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NO. 359735-III

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

ASPLUNDH TREE EXPERT, CO.,
Appellant,

vs.

LUCIANO M. GALVEZ and
DEPARTMENT OF LABOR AND INDUSTRIES,
Respondents.

BRIEF OF RESPONDENT GALVEZ

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I. INTRODUCTION

This is a de novo review arising from a workers' compensation appeal filed by Appellant Asplundh Tree Expert, Co., the Self-Insured Employer, from a Benton County Superior Court order denying the Self-Insured Employer's Motion (to Reverse Board of Industrial Insurance Appeals Denial of CR 35 Examinations and Petition for Interlocutory Review) and dismissing the action "because the superior court lacks general jurisdiction, and has only limited appellate jurisdiction per RCW 51.04.010 and 51.52.110." Clerk's Papers [CP] 598-99. The Self-Insured Employer appealed an order of the Board of Industrial Insurance Appeals [Board] denying interlocutory review rather than waiting to appeal the Board's final decision as mandated by RCW 51.52.110. The Self-Insured Employer seeks to create jurisdiction where it is lacking. Alternatively, it seeks to create a new superior court procedure for remand to the Board to "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 . . ." - in contravention of RCW 51.52.115.

The superior court's dismissal for lack of jurisdiction is wholly consistent with the provisions of the Industrial Insurance Act, Title 51, RCW, which Washington law requires to be liberally construed in favor of the worker to effectuate its legislative purpose as declared in RCW 51.04.010.

Accordingly, Respondent Luciano M. Galvez, an injured worker, respectfully requests that this Court decline the Self-Insured Employer's invitations and affirm the superior court's order as consistent with the Industrial Insurance Act, and its express design. Even on the merits, the underlying motion must also be denied in that the Board's order (Denying Employer's Motions to Compel CR 35 Examinations) is not manifestly unreasonable under the circumstances, was not exercised on untenable grounds or for untenable reasons. The Self-Insured Employer has failed to show an abuse of discretion.

II. COUNTER-STATEMENT OF THE ISSUES

Whether the Superior Court of Benton County erred in dismissing the Self-Insured Employer's appeal from the Board Order Denying Review of Interlocutory Appeal under Docket No. 17-2-01421-1 (from the Order Denying Employer's Motions to Compel CR35 Examinations) for lack of jurisdiction in that the Board had not issued a final decision as required by RCW 51.52.110 and since RCW 51.52.115 dictates 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 as provided in RCW 51.52.110 . . .", a remand exceeded the statutory authority granted the trial court.

III. COUNTER-STATEMENT OF THE CASE

It is undisputed that “[o]n February 3, 2011, while employed as a foreman at Asplundh Tree Expert Co., Luciano Galvez suffered an industrial injury to his cervical spine when, after carrying a large round from a downed tree, he began to experience numbness, tingling, and loss of strength in his arms and legs, and problems with his balance.” CP 183 (BIIA FoF No. 2). Further, it is undisputed that “[t]his sudden incident, traumatic in nature, proximately caused to become symptomatic, or lit up, a preexisting asymptomatic cervical myelopathy.” CP 184 (BIIA FoF No. 3). The Department’s allowance order from 2011 and the Board’s findings from 2013 were silent on whether Mr. Galvez aggravated a preexisting lumbar condition. However, additional conditions proximately caused by an industrial injury regularly arise during the course of claim administration. Here, the lumbar spine condition was questioned and contended as aggravated by the industrial injury early, but the Self-Insured Employer chose to deny, decline, or ignore it without requesting an express order denying responsibility or segregating the condition by order.

When he first sought medical treatment for his industrial injury with Cheryl P. Hipolito, M.D., Mr. Galvez complained of low back pain on March 18, 2011. It was noted that he had a prior back surgery with no

residual limitations, but with “mild tenderness on the lumbar spine [with] paraspinal muscle spasms” on examination. Dr. Hipolito’s plan for Mr. Galvez included a lumbar MRI. CP 112-16. The Self-Insured Employer commissioned a medical examination by Eugene Wong, M.D., and Walter D. Fife, M.D., on June 10, 2011, which included lumbar complaints, review of Dr. Hipolito’s chart notes and of the lumbar MRI report, but did not identify any work related injury or condition. CP 122-32. Later that same year, months after performing the emergent surgery to treat the paralyzing cervical myelopathy, Mr. Galvez’s attending spine surgeon, Brian O’Grady, M.D., requested authorization on December 21, 2011, to treat the lumbar spine condition, but the Self-Insured Employer declined his request. Again on January 25, 2012, the Self-Insured Employer denied authorization for lumbar surgery. CP 135. Mr. Galvez proceeded with the necessary treatment, nonetheless. *See e.g.*, CP 159, 557.

