

FILED

MAR 13 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 35626-4-III

Superior Court No. 16-2-01533-3

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FRANCISCO SORIANO, individually,

Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES

Respondent

BRIEF OF APPELLANT

Marcus R. Henry
WSBA No. 45465
Smart Law Offices P.S.
309 North Delaware Street, PO Box 7284
Kennewick, WA 99336
509-735-5555
Attorneys for Appellant

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III. INTRODUCTION

Mr. Francisco Soriano appeals the trial court's decision affirming the Board of Industrial Appeals' (Board) decision and order to uphold a January 2014 decision of the Department of Labor and Industries (Department) that limited his worker's compensation benefits to "authorized treatment" even though a Department order dated 9-months later awarded him that specifically stated it superseded the January 2014 order "authorized treatment *and benefits.*" Mr. Soriano contends the trial court failed to give any deference to the *final and binding* October 2014 Department order which, by definition, would have included time loss payments and a possible additional permanent partial disability award.

IV. ASSIGNMENTS OF ERROR

A. Substantial evidence does not support the trial court's finding of fact #1.24, which states:

On or about October 1, 2015, the Director of the Department of Labor and Industries exercised his discretion, and decided that Mr. Soriano's claim for industrial insurance benefits would remain open for payment of medical benefits only, and additional disability benefits would not be granted. The decision was communicated to Mr. Soriano in a letter dated October 1, 2015, and was affirmed by order dated November 4, 2015. (CP 117)

B. The trial court's finding of fact #1.25 is not supported by substantial evidence. It states:

Mr. Soriano has presented no evidence of the factual information that was before the Director at the time he [the director] decided to limit Mr. Soriano's reopened claim to only medical benefits. (CP 117)

C. The following conclusions of law do not flow from the court's findings of fact:

2.23 The evidentiary record does not show the Director of the Department of Labor and Industries abused his discretion pursuant to RCW 51.31.160(1)(a) when he decided to reopen Mr. Soriano's claim for only medical benefits, and denied any additional disability benefits. (CP 117)

2.24 The October 1, 2015 letter and the November 4, 2015 Department order are correct and are affirmed. (CP 117)

2.3 The Board's July 19, 2016, [decision and] order that adopted the June 22, 2016, Proposed Decision and Order is correct and is affirmed. (CP 117)

2.4 The October 1, 2015 letter and the November 4, 2015 Department order which reopened Mr. Soriano's claim for medical benefits only, are correct and are affirmed. *This conclusion repeats #2.24 above.* (CP 117)

D. Because of these errors the trial court's entire September 1, 2017 Judgment should be reversed, which includes:

3.1 "The July 19, 2016, Board of Industrial Insurance Appeals order that adopted the June 22, 2016, Proposed Decision and Order which affirmed the Department of Labor and Industries October 28, 2011 order, be and the same is hereby affirmed." (CP 118)

3.2 "The Department is awarded, and Francisco Soriano is ordered to pay, a statutory attorney fee of \$200.00." (CP 118)

3.3 "The Department is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110." (CP 118)

V. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Based solely on the record provided from below, does substantial evidence support the trial court's determination that the Department

Director exercised discretion prior to reversing its own Department's final order of October 16, 2014 that specifically granted Mr. Soriano's reopening claim "for authorized treatment *and benefits?*"

B. Does substantial evidence support the trial court's determination that Mr. Soriano presented *no evidence of any* factual information the Director may have considered prior to reversing a Department order that accepted Mr. Soriano's reopening application and awarded him authorized medical treatment and "benefits?" Even if this court agrees with finding #1.25, does that necessarily mean the Director did not abuse his discretion in unilaterally reversing a final and binding Department order?

C. Does the lack of a trial court finding and/or conclusion regarding the finality of an un-appealed Department order prevent meaningful review?

