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NO. 35973-5-III

COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON

ASPLUNDH TREE EXPERT, CO,

Appellant,

v.

LUCIANO M. GALVEZ, and DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

REPLY
BRIEF OF APPELLANT

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I. ARGUMENT

Asplundh comes to this Court seeking guidance. Asplundh asserted in its Brief of Appellant that “one of two things must be true: either the Superior Court has statutory authority to hear the Employer’s direct review of the April 25, 2017 Board Order Denying Review of Interlocutory Appeal; or the Superior Court has statutory authority to remand appeals of the Board’s Decision and Order for the taking of CR 35 examinations and testimony regarding those examinations.” Asplundh takes the position that superior court jurisdiction over direct and immediate appeal of CR 35 denial is the most consonant with existing authority and is most just to all parties.

The response briefing offered by the Department is useful insofar as it takes a clear position in favor of superior court review of Board CR 35 denial upon appeal of the Board’s Decision and Order. However, the Department argues for superior court CR 35 review limited to whether there is a “fundamental” problem with the Board decision. But the Department is mistaken.

Galvez takes the position that not only did the superior court lack the jurisdiction to hear Asplundh’s direct appeal of the Board order denying interlocutory review, but that the superior court also lacks authority to reverse Board denial of CR 35 motions and to provide a

remedy. Galvez's position is not only facially untenable, but also belies his dubious assertion that "There is no issue of first impression here." Galvez Br. at 21.

A. If Superior Courts Have Authority to Reverse Board CR 35 Denial Only Upon Appeal of the Board Decision and Order, It Would Not Be For the Reasons Argued by the Department

It is possible, as the Department argues, that superior courts have statutory authority to reverse Board CR 35 motion denial upon appeal of a Board Decision and Order. Indeed, superior court authority to review and remand upon appeal of a Board Decision and Order would be the Department's most compelling argument against Benton County Superior Court having jurisdiction over Asplundh's direct appeal of CR 35 denial. However, the Department's argument for limited superior court review is largely without merit.

The Department's response brief begins with an argument against superior court jurisdiction to hear Asplundh's direct appeal of the Board order denying interlocutory review of CR 35 denial. There is no dispute that RCW 51.52.110 permits parties to appeal "the decision and order of the board" to superior court. There is also no dispute that appeals of non-final "interlocutory" orders of the Board to superior court are not permitted. See Dept. Br. at 7 (citing *Callihan*, 10 Wn. App. at 158).

However, the Department fails to squarely address Asplundh's main argument – that the Board's April 25, 2017 Order *would* be interlocutory in nature but-for RCW 51.52.115 and the potential preclusion of court review and remedy if Asplundh awaited the Board Decision and Order's CR 35 determination. This is where both *Callihan* and the Department's argument initially fail.

The Department leans heavily upon *Callihan* but has declined to reconcile the fact that *Callihan* involved a Board decision *directing* the taking of further evidence, not a Board order *precluding* evidence. The “interlocutory” nature of the Board decision in *Callihan* to take further evidence did not preclude any party from mounting a substantive case in superior court, nor did it preclude the admissibility of that evidence from being reviewed by the superior court upon appeal of the Board Decision and Order. The Board order in *Callihan* necessarily maintained its “interlocutory” character because it did not finally adjudicate any party's rights, as the Board's denial of Asplundh's CR 35 motion likely would if Asplundh had not directly appealed the Board order denying interlocutory review of CR 35 denial.

Callihan does not control here and its relevance is limited to standing for the proposition that interlocutory orders of the Board are not appealable. *Callihan* does nothing to inform whether the Board Order

denying interlocutory review of the Industrial Appeals Judge's ("IAJ's") denial of CR 35 motions was effectively interlocutory or "final."

The Department's most compelling argument against superior court jurisdiction to hear Asplundh's direct appeal is the very argument the Department claims is "irrelevant" – that the superior court can remand to the Board for purposes of CR 35 examination and testimony after appeal of a Decision and Order. *See* Dept. Br. at 9. However, the Department did not embark upon this line of argument without making foundational errors in its analysis.