When the staff of treating provider Wing Chau, M.D., contacted the Self-Insured Employer for claim status in March 2012, it was “reiterated” that the claim was never accepted by the Self-Insured Employer and could be in litigation for “a year or even two.” CP 136. By report of examination dated September 21, 2013, commissioned by the Self-Insured Employer, Drs. S. Daniel Seltzer, M.D., and Voderbet Kamath, M.D., noted:

Claimant also began to have low back problems with right leg pain, and Dr. O'Grady recommended that he have surgery. In April of 2012, he underwent a second procedure. This was on his lower back. The claimant had said that Dr. O'Grady told him that this was related to the claim and subsequent to that, he had a good result and continued on under the care of his primary care provider.

CP 159. Dr. Seltzer, at least, opined that Mr. Galvez's "lumbar conditions are unrelated to the claim." CP 167, 417. By another Self-Insured Employer commissioned exam dated July 2, 2015, Eugene Toomey, M.D., reviewed limited records, examined Mr. Galvez and related the cervical conditions by aggravation to the industrial injury, but offered no diagnosis or opinion regarding the lumbar spine. CP 190-99.

As predicted, extensive litigation followed, including the Self-Insured Employer's appeal to the Board from the Department's order dated December 16, 2011, which accepted the claim. CP 118-19. Following deposition testimony and adversarial hearings, the Board issued a PD&O affirming the Department's order allowing the claim for an industrial injury. The Self-Insured Employer then filed a Petition for Review [PFR], which resulted in the Board's Order Denying Petition for Review dated July 15, 2013, affirming the PD&O and, thereby, affirming the Department's decision to accept the claim. CP 174-85. The Self-Insured Employer continued to deny any lumbar condition as related to the industrial injury, as reflected in

correspondence dated May 1, 2014. CP 137. Further litigation followed with the Self-Insured Employer's appeal to the Benton County Superior Court, which resulted in the Board's decision being upheld by a jury verdict and judgment issued June 24, 2015. CP 186-88. More than four years had passed since the industrial injury and filing of the claim.

During administration of the claim, a self-insured employer is responsible for providing any and all appropriate benefits to the injured worker in accordance with Washington's workers' compensation law and regulations. *See e.g.*, WAC 296-15-310. The claim file evidence is generated by the self-insured employer, who requests and schedules medical evaluations, including medical examination and functional capacity evaluation. *See* RCW 51.32.110. The time for a self-insured employer to generate medical evidence in support of claim closure occurs before claim closure, including whether all contended medical conditions were addressed in the closing medical documentation.

Based on the Self-Insured Employer's request, the Department issued an order closing the claim with a Permanent Partial Disability award for category IV cervico-dorsal impairment on June 13, 2016. CP 91, 241-42, 276. Mr. Galvez filed a Notice of Appeal to the claim closure and served the Self-Insured Employer with discovery requests, but the Department re-

assumed jurisdiction per RCW 51.52.060(4). *See* CP 277. The Department affirmed closure by order dated September 13, 2016. CP 239-40, 276-77. In the interim, meaning between June 13, 2016, and September 13, 2016, the Self-Insured Employer had the opportunity but did not schedule further evaluations.

On November 4, 2016, Mr. Galvez again filed a Notice of Appeal with the Board, which was granted on November 14, 2016. CP. 279, 273. On December 14, 2016, Mr. Galvez timely served the Self-Insured Employer, through counsel, with another set of discovery requests under the newly granted appeal. CP 91. On December 23, 2016, the Self-Insured Employer served discovery requests on Mr. Galvez, through counsel. CP 12, 256, 263. IAJ Dalton held a scheduling conference by telephone on January 18, 2017, and issued a litigation order. The issues included whether a lumbar condition was industrial related. CP 268-71. The litigation order set discovery completion by March 28, 2017, and the attached Ground Rules explained that “[t]he parties must finish by the Discovery Completion Date.” CP 271. Mr. Galvez identified his expert witnesses by name at scheduling. CP 269.

