the order based on its determination that this document was a duplicate of Robbins's July 2008 application that gave the Department no reasonable notice of a new application to reopen a claim.

Because the superior court correctly concluded that the November 2008 document did not provide adequate notice that Robbins was seeking to reopen his claim based on additional worsening of his condition, this Court should affirm.

**1. The Department Was Not Permitted To Act On a Reopening Application at the Time the November 2008 Document Was Received**

As an initial matter, the Department could not act on any new reopening application when it received the November 2008 document. Where a previous order denying reopening is on appeal, the Department cannot take action on a new reopening application until there is a final determination of the claimant's condition at the time of the previous order. *See Reid*, 1 Wn.2d at 437.

Here, the Department received the November 2008 document while its August 21, 2008 order denying Robbins's July 2008 reopening application was pending on appeal before the Board. After receiving the November 2008 document, the Department agreed to reverse its August

21, 2008 order and reopen Robbins's claim. In March 2009, the parties agreed that Robbins's condition became aggravated between June 15, 2007 and August 21, 2008. CP 181. The parties stipulated to increasing Mr. Robbin's permanent partial disability for his right arm, and the Department issued a final order consistent with this agreement in July 2009. CP 181, 184-85.

As the superior court correctly determined, the Department lacked authority to act on a proper reopening application submitted during the pendency of the appeal until the July 2009 order.<sup>6</sup> This order constituted a final decision on all the issues raised by Robbins's July 2008 application. Accordingly, if the November 2008 document was merely a second copy of the July 2008 application, this document would not inform the Department that it was required to take any further action on Robbins's claim.

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<sup>6</sup> Robbins contends that the superior court improperly determined that the Department need not *ever* act upon a reopening application received during the pendency of an appeal. App. Br. at 25-27. The court decided no such thing. Instead, the court "parenthetically" noted that Assistant Chief Industrial Appeals Judge Calvin Jackson had denied Robbins's request of interlocutory review based on his determination that Robbins's claim was in fact open in November 2008. CP 15-16; CP 123-24. The court did not adopt IAJ Jackson's reasoning; nor did this statement form the basis of the superior court's decision. Instead, the court affirmed the Department's order because "the record presented does not provide a basis upon which to conclude there was adequate notice of a new request to open a claim." CP 16.

**2. The November 2008 Document Was a Second Copy of Robbins's July 2008 Reopening Application**

Substantial evidence supports the superior court's finding that the November 2008 document was a second copy of Robbins's July 2008 reopening application and not an independent application. As the court explained, the first page of this document was an exact duplicate of the July 2008 application. Both documents identified Robbins's right arm as the part of his body affected by his industrial injury. CP 158, 178. Both documents stated that Robbins's condition worsened on June 17, 2008. CP 158, 178. Robbins signed and dated both documents on July 22, 2008. CP 158, 178.

Such a duplicate does not constitute the type of individual application envisioned by the Supreme Court in *Donati*. Just as RCW 51.32.160 does not contemplate multiple reopening requests within a single application, the statute does not provide that the same application may be utilized to seek reopening on multiple occasions. *See Donati*, 35 Wn.2d at 153-54 (multiple reopening requests by 18 different claimants not a proper reopening application). Because the first page of the November 2008 document was a photocopy of Robbins's reopening application signed and dated on July 22, 2008, for this reason alone, it did

not put the Department on notice that Robbins intended the November 2008 document as a separate and distinct application to reopen his claim.

Furthermore, the first page the November 2008 document included information that is inconsistent with the notion that this document was a new reopening application. Robbins contends that the first page was limited to his “personal information” and that, because this information had not changed since the time of his July 2008 application, it was not “fatal error” to submit a duplicate of this page. App. Br. at 15. However, Robbins is wrong that the first page of the November 2008 document was limited to his personal information. Instead, this page included specific information about when Robbins’s condition worsened that is irreconcilable with his assertion that this document was a separate and distinct reopening application.

In his July 2008 application, Robbins sought reopening based on a worsening of his condition between June 15, 2007 (the first terminal date when the Department last denied a reopening application) and June 17, 2008 (the date of Dr. Gritzka’s medical examination). Robbins now contends that his submission of this same reopening application in November 2008 was intended as separate application. Although he does not identify the time period to which such an application would relate, given that the Department closed Robbins’s claim on August 21, 2008, this date would

be the “first terminal date” with respect to any new application filed in November 2008. *Grimes*, 78 Wn. App. at 561.

