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

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ASPLUNDH TREE EXPERT, CO.,

Appellant,

v.

LUCIANO M. GALVEZ and DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondents.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR & INDUSTRIES**

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ROBERT W. FERGUSON  
Attorney General

Anastasia Sandstrom  
Senior Counsel  
WSBA No. 24163  
Office Id. No. 91018  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104  
(206) 464-6993

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## **I. INTRODUCTION**

It is black-letter law in an industrial insurance case that a party cannot appeal from an interlocutory order of the Board of Industrial Insurance Appeals. For this reason, the trial court properly declined to consider Asplundh Tree Expert Co.'s interlocutory appeal of an order denying a motion for CR 35 examination. This Court should affirm.

## **II. ISSUE**

RCW 51.52.110 allows for an appeal within 30 days of final decision of the Board. Asplundh appeals from an interlocutory order. Did the trial court properly decide it did not have authority to consider the appeal?

## **III. STATEMENT OF THE CASE**

### **A. Background of Applicable Workers' Compensation Principles**

The Board of Industrial Insurance Appeals is a three-member board that decides workers' compensation appeals and other matters. RCW 51.52.010. Industrial appeals judges conduct preliminary hearings on appeals from Department of Labor & Industries' orders. RCW 51.52.100, .104, .106. After considering the evidence in a case, the industrial appeals judge will issue a proposed decision and order. RCW 51.52.104. A party may challenge the proposed decision by petitioning the full Board for review. *Id.* The Board either adopts or replaces the proposed

decision. RCW 51.52.106. A party may raise an objection to a procedural matter in its petition for review to the Board. RCW 51.52.104.

Ordinary civil practice applies to proceedings at the Board. RCW 51.52.104. So a party can move for a CR 35 examination to have a medical expert examine a worker. The industrial appeals judge will rule on the motion in an interlocutory order. A party can request a review of that decision by an assistant chief industrial appeals judge. WAC 263-12-115(6)(a). If the party does not prevail before the assistant chief judge, the party can still raise the objection later. WAC 263-12-115(6)(b).

A party cannot appeal to the Board from the interlocutory review decision, but can re-raise the issue if the party chooses to petition the full Board for review of the proposed decision and order. *Dep't of Labor & Indus. v. Bd. of Indus. Ins. Appeals*, 186 Wn. App. 240, 245, 347 P.3d 63 (2015). The Board may either deny the petition or may accept the petition and will issue either an order remanding for further evidence to be taken or render a final decision and order. *See* RCW 51.52.104, .106. If a party is aggrieved by the Board's final decision, the party may appeal to the superior court. RCW 51.52.110.

**B. Asplundh Sought a CR 35 Examination Related to a Back Condition, Which the Industrial Appeals Judge Denied in an Interlocutory Order**

Luciano Galvez suffered an industrial injury in 2011. CP 275. He had a neck condition and complained of back problems. CP 250. In September 2016, the Department closed his claim, with a permanent partial disability award for his neck. CP 281, 283. He appealed to the Board, seeking a wide range of remedies, ranging from treatment to a pension. CP 279-80. One of his issues was whether he had a back condition proximately caused by his injury. CP 269.

In December 2016, after the claim had closed, Galvez obtained a functional capacities evaluation and had a medical examination performed by Inland Medical Evaluations based on his own request that found a low-back impairment caused by the industrial injury. CP 258, 361, 379-80. He had an earlier functional capacities examination and previous independent medical examinations ordered by the employer when the claim was open. CP 190, 372, 374-77, 384-85.

Asplundh requested a CR 35 examination to provide an updated functional capacities evaluation and independent medical examination to respond to the new medical information provided by Galvez. CP 254, 261, 290. The industrial appeals judge denied the request because the CR 35 motion sought to compel Galvez to travel six hours to attend the

examinations and because Galvez had already submitted to previous independent medical examinations. CP 40. The industrial appeals judge concluded that the employer failed to show the good cause necessary to compel Galvez to attend the new examinations. CP 40.

Asplundh moved for interlocutory review under WAC 263-12-115(6)(a). In such a review, a chief industrial appeals judge decides whether to reverse an interlocutory decision. WAC 263-12-115(6)(a). An assistant chief industrial appeals judge denied the request for review. CP 10. This order did not preclude Asplundh from raising the objection again but it could not be appealed to the Board at that time, instead Asplundh would have to wait until the petition for review of the proposed decision to appeal to the Board. WAC 296-12-115(6)(b); *Bd. of Indus. Ins. Appeals*, 186 Wn. App. at 245. Instead of waiting for a final Board decision, Asplundh appealed to the superior court. CP 1.

