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Division III  
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NO. 359735-III

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COURT OF APPEALS FOR DIVISION III  
STATE OF WASHINGTON

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ASPLUNDH TREE EXPERT, CO.,

Appellant,

v.

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

Respondents.

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BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERRORS

1. The superior court's dismissal of Asplundh's appeal under Cause No. 17-2-01421-1 was legal error because the superior court had jurisdiction and statutory authority to consider Asplundh's direct appeal of the April 25, 2017 Board Order Denying Review of Interlocutory Appeal.

## II. STATEMENT OF ISSUES

Whether the Superior Court of Benton County had jurisdiction and/or statutory authority to hear Asplundh's direct appeal of the Board Order Denying Review of Interlocutory Appeal when 1.) superior courts have a statutory right to review *all* Board orders contained in the Board Record, 2.) direct appeal of Board orders denying CR 35 motions is consonant with RCW 51.52.115 and related case law, and 3.) there is no authority providing a CR 35 reversal exception to RCW 51.52.115's preclusion of the taking of new evidence once an appeal of the Decision and Order reaches Superior Court.

(Assignment of Error No. 1)

## III. STATEMENT OF THE CASE

On September 15, 2011, the Department issued an order allowing this workers' compensation claim for "the injury on 02/03/11." CP at 119. The Department's claim allowance was appealed, litigated, and resulted in a June 24, 2015 Judgment by the Benton County Superior Court affirming claim allowance. *See id.* at 174-88. The Superior Court found that the Claimant suffered an industrial injury that lit up and caused his pre-existent cervical myelopathy to worsen and become symptomatic. *Id.* at 187.

There was no finding by the Superior Court that the Claimant had any aggravation of his pre-existent lumbar condition, despite the fact that Mr. Galvez's preexisting lumbar condition was testified to by expert witnesses, as was noted in the June 4, 2013 Board Proposed Decision and Order ("PD&O"). *Id.* at 178 ln 3; *id.* at 179 lns 13-15; *id.* at 179 ln 30 through 180 ln 1; *id.* at 180 lns 16-17; *see also id.* at 187.

On July 2, 2015 (while the claim was still being administered before the Department), Dr. Eugene Toomey, an orthopedic surgeon, conducted an Independent Medical Examination ("IME") of Mr. Galvez and drafted a report. *Id.* at 190-99. Dr. Toomey concluded that the diagnoses related to this claim were cervical myelopathy, and cervical degenerative disc disease that was pre-existent and aggravated by the industrial injury under this claim. *Id.* at 197. Dr. Toomey opined that the only pre-existing condition relevant to this claim was the degenerative cervical condition, and also noted that he was "very specific in questioning about this today." *Id.* at 198. Dr. Toomey's IME report indicated that there was no further treatment recommended under this claim, and that the Claimant's category 4 impairment is appropriate. *Id.* at 198-99.

On July 10, 2015, the Employer sent a letter to Dr. You, the Claimant's attending physician, requesting review of Dr. Toomey's July 2, 2015 report. *Id.* at 335-36. The July 10, 2015 letter also asked Dr. You if

she concurred with Dr. Toomey's report. *Id.* Dr. You signed the form indicating her concurrence with the IME report, and its contents. *Id.* at 336. Prior to claim closure, Dr. You never indicated any change in opinion from her concurrence with Dr. Toomey's IME report.

On June 13, 2016, the Department issued an order closing this claim because the Defendant's "covered medical condition(s) is stable." *Id.* at 241. The Department's closing order awarded the Claimant category IV permanent cervical and cervico-dorsal impairments. *Id.* It may be presumed that the Department relied, in part, upon Dr. You's concurrence with Dr. Toomey's IME report in closing the Defendant's claim, as it is the usual practice for the IME reports, as well as the attending physician's concurrence or non-concurrence to be submitted to the Department in support of the Employer's request for claim closure.

The Claimant protested the June 13, 2016 order, but on September 13, 2016, the Department affirmed the June 13, 2016 order closing Mr Galvez's claim with a PPD award for category IV cervico-doral impairment. *Id.* at 239. On November 4, 2016, the Claimant filed a Notice of Appeal to the Board of Industrial Insurance Appeals ("Board"), which was granted on November 14, 2016. *Id.* at 279, 273.

On December 23, 2016, the Employer timely served Interrogatories and Requests for Production upon the Claimant. *See, e.g., id.* at 12, 256,

263. The Employer's Interrogatories asked Mr. Galvez, in pertinent part, to identify any persons he might know or believe to have knowledge of facts relevant to the appeal; to identify and produce all records, files, reports, etc. "believed or understood by the claimant to be material to the appeal and/or claim on appeal"; to identify each expert witness he intended to call and provide contact information and information regarding anticipated testimony; and to identify witnesses or purported witnesses "believed or understood" by Galvez "to have knowledge of this claim" if they had not already been identified by the claimant in prior responses. *See id.* at 12-13.