On February 6, 2017, Mr. Galvez sent Responses to the Self-Insured Employer’s First Interrogatories and Requests for Production of Documents to the Employer. CP 19-30. Mr. Galvez’s Responses included General

Objections and a specific objection to the Self-Insured Employer's

Interrogatories requesting anticipated witnesses:

OBJECTION: Claimant's witnesses will be identified consistent with the Board's litigation schedule and deadlines. To the extent that this Interrogatory seeks work product, it is beyond the scope of permissible discovery without a showing of substantial need and the inability without undue hardship to obtain substantial equivalent information by other means. CR 26(b). This Interrogatory exceeds the scope of permissible discovery to the extent that it requests the names, addresses, subject matter, and the substance of anticipated testimony. CR 26(b)(a); *Agranoff v. Jay*, 9 Wn. App. 429, 434, [512 P.2d 1132] (1973) (holding that the plaintiffs' request for a "list of all witnesses you intend to call upon at trial" is not a proper subject for discovery); *Weber v. Biddle*, 72 Wn.2d 22, 29 [431 P.2d 705](1967) (holding that requesting the identity of persons who have information is warranted, but that the opposing party is not required to "put on a dress rehearsal of the trial."). Experts to be called at hearing will also be identified consistent with the Board's litigation schedule. The experts will provide testimony consistent with the information in their reports and records. It is expected that they will testify favorably on behalf of the injured worker and consistent with the injured worker's position on all the issues raised by this appeal, including injury, diagnosis, medical treatment and disability, if any. These experts' opinions are based on their examination of the injured worker and their review of other records contained in Self-Insured Employer's file or the Department claim file or those that have otherwise been provided and disclosed. Each expert witness, save the physical therapist, if called has been or will be provided with the reports and/or records of the others. 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. If you do not have these reports or believe a report has been

overlooked, please contact our office and we will promptly forward same to you.

CP 22.

On February 15, 2017, Mr. Galvez confirmed witnesses. On February 27, 2017, Mr. Galvez received the Self-Insured Employer's First Supplemental Answers to Claimant's Interrogatories and Requests for Production, which now included the Poth Investigative report based on the Self-Insured Employer's commissioned surveillance, taken in early September, 2016. CP 73-82, 92, 560-61. On March 9, 2017, a joint CR 26(i) conference was held and reciprocal agreements made to supplement discovery responses. Through counsel, Mr. Galvez also confirmed that a mental health condition was not alleged, contended, or at issue on appeal. CP 91.

On March 10, 2017, Mr. Galvez sent, and the Self-Insured Employer received, "Claimant's Supplemental Answers to Self-Insured Employer's First Set of Interrogatories and Requests for Production." CP 14, 91. The Claimant's Supplemental Answers included the December 29, 2016, medical evaluation by Thomas L. Gritzka, M.D., and Voderbet Kamath, M.D. and a subjoined January 10, 2017, Addendum. The Addendum dated January 10, 2017, concurs with the FCE authored by Trevor Anderson, P.T., on December 1, 2016, and opines that the physical capacities described by

Mr. Anderson are “consistent with Mr. Galvez’ diagnosis and residual cervical myelopathy, L5 radiculopathy, chronic pain requiring opioids and deconditioning.” CP 15. Consistent with Dr. O’Grady’s early requests, Drs. Gritzka and Dr. Kamath opined that not only Mr. Galvez’s neck but his lumbar conditions were aggravated by and/or “compatible with” Mr. Galvez’s industrial injury. CP 15; *See also*, CP 365-66, 445, 456-58. The documents supplemented by Mr. Galvez on March 10, 2017, also included a Functional Capacities Evaluation [FCE] performed and authored by Mr. Anderson dated December 1, 2016. CP 16, 46-69, 560. Mr. Galvez’s supplemental disclosures also included Medical Questionnaires answered by Jean You, M.D., in which she concurred with the FCE and with numerous aspects of the report of Drs. Gritzka and Kamath. CP 15-16, 330-334.

On March 31, 2017, the Self-Insured Employer filed CR 35 motions for a new or fresh neurological and orthopedic examination in Seattle, and for an FCE in Everett. CP 253-67. Mr. Galvez objected and opposed the motions. CP 243-49. He provided a translated declaration explaining his objection:

I am the above-referenced claimant injured in the course of my employment with Asplund tree Expert Co., on February 3, 2011, which is the subject of claim SD-03379. I understand that the Self-Insured Employer has now claimed “surprise” that my industrial injury caused-directly or by aggravation, my lumbar or low back problems, and requested

that the Board of Industrial Insurance Appeals order me to attend another Independent Medical Examination (IME) by new experts. The medical records make clear that I complained of low back pain from the beginning, and while the cervical took priority early, when Dr. O'Grady started to address the continuing lumbar issues, he was denied authorization. The Self-Insured Employer examiners always examined the low back, but ignored or denied its relationship to the injury. After being denied authorization under the claim, Dr. O'Grady performed the lumbar (second) procedure under other insurance. My condition required that I do something to improve my function. I did and am grateful.