VI. FACTS

The parties agree Mr. Soriano was seriously injured in the course of his employment in August 1980, triggering the Industrial Insurance Act (IIA) Title 51 RCW. The Department appropriately awarded him worker's compensation benefits, which included medical treatment and disability payments while he recovered as well as a permanent partial disability award. In October 1981 Mr. Soriano's original claim was closed.¹ Mr. Soriano's claim has been

¹ This date is important in the resolution of Mr. Soriano's appeal. Pursuant to RCW 51.32.160, a claimant has seven years (10 years for eye injuries) from the date of the first closing order in which to file an application to reopen their claim due to aggravation. An application outside the seven years is known colloquially as an "over-seven application. With an over-seven application, the Director of the Department has the discretion to allow reopening. RCW 51.32.060; *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502, 512, 215 P.3d 1043, 1048 (2009)

reopened for aggravation and closed again a few times since that time. The relevant Department reopening occurred on September 4, 2013. (CP 39, 48) A fact-specific, concise timeline of the remaining facts included in the Certified Appeals Board Record (CABR) (CP 4-97) will hopefully assist this court in understanding why Mr. Soriano maintains the Board/trial court decisions are incorrect.²

Timeline Regarding Applicable Reopening/Closure Decisions

- 9.10.13 Mr. Soriano files “over-7” (see footnote 1) reopening application with Department
- 12.18.13 Application deemed granted as of September 4, 2013 as *Department failed to enter a formal decision within statutory 90-days*; no disability benefits awarded “unless and until the Director exercises his/her discretion” (CP 51)
- 1.09.14 New order corrects and supersedes 12.18.13 order – no changes noted (CP 52)
- 5.15.14 (4-months later) Department closes reopening claim; no additional PPD awarded (CP 53)
- 7.10.14 Mr. Soriano timely protests order
- 8.12.14 Department affirms closing order (CP 54)
- 10.10.14 Mr. Soriano timely protests again

² All dates were confirmed in the March 15, 2016 Stipulation of Parties prepared prior to the hearing before the Board’s Industrial Appeals Judge (IAJ). CP 47-50

- 10.16.14³ Department cancels 5.15.14 order; reopening "claim remains open for authorized treatment and benefits" (CP 55) – no appeal by either party, order becomes final and binding 12.16.14
- 10.01.15 *one-year later* Director writes *letter* to Mr. Soriano – you are not eligible to receive time-loss benefits, medical only (CP 91)
- 11.04.15 formal Department order entered (CP 92)
- 11.20.15 Mr. Soriano files protest
- 6.22.16 IAJ files PDO affirming Department 11.4.15 order
- 6.30.16 Mr. Soriano files Petition for Review to full Board (CP 11-14)
- 7.19.16 Board denies PFR – affirms PDO (CP 9)
- 7.22.16 Mr. Soriano files Notice of Appeal to Benton County Superior Court (CP 2-3)
- 6.05.17 Bench trial (RP 3-18) – court affirms Board decision
- 9.01.17 Findings, conclusions, judgment filed (CP115-118)
- 10.06.17 Notice of Appeal to Division III (CP 119-120)
- 11.09.17 Judgment satisfied (CP 125)

VII. ANALYSIS

a. The Industrial Insurance Act (Title 51 RCW).

Title 51 RCW (the Act) is broad in scope and includes the directive that it be liberally construed “for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW

³ This order is the crux of Mr. Soriano’s appeal.

51.12.010. This liberal construction dictates that all doubts be resolved in favor of coverage for workers injured in their employment. *Dep't of Labor & Indus. v. Lyons Enterprises Inc.*, 185 Wn.2d 721, 734, 374 P.3d 1097, 1103 (2016). This principle assures the Act's purpose of providing compensation to all covered employees.

b. Standard of Review

The court of appeals reviews the superior court's decision, not the Board's order. RCW 51.52.140. It determines whether substantial evidence supports the superior court's factual findings and then reviews de novo whether the superior court's conclusions of law flow from those findings. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). Substantial evidence exists when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685 (2012). In performing its review, this court takes the record in the light most favorable to the party who prevailed in superior court, here the Department. *Rogers*, 151 Wn. App. at 180.

c. Trial court review

As will be seen below, though he argues the case turns on another issue not discussed below, the only relevant legal issues Mr. Soriano can appropriately appeal are whether the trial court's disputed findings are supported by substantial evidence and whether its conclusions flow from those findings. He contends they do not.