On February 6, 2017, the Claimant sent Responses to the Self-Insured Employer's First Interrogatories and Requests for Production of Documents to the Employer. *Id.* at 19-30. These Answers and Responses included one Memorex CD-RW disc containing electronic files/documents disclosed to the Employer. *Id.* at 19. The Employer received the Claimant's discovery responses on February 10, 2017. *Id.*

None of the files/documents contained on the Memorex CD-RW disc were copies of the December 29, 2016 Inland Medical Evaluations report and addendum; nor the February 6, 2017 Concurrence "Questionnaire" by Dr. You. *See id.* at 31-36.

In the Claimant's February 6, 2017 Answers and Responses to the Employer's Interrogatories and Requests for Production, the Claimant did not identify any anticipated lay or expert witnesses, any anticipated expert witness testimony, nor any documents generated or possessed that were responsive to the Employer's Interrogatories pertaining to the Claimant's expert witnesses. *Id.* at 19-29. Instead, Mr. Galvez answered the Employer's Interrogatory No. 4 and Request for Production No. (regarding expert witnesses) by referring the Employer to his preamble objection to Interrogatory No. 2, which stated, in pertinent part, "These experts' opinions are otherwise summarized in their reports and the records. These reports, and the records that they are based on, are contained in Self-Insured Employer's files, the Department's claim file, or have been disclosed by Claimant previously or in response hereto." *Id.* at 22, 27.

On or about March 9, 2017, the Employer held a CR 26(i) conference with the Claimant's counsel regarding Claimant's Answers and Responses to the Employer's Interrogatories. *See id.* at 14. On March 10, 2017, approximately two and a half months after serving the Interrogatories upon the Claimant, the Employer received "Claimant's Supplemental Answers to Self-Insured Employer's First Set of Interrogatories and Requests for Production" via email. *Id.* at 14; *see also, id.* at 102, 257.

The Claimant's March 10, 2017 Supplemental Answers did not identify any anticipated witnesses or describe any anticipated testimony by expert witnesses in response to the Employer's Interrogatories, though the Claimant did attach numerous documents to his March 10, 2017 Supplemental Answers. *Id.* at 14-15; *see also, id.* at 102, 257. The documents supplemented by the Claimant on March 10, 2017 included: a December 29, 2016 Inland Medical Evaluations report generated at the request of Claimant's counsel with a January 10, 2017 Addendum; and a February 6, 2017 "Medical Questionnaire" and concurrence completed and signed by Dr. Jean You on February 6, 2017. *Id.*

The December 29, 2016 Inland Medical Evaluations report was generated by Dr. Thomas Gritzka and Dr. Voderbet Kamath, witnesses anticipated by the Claimant since as early as the scheduling conference. *Id.* at 268-70, 444-45. The December 29, 2016 Inland Medical Evaluations report alleged neck and lumbar conditions to have been aggravated by and/or "compatible with" the Claimant's February 3, 2011 industrial injury. *Id.* at 15; *see also, id.* at 365-66, 445, 456-58. The December 29, 2016 Inland Medical Evaluations report also alleges that the Claimant has a category III impairment of the dorsolumbar and lumbosacral spine, and that the Claimant has an "inability to engage in reasonably continuous employment from February 2016 to the present time... at least in part, due

to the residuals of the industrial injury” of February 3, 2011. *Id.* at 15; *see also, id.* at 380, 381-84, 462, 464.

The January 10, 2017 Inland Medical report Addendum expressly relies on and concurs with a Functional Capacities Evaluation authored by Mr. Anderson, and opines that the physical capacities described by Mr. Anderson are “consistent with Mr. Galvez’ diagnosis and residual cervical myelopathy, L5 radiculopathy.” *Id.*

The documents supplemented by the Claimant on March 10, 2017 also included a Functional Capacity Evaluation and Summary by Anderson Physical Therapy, both dated December 1, 2016. *Id.* at 16, 46-69. The December 1, 2016 Functional Capacity Evaluation contemplates a “Low Back Disability Questionnaire” completed by the Claimant, cites “low back pain” as a limiting factor for the claimant’s task performance on nearly every task for which the claimant was evaluated, alleges that the Claimant is not able to return to work whatsoever, and supports a full pension award to the Claimant based, in large part, upon lumbar (“low back”) conditions not accepted as related to this claim by the Department. *Id.* Further, the December 1, 2016 Functional Capacity Evaluation occurred over two (2) years after the previous vocational evaluation in 2014. *Id.* at 16, 65, 216-237.