The Department argues that whether Asplundh can seek remedy for CR 35 denial in superior court upon appeal of the Decision and Order is "irrelevant" because "the Legislature does not need to grant all remedies in a superior court appeal." *See* Dept. Br. at 9 (citing *State ex rel. Bates*, 51 Wn.2d at 130-31 for the proposition that "under former RCW 51.52.110" the *state* lacked appeal rights). But the Legislature *did* grant all aggrieved parties the right to superior court review of decisions contained in the Board record, and whether Asplundh can seek review and remedy for CR 35 upon appeal of the Board Decision and Order is of central relevance.

The Legislature has clearly given Asplundh, as an entity "aggrieved," a right to superior court appeal, and a right to a "de novo" hearing. RCW 51.52.110; RCW 51.52.115. "De novo" is defined as "To

look at an issue as if from the start...a complete consideration of all of the issues, facts, and law in the case without regard for the findings made by the court that had previously heard the case.” Wolters Kluwer Bouvier Law Dictionary Desk Ed., 2012. The only Legislative restraints upon the superior court’s “complete consideration of all of the issues, facts, and law” are contained in RCW 51.52.115.

RCW 51.52.115 explains that while superior court review is “de novo,” “only such issues of law or fact may be raised as were properly included in the notice of appeal to the board.” RCW 51.52.115 also includes the disputed language that

the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court...PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court.

It is a literal reading of RCW 51.52.115 in context of relevant case law that could lead a reasonable person to conclude that superior courts have unrestricted authority to review Board orders denying CR 35 examinations, following an appeal of the Board’s Decision and Order. The Department could have argued that RCW 51.52.115 only precludes the superior court from taking new testimony “*in* the superior court,” but does not preclude the superior court from reversing Board denial of Asplundh’s

CR 35 motions and remanding the case for taking of further testimony *before the Board*, followed by subsequent supplementation of the Certified Board Record filed with the superior court.

The plain language reading of RCW 51.52.115 above could even be argued to be consonant with existing case law. One could argue that *Freeman*, 2015 Wash. App. LEXIS 2995, involved an employer filing a new CR 35 in superior court, as opposed to *review* of a Board order denying the CR 35. While a very technical argument, unfettered superior court review of CR 35 denial under RCW 51.52.115 would be consonant with *Freeman* and Division I's apparent concern for the superior court's statutory appellate authority.

Ivey can also be squared with a plain reading of RCW 51.52.115 insofar as the superior court did not appear to be acting in its appellate capacity by reviewing denial of a motion by the parties, but acting on its independent volition in "a directory and supervisory" way. *See Ivey*, 4 Wn.2d at 162-63. However, case law citing *Ivey* suggests superior courts lack authority to remand for the taking of further evidence upon appeal of the Decision and Order in this case. *See Andreas v. Bates*, 15 Wn.2d 322, 326-27, 128 P.2d 300 (1942)(citing *Ivey* for the proposition that "in no case does the superior court have the power to remand the case to the commissioner for the purpose of taking further

testimony”); but *see also*, *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 508-09, 208 P.2d 1181 (1949)(stating that *Ivey's* prohibition of superior court remand for taking further evidence was dicta but “true in so far as the phrase ‘additional evidence’ or newly discovered evidence is usually understood”).

Superior court authority to reverse and remand for the taking of further evidence, on plain language of RCW 51.52.115, can also be argued to agree with *Surina* insofar as reversal of Board orders denying CR 35 motions can be likened to the Board precluding rebuttal evidence. Though, the Supreme Court’s apparent disfavor for remanding for further evidence “after a case had been closed” is not wholly reconciled by this reading of the statute. *See Surina*, 34 Wn.2d at 843-44.

This plain language argument under RCW 51.52.115 would have also rendered the Department’s dubious argument that the superior court has authority to review CR 35 denial only when “fundamentally wrong” or procedurally defective unnecessary. There is zero authority precluding parties from court review of Board CR 35 rulings specifically, or for special treatment of CR 35 review in superior court. Such an argument by the Department is attenuated and largely unsupported.