From my perspective, submitting to another IME is not a pleasant event. After my employer protested claim allowance and requested an IME, I was ordered to be examined on June 10, 2011, by Eugene Wong, M.D., and Walter D. Fife, M.D.; then on September 21, 2013, by S. Daniel Seltzer, M.D., and Voderbet Kamath, M.D.; and then again, prior to claim closure, by Eugene P. Toomey, M.D., on July 2, 2015. I found the examination process to be intimidating, invasive, and painful even though the physicians are generally each careful and considerate during examination. I do not wish to undergo another – especially, an examination scheduled with the Self-Insured Employer's newly hired experts - none of whom I have seen before, and only two are physicians.

The Self-Insured Employer and Third Party Administrator also previously required me to attend a Performance-Based Physical Capacity Evaluation on June 19, 2014, by Clay Smith, P.T. These evaluations test you to your tolerance limits. I am fearful of re-injury and usually sore for days afterwards. I do not wish to undergo another physical or functional capacity evaluation ever again in my life. Moreover, I am reluctant and find it very difficult to travel very far from home, meaning outside the Tri-City area. It is not reasonable for me to travel to the Seattle area for examinations that should have taken place before the Self-Insured Employer requested claim closure. Because I am not completely fluent in the English language, I had this declaration read and translated to me.

CP 250-51. Claimant filed a response to Self-Insured Employer's CR 35 motions, which provided additional objections to, and argument against, an Order on Examination five days before deposition testimony began. CP 243-49.

After review of the record and oral argument, IAJ Dalton issued an Order Denying Employer's Motions to Compel CR 35 Examinations on April 12, 2017, finding that the Self-Insured Employer did not present "good cause" to grant the CR 35 examinations:

The self-insured employer filed motions to compel two CR 35 examinations of Luciano Galvez. One of the proposed examinations was to be a functional capacity evaluation performed by Ted Becker, Ph.D., and the other examination was to be a physical examination by Lance Brigham, MD (orthopedic surgeon) and William Stump, MD (neurologist). The examinations would take place in Everett and Seattle. Mr. Galvez and his attorney reside in the Tri-Cities area of Eastern Washington.

Mr. Galvez objects to the proposed examinations for a number of reasons []. In summary, the objections are: (1) neither CR 35 nor WAC 263-12-095 authorize a party to compel a functional capacity evaluation by a non-physician; (2) Mr. Galvez had already submitted to medical examinations by an orthopedic surgeon and a neurologist, and multiple other medical examinations at the request of the Department and/or the Self-Insured Employer; (3) the Self-Insured Employer has failed to show good cause to compel another involuntary physical examination; (4) the Self-Insured Employer has failed to show that a new condition is being claimed as the lumbar spine has been at issue in this claim since 2011; (5) the Self-Insured Employer has failed to show why the examinations it proposes could not

have been accomplished during the time the claim was within the jurisdiction of the Department; (6) the Self-Insured Employer has failed to show a procedural or legal justification to require Mr. Galvez to travel unreasonable distances (approximately six hours each way by motor vehicle) for the examinations as required by RCW 51.32.110 (examination to be held at a location convenient to the injured worker).

With the exception of claimant's first objection and argument, I agree with the claimant's position and argument. I also considered as important the procedural history of this appeal.

A telephone conference of myself and the attorneys for the parties was held on January 18, 2017 during which deadlines were established for the appeal, including when the parties would identify either the category or names of the witnesses they intended to have testify. In fact, rather than identifying witnesses in general categories of lay or expert, Mr. Galvez specifically identified Jean You, MD (pain medicine), Thomas Gritzka, MD (orthopedic surgeon), Voderbet Kamath, MD (neurologist), and Maui Garza (Vocational Rehabilitation Counselor) during the January 18, 2017 telephone conference.

During that telephone conference, February 22, 2017 was set as the deadline for Mr. Galvez to provide written confirmation of the witnesses he would call to testify. On February 15, 2017 Mr. Galvez identified the same witnesses in his written confirmation of witnesses as were identified at the January 18, 2017 telephone conference.

The January 18, 2017 and February 15, 2017 notifications by Mr. Galvez of his witnesses put the Self-Insured Employer on notice. It was then incumbent on the Self-Insured Employer to conduct discovery regarding those witnesses.

At the January 18, 2017 telephone conference, March 28, 2017 was set as the deadline to complete discovery. Thus, the Self-Insured Employer was on notice as early as January 18,

2017 of the names of the witnesses for Mr. Galvez, and should have taken steps to obtain the witnesses records and take their depositions before the March 28, 2017 discovery deadline.

The Self-Insured Employer argues that it did not receive from the attorney for Mr. Galvez reports by Mr. Anderson and Drs. Gritzka, Kamath, and You until March 10, 2017. The attorney for the Self-Insured Employer did not explain in what steps, if any, were taken with the attorney for Mr. Galvez to take the depositions of those witnesses.

