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Court of Appeals
Division III
State of Washington
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No. 365638

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

LEONARD ELLERBROEK, and
DEPARTMENT OF LABOR AND
INDUSTRIES, *Respondents.*

v.

CHS INC., *Appellant,*

APPELLANT'S BRIEF

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INTRODUCTION

CHS Inc., by way of its attorneys, seek an order overturning the judgment of the Spokane County Superior Court assessing a penalty against it pursuant to Revised Code of Washington (RCW) 51.48.017 and the award of plaintiff/respondent Ellerbroek's attorney's fees.

ASSIGNMENTS OF ERROR

1) The trial court erred in finding Employer had an obligation to pay benefits prior to the Board of Industrial Insurance Appeals acting on its timely filed Motion for a Stay of Benefits.
2) The trial court erred in finding that CHS Inc. did not possess a genuine doubt from a legal standpoint as to its obligation to pay benefits such that its delay was reasonable.
3) The trial court erred by failing to find that plaintiff/respondent was not equitably estopped from requesting a penalty be assessed against CHS Inc.
4) The trial court erred in awarding an unreasonable amount of attorney's fees to plaintiff/respondent.

STATEMENT OF THE CASE

On February 2, 2015, the Department ordered self-insured employer, CHS Inc., (Employer) to pay time loss benefits to plaintiff/respondent Ellerbroek (Ellerbroek) from October 9, 2014, through February 2, 2015, and continuing for a condition allegedly related to an industrial injury suffered during his employment. Exhibit 10. Employer filed a Protest and Request for Reconsideration of this order on February 4, 2015. 2/8/16 Hearing Testimony at 202. On February 24, 2015, the Department issued a subsequent order affirming its February 2, 2015, order to pay benefits. Exhibit 11.

On March 5, 2015, Employer appealed that order to the Board of Industrial Insurance Appeals (Board) and concurrently filed a Motion for a Stay of Benefits. 2/4/16 Hearing Testimony at 83. The parties stipulated that on March 12, 2015, counsel for Employer left a voice mail message for Jerry Hertel, attorney for Ellerbroek, indicating that an appeal and Motion for a Stay of Benefits had been filed with the Board. *Id.* at 4-5. Employer's counsel further stated that in the event the Board granted review but denied the Motion for a Stay of Benefits, the time loss check was ready to be sent and that he should contact counsel for the Employer if there were any concerns about this approach. *Id.* Ellerbroek's attorney did not return the Employer's counsel's telephone call until April 30, 2015. *Id.*

On March 17, 2015, the Department reassumed jurisdiction over this matter. *Id.* at 89-90. On March 23, 2015, the Department received a request from Ellerbroek's counsel to assess a penalty against Employer for unreasonably delaying payment of benefits. CP 23. On April 8, 2015, the Department issued an order holding the February 24, 2015, order in abeyance pending further review. 2/4/16 Hearing Testimony at 90. On April 21, 2015, the Department assessed the penalty against the Employer for unreasonably delaying in paying claimant benefits. *Id.* at 90.

Employer filed a Protest and Request for Reconsideration of the assessed penalty. On May 6, 2015, the Department affirmed the February 24, 2015, order reinstating benefits. *Id.* at 91. Employer received the affirming order on May 11, 2015, and paid Ellerbroek benefits on May 15, 2015. *Id.*

Employer appealed the penalty and time loss order to the Board on May 14, 2015. CABR at 80. On June 2, 2016, Industrial Appeals Judge Donna Emmingham issued a Proposed Decision and Order finding Ellerbroek was not temporarily totally disabled and that the

Employer had a genuine legal and medical doubt that Ellerbroek was entitled to benefits. CABR at 52. Therefore, IAJ Emmingham reversed the Department's penalty order. The claimant petitioned the Board for review of Judge Emmingham's Proposed Decision and Order and review was denied. The Proposed Decision and Order of Judge Emmingham became the Decision and Order of the Board on August 3, 2016. CABR at 3.

Both the Department and Ellerbroek appealed to Superior Court in Spokane County. On December 18, 2018, Judge Fennessey issued an order reversing the Board and reinstating the penalty of $2,955.56 and awarding plaintiff/respondent Ellerbroek $22,596.00 in attorney's fees. CP 60.