It may very well be that the Legislature gave superior courts statutory authority to review all Board orders upon appeal of a Board

Decision and Order, including Board orders denying CR 35 motions. However, this argument is thinly supported by existing authority and runs contrary to the guiding principles of the Industrial Insurance Act (“Act”): to provide “sure and certain relief for workers” and to resolve ambiguities in the Act in favor of claimants.

B. The Guiding Principles of the Act Cut In Favor of Superior Courts Having Jurisdiction to Hear Direct Appeals of Board Orders Denying CR 35 Motions

Despite the apparent simplicity of the plain reading of RCW 51.52.115 as described above, this theory runs contrary to the policies underlying the Act. The Supreme Court has explained the policies underlying the Act:

RCW 51.04.010...declares, among other things, that "sure and certain relief for workers, injured in their work...is hereby provided [by the Act] regardless of questions of fault and to the exclusion of every other remedy". To this end, the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.

Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)(citing RCW 51.12.010; *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979); et. al.).

Interpreting RCW 51.52.115 to require parties to wait until all evidence has been taken at the Board, the Proposed Decision and Order (“PD&O”) has been issued, Petition for Review (“PFR”) has been filed, the Board Decision and Order (or order denying PFR) has been issued, an appeal to superior court has been filed, superior court hearing for renewal of the CR 35 motion(s) has been held, *then* for remand and scheduling of CR 35 examinations and testimony would be caustic to the “guiding principle” of the Act to provide workers “sure and certain relief.”

Requiring the parties to wait months or years until the superior court can hear and rule upon challenges to Board orders denying CR 35 motions is also contrary to the “guiding principle” of interpreting ambiguity in the Act in favor of injured workers. Claimants stand to suffer unnecessary prejudice when employers obtain CR 35 examinations months or years after the other testimony had been offered in the appeal.

The evidentiary prejudice and added litigation costs would be greatly minimized by direct superior court appeal of Board orders denying CR 35 motions while the substantive appeal is still pending before the Board. Direct appeal would also permit the IAJ and the three members of the Board to consider the CR 35 examiners’ testimony before rendering their decisions, as opposed to review of this evidence for the first time in superior court. Prompt, direct appeal of Board CR 35 denial may

ultimately lessen the perceived need of parties to seek superior court appeal of Board Decision and Orders when the parties feel as though they have been fully heard.

Direct appeal of Board orders denying CR 35 motions benefits claimants and serves the “guiding principles” of the Act. The ambiguities of RCW 51.52.115 should be construed in favor of workers.

C. The Department’s Analysis of Case Law for Limited Superior Court Review of Board CR 35 Denial Upon Appeal of Decision and Orders, and Against Direct Review, is Unpersuasive

Existing case law cuts more strongly in favor of direct appeal of Board orders denying CR 35 motions, and against waiting until appeal of a Decision and Order. The Department argues that *Ivey* stands only for the proposition that superior court cannot direct the taking of further “evidence to meet an evidentiary burden.” Dept. Br. at 10. The Supreme Court has interpreted *Ivey* more broadly than the Department argues.

In *Andreas v. Bates*, the superior court entered judgment remanding the unemployment claim to the Department for the taking of further testimony. *Andreas*, 15 Wn.2d at 326. The appellants argued that the superior court should be reversed because “the trial court had no jurisdiction or power to remand the cause to the commissioner with directions to take further testimony.” *Id.* at 327. The Supreme Court agreed. *Id.*

The Supreme Court noted that the law governing superior court authority in workers' compensation appeals "is almost, if not word for word, the same as the last paragraph of the portion of the section of the unemployment compensation act relative to court review." *Id.* at 328. The *Andreas* Court held,

the *Ivey* case is authority for our conclusion that, under the unemployment compensation act, the court is required to hear and determine the case upon the record as made before the appeal tribunal or the commissioner, and that upon that record the court must either affirm the decision of the commissioner, or reverse or modify it, and that in no case does the superior court have the power to remand the case to the commissioner for the purpose of taking further testimony.

Id. Thus, *direct* appeals of Board orders denying CR 35 examinations prior to issuance of a Proposed Decision and Order would be consonant with *Ivey* and *Andreas*, and inconsistent with waiting for appeal of a Board Decision and Order.