The Self-Insured Employer's motions to compel CR 35 examinations are denied.

CP, at 4-5 [footnote omitted].

Two days later, on April 14, 2017, the Self-Insured Employer filed a Petition for Interlocutory Review of the IAJ Dalton's April 12, 2017, Order Denying Employer's Motions to Compel CR 35 Examinations. CP 11. By Order dated April 25, 2017, the Board issued an Order Denying Review or Interlocutory Appeal, holding: "After careful consideration of the self-insured employer's motions and the record in this appeal, and finding that the self-insured employer failed to show good cause for granting its motion for an orthopedic and neurologic examination, or its motion for a functional; capacity examination, review of Judge Dalton's April 12, 2017 order is denied." CP 2, 10, 11. The Self-Insured Employer filed an appeal from the Order Denying Review of Interlocutory Appeal in Benton County Superior Court on May 26, 2017. CP 1-3.

The Self-Insured Employer then 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 on September 12, 2017. CP 491-509. The Self-Insured Employer also filed a Motion for a Stay with the Board, seeking a stay of proceedings pending the resolution of it's appeal to superior court. *See* CP 553-54. On September 26, 2017, the Board issued its Order Denying Motion for a Stay. CP 554. IAJ Dalton issued the Board's PD&O on October 3, 2017, finding *inter alia* that Mr. Galvez "suffered cervical and lumbar spine injuries diagnosed as cervical spinal cord compression, cervical myelopathy, loss of function in all four extremities, and aggravation of pre-existing degenerative disk disease of the dorsolumbar and lumbosacral spine at L4-5 and S1 levels, with left lower extremity residuals of S1 radiculopathy." IAJ Dalton also concluded that Mr. "Galvez was a permanently totally disabled worker within the meaning of RCW 51.08.160, as of September 13, 2016." CP 565-66, 590-91. The Self-Insured Employer filed a PFR, which the Board considered along with the PD&O and denied the Petition: "Citing RCW 51.52.106, the proposed decision and order becomes the decision and order of the Board." VRP at 54. After hearing oral argument on the Self-Insured Employer's motion on October 20, 2017, the Honorable Carrie Runge in Benton County Superior Court ordered that the

Self-Insured Employer’s motion “be continued until such time as the Board of Industrial Insurance Appeals has issued its Decision and Order in the SD-03379 matter under Docket Number 16 21518.” CP 578-79. The Board, in fact, subsequently issued a final decision when it denied the Self-Insured Employer’s PFR, which final decision was appealed by the Self-Insured Employer to the Benton County Superior Court and assigned Docket No. 18-2-00002-2. VRP 54. However, the Self-Insured Employer did not note its motion under that docket number. Nor did the Self-Insured Employer move to merge or consolidate the dockets at superior court.

By order dated March 16, 2018, under Docket No. 17-2-01421-1, the Honorable Samuel P. Swanberg of the Benton County Superior Court ordered “that the Plaintiff’s Motion to Reverse Board of Industrial Insurance Appeals Denial of CR 35 Examination and Petition for Interlocutory Review is DENIED because the Superior Court lacks general jurisdiction, and has only limited appellate jurisdiction per RCW 51.04.010 and 51.52.110, [and] this action is hereby DISMISSED.” CP 598-99. Finally, the Self-Insured Employer filed a Notice of Appeal to this Court on April 16, 2018, from the trial court’s dismissal of its appeal (from the Board’s Order Denying Review of Interlocutory Appeal) under Docket No. 17-2-01421-1. CP 600. The Self-

Insured Employer's appeal from the Board's final order (Docket No. 18-2-00002-2) remains at the trial court.

IV. STANDARD OF REVIEW

In a workers' compensation case involving interpretation of the Industrial Appeals Act, Title 51, RCW, the Court review is de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3rd 583 (2001). When a discretionary decision to deny a CR 35 examination is on appeal, the standard of review is an abuse of discretion. *Tietjen v. Dep't of Labor & Indus.*, 13 Wn. App. 86, 91, 534 P.2d 151 (1975).

V. SUMMARY OF ARGUMENT

The Industrial Insurance Act, Title 51, RCW, was enacted in 1911 and created a no-fault compensation system designed to provide "sure and certain relief for workers, injured in their work." RCW 51.04.010. In an exercise of police powers, the Act abolished all other civil actions, remedies and jurisdiction under common law. *Id.* The Benton County Superior Court correctly dismissed the Self-Insured Employer's appeal from a Board Order Denying Review of Interlocutory Appeal for lack of general jurisdiction and properly declined the Self-Insured Employer's invitation to roll back to 1910 and carve out an exception to RCW 51.52.110 for appeals from a not-yet-final Board's decision and carve out an exception to RCW 51.52.115 to grant

the superior court authority to reopen the evidence or testimony before the Board. There was no irregularity in procedure before the Board. Moreover, the underlying Board Order Denying Employer's Motions to Compel CR 35 Examinations is well supported by the record and the Self-Insured Employer has failed to show an abuse of discretion.