ARGUMENT

A. THIS COURT SHOULD FIND EMPLOYER HAD NO OBLIGATION TO PAY BENEFITS UNTIL THE BOARD DENIED EMPLOYER'S TIMELY FILED MOTION FOR A STAY OF BENEFITS

The Department takes the position that as soon as an order directing payment of time loss benefits is issued, the benefits are due and must be paid within 14 days of the order awarding benefits pursuant to WAC 296-15-266. 2/8/16 Hearing Testimony at 188. WAC 296-15-266(g) provides employers a three-day grace period to comply with orders. So functionally employers have 17 days to comply with orders. Further, the Department also takes the position that benefits are due even if the order awarding them is held in abeyance. *Id.* at 202. As such, the Department determined that the Employer unreasonably delayed paying benefits as ordered on February 2, 2015, and ordered and assessed a penalty. *Id.*

The position of the Department is inconsistent with controlling law. Employer filed a timely protest of the Department's February 2, 2015, order on February 4, 2015, only two days after its issuance. As a result of the protest, the February 2, 2015, order was automatically held in abeyance thereby suspending Employer's obligation to pay. *In Re Gerald M. Wynkoop*, Dkt. No. 34, 133 (1970). Employer filed its appeal and Motion for a Stay of Benefits with the Board only nine days after the Department issued its February 24, 2015, affirming order which is well within the time frame the Department contends employers must act on orders. In fact, excluding the time the February 2, 2015, order was automatically held in abeyance due to Employer's protest, Employer had only used 11 out of its allotted 17 days to issue payment as ordered by the Department before filing its appeal and Motion for a Stay of Benefits.

Employer's obligation to pay benefits after timely filing a Motion for a Stay of Benefits depends on interpretation of RCW 51.52.050. Statutory construction is a question of law that is reviewed de novo. *Stuckey v. Dep't of Labor & Indus.*, 129 Wash.2d 289, 295, 916 P.2d 399 (1996). The primary goal for the Court is to carry out legislative intent. *Taylor v. Nalley's Fine Foods*, 119 Wn.App. 919, 923, 83 P.3d 1018 (Div. 2, 2004). It is necessary to give effect to all of the statutory language in construing a statute so that no portion is rendered meaningless or superfluous. *Davis v. Department of Licensing*, 137 Wn.2d 957, 963 (1999).

Prior to the revision of RCW 51.52.050(2), benefits ordered by the Department were not due until the conclusion of litigation before the Board. The language of RCW 51.52.050(2)(b) now states: "An order by the Department awarding benefits shall become effective and benefits due on the date issued. Subject to (b)(i) and (ii) of this subsection, if the Department order is appealed, the order shall not be stayed pending a final decision on the merits unless ordered by the Board." The Motion for Stay of Benefits must be filed within 15 days and the Board is

required to expedite this review and issue a final decision within 25 days of the filing of the motion or the order granting appeal. *Id.* The Department asserts that benefits must be paid within 14 calendar days to avoid a penalty delay regardless of whether any appeals and motion for stay had been filed. The Department further asserts that if granted, any stay of benefits would only apply to prospective benefits. This is inconsistent with the legislative intent and canons of statutory construction. Liberal construction of the statute is inapplicable if doing so would result in a strained or unrealistic interpretation of the statutory language. *Dep't of Labor & Indus. Of Washington v. Blanca Ortiz & Universal Frozen Foods,* 194 Wash. App. 146, 150, 374 P.3d 258 (Wash. App. 2016).

If there is more than one reasonable interpretation of a statute, it is considered ambiguous. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). In the event that a statute is considered ambiguous, the Court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent. *City of Seattle v. Winebrenner*, 167 Wn.2d 451 (2009). When using the rules of statutory construction, the Court is to determine legislative intent and interpret the statutory provisions in such a way as to carry out that intent. *Jametsky v. Olsen*, 179 Wn.2d 756 (2014).