The date of worsening reported in the November 2008 document, however, is inconsistent with a first terminal date of August 21, 2008. On the first page of this document, Robbins reported that his right arm condition worsened on June 17, 2008. CP 178. This reported date of worsening would be nonsensical if the November 2008 document was intended as a new reopening application. The date that a condition is alleged to have worsened cannot precede the first terminal date of an aggravation period. Instead, the worsening of the condition must occur after the first terminal date. *See Eastwood*, 152 Wn. App. at 658-59. Given that the November 2008 document reported that Robbins’s condition had *already* worsened before the first terminal date of August 21, 2008 (by June 17, 2008), this document cannot be reasonably construed as an application for worsening occurring *after* that date.

Rather, as the superior court properly decided, the November 2008 document was “another copy of the application to reopen claim form signed by Robbins on July 22, 2008” and not a separate and distinct reopening application.<sup>7</sup> CP 9. Robbins does not and cannot contend that

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<sup>7</sup> Robbins’s own conduct supports the superior court’s conclusion that the November 2008 document did not constitute a new reopening application. It was not until April 2012 that Robbins first asserted that he intended the November 2008

the Department failed to act on his July 2008 application. The Department's receipt of a second copy of this application provides no basis for reopening Robbins's claim.

**3. The Medical Information of Worsening in the November 2008 Document Related to Robbins's July 2008 Reopening Application**

Substantial evidence likewise supports the superior court's finding that the medical information on the second page of the November 2008 document was "supplementary" information that related to Robbins's July 2008 reopening application. CP 9.

As explained above, the June 17, 2008 date of worsening reported in the November 2008 document is inconsistent with Robbins's contention that this document was a new reopening application. PAC Barber completed the second page of the November 2008 document—a "doctor's information" section—on October 28, 2008. CP 179. PAC Barber was aware that Robbins had reported a worsening date of June 17, 2008, having completed this portion of the document after Robbins completed the first page. PAC Barber did not indicate a different date on which he believed Robbins's condition to have worsened. Nor did he state that

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document as a separate and distinct application to reopen his claim. This argument was raised for the first time after the November 2008 document was "discovered" by Robbins's attorney. CP 134. Robbins's long delay in asserting such an argument belies his contention that the November 2008 document was intended as new reopening application that was separate and distinct from his July 2008 application.

Robbins's condition had worsened during the period between August 21, 2008 and the time of the October 2008 medical examination.

Given that PAC Barber attached his findings to a document indicating that Robbins's condition worsened by June 17, 2008, substantial evidence supports the superior court's finding that PAC Barber's opinion related to the worsening alleged in Robbins's July 2008 application.

Nevertheless, Robbins contends that this medical information could not have related to the July 2008 application because the Department lacked authority to reconsider its order denying reopening at the time it received this information. App. Br. at 16-17. This argument lacks merit. While it is true that the Department may not adjudicate an issue while that issue is on appeal before the Board, *Wilson*, 2004 WL 1901021 at \*3, nothing prevents a worker from submitting additional medical evidence to support reopening with the goal of reaching settlement. In this very case, the Department eventually agreed to reopen Robbins's claim after receiving such evidence.<sup>8</sup> Contrary to Robbins's assertion, workers can and do submit supplementary medical evidence to the Department even when the issues to which that evidence relates are on appeal.

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<sup>8</sup> Whether or not the medical evidence contained in the November 2008 document was considered during settlement negotiations is not part of the record.

It is of no consequence that the medical information from PAC Barber was not identical to that submitted in July 2008. Robbins appears to contend that, because this information differed in “scope and substance,” it could not have pertained to his July 2008 application. App. Br. at 6, 15. However, the superior court did not reject Robbins’s claim based on a finding that this evidence was the same as earlier submitted evidence. Instead, the court’s critical finding was that this medical evidence related to Robbins’s July 2008 application. As explained above, substantial evidence supports that finding because PAC Barber attached his medical opinion to a document that indicated that Robbins’ condition had worsened on June 17, 2008. Whether or not PAC Barber’s opinion differed in “scope and substance” from previously submitted medical evidence has no bearing on this finding.<sup>9</sup>

Importantly, PAC Barber attached his findings directly to the photocopy of the July 2008 application. Robbins argues that by completing the second side of this application form, PAC Barber transformed the photocopy into a new application. App. Br. at 13.