VI. ARGUMENT

The superior court properly denied the motion and dismissed the matter as there is no jurisdiction and no legal basis to support the Self-Insured Employer's motion. No statutory authority or common law precedent supports the motion. The Self-Insured Employer claims unfair prejudice results from administrative procedures before the Board, but had yet to exhaust those administrative procedures and remedy, and failed to recognize the statutorily mandated limited appellate jurisdiction of superior court per RCW 51.04.010.

The Industrial Insurance Act, Title 51, RCW, "is based on a compromise between workers and employers, under which workers become entitled to speedy and sure relief, while employers are immunized from common law responsibility." *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 422, 869 P.2d 14 (1994), citing *inter alia* RCW 51.04.010. The Self-Insured Employer here, just like the injured worker, Mr. Galvez, is part

of that “grand compromise” as coined by the Supreme Court in *Birklid v. Boeing* 127 Wn.2d 853, 859, 904 P.2d 278 (1995). The pertinent part of RCW 51.04.010 establishes that “all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.” RCW 51.52.110 authorizes appeal to superior court only after a decision of the Board to deny a petition for review or final order.

Without first obtaining *a final order of the Board*, Washington law clearly dictates that a party has failed to invoke the appellate jurisdiction of the trial court to review a claim, and that the trial court lacks subject matter jurisdiction over a controversy in an industrial insurance claim. *Davis v. Dep’t of Labor & Indus.*, 159 Wn. App. 437, 441-42, 245 P.3d 253 (2011). In the *published* decision of *Davis v. Dep’t of Labor & Indus.*, Division Two of the Court of Appeals, clearly affirmed the long-held limited jurisdiction of the trial court:

A party cannot invoke the appellate jurisdiction of the superior court absent a final order to appeal. *See Kingery v. Dep’t of Labor & Indus.*, 80 Wn. App. 704, 710, 910 P.2d 1325 (1996) (“[t]he superior court may only confirm, reverse, or modify a decision of the Board”). Moreover, it is undisputed that the superior court lacks original jurisdiction over industrial insurance claims. RCW 51.04.010. Without subject matter jurisdiction, a superior court lacks the power to decide a controversy. *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). Thus, the trial court should have dismissed the lawsuit for lack of subject matter jurisdiction.

159 Wn. App. 427, 442, 245 P.3d 253 (2011).

The order appealed by the Self-Insured Employer in this case was an Order Denying Review of Interlocutory Appeal, which was not signed by a member of the Board. CP 1-6. There was not yet a final order, issued by the Board - only an order denying interlocutory review by an Assistant Chief Industrial Appeals Judge. As made clear so many years ago by the Court of Appeals: “There is no review from an interlocutory order to the superior court. The order, to be reviewable, must be a final one.” *Callihan v. Dep’t of Labor & Indus.*, 10 Wn. App. 153, 158, 516 P.2d 1073 (1973), citing *Bergman v. Dep’t of Labor & Indus.*, 44 Wn.2d 117, 265 P.2d 293 (1954); *Wiles, v. Dep’t of Labor & Indus.*, 34 Wn.2d 714, 209 P.2d 462 (1949). There is no review here because appeal was taken from an interlocutory order rather than “a final one.”

At the time of appeal of this matter, meaning Benton County Superior Court Docket No. 17-2-01421-1, there was no PD&O yet, no PFR, and no order denying PFR or final decision and order. The Self-Insured Employer still had the opportunity to ask the Board - after the PD&O - to remand for further proceedings. *See* WAC 263-12-145. Upon filing of a PFR, the Board’s procedural regulations make clear that it has options:

After review of the record, the board may set aside the proposed decision and order and remand the appeal to the

hearing process, with instructions to the industrial appeals judge to whom the appeal is assigned on remand, to dispose of the matter in any manner consistent with chapter 263-12 WAC.

WAC 263-12-145(5). Inasmuch, at the time of this appeal, the Self-Insured Employer failed to exhaust the remedies available at the Board. The appeal was premature and, lacking jurisdiction, the case was properly dismissed.