The Employer was not made aware of the Claimant's December 1, 2016 Functional Capacity Evaluation until March 10, 2017, almost three months after it was drafted, and timely discovery requests were served upon Mr. Galvez.

The Claimant's March 10, 2017 supplemental disclosures also included a February 3, 2017 Medical Questionnaire answered by Dr. You (not previously disclosed), evidencing her February 6, 2017 concurrence with numerous aspects of the January 10, 2017 Inland Medical Evaluations report obtained by the Claimant. *Id.* at 15-16. This concurrence by Dr. You, the Claimant's attending provider, evidenced a reversal of medical opinion based upon the new "evidence" provided to her by Galvez while his appeal was pending before the Board. *Id.* at 16, 264, 334-46.

The 2014 Functional Capacities exam focused on the Claimant's cervical condition, as that is the only condition that has been accepted by the Department of Labor and Industries as related to this claim, and Galvez's low back issues and surgery were preexistent. *Id.* at 219-20; *see also, id.* at 8. Additionally, the June 19, 2014 functional capacities examination pre-dated Mr. Galvez's Board appeal by nearly 2.5 years and could therefore be characterized as "stale." *Id.* at 219, 273.

On March 31, 2017, the Employer filed a CR 35 motion for neurological and orthopedic examination, and a CR 35 motion for a

functional capacity evaluation contemplating the Claimant's alleged-but-not-accepted lumbar condition. *Id.* at 254-67. The Employer argued that the CR 35 examinations are necessary and proper to the Employer being able to verify or rebut the Claimant's new post-appeal evidence, and for the Employer to be capable of presenting a meaningful defense with contemporaneous information. *Id.* at 17; *see also, id.* at 265-66

The Employer also argued that the CR 35 examinations were necessary and proper to the Board fulfilling its purpose of developing a full and complete record, then to make relevant evidentiary rulings on the evidence placed in the record for future appeal. *Id.*

On April 12, 2017, Industrial Appeals Judge ("IAJ") John Dalton issued an Order Denying Employer's Motions to Compel CR 35 Examinations, finding that the Employer did not present "good cause" to grant the CR 35 examinations, and favoring the arguments advanced by the Claimant. *Id.* at 40-41.

On April 14, 2017, the Employer filed with the Board a Petition for Interlocutory Review of the IAJ's April 12, 2017 order denying the Employer's CR 35 examinations of the Claimant. *Id.* at 11-18.

On April 25, 2017, the Board issued an Order Denying Review of Interlocutory Appeal, concluding that the Employer did not show good cause for granting its CR 35 motions. *Id.* at 10.

On May 26, 2017, Asplundh's appeal of the April 25, 2017 Board Order Denying Review of Interlocutory Appeal was filed with Benton County Superior Court. *Id.* at 1-3.

On September 12, 2017, Asplundh filed its Motion to Reverse Board of Industrial Insurance Appeals Denial of CR 35 Examination and Petition for Interlocutory Review with Benton County Superior Court. Asplundh presented two main arguments: the Employer argued that the superior court had jurisdiction to entertain the Employer's appeal, despite the otherwise interlocutory appearance of the Board order; and the Employer argued the merits of its CR 35 motions. *See id.* at 499-508.

The Employer also filed a Motion for a Stay with the Board, seeking a stay of proceedings pending the resolution of the Employer's appeal to Superior Court. *See* 553-54. On September 26, 2017, the Board issued its Order Denying Motion for a Stay. *Id.* at 554. The Board Order denying the Employer's motion noted that "It is the employer's position that unless it receives a decision from the Superior Court prior to the issuance of the Proposed Decision and Order, it will lose its right to contest Judge Dalton's decision and present evidence based on a new examination." *Id.* at 553. The Board's Order remarked, "Though the employer presents a compelling argument, its motion is denied." *Id.*

The Order Denying Motion for a Stay reasoned that “[e]ven if the Board agrees with the IAJ, the employer can still raise the issue in Superior Court and that court can remand it to the Board for further proceedings since it will be an appeal from an appealable Board order.” CP at 553-54 (citing *Dep’t of Labor & Indus. v. BIIA*, 186 Wn. App. 240, 347 P.3d 63 (2015) as authority, no pin citation provided).

On October 3, 2017, IAJ Dalton issued his Proposed Decision and Order, finding Mr. Galvez to be totally and permanently disabled, and awarding him a pension. *Id.* at 556-66. The IAJ concluded that the preponderance of the credible evidence, including Dr. You’s reversed opinion in Galvez’s favor, supported his ruling. *Id.* at 564-65.