**C. The Superior Court Did Not Consider Asplundh's Appeal Because It Did Not Have Jurisdiction to Consider an Interlocutory Appeal**

The superior court ruled that it did not have jurisdiction to consider the appeal from the interlocutory order. CP 599.

**IV. STANDARD OF REVIEW**

This Court applies the ordinary civil standards of review to appeals from a superior court'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. An appellate court reviews the superior court's decision, not the Board's decision. *Rogers*, 151 Wn. App. at 180. A challenge to a trial court's decision based on jurisdiction is reviewed de novo. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 71, 170 P.3d 10 (2007).

## V. ARGUMENT

Asplundh has not perfected the superior court's appellate jurisdiction because RCW 51.52.110 requires a final decision from the Board before a party can appeal. Superior courts only exercise their appellate function over the Board's decisions when the appealing party complies with the requirements set forth in RCW 51.52.110. *See Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990). A party needs to comply with procedural requirements to perfect appellate jurisdiction and failure to comply with RCW 51.52.110 necessitates dismissal. *See Stewart v. Dep't of Empl. Sec.*, 191 Wn.2d 42, 52, 419 P.3d 838, *reconsideration denied* (2018); *Fay*, 115 Wn.2d at 201. Here, Asplundh failed to appeal from a final order of the Board and a final order of the Board is a procedural requirement to obtain the appellate jurisdiction of the superior court. This Court should affirm the superior court.

**A. RCW 51.52.110 Allows Appeals Only From Final Board Decisions**

Under RCW 51.52.110, a party may only appeal from a final decision of the Board:

Within thirty days after a decision of the board to deny the petition or petitions for review upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the final decision and order of the board upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the appeal is denied as herein provided, such worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal to the superior court. If such worker, beneficiary, employer, or other person fails to file with the superior court its appeal as provided in this section within said thirty days, the decision of the board to deny the petition or petitions for review or the final decision and order of the board shall become final.

The statute provides for appeals of only “a decision of the board to deny the petition . . . for review” or of a “final decision and order of the board.” RCW 51.52.110. An interlocutory decision by an industrial appeals judge denying a CR 35 examination or a denial of an interlocutory review order by an assistant chief industrial appeals judge is not an order of the Board, nor is it a final order. *Stratton v. Dep’t of Labor & Indus.*, 1 Wn. App. 77, 79, 459 P.2d 651 (1969) (industrial appeals judges are employees of the Board, not the Board); WAC 263-12-115(6)(b) (unfavorable decision on interlocutory review does not preclude the party

from re-raising objection). So the interlocutory order here cannot be appealed.

The courts have repeatedly concluded that there is no review of interlocutory orders of industrial insurance appeals judges: “There is no review from an interlocutory order to the superior court.” *Callihan v. Dep’t of Labor & Indus.*, 10 Wn. App. 153, 158, 516 P.2d 1073 (1973); *Bd. of Indus. Ins. Appeals*, 186 Wn. App. at 245. *See Gen. Elec. Co. v. Scofield*, 51 Wn.2d 336, 337, 317 P.2d 1058 (1957), *overruled on different grounds by Allied Stores Corp. v. Dep’t of Labor & Indus.*, 60 Wn.2d 138, 372 P.2d 190 (1962). In *Callihan*, the Board decided that the industrial appeals judge had to take more evidence and remanded for further hearings. 10 Wn. App. at 155, 158. The court held that this was an interlocutory order and could not be appealed because there is no final order. *Id.* at 158. “The order, to be reviewable, must be a final one.” *Id.*

Asplundh cites to *Allied Stores* to argue it may appeal if it is aggrieved. Appellant’s Brief (AB) 16-17. But *Allied Stores* involved an appeal from a final decision and order of the Board itself, not an interlocutory order from an industrial appeals judge. 60 Wn.2d at 140. Nothing in this case says that interlocutory decisions may be appealed.

Sound principles support that “[a]gency action cannot be challenged on review until all rights of administrative appeal have been

exhausted.” *Dils v. Dep’t of Labor & Indus.*, 51 Wn. App. 216, 219, 752 P.2d 1357 (1988) (citing *South Hollywood Hills Citizens Ass’n for the Preserv. of Neighborhood Safety and the Env’t v. King Cty.*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984)). The rule prevents interruption of the administrative process, allows development of a factual record, facilitates the exercise of administrative expertise, allows correction of errors, and prevents circumvention of procedures by resorting to the courts. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997).