There is no issue of first impression here. The Self-Insured Employer strings together three cites in support of its motion: RCW 51.52.115; *Ivey v. Dep't of Labor & Indus.*, 4 Wn.2d 162, 164, 102 P.2d 683 (1940); and the unpublished *Willapa Harbor Hosp. v. Freeman*, No. 73664-7-1, 2015 Wash. App. LEXIS 2995, 2015 WL 9118957 (Wash. Ct. App., Dec.14, 2015). The legislative history of RCW 51.52.115 dates, in part, well beyond the turn of the last century. As a statute, it is settled law: “the court shall not receive evidence or testimony other than, or in addition to, that offered before the board” RCW 51.52.115. In its unpublished decision, *Freeman*, Division One of the Court of Appeals noted: “Absent an alleged procedural irregularity, the superior court reviews the Board’s decision based solely on the evidence and testimony presented to the Board. *Freeman*, 2015 Wash. App. LEXIS 2995, at *7, 2015 WL 9118957, citing *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002). There were no procedural irregularities here, save that created by the Self-Insured

Employer's premature appeal to superior court from an interlocutory order of the Board.

The holding in *Ivey* is well established law - namely, that the superior court "jurisdiction is limited by the statute to reviewing the evidence already taken" and "[t]he court could not remand the case for the taking of additional evidence." *Ivey*, 4 Wn.2d at 164. The Self-Insured Employer's reliance on a rebuttal case - *Surina v. Dep't of Labor & Indus.*, 35 Wn.2d 839, 210 P.2d 403 (1945), is misplaced. There, the court explained that a remand did not conflict with *Ivey* but was distinguishable because the Board did not provide "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 844. In the instant case, the Self-Insured Employer was not "inadvertently deprived" of a full and complete hearing, but merely failed to present good cause to justify or compel involuntary, invasive, and inconvenient medical examinations under CR 35.

There is nothing of first impression or ground-breaking in the *un*published *Freeman* decision, which lacks precedential value. In fact, *Freeman* is eerily similar to *Ivey*, and the decision begins:

Under well settled law, judicial appeal of a decision by the Board of Industrial Insurance Appeals (the Board) is de novo, but is based solely on the evidence and testimony presented to the Board. Here, 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. We reverse the trial court's order, lift the stay previously imposed, and remand to the trial court with instructions to reinstate the jury trial.

Id., at *1. Curiously, the court in *Freeman* noted:

The trial court lacked authority to grant the CR 35 motion and order remand to the Board for additional evidence. The Hospital cites no authority to support the relief ordered here. Where no authorities are cited in support of a proposition, the court may assume that counsel, after diligent search, has found none. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 862, 292 P.3d 779 (2013).

Id., at *10. There is a scenario with citations provided in the instant case, but the scenario is flawed, and no actual authority exists to support the relief requested because original jurisdiction does not exist. In fact, the only authority provided dictates that this matter be dismissed.

If this matter is not dismissed, and the court considers the merits of the underlying motion, it will find that the arguments advanced here by the Self-Insured Employer in support of reversal are essentially identical to those argued before the Board, and fall far short of establishing an abuse of discretion. Even if jurisdiction existed, the ruling on the Self-Insured Employer's motions for CR 35 examinations is reviewed for abuse of discretion. *Tietjen v. Dep't of Labor & Indus.*, 13 Wn. App. 86, 91, 534 P.2d 151 (1975). "An abuse of discretion occurs when the trial court's decision

is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons.” *Cornish Coll. Of Arts v. 1000 Va. Ltd. P’ship*, 158 Wn. App. 203, 221, 242 P.3d 1 (2010). The record contains ample support for IAJ Dalton’s well-reasoned ruling and order denying the Self-Insured Employer’s motions for CR 35 examinations. *See* CP 4-6, 243-52. Likewise, it supports the Assistant Chief Industrial Appeals Judge’s denial of the Self-Insured Employer’s Interlocutory Appeal. CP 2-3.

During claim administration, the Department or Self-Insurer are authorized to request and schedule medical examinations of injured workers and suspend benefits for non-cooperation. *See* RCW 51.32.110. Injured workers often look forward to closing orders - especially, in self-insured claims - because if they are lucky enough to have resources or a permanent partial disability awarded to fund forensic efforts, the opportunity arises to commission their own medical or functional capacity examination. Make no mistake, this appeal and the underlying motions are not about any surprise in discovery. Arguably, the only true surprise was the Self-Insured Employer’s surveillance of Mr. Galvez obtained while the closure was in abeyance but only disclosed in supplemental discovery provide more than five months after the surveillance. CP 73, 92. Rather, it is about both securing additional and more fresh expert opinions after claim closure through a CR 35 motions and

about securing relief from an adverse Board decision at superior court prior to a final Board decision.