On October 20, 2017, the Parties presented oral argument before the Honorable Carrie Runge in Benton County Superior Court. VRP at 4. Counsel for Mr. Galvez proposed dismissal of the Employer’s appeal, but Judge Runge declined, and instead ordered a continuance pending the Board’s issuance of its Decision and Order. *Id.* at 41-43, CP at 578-79.

On February 8, 2018, following the Board’s adoption of the Proposed Decision and Order and refusal to reverse its prior CR 35 rulings, the Employer re-noted the superior court matter for further argument to occur on March 16, 2018. CP at 595, VRP at 44-46. No additional briefing

was submitted to the Benton County Superior Court in anticipation of the re-noted argument.

On March 16, 2018, the Parties presented argument to the Honorable Sam Swanberg in Benton County Superior Court. CP at 598-99; *see also*, VRP at 44-61. Judge Swanberg declined to rule on “whether or not the Court can entertain an appeal of the -- the -- of the denial of the 35 examination,” but did rule “that for purposes of jurisdictional requirements, that this Court does not have jurisdiction to make that determination under this cause number because it’s not a final decision.” VRP at 60. Judge Swanberg signed the Order dismissing the Employer’s appeal under 17-2-01421-1 for lack of “general jurisdiction” on March 16, 2018. CP at 598-99.

On April 16, 2018, Asplundh’s filed a Notice of Appeal to this Court of the dismissal of its Superior Court appeal under 17-2-01421-1. *Id.* at 600.

#### IV. ARGUMENT

Board decisions contained in the Board record are not immune from court review and remedy, as evidenced by the plain language of RCW 51.52.115. Therefore, 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.

The Employer argues that existing authority would preclude the Superior Court from reversing Board denial of CR 35 motions upon appeal of the Board's Decision and Order, and that Asplundh's direct appeal to Superior Court of the Board Order Denying Review of Interlocutory Appeal was therefore proper and should not have been dismissed for lack of jurisdiction.

**A. This Court Reviews De Novo Appeals Of Superior Court Dismissals For Lack Of Jurisdiction**

“Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court as in other civil cases.” RCW 51.52.140. “[T]his court's role is to determine whether the trial court's findings, to which error is assigned, are supported by substantial evidence and whether the conclusions of law flow therefrom.” *Du Pont v. Dep't of Labor & Indus.*, 46 Wn. App. 471, 476-477, 730 P.2d 1345 (Div. I 1986)(citing *Bayliner Marine Corp. v. Perrigoue*, 40 Wn. App. 110, 114, 697 P.2d 277 (Div. I 1985)).

“A challenge to a trial court’s subject matter jurisdiction to hear a claim is reviewed de novo.” *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 71, 170 P.3d 10 (2007)(citing *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 118-19, 147 P.3d 1275 (2006), cert. dismissed, 127 S. Ct. 2161 (2007)).

**B. The April 25, 2017 Board Order Denying Review Was Not Interlocutory, And It Caused Asplundh To Become “Aggrieved” For Purposes Of Its Appeal To Superior Court**

RCW 51.52.115’s preclusion of superior courts from remanding appeals to the Board for the taking of additional evidence renders the April 25, 2017 Board Order Denying Review of the IAJ’s denial of Asplundh’s CR 35 motions *not* interlocutory and therefore subject to direct appeal.

The Employer acknowledges that but-for RCW 51.52.115, the Board’s April 25, 2017 Order *would* be interlocutory in nature, and would not be subject to direct appeal. “Interlocutory” is defined as:

Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy. An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.

*Alwood v. Harper*, 94 Wn. App. 396, 400, 973 P.2d 12 (Div. I 1999)(citing Black’s Law Dictionary). *See, also, Callihan v. Dep’t of Labor & Indus.*,

10 Wn. App. 153, 158, 516 P.2d 1073 (Div. I 1973) (holding that during a workers' compensation appeal before the Board, "[t]here is no review from an interlocutory order to the superior court").

In a typical workers' compensation setting, interlocutory decisions by the Board are reviewable in superior courts upon appeal of the Board's Decision and Order. RCW 51.52.115 provides that "[t]he hearing in the superior court shall be de novo" and that "such issues of law or fact may be raised as were properly included in the notice of appeal to the board or in the complete record of the proceedings before the board." But critically, RCW 51.52.115 also constrains superior court's "de novo" review:

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 as provided in RCW 51.52.110: 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.

RCW 51.52.115's preclusion of the Superior Court from receiving "evidence or testimony" not "offered before the Board" suggests that the Superior Court lacks statutory authority to remand appeals of Board Decision and Orders for the taking of further evidence, but is consonant with the Employer's direct appeal of the Board Order Denying Review of Interlocutory Appeal.