The legislative history of RCW 51.52.050(2)(b) is clear that this provision was designed to provide an expedited review so that claimants weren't waiting through a long litigation in order to receive their benefits. CP at 24. However, in order for this to be truly fair, an expedited stay of benefits can be issued in order to not shift the financial burden immediately to the employer. As it is not fundamentally "fair" for the claimant to not receive benefits pending the full litigation on the merits, the legislative history demonstrates that they are intending to make this an option for the employer to get relief as well. In the testimony before the Senate regarding

this Bill, the Legislative Director for the Joint Council of Teamsters No. 28 stated, "after an order by the Department to pay benefits, E2SHouse Bill 3139 would require self-insurers to either pay those benefits *or* request the Board for an expedited review to stay benefits pending a final decision in the case." (*emphasis added*) CP at 24. This language could not make the legislative intent more clear, self-insured employers have the option of paying immediately or requesting an expedited review to stay benefits. In this case, Employer requested the expedited review and immediately upon the resolution of that expedited review paid the benefits due to Ellerbroek.

The respondent would like this statute to omit the language "on the merits" because the crux of their arguments is that these orders shall not be stayed pending a decision of the Board. Respondent must not ignore language because it is inconvenient to them. In addition, they cannot read in the statute language that says "it shall not be stayed pending a decision on the Motion for the Stay of Benefits."

The Employer asks this Court to find that the trial court's interpretation of RCW 51.52.050(2)(b) is incorrect regarding Employer's obligation to pay benefits pending a decision by the Board on its Motion for Stay of Benefits. Employer further asks this Court to interpret RCW 51.52.050(2)(b) to require payment of benefits immediately unless a timely appeal and Motion for a Stay of Benefits is filed.

B. THIS COURT SHOULD FIND THAT THERE WAS GENUINE LEGAL DOUBT AS TO WHETHER CHS INC. OWED PAYMENT OF BENEFITS AND THEREFORE ISSUANCE OF A PENALTY WAS INAPPROPRIATE

Board decisions are not controlling on this Court, but they provide guidance for determining when penalty assessments are appropriate. *Taylor*, 119 Wn. at 924. It is well established that "unreasonable delay" turns on whether the Employer possessed a genuine doubt from a legal or medical standpoint as to whether it was liable for benefits. *Id.* at 926.

By the fact that the Board, which regularly decides whether penalties have been appropriately assessed, found in favor of Employer supports Employer's position that it had genuine legal doubt regarding its obligations. It must be noted that at the time the penalty was assessed, there was no controlling case law from any court or the Board itself concerning an employer's obligation to pay benefits after appealing a Department order and filing a Motion for a Stay of Benefits. Additionally, the Department had only issued WAC 296-15-266, upon which it relies to consider Employer's payments unreasonably delayed, on January 21, 2015, less than two weeks before the February 2, 2015, order. These factors show that at the time the penalty was issued, this area of the law was still in flux and it was reasonable for the Employer to have a genuine doubt regarding its obligation to pay benefits while its Motion for a Stay of Benefits was pending before the Board.

Further, this doubt discussed above was increased purely as the result of the Department's own actions in holding its February 24, 2015, decision in abeyance until May 6, 2015. Further, the Board stated in a significant decision *In Re Madrid*, "We accept the proposition ... that generally a failure to pay because of a good faith belief that no payment is due will not warrant a penalty." BIIA Decision 86 0224-A (1987). Employer had a genuine doubt

that it had an obligation to pay Ellerbroek benefits as ordered on February 2, 2015, because it first timely protested and then appealed and filed a Motion for a Stay of Benefits. In contrast, had Employer continued to refuse to pay benefits during the entirety of the appeal litigation, this reasoning would be sound and consistent with RCW 51.52.050(2)(b). Employer has never asserted that it should not pay benefits during the entire appeal period and the Board correctly acknowledged this interpretation of Employer's position.

Regardless of this Court's interpretation of RCW 51.52.050(2)(b), it is clear that at the time the penalty was assessed, there was legal ambiguity which created genuine doubt that Employer was obligated to pay benefits. For this and the reasons expressed above, Employer asks this Court to reverse the trial court's decision and find that Employer had a genuine legal doubt as to whether it was liable for benefits while its timely filed Motion for Stay of Benefits was being considered. Therefore, any delay in payment was reasonable for purposes of RCW 51.48.017.