For the reasons set forth in the ruling itself and in the record, the Board Order Denying Employer's Motions for CR 35 Examinations is manifestly reasonable and exercised on tenable grounds. The transcript of ORAL ARGUMENT on the CR 35 Motions, held April 12, 2017, CP 286-314, together with the Litigation Timeline, Ex. O, CP 91-92, make clear that there was no real surprise here, reciprocal supplementation of discovery was ongoing and conducted in good faith, and that good cause was lacking for multiple and additional involuntary examinations, which required the injured worker to travel **un**reasonable distances. No abuse of discretion occurred.

Here, the Self-Insured Employer failed to obtain a final Board order or exhaust its remedies before filing an appeal. After the PD&O is issued, the Self-Insured Employer may file a PFR and ask the three **Board** members to review the record and decision, including review and reconsideration of the denial of its motions to compel additional CR 35 examinations. As part of its review, the Board regularly reviews the evidentiary record, including motions previously ruled upon by Industrial Appeals Judges, and will remand for further proceedings and advise parties that its decision to remand is not a final order of the Board within the meaning of RCW 51.52.110 and that the

right to again petition for review exists. The procedure for filing a PFR is set forth in RCW 51.52.104 and WAC 263-12-145.

Subsequent to the instant appeal, IAJ Dalton did author a PD&O, and the Self-Insured Employer did file a PFR, which was denied. If a Self-Insured Employer disagrees with the *final* decision of the Board, it then may appeal to superior court. The Self-Insured Employer did, in fact, appeal that final decision to Benton County Superior Court, which was assigned cause Docket No. 18-2-00002-2. The pertinent statute provides:

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.

RCW 51.52.110. However, the order appealed here is interlocutory, reflecting the decision of an Assistant Chief Industrial Judge, and does not reflect “a decision of the [B]oard to deny the petition or petitions for review” or a “final decision and order of the [B]oard . . .”. It bares the singular signature of the Assistant Chief Industrial Appeals Judge rather than the

signature of a Board member. Thus, this appeal was premature, and was correctly dismissed as the Self-Insured Employer failed to properly invoke the superior court's jurisdiction under Docket No. 17-2-01421-1.

In *Cowlitz Stud Co. v. Clevenger*, the Washington Supreme Court framed the context for analysis of claims and issues under the Industrial Insurance Act [IIA] as follows:

The IIA is the product of a compromise between employers and workers. Under the IIA, employers accepted limited liability for claims that might not have been compensable under the common law. *Dennis v. Dep't of Labor & Indus.*, 109 Wn. 2d 467, 469, 745 P.2d 1295 (1987). In exchange, workers forfeited common law remedies. *Id.* This compromise is reflected in RCW 51.04.010, which states that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy." In furtherance of this policy, the IIA is to "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 51.12.010; see also *Cockle v. Dep't of Labor & Indus.*, 142 Wn 2d 801, 811, 16 P.3d 583 (2001) ("[W]here reasonable minds can differ over what Title 51 RCW provisions mean . . . the benefit of doubt belongs to the injured worker.").

157 Wn.2d 569, 572-73, 141 P.3d 1 (2006).

The Self-Insured Employer would like another or earlier opportunity to secure relief in superior court from an adverse interlocutory Board order, without waiting for a final decision and order to be issued. However, the statutorily mandated limited jurisdiction, resulting from the "grand

compromise” that created the IIA, precludes it. The “sure and certain relief for workers” precludes it. Pursuant to RCW 51.52.130, Mr. Galvez requests that he be awarded attorney fees.

VII. CONCLUSION

For the foregoing reasons, Mr. Galvez requests that this Court affirm the Benton County Superior Court’s order dismissing the appeal for lack of jurisdiction. The superior court correctly interpreted and adhered to the mandates of RCW 51.04.010, 51.52.115, and 51.53.110, and, because of the statutorily limited appellate jurisdiction, it did not err in dismissing the Self-Insured Employer’s appeal. Finally, because the Board’s denial of its CR 35 motions was not manifestly unreasonable under the circumstances and was not exercised on untenable grounds or for untenable reasons, the Self-Insured Employer has failed to show an abuse of discretion.

Respectfully submitted this 29th day of October, 2018.

s/ Timothy S. Hamill

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No. 35973-5

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

ASPLUNDH TREE EXPERT, CO.,))	
)	CERTIFICATE OF
Appellant,))	SERVICE
)	
v.))	
)	
LUCIANO M. GALVEZ and))	
DEPARTMENT OF LABOR))	
AND INDUSTRIES,))	
)	
Respondents.))	
_____))	

The undersigned, under penalty of perjury under the laws of the state of Washington, declares that on the below date, she caused to be served the Brief of Respondent Galvez and this certificate in the below-described manner:

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