Asplundh's direct appeal of the Board Order Denying Review permitted court review of the Board's denial of CR 35 examination and preserves the superior court's ability to grant the requested examination(s) without running afoul of RCW 51.52.115's prohibition upon receiving evidence or testimony that is not within the Board record. In other words, if the Superior Court had reversed the Board Order Denying Review and denial of the Employer's CR 35 motions on Asplundh's direct appeal, the testimony of the CR 35 examiner(s) would have been "offered before the Board" and properly brought before the Superior Court in the event of an appeal of the Board's Decision and Order.

Conversely, if the Employer did not appeal the Board Order denying interlocutory review directly to Superior Court, and instead waited until it appealed the Board's Decision and Order (as the Respondent has argued), existing authority suggests that the Superior Court lacks statutory authority to remand the matter back to the Board for the taking of further evidence. This creates a legal right of the Employer to directly appeal the Board's Order Denying Review to Superior Court.

In *Allied*, the Supreme Court described how a party may become "aggrieved" for purposes of appealing orders, "We have consistently held that an employer has the right to appeal from a department **or board order** and from a superior court judgment or verdict...We find no basis in [RCW

51.52.110] for the view that the employer may appeal from one determination of the department, but not from the other. He has a right to appeal in all cases where his interest may be affected; and, unless he does so, he is concluded by the decision.” *Allied Stores Corp. v. Dep’t of Labor & Indus.*, 60 Wn.2d 138, 141-42, 372 P.2d 190 (1962). Emphasis added.

Asplundh has a right to directly appeal the Board’s Order Denying Review because existing authority suggests that the Employer would have otherwise been “concluded by the decision” of the Board upon appeal of the Board’s Decision and Order. The Employer has a statutory right to court review of the Board’s orders denying its CR 35 motions. It necessarily follows that if the Employer is precluded from seeking court review of CR 35 denial upon appeal of the Board’s Decision and Order, then it must have the right to direct appeal of Board orders denying its CR 35 motions, lest it be “aggrieved” by infringement by the loss of its right to court review of Board orders.

Washington law regarding when an Employer may seek review and remedy in Superior Court for Board denial of CR 35 motions is not yet settled however, and this case presents this Court with this issue of first impression.

In an unpublished 2015 case, the Division I Court of Appeals addressed superior court statutory authority under RCW 51.52.115 to grant

a CR 35 motion and remand the matter back to the Board for the taking of further testimony. In *Willapa Harbor Hosp. v. Freeman*, a claimant filed an industrial injury claim and received benefits under the Industrial Insurance Act. 2015 Wn. App. LEXIS 2995, \*1-2, 2015 WL 9118957 (Div. I 2015). During administration of Ms. Freeman's allowed claim, the Employer notified her that it had scheduled her an examination to attend for purposes of evaluating worsening or changing of the claimant's condition. *Id.* at 2-3. The claimant refused to attend the examination scheduled by the Employer, then subsequently appealed a Department order denying allowance of her mental health condition to the Board. *Id.* at 3.

Willapa Harbor Hospital filed a motion for a CR 35 mental health examination of the Claimant with the Board. *Id.* The *Freeman* Board denied the Employer's CR 35 motion, and the Employer filed a petition for interlocutory review with the Board of the CR 35 denial. *Id.* at 5. The Board declined review. *Id.*

On appeal to the superior court, the Employer filed "a motion with the superior court entitled, 'MOTION FOR CR 35 EXAMINATION.'" *Id.* The Employer's supporting affidavit detailed the procedural history. *Id.* In response to the Employer's superior court CR 35 motion, the Claimant

argued that RCW 51.52.115 prohibited the bringing of the CR 35 motion at the Superior Court. *Id.*

The superior court granted the Employer's motion for CR 35 examination, remanded the matter to the Board with direction to allow the Employer's mental health examination of the claimant, to supplement the record with the CR 35 examiner's testimony, and to allow the claimant to supplement the record with additional medical evidence if necessary. *Id.* at 6-7. The Claimant appealed this superior court order to the Court of Appeals. *Id.* at 7.

Division I's *Freeman* analysis focused upon the superior court's statutory appellate authority under RCW 51.52.115, recognizing that superior court review is "de novo," but is limited to the Board proceedings and record "absent an alleged procedural irregularity." *Id.* at 8-9. In concluding its analysis, the *Freeman* Court remarked that "The Hospital cites no authority to support the relief ordered" by the superior court, and cited *Lodis*, 172 Wn. App. at 862, for the proposition that "[w]here no authorities are cited in support of a proposition, the court may assume that counsel, after diligent search, has found none." *Id.* at 10.