(i) Final and binding orders

It is axiomatic that one of the purposes of the Industrial Insurance Act is "to provide sure and certain relief," which includes the finality of un-appealed Department decisions. RCW 51.04.010 Just as in other areas of law, an un-appealed order is *res judicata* regarding the issues contained within unless the order was void when it was entered. This includes orders that may have been wrong. RCW 51.52.050, .060; *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 170, 937 P.2d 565 (1997)(citation omitted). As this court knows, the Department certainly doesn't afford clemency to a *claimant* that does not file a timely review of a *Department* order. Mr. Soriano, relying on the plain wording of the October 16, 2014 Department order, requested his awarded benefits yet the director took over a year to unilaterally cancel the order claiming the authority to do so yet, as will be seen below, fails to inform the parties on what

evidence he relied. Mr. Soriano requests this court determine the October 16, 2014 order became final and binding after 60-days when no appeal was taken. At a minimum, Mr. Soriano alleges a Board and trial court finding should reflect such.

(ii) October 16, 2014 Department order

The Department eventually agreed the un-appealed October 16, 2014 Department closing order was final and binding. Clearly the parties disagree as to what the order means. Mr. Soriano claims the order grants him the authorized medical treatments he had been receiving in addition to the new award of disability benefits. The Department argues that since the Department's closing order of May 15, 2014 (CP 53) was cancelled, the Department was required to return to the *next* most recent (in terms of time) order that wasn't cancelled i.e. the December 18, 2013 order to interpret the meaning of the October 16, 2014 "authorized treatment and benefits" statement. (CP 51) First, Mr. Soriano thinks it is significant lot that the December 18, 2013 order had to be granted by operation of law because the Department *failed to act upon it* within the required 60-days. Next, for some reason that order was "corrected and superseded" in a January 9, 2014 Department order, (CP 52) although Mr. Soriano fails to recognize any corrections. Regardless,

it is agreed the order states that Mr. Soriano is not entitled to disability benefits *unless and until* the Director makes a discretionary decision to grant them. As will be seen below, the Director failed to make that discretionary decision both prior to and after he denied the disability benefits. Although the Department and trial court decided the issue on appeal was about semantics and whether the word “authorized” modified the words treatment and benefits or not (6/5/17 RP 3-17), the trial court failed to address the initial arbitrary and capricious action of the director in failing to make a discretionary decision in the first place, which was an abuse of discretion. For this reason, the findings, conclusions and judgment should be reversed.

(iii) The *Dorr* decision

Both the Department and the Board had precedent to follow in considering Mr. Soriano’s appeal of the Department’s latest decision to close his claim. It is found in the significant Board decision of *In re Robert Dorr, Jr.*, BIIA Dec., 07 23982 (2009), which may also prove persuasive to this court. While the courts have the ultimate authority to interpret a statute, substantial weight is given to the Board's interpretation of the Act. *Rose v. Dep't of Labor & Indus.*, 57 Wn. App. 751, 757, 790 P.2d 201 (1990); see *Matthews v. Dep't*

of Labor & Indus., 171 Wn. App. 477, 490 n.13, 288 P.3d 630 (2012), *review denied*, 176 Wn.2d 1026 (2013) (although not binding, Board's significant decisions are persuasive authority).

The background facts of the Board's significant decision in the *Dorr* case are nearly on "all fours" with those of Mr. Soriano. *Black's Law Dictionary*, 75 (6th ed. 1991) Mr. Dorr appealed an IAJ Proposed Decision and Order that, like Mr. Soriano, affirmed an over-seven Department order denying him additional disability benefits based solely on the Director's alleged discretionary decision that payment of only medical benefits to Mr. Dorr was appropriate since he had voluntarily taken himself out of the workforce. *Dorr* at 1. The 3-member Board's review was limited to determining whether the Director's discretion was arbitrary and capricious based on the information before them.

Arbitrary and capricious action consistently has been described as, "willful and unreasoning, without consideration and without regard to the attending facts or circumstances." On the other hand, our state supreme court has held that if there exists the possibility of two opinions, any action taken after *due consideration* is not arbitrary and capricious even if the reviewing court would have

decided the issue differently. *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 809, 863 P.2d 64, 68–69 (1993)(emphasis added)(citations omitted). The key phrase is that the Director must exercise due consideration prior to making a discretionary decision. This is the crux of Mr. Soriano’s appeal of the trial court decision.

The *Dorr* decision emphasized it was not the Director’s *conclusion* that was arbitrary and capricious, but the complete failure to even consider whether Mr. Dorr had *voluntarily* removed himself from the work force or whether it was because he was *unable* to work as a result of his industrial injury. For this reason, it reversed and remanded the decision to the Department to make this determination.