Olympia Brewing also cuts in favor of direct superior court review of Board CR 35 denial. While the Supreme Court characterized *Ivey*'s statement that "the court could not remand the case for the taking of additional evidence" as dicta, the Court explained that this statement "is true" as it pertains to "additional evidence or newly discovered evidence." *Olympia Brewing*, 34 Wn.2d at 508-09, *internal quotations omitted*. Here, it is likely that a superior court remand for purposes of conducting CR 35

examination and deposing the examining experts would be characterized as “additional...newly discovered evidence.” To the extent CR 35 examination and resulting testimony is “newly discovered evidence,” *Olympia Brewing* also cuts sharply in favor of direct review of Board CR 35 denial to avoid remand for the taking of “newly discovered evidence.”

Asplundh’s brief argued that in *Surina* the Supreme Court appeared to limit its holding in *Ivey*, but did not provide a clear standard for its exception to *Ivey*. The *Surina* Court held that superior court remand to the Board for the taking of *rebuttal evidence* is “not in conflict” with *Ivey*

because the superior court...did not direct the taking of additional testimony by the joint board after a case had been closed, but directed that the joint board give the claimant an opportunity to present rebuttal evidence, which opportunity the claimant should have had before the joint board passed upon the merits of her claim.”

Surina v. Dep’t of Labor & Indus., 34 Wn.2d 839, 843-44, 210 P.2d 403 (1949).

Asplundh argued that *Surina* merely stands for the proposition that a superior court can remand a case for the taking of *rebuttal evidence* denied by the Board, and that the *Surina* holding was apparently limited to this. The Department appears to disagree with Asplundh on this point, arguing that *Surina* stands for the proposition that superior courts can

remand for taking of further evidence when there is a procedural defect. Dept. Br. at 10; but *see also*, RCW 51.52.115 (allowing for taking of further evidence when there has been alleged procedural defects at the Board).

The *Surina* Court stated that remand for rebuttal evidence is consistent with *Ivey* “because the superior court...did not direct the taking of additional testimony by the joint board after a case had been closed.” *Surina*, 34 Wn.2d at 843. *Surina* clarifies RCW 51.52.115 insofar as it holds a denial of rebuttal evidence to be a procedural defect within the meaning of RCW 51.52.115.

Surina is either limited strictly to remand for rebuttal evidence, or it cuts in favor of superior court jurisdiction to hear direct appeals of Board CR 35 denial. If employers were permitted to file direct appeals of Board CR 35 denial in superior court, this would arguably preclude the case from having become “closed” within the meaning of *Surina*, and would permit superior court review and remand of CR 35 determinations. Absent direct appeal of Board CR 35 denial being proper, there is likely nothing in this case to have prevented the case from having become “closed,” and *Surina* would therefore not apply.

The Department’s reliance upon *Olympia Brewing* is also errant, absent a very broad reading of the Court’s holding. *See* Dept. Br. at 10. In

Olympia Brewing, the Court found that the claimant had proceeded in her appeal “misled by the department’s position...that the cause of Mr. Smith’s death was...prima facie correct, and that the burden was on the employer...Had that position been correct, the claimant would have been justified in not presenting any evidence, because the employer clearly did not sustain that burden.” *Olympia Brewing Co. v. Dep’t of Labor & Indus.*, 34 Wn.2d 498, 507-508, 208 P.2d 1181 (1949), *overruled on other grounds by Windust v. Dep’t of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958). “We now hold that the department proceeded on a fundamentally wrong basis, the matter should be remanded to the joint board for further hearing.” *Id.* at 508.

An argument could be made that *Olympia Brewing* stands for the proposition that superior courts can remand for the taking of further evidence when the Board “has drawn an unwarranted conclusion from the facts and has misconstrued the law.” *Olympia Brewing*, 34 Wn.2d at 509. However, such a broad rule does not necessarily follow from the facts presented in *Olympia Brewing*, where a claimant was materially misled by representations made by the state, and to her extreme prejudice. Here, the issue involves a substantive decision by an IAJ, then a Chief Industrial Appeals Judge, to deny Asplundh’s timely CR 35 motions.