The Division One Court of Appeals held that "the trial court exceeded its authority when it granted Willapa Harbor Hospital's Civil Rule 35 motion and remanded to the Board with instructions to allow

supplementation of the record with additional evidence.” *Id.* at 1. Division I remanded the case back to superior court, lifting the stay, and directing that the jury trial be reinstated. *Id.* at 10.

However, the Division I Court of Appeals did appear to narrow its holding, “Under the unique circumstances presented in this case, we conclude that the superior court erred by granting the Hospital’s CR 35 motion and remanding to the Board to reopen the evidentiary record.” *Id.* at 10-11.

*Freeman* appears to support the proposition that RCW 51.52.115 prohibits superior courts from remanding appeals to the Board for purposes of a CR 35 examination and subsequent testimony. Admittedly, it is unclear whether the *Freeman* Court would have ruled differently if the employer had expressly renewed its objection to the Board order denying the CR 35 motion, as opposed to filing a “new” CR 35 motion with the superior court. However, the *Freeman* Court did focus on “the relief” ordered by the superior court (remand for examination and testimony), for which the *Freeman* employer was unable to identify any authority. It is this remedy pitfall that Asplundh seeks to avoid by filing its direct appeal of the Board Orders denying its CR 35 motions, while the Board still maintained jurisdiction over the workers’ compensation litigation (prior to issuance of its Proposed Decision and Order).

The Supreme Court's *Ivey* decision also suggests that the Superior Court lacks statutory authority to provide Asplundh remedy if Asplundh were to have raised the Board denial of CR 35 examination for the first time on appeal of the Decision and Order to superior court.

In *Ivey*, the superior court found that the record brought before it was "incomplete" because the "authorities" were in conflict as to whether the workers' operation was necessary. *Ivey*, 4 Wn.2d at 163. The superior court judgment directed the Department to reopen the case and "have the claimant examined by three (3) disinterested physicians for their recommendation and that this matter be further held open until such examination is made and further action taken by the joint board." *Id.* Internal quotations omitted. The Department of Labor and Industries appealed. *Id.* at 162.

The *Ivey* Court held that

the [superior] court assumed a directory and supervisory power over the department which it does not possess. It has been consistently and repeatedly held that the superior courts have no original jurisdiction in workmen's compensation cases, but appellate jurisdiction only...the appellate jurisdiction of the superior courts in such cases is very limited. They are given the power to review, and that only.

*Id.* See also, *Andreas v. Bates*, 14 Wn.2d 322, 328, 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” in an unemployment compensation case).

The *Ivey* Court found significant that it was “clear...that the court did not reverse the decision of the department upon the merits, but for the purpose of clearing the way for the taking of additional evidence...The court could not remand the case for the taking of additional evidence.” *Id.* at 164.

According to the Respondent, the Employer’s only recourse to the Board’s denial of interlocutory review was appeal of the CR 35 denial in a Petition for Review of the Proposed Decision and Order, in the hopes of a favorable Decision and Order. However, this would be an apparent dead-end under RCW 51.52.115, *Ivey*, and *Freeman*. Such a dead-end precluding court appeal of Board orders would be in contravention of clear legislative intent, and would be manifestly unjust. *See* RCW 51.52.115.

To preserve its rights, the Employer had no choice but to file a direct appeal of the Board Order Denying Review of Interlocutory Appeal, seeking remedy available from Superior Court while the case was still pending before the Board and thereby not requiring remand or the filing of a new CR 35 motion with the Superior Court.

The Superior Court erred in dismissing Asplundh's direct appeal of the Board Order Denying Review on jurisdictional grounds, and Asplundh 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.

**C. Existing Authority Does Not Support Superior Court Authority To Remand An Appeal Of A Board Decision And Order For The Purposes Of Granting CR 35 Examination And Testimony**

If the Superior Court lacks statutory authority to hear the Employer's direct appeal of the Board Order Denying Review of Interlocutory Appeal, then the Superior Court must necessarily have statutory authority to reverse the Board's denial of the Employer's CR 35 motions and provide remedy (if appropriate) upon appeal of the Board Decision and Order to Superior Court. However, there is no authority directly supporting Superior Court statutory authority to remand an appeal of a Board Decision and Order for purposes of allowing CR 35 examination and the taking of testimony regarding those examinations.

The Superior Court has authority to review Board denial of CR 35 motions by the Board because the Employer's motions for CR 35 examinations, as well as the Board's Orders denying these motions, must be included in the Board record.

WAC 263-12-135 explains that the Board record “in any contested case shall consist of the order of the department, the notice of appeal therefrom, all orders issued by the board... responsive pleadings, if any...and any other written applications, motions, stipulations or requests duly filed by any party.” *See also*, RCW 51.52.020 (providing that regulations enacted by the Board “shall have the force and effect of law until altered, repealed, or set aside by the board”). Under RCW 51.52.115, “the trial court, in a ‘de novo’ review, has no limitation on the intensity of its review of [the Board] record.” *Garrett Freightlines v. Dep’t of Labor & Indus.*, 45 Wn. App. 335, 341, 725 P.2d 463 (Div. I 1986).