C. THIS COURT SHOULD FIND ELLERBROEK WAS EQUITABLY ESTOPPED FROM REQUESTING A PENALTY BE ASSESSED AGAINST EMPLOYER.

A party may be equitably estopped from raising a claim when it is proved: 1) an admission, statement, or act inconsistent with a claim afterwards asserted; 2) action by another in reasonable reliance on that act, statement, or admission; and 3) injury to the party who relied on said act, statement, or admission if the Court allows the first party to contradict or repudiate the prior act, statement, or admission. *Peterson v. Groves*, 111 Wash. App. 306, 44 P.3d 894, 896 (2002). Where a party knows what is occurring and would be expected to speak, if he wished to protect his interest, his acquiescence manifests his tacit consent. *Board of Regents of University*

of Washington v. City of Seattle, 108 Wn.2d 545, 554, 741 P.2d 11 (Wash.1987). An estoppel may arise from silence or inaction as well as from words or actions. *Id.* at 553-54.

In the present case, it was the actions of Ellerbroek that gave rise to the penalty at issue on this appeal. There is no dispute among the parties that counsel for Employer left a voice mail message for Jerry Hertel, attorney for Ellerbroek, indicating that an appeal and Motion for a Stay of Benefits had been filed with the Board. 2/4/16 Hearing Testimony at 4-5. Employer's counsel further stated that in the event the Board granted review but denied the Motion for a Stay of Benefits, the time loss check was ready to be sent and that he should contact counsel for the employer if there were any concerns about this approach. *Id.* Ellerbroek's attorney did not return the Employer's counsel's telephone call until April 30, 2015. *Id.*

There can be no dispute that Ellerbroek's counsel's failure to contact Employer's counsel constituted Ellerbroek's acquiescence to the Employer withholding benefit payments pending review by the Board. Further, Employer relied on this acquiescence in withholding payment. Instead of requesting Employer pay benefits immediately, which it was willing to do, on March 23, 2015, Ellerbroek instead requested the Department assess a penalty against the Employer. The result was Ellerbroek's counsel knowingly injuring Employer by requesting a penalty be assessed rather than asking for the time loss to be paid.

This Court should find Ellerbroek was equitably estopped from requesting the Department assess a penalty against the Employer. Any other conclusion would result in Ellerbroek being allowed to reap a windfall, in the form of the penalty, by allowing Employer to believe he had acquiesced to Employer withholding benefits pending appeal.

D. THE ATTORNEY'S FEES AWARD GRANTED TO PLAINTIFF WAS UNREASONABLE AND SHOULD BE REVERSED

The attorney fees awarded to Ellerbroek were unreasonable. While Employer does not dispute that by reinstating the penalty, despite the flawed analysis discussed in detail above, Ellerbroek was successful in his appeal and reasonable fees should be awarded. However, the amount of fees awarded to Ellerbroek are unreasonable both for the number of hours claimed by Ellerbroek's counsel and for the lodestar multiplier awarded by the Court.

Attorney fee awards are reviewed for an abuse of discretion by the trial court. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993).To determine the reasonable fee, the Court should begin with a calculation of the lodestar which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Berryman v. Metcalf*, 177 Wn.App. 644, 656-57, 312 P.3d 745 (2013). The Court must also segregate and "discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." *Bowers v. Transamerica Title Ins. Co.,* 100 Wn.2d 581, 597, 675 P.2d 193 (1983). The lodestar is then adjusted up or down to reflect factors which have not already been taken into account in computing the "lodestar" and which are shown to warrant the adjustment by the party proposing it. *Id.* In other words, there is not an automatic adjustment if the contingent nature of success or the quality of legal representation have already been taken into consideration in computing the original lodestar. *Id.*

The relationship of the amount of the fees requested to the amount of damages in dispute is a vital consideration when assessing the reasonableness of a fee request. This is particularly true where a fee awarded "grossly exceeds" the amount in controversy. *Public Utils. Dist. No. 1 v. Crea*, 88 Wn. App. 390, 397, 945 P.2d 722 (1997), citing *Scott Fetzer Co.*, 122 Wn.2d at 150.

As an initial matter, Employer does not challenge the hourly rate claimed by Ellerbroek's counsel. It is customary that attorneys who work on a contingency basis to charge a premium to compensate for the risk that litigation may be ultimately unsuccessful. *See Bowers*, 100 Wn.2d at 598. This premium hourly rate adequately accounts for the uncertain nature of contingent work.