The Department's reliance upon *Olympia Brewing* is misplaced and inapt. There is nothing in *Olympia Brewing* that suggests a limited capacity by superior courts to review Board CR 35 motion denial, nor to do so only upon appeal of a Board Decision and Order. *Olympia Brewing* is either factually distinguishable and does not apply in this case, or it stands for the proposition that superior courts have the authority to remand cases to the Board when the Board draws "an unwarranted conclusion from the facts and has misconstrued the law."

The weight of existing authority, sound policy, and the "guiding principles" of the Industrial Insurance Act strongly cut in favor of superior court jurisdiction to hear direct appeals of CR 35 motion denial while the substantive appeal is pending before the Board.

D. Mr. Galvez' Analysis Does Little to Further the Resolution of This Appeal and Is Internally Inconsistent

Asplundh agrees with the Department that "[a]n appellate court reviews the superior court's decision, not the Board's decision." Dept. Br. at 5. Therefore, the merits of Asplundh's CR 35 motions are not before this court, and the superior court's dismissal on jurisdictional grounds is. Thus, Asplundh will not address herein Mr. Galvez's vigorous and imbalanced argument on the merits of Asplundh's CR 35 motions.

While most of Mr. Galvez's arguments and citations to authority have already been addressed in briefing, one glaring inconsistency within his Response warrants a few words.

Asplundh posited in its Brief that "one of two things must be true: either the Superior Court has statutory authority to hear the Employer's direct review...or the Superior Court has statutory authority to remand appeals of the Board's Decision and Order for the taking of CR 35 examinations and testimony." Asplundh acknowledges that either could be the case, but argues that the weight of authority cuts in favor of the superior court having jurisdiction to hear direct appeals of Board CR 35 denial while the substantive appeal is still pending before the Board. The Department takes the position that superior courts only have statutory authority to reverse and remand CR 35 denial upon appeal of the Decision and Order, and only when "there is a fundamental problem in how the Board proceeded."

Mr. Galvez, however, argues that Asplundh and the Department are both wrong – that superior courts may not review CR 35 denial and provide remedy at all. *See* Galvez Br. at 1. Despite Mr. Galvez failing to present any authority for the proposition that CR 35 motion denial is beyond the superior court's statutory authority under RCW 51.52.115, Galvez

dubiously insists “[t]here is no issue of first impression here.” Galvez Br. at 21.

The fact that all three parties before this Court are unable to agree on when employers may appeal CR 35 denial to superior court makes abundantly clear that there *is* an issue of first impression here. Our case law has not spoken directly on this question, as evidenced by the extensive briefing and arguments by the parties.

What is clear, however, is that RCW 51.52.115 permits parties to raise “such issues of law or fact...as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board.” Board orders denying CR 35 motions are typically included in “the complete record of the proceedings before the board,” otherwise referred to as the Certified Appeal Board Record.

How then does the law reconcile superior court review of Board orders denying CR 35 motions when RCW 51.52.115 also precludes testimony from being “taken in the superior court” absent “alleged irregularities in procedure before the board”? Perhaps coarsely put, that is the question presented to this Court. A question to which Mr. Galvez fails to offer a clear point of authority. A question which Mr. Galvez nevertheless insists is not of one first impression.

II. CONCLUSION

For the reasons stated above, Asplundh Tree Expert Co. respectfully requests this Court to reverse the Superior Court's March 16, 2018 Order Denying Self-Insured Employer's Motion and Dismissing the Appeal Without Prejudice, find that Benton County Superior Court had jurisdiction to hear Asplundh's appeal under Case No. 17-2-01421-1, and remand this matter to Benton County Superior Court for further proceedings on the merits of Asplundh's appeal of the Board's denial of its CR 35 motions.

RESPECTFULLY SUBMITTED this 27 day of November,
2018.



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

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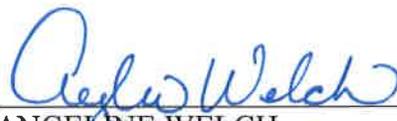
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