Like *Dorr*, there is no evidence the Department Director in Mr. Soriano’s claim appeal exercised any due consideration of the facts and circumstances of his medical and employment status at the time of his reopening application prior to making his alleged discretionary decision to deny his disability benefits. Instead, after a year of waiting for benefits the Director wrote *in a letter* dated October 1, 2015 that “Mr. Soriano is not eligible to receive time-loss benefits because he was not attached to the workforce when he filed reopening of this claim and has no wages to replace.” (CP 91) No

mention was made nor facts provided that would indicate whether the Director gave due consideration to a discretionary decision. The closest thing to it is the second sentence which states: "Because your claim has been closed for more than seven years, these [time loss] benefits must be approved by the director and can only be approved under special circumstances." (CP 91) A final Department order was entered November 4, 2015, which stated that that only the Director had the authority to "grand [sic] additional disability benefits" since this was an over seven claim. (CP 92) The order continued: "The Director *has decided* that only payment of medical benefits is appropriate. Additional disability benefits will not be granted." CP 92 No mention of or even inference to "due consideration" or discretion on the part of the Director prior to making his decision was given. The Department will argue that the letter and the order should be read together to supply the necessary information. Yet as far back as 1935 our state supreme court stated clearly that letters written to the claimant by the Department are not "considered as formal orders." *Puliz v. Dep't of Labor & Indus. of Washington*, 184 Wash. 585, 593, 52 P.2d 347, 350 (1935). Here, the IAJ, 3-member Board and the trial court all missed this fact and improperly affirmed the Department's decision despite the *Dorr* significant decision that

found that the complete failure to consider *why* a claimant is unable to work prior to concluding they were not eligible for disability benefits was arbitrary and capricious action on the part of the Director, thus an abuse of discretion for the Board and trial court to affirm.

The Department argued before the Board the Director's decision couldn't have been arbitrary and capricious because he reviewed the "claims managers Recommendation to Exercise Discretion on an 'Over Seven/Ten'" (CP 66) However, that document was *not* admitted as an exhibit before the Board and should not have been included in the CABR for review by the trial court. (CP 22, 25) In her decision the IAJ *presumes* the Director read and applied this Recommendation prior to making his decision thus the failure of Mr. Soriano to provide the Recommendation for the Board's review was fatal to his appeal. (CP 21) Mr. Soriano strongly disagrees. Even if this Recommendation (which is not sworn to or declared) *had* been included for the Board's consideration there is no way for either party or the IAJ to know definitively whether the director reviewed it before, after or even at all prior to making his "discretionary" decision. The denial of disability benefits is devastating to Mr. Soriano who now lives on minimal government benefits. The Director's unilateral discretionary decision process is too important to fail to present full

documentation for all parties to see. The trial court's apparent agreement with the presumption of a reliable discretionary decision should be disregarded and the disputed findings, conclusions and judgment reversed.

VIII. ATTORNEY FEES

If successful on appeal Mr. Soriano requests attorney fees pursuant to RCW 51.52.130 and RAP 18.1 not only for fees and costs incurred in this appeal but also the fees and costs incurred in his appeal to superior court. See, *Spivey v. City of Bellevue*, 187 Wn.2d 716, 739-740, 389 P.3d 504 (2017)(plain language of the statute authorizes attorney fees for "all reasonable costs of the appeal").

IX. CONCLUSION

Based on the abovementioned citations and analysis Mr. Soriano requests this court reverse the Benton County Superior Court's September 1, 2017 findings, conclusions and judgment that affirmed the Board's decision and order. In so doing he asks this court to remand his case to the Department for a proper determination of disability benefits consistent with its final and binding October 16, 2014 order.

Respectfully submitted this 12 day of March 2018.

A handwritten signature in black ink, appearing to read 'MR Henry', written over a horizontal line.

Marcus R. Henry
WSBA # 45465
Attorney for Mr. Soriano

CERTIFICATE OF SERVICE

I certify that on the 12th day of March, 2018, I caused a true and correct copy of Brief of Appellant to be served on the following individuals in the manner indicated below:

Counsel for: Respondents, Department of Labor and Industries

Steve Vinyard, AAG (X) U.S. Mail
Office of Attorney General
P.O. Box 40121
Olympia, WA 98504

Clerk of the Court of Appeals (X) U.S. Mail
Renee S. Townsley
500 North Cedar Street
Spokane, WA 99210

By: 
Magali Morfin, Legal Assistant