The first issue with Ellerbroek's fee request was excessive number of hours Ellerbroek's counsel claims to have put in to only the penalty portion of the case. The affidavit submitted by Ellerbroek's counsel and generally accepted by Judge Fennessy contain a number of excessive entries. CP 52, 61. Additionally, Ellerbroek's counsel admitted in his reply to commingling time entries for the time loss and penalty portions of this case. CP 59. These entries include:

- *October 6, 2016 – prepared jury demand and affidavit of mailing – 0.5* (in the appeal of the penalty there was a bench trial);
- *May 9, 2017 – Researched, prepared & submitted Plaintiff's proposed instructions to the jury – 5.0* (setting aside the issue of block billing, this again is unrelated to this appeal as this issue was tried to the Court);
- *June 16, 2017 – Met with attorneys to clean up the record prior to trial – 3.0* (this entry relates to the time loss appeal rather than the penalty issue);
- *February 7, 2018 – Review transcripts with the parties; note objections; note lines to be stricken during trial – 4.0* (this entry demonstrates the commingling of time entries by Ellerbroek's counsel to inflate his fee award);
- *February 8, 2018 – Review transcripts with the parties; note objections; note lines to be stricken during trial – 2.0* (same as above);
- *February 8, 2018 – Prepared agreed motion for order continuing trial date – 1.0* (this related to the time loss matter, not the penalty issue); and

- *February 9, 2018 – Travel to and from courthouse to present agreed order continuing trial date to Judge Fennessy – 1.0* (again related to time loss matter, not the penalty issue);

CP 52. The time entries for February 8, 2018, and February 9, 2018, relating to reviewing transcripts were withdrawn by Ellerbroek's counsel as unrelated to the penalty portion of the case. CP 59. In total, Ellerbroek's counsel sought fees for 10.5 hours of time that was unrelated to the penalty issue.[1] This represents 17.5% of the total requested fee by Ellerbroek.

The second issue with Ellerbroek's fee request is the entry of June 5, 2017, for 20.0 hours described as: Researched and prepared Plaintiff's Supplemental Reply to Department's CR 50 Motion and Affidavit of Mailing. CR 52. While this is fully one-third of the total time Ellerbroek's counsel claims to have spent on the penalty issue, it is duplicative of the Department's filing. CP 23, 26. For example, Ellerbroek simply relies on the fact section of the Department's motion for his Supplemental Reply. CP 26. Further, the ultimate conclusion of the nine-page filing is the statute is unambiguous, surely a lawyer with 39 years of experience does not need 20 hours to come to that conclusion. CP 26, 52. Finally, in regards to this entry, applying the simple lodestar to this entry alone results in a fee of $7,000.00 without adjustment. That is more than double the amount in controversy in the penalty matter. As such, this entry alone is excessive and should have been reduced by the trial court.

Third, it should be noted from Ellerbroek's counsel's affidavit that each and every letter he received took 0.25 hours to read. Some of these letters consisted of less than ten lines. As

[1] This calculation does not include time withdrawn from Ellerbroek's initial fee request for February 8, 2018, and February 9, 2018.

such, it seems improbable that it actually took counsel this long to read said correspondence and therefore these entries should have been stricken as inaccurate.

Fourth, this Court should note that the entire penalty issue arises from Ellerbroek's counsel's inability to answer his telephone or return a voice mail. Employer was ready to pay benefits to Ellerbroek when the March 5, 2015, appeal was filed. 2/4/16 Hearing Testimony at 83. Employer's counsel attempted to contact Ellerbroek's counsel regarding the Employer's decision to withhold payment pending the Board's decision regarding Employer's Motion for a Stay of Benefits. *Id.* Had Ellerbroek's counsel answered his telephone or returned his phone messages in a timely manner, Employer would have promptly remitted payment to Ellerbroek. *Id.* Consequently, the delay and expense of litigating the penalty issue can be placed squarely on Ellerbroek's counsel.

The final issue in regards to the attorney's fees granted to Ellerbroek is the multiplier. A trial court abuses its discretion when it takes irrelevant factors into account in considering an adjustment to the lodestar amount. *Chuong van Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 976, 984 (Wash. 2007).