Thus, the question is not *whether* the Superior Court has authority to review the Board’s denial of Asplundh’s CR 35 motions, but *when*. And existing authority does not appear to permit the Superior Court to review and reverse CR 35 denial upon appeal of the Board’s Decision and Order to Superior Court.

The Employer filed a motion to stay the Board’s issuance of its Proposed Decision and Order, to allow the Superior Court time to make a ruling on the Employer’s direct appeal of Board CR 35 denial and therefore avoid the later preclusion of CR 35 remedy when the Board’s Decision and Order was appealed to Superior Court. *See* CP at 553.

The Board denied the Employer's motion to stay, reasoning that "[t]hough the employer presents a compelling argument," even if the Board's Decision and Order declines to reverse the denial of the CR 35 motions, "the employer can still raise the issue in Superior Court and that court can remand it to the Board for further proceedings since it will be an appeal from an appealable Board order." CP at 553-54 (citing *Dep't of Labor & Indus. v. BIIA*, 186 Wn. App. 240, 347 P.3d 63 (Div. I 2015), no pin cite provided).

The Board Order Denying Motion for a Stay was dismissive of the Employer's reliance upon *Ivey v. Dep't of Labor & Indus.*, 4 Wn.2d 162, 163, 102 P.2d 683 (1940) as factually distinguishable, instead concluding that *Dep't of Labor & Indus. v. BIIA* is controlling and dispositive. *See id.* However, *Dep't of Labor & Indus. v. BIIA* is not dispositive, controlling, or even analogous to the facts in this case.

In *Dep't of Labor & Indus. v. BIIA*, Tesoro appealed numerous citations from the Department of Labor and Industries to the Board. *Dep't of Labor & Indus.*, 186 Wn. App. at 243. On appeal, the Department sought to present testimony in colloquy regarding vacated citations issued to Tesoro, but "IAJ Jaffe denied the Department's request to place evidence in colloquy." *Id.* The Board review of the IAJ's denial of colloquy evidence denied the Department relief. *Id.* at 244.

The Department sought a statutory writ of review in superior court of the Board's denial of colloquy evidence, Tesoro intervened in the superior court matter, and "[t]he superior court granted the statutory writ of review and directed the Board to allow the testimony in colloquy." *Id.* Tesoro appealed the superior court ruling to the Court of Appeals. *Id.*

In *Dep't of Labor & Indus.*, Tesoro argued that the writ of review was not available to the Department because "the Department has an adequate remedy by appeal" of the Proposed Decision and Order to the Board, and Division I agreed. *Id.* at 245. Division I held, "The Department has an adequate remedy by appeal from the IAJ's proposed decision and order. The statutory writ of review should not have issued because the Department failed to establish a statutory prerequisite." *Id.* at 248.

Here, the Employer did not file a statutory writ of review to Superior Court regarding the Board's Order denying review of CR 35 denial. Therefore, Division I's statutory writ of review analysis is irrelevant. Further, while *Dep't of Labor & Indus.* did hold that superior court review is not available (in a writ of review context) when the aggrieved Party maintains appeal rights, *Dep't of Labor & Indus.* did not address the statutory nuance of RCW 51.52.115 that appears to preclude the Superior Court from granting Asplundh remedy if Asplundh had not appealed CR 35 denial to Superior Court while the Board maintained

jurisdiction over the pending litigation. *Dep't of Labor & Indus.* is not controlling.

Further, nine years after *Ivey*, the Supreme Court appeared to limit its *Ivey* holding, but without providing a clear standard for the apparent exception created. In *Surina*, the claimant presented the testimony of a physician and herself, and then her attorney rested. *Surina v. Dep't of Labor & Indus.*, 34 Wn.2d 839, 840, 210 P.2d 403 (1949). After the Department presented its one medical witness, then rested, the joint board “apparently assuming that the claimant had no further evidence, entered an order adverse to the claimant.” *Id.* Upon appeal to the superior court, the Claimant “moved to return the case to the joint board for further proceedings, on the theory that she had been denied the opportunity to present any rebuttal evidence.” *Id.* The superior court concluded,

the action of the Joint Board of the Department of Labor and Industries of the State of Washington in refusing the claimant the right to present further testimony upon the completion of the Department’s case was arbitrary and capricious, and constituted a denial of the claimant’s rights to have a full and complete hearing of her claim.

*Id.* at 841.