Here, the industrial appeals judge issued an order that the assistant chief judge issued an order on which the assistant chief judge denied review. Once the industrial appeals judge issues the proposed order, Asplundh could petition the Board for review of this decision. RCW 51.52.104. The Board could reverse the decision of the industrial appeals judge and remand to grant the CR 35 motion and take more evidence. *See, e.g., Callihan*, 10 Wn. App. at 158 (remanding for industrial appeals judge to take more evidence). Once the Board makes a final decision about the issue, if it is unfavorable, Asplundh could appeal to superior court. RCW 51.52.104, .106, .110. But it could not appeal the interlocutory order. *Callihan*, 10 Wn. App. at 158.

**B. Whether the Superior Court May Remand to Order a CR 35 Examination Is Irrelevant to This Case but, in Any Event, It Can**

The procedure the superior court takes in an appeal from a final Board decision about a CR 35 examination is irrelevant to whether RCW 51.52.110 gives Asplundh a right to an interlocutory appeal. Asplundh's theory is that the superior court must review the interlocutory order because it alleges that the superior court does not have the authority to remand to order a CR 35 examination in an appeal from a Board decision and order. AB 15-16. It points to the fact that the superior court must not take new testimony at superior court. RCW 51.52.115; AB 15-16. This argument fails for two reasons.

First, it does not follow that if the superior court could not remand the case in an appeal of a final Board decision, this means that there must be an interlocutory appeal in this case. The Legislature does not need to grant all remedies in a superior court appeal or even provide for a superior court appeal, and because of this, if the superior court cannot remand, then there would be no remedy for Asplundh in superior court. *See State ex rel. Bates v. Bd. of Indus. Ins. Appeals*, 51 Wn.2d 125, 130-31, 316 P.2d 467 (1957) (under former RCW 51.52.110 Department did not have right to appeal). Moreover, Asplundh believes that its only remedy would be to seek a superior court appeal. This is incorrect. Its remedy was to seek

relief by the Board in a petition for review. RCW 51.52.104. So it had a remedy. *See Bd. of Indus. Ins. Appeals*, 186 Wn. App. at 243.

Second, however, the superior court may remand to the Board if there is a fundamental problem in how the Board proceeded. *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 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). Under *Ivey v. Department of Labor & Industries*, 4 Wn.2d 162, 163-64, 102 P.2d 683 (1940), the court held that the superior court cannot order to take new evidence to meet an evidentiary burden. But *Surina v. Department of Labor & Industries*, 34 Wn.2d 839, 843, 210 P.2d 403 (1949), clarifies that the superior court can remand if there is a procedural flaw in how the Board took evidence. In *Surina*, the court remanded to allow the party to take rebuttal evidence that was wrongly denied. *Id.* at 843-44. *Surina* and *Olympia Brewing* together clarify that there can be a remand if there is a procedural flaw in how the Board proceeded regarding the evidence. This is a high burden but, if Asplundh could prove that the Board's final decision to deny a CR 35 examination was fundamentally wrong, then it could obtain a remand.

Asplundh relies on the nonprecedential unpublished decision *Willapa Harbor Hosp. v. Freeman*, No. 73664-7-I, 2015 WL 9118957 (Wash. Ct. App. Dec. 14, 2015) (unpublished), for the proposition that

there is no right for remand to take a CR 35 examination. But *Freeman* relied on the fact that the party seeking the CR 35 examination did not cite any authority to support its proposition, and does not provide any guidance beyond this. 2015 WL 9118957, at \*4. The court specifically said “we do not decide the question of when, or under what circumstances, the superior court may remand to the Board to reopen the evidentiary record.” *Id.* at \*4 n.6. It is not useful to rely on an unpublished decision for a proposition it did not reach.

This Court need not reach the question of whether the superior court could remand to order a CR 35 examination because Asplundh did not properly bring the issue to the court. It needed to wait until the proposed decision and order was issued, petition for review from that decision, and if the Board did not grant its relief, appeal to superior court and raise the issue then. The trial court properly declined to consider the case.

## **VI. CONCLUSION**

RCW 51.52.110 required Asplundh to appeal from a final Board decision. Because it did not, the superior court properly dismissed for lack of appellate jurisdiction.

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RESPECTFULLY SUBMITTED this 29th day of October, 2018.

ROBERT W. FERGUSON  
Attorney General

A handwritten signature in black ink, appearing to read "A. Sandstrom". The signature is written in a cursive, flowing style.

Anastasia Sandstrom  
Senior Counsel  
WSBA No. 24163  
Office Id. No. 91018  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104  
(206) 464-6993

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Hall & Miller, PS  
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[thall@thall.com](mailto:thall@thall.com)  
[wpratt@thall.com](mailto:wpratt@thall.com)

Timothy Hamill  
Bothwell & Hamill, PLLC  
[tim@bothwellhamill.com](mailto:tim@bothwellhamill.com)

DATED this 29th day of October, 2018.



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MYKAILA OSTROM  
Legal Assistant  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 464-7740

**WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE**

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