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<sup>9</sup> Robbins’s argument fails on its own terms. The Department’s July 2009 order set Robbins’s permanent partial impairment in August 2014 as “consistent with 4 percent of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder.” CP 181. The medical evidence provided by PAC Barber in no way suggests that Robbins’s right arm condition objectively worsened compared to that level of impairment. Accordingly, the “scope and substance” of this evidence also provides no basis for reopening Robbins’s claim.

However, the opposite is true. By affixing his findings to the same form that Robbins submitted in July 2008, PAC Barber signaled his intent to supplement that original form. Contrary to Robbins's contention, the fact that this medical information was placed on the back of the July 2008 application only further supports the superior court's determination that this information was intended to supplement that application.

The superior court correctly found that PAC Barber's medical opinion was intended to substantiate the worsening reported by Robbins in his July 2008 application. Because this medical information related to Robbins's assertion that his condition had worsened between June 15, 2007 and June 17, 2008, and not during some different time period, the superior court properly concluded that this information merely supplemented Mr. Robbin's July 2008 reopening application. Substantial evidence supports the superior court's finding that PAC Barber's medical opinion was not intended to support a separate and distinct reopening application.

**4. The November 2008 Document Was Not a Sufficient Application to Reopen Robbins's Claim**

The superior court correctly determined that the November 2008 document was not a new application to reopen Robbins's claim. As discussed above, substantial evidence supports the superior court's finding

that the November 2008 document was a second copy of Robbins's July 2008 application, along with supplementary medical information relating to that application. CP 9. This finding in turn supports the superior court's conclusion that the November 2008 document did not adequately put the Department on notice that Robbins was "seeking reopening of his claim separate and distinct from the [July 2008 application.]" CP 10, 37. As the court explained, "the record presented does not provide a basis upon which to conclude there was adequate notice of a new request to open a claim." CP 16.

The 90-day time limit for the Department to act on a worker's reopening application is only applicable where a new "application to reopen" has been filed. RCW 51.32.160(1)(d). The November 2008 document did not constitute such an application. The superior court properly concluded that Robbins's claim must remain closed. CP 16. Because substantial evidence supports the superior court's findings, and the court's conclusions of law flow from the findings, this Court should affirm. *Ruse*, 138 Wn.2d at 5.

**C. Robbins's Remaining Arguments Have No Merit**

With no citation to authority, Robbins asks this Court to remand for "more complete findings of fact and conclusions of law." App. Br. at 10. Robbins is incorrect that the court's findings of fact and conclusions

of law are inadequate. They fully state the basis for the superior court's decision and provide a record that is sufficient for appellate review. Moreover, in addition to the findings of fact and conclusions of law, this Court may also consider the superior court's four-page memorandum opinion. *See, e.g., Smith v. Dalton*, 58 Wn. App. 876, 880, 795 P.2d 706 (1990) (considering entire record, including the superior court's oral decision, is assessing adequacy of court's written findings). Because the superior court's findings of fact, conclusions of law, and memorandum opinion provide a sufficient record for appellate review, Robbins's request for remand on this basis should be denied.

Robbins is not entitled to attorney fees. Fees are awarded against the Department only if the worker requesting fees prevails in the action and if the accident fund or medical aid fund is affected by the litigation. RCW 51.52.130; *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). Because Robbins should not prevail in this appeal, he is not entitled to attorney fees.<sup>10</sup>

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<sup>10</sup> Even if Robbins were to prevail in this appeal, he would not be entitled to attorney fees. This is because his only remedy would be for the Department to reopen his claim, not for the payment of any particular benefits. Whether or not Robbins would be entitled to additional benefits would be determined in a separate adjudication. *See Casey*, 1992 WL 160678 at \*3 (explaining that even when claim is "deemed granted," claimant must still sustain burden of establishing entitlement to further benefits).

## VII. CONCLUSION

The Department's receipt of a photocopy of Robbins's July 2008 reopening application did not adequately put the Department on notice that this document was a separate and distinct application to reopen Robbins's claim. Because this document did not constitute a new reopening application, the statutory time limits to act on such an application did not apply. The superior court correctly ruled that Robbins's claim must remain closed. This Court should affirm.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of September,  
2014

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**FILED**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 32237-8

**COURT OF APPEALS. DIVISION III  
OF THE STATE OF WASHINGTON**

SHAWN ROBBINS,

Appellant,

v.

WASHINGTON STATE  
DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

DECLARATION OF  
MAILING

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on Sept. 17, 2014, I mailed the Department's Brief of Respondent of Department of Labor & Industries to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

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DATED this 17<sup>th</sup> day of September, 2014.

  
\_\_\_\_\_  
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