The Department appealed the superior court decision in *Surina*. *Id.*

In affirming the superior court, the Court held,

A remand to the joint board for the purpose of permitting the claimant to present any rebuttal evidence she may have

is not in conflict with our holding in *Ivey v. Department of Labor & Industries*, 4 Wn. (2d) 162, 102 P. (2d) 683, because the superior court in the present case 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.

*Id.* at 843-44.

*Surina*, then, stands for the proposition that a superior court may remand a case to the Board for the taking of *rebuttal* evidence when a Party is deprived of this opportunity. The Supreme Court also remarked that *Surina* was not in contravention of *Ivey* because the superior court did not order the taking of further evidence “after a case had been closed,” but for *rebuttal* testimony to evidence already provided.

*Surina* is not controlling here for at least a couple reasons. First, the express language of RCW 51.52.115, the Supreme Court’s strongly worded holdings in *Ivey* and *Andreas*, and Division I’s unpublished opinion in *Freeman* all strongly suggest that Superior Court remand of an appeal for purposes of gathering new evidence (CR 35 examination) and testimony thereon would be prohibited. Second, in *Surina*, the Supreme Court explained that rebuttal evidence was allowable because it was not being allowed *after the case had been closed*, as would arguably be the

case here. CR 35 examination and testimony is materially distinguishable from rebuttal testimony, and *Surina* does not control.

The Respondent argued that the Superior Court lacked jurisdiction to consider the Employer's direct appeal of the Board Order Denying Review of Interlocutory appeal because there had been no "final order" issued by the Board, and the Employer still had not exhausted its remedies before the Board. CP at 515-17. Respondent asserted that the Employer "should ask the Board – after the Proposed Decision and Order – to remand for further proceedings."

However, the Respondent offered nothing in the way of authority regarding *when* the Superior Court may properly review the Board's denial of the Employer's CR 35 motions, and failed to present authority for the implied argument that the Employer could pursue court review of the CR 35 denial once the Board's Decision and Order was issued by the Board. Indeed, when confronted with Respondent's failure to confront the paradox of CR 35 court review under RCW 51.52.115, Respondent largely dodged the answer, but conceded "I might say it doesn't have the original jurisdiction" if the CR 35 issue were to be renewed upon appeal of the Board Decision and Order. VRP at 38. In other words, the Respondent would seek to exploit the very statutory paradox that he argues does not exist. *See* CP at 517 (arguing "There is no jurisdiction, and no issue of first

impression here,” but citing no authority for when the Superior Court has authority to review Board denials of CR 35 motions).

The Respondent also cited his right to “speedy and sure relief” as a justification for dismissing the Employer’s direct appeal of the Board Order Denying Review of Interlocutory Appeal. *Id.* at 515, 521. This argument fails because direct appeal of the Board’s denial of CR 35 examination is the most efficient manner in which to provide “speedy and sure relief” to the worker, without sacrificing the Employer’s statutory right to court review.

The Employer’s direct appeal of the Board order Denying Review promised to be the most efficient manner by which the Employer would receive court review of the Board’s CR 35 denial. Once the Superior Court was to rule on the Employer’s direct appeal, the Board could more contemporaneously incorporate that ruling into the ongoing litigation and testimony being taken.

Even assuming the Superior Court has statutory authority to review CR 35 denial upon appeal of the Board’s Decision and Order, which the Respondent is careful to not argue, reversal of CR 35 denial upon appeal of the Decision and Order itself would result in CR 35 examination of the Respondent many months or years after the conclusion of the Board litigation. This would create yet another disparity in the timing and

contemporaneousness of the evidence presented by the Parties, likely resulting in the worker seeking to offer *yet more* testimony in rebuttal to this belated CR 35 testimony. The Respondent's argument that direct Superior Court appeal of Board CR 35 denial offends his "right" to "speedy and sure relief" is without merit.

The Respondent's arguments in opposition to the Employer's direct appeal of Board CR 35 denial fail to confront the paradox created by RCW 51.52.115, or to offer any resolution thereto. The authority cited by the Board fails to squarely confront this paradox as well.

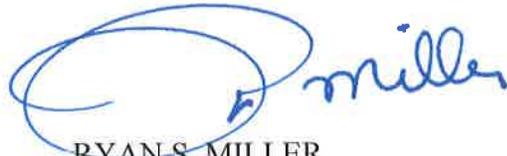
Existing authority indicates that the Superior Court had jurisdiction to hear and rule upon the Employer's direct appeal of the Board Order Denying Review of the IAJ's Order denying the Employer's CR 35 motions. The Superior Court Order dismissing Asplundh's appeal for lack of jurisdiction should therefore be reversed.

## **V. 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 28 day of August, 2018.



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