In this case, Judge Fennessy determined that a multiplier was appropriate because of Employer's counsel being a zealous advocate for his client. Judge Fennessy's letter opinion stated his reasoning as:

> In this circumstance, counsel for CHS Inc. continues to zealously advocate for his client by recommending inclusion of several Findings of Fact that suggest this representation is likely to continue. Such zeal provides some insight to the trial judge in confirmation of the need for Mr. Hertel to be extraordinarily complete in his analysis, evaluation, and representation in this case. In light of that insight, I believe a "lodestar" is appropriate and applied a small multiplier of 1.2 in arriving at $22,596.00 in fees reflected in the Court's Order and Judgment Summary.

CP 61. In *Bowers*, the Court laid out 12 factors to consider in determining whether a multiplier was appropriate, and zealous advocacy by opposing counsel is not among them. 100 Wn.2d at 599. Thus, the trial court abused its discretion by resting its multiplier decision on an irrelevant factor.

The attorney fee award grossly exceeds the amount that was in controversy in this appeal. In fact, it is over seven times greater than the penalty even after the reductions made by Judge Fennessy. It is for this reason, and for the other reasons set forth above, the trial court abused its discretion and the attorney fee award granted to Ellerbroek should be reversed.

CONCLUSION

The employer asks this Court to REVERSE the Order of Judge Fennessy dated December 17, 2018.

APPENDIX

Revised Code of Washington 51.52.050

Service of departmental action—Demand for repayment—Orders amending benefits—Reconsideration or appeal.

(1) Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, or if the worker, beneficiary, employer, or other person affected thereby chooses, the department may send correspondence and other legal notices by secure electronic means except for orders communicating the closure of a claim. Persons who choose to receive correspondence and other legal notices electronically shall be provided information to assist them in ensuring all electronic documents and communications are received. Correspondence and notices must be addressed to such a person at his or her last known postal or electronic address as shown by the records of the department. Correspondence and notices sent electronically are considered received on the date sent by the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia. However, a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

(2)(a) Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.

(b) An order by the department awarding benefits shall become effective and benefits due on the date issued. Subject to (b)(i) and (ii) of this subsection, if the department order is appealed the order shall not be stayed pending a final decision on the merits unless ordered by the board. Upon issuance of the order granting the appeal, the board will provide the worker with notice concerning the potential of an overpayment of benefits paid pending the outcome of the appeal and the requirements for interest on unpaid benefits pursuant to RCW 51.52.135. A worker may

request that benefits cease pending appeal at any time following the employer's motion for stay or the board's order granting appeal. The request must be submitted in writing to the employer, the board, and the department. Any employer may move for a stay of the order on appeal, in whole or in part. The motion must be filed within fifteen days of the order granting appeal. The board shall conduct an expedited review of the claim file provided by the department as it existed on the date of the department order. The board shall issue a final decision within twenty-five days of the filing of the motion for stay or the order granting appeal, whichever is later. The board's final decision may be appealed to superior court in accordance with RCW 51.52.110. The board shall grant a motion to stay if the moving party demonstrates that it is more likely than not to prevail on the facts as they existed at the time of the order on appeal. The board shall not consider the likelihood of recoupment of benefits as a basis to grant or deny a motion to stay. If a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW 51.32.240.

(i) If upon reconsideration requested by a worker or medical provider, the department has ordered an increase in a permanent partial disability award from the amount reflected in an earlier order, the award reflected in the earlier order shall not be stayed pending a final decision on the merits. However, the increase is stayed without further action by the board pending a final decision on the merits.

(ii) If any party appeals an order establishing a worker's wages or the compensation rate at which a worker will be paid temporary or permanent total disability or loss of earning power benefits, the worker shall receive payment pending a final decision on the merits based on the following:

(A) When the employer is self-insured, the wage calculation or compensation rate the employer most recently submitted to the department; or

(B) When the employer is insured through the state fund, the highest wage amount or compensation rate uncontested by the parties.

Payment of benefits or consideration of wages at a rate that is higher than that specified in (b)(ii)(A) or (B) of this subsection is stayed without further action by the board pending a final decision on the merits.

(c) In an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

2011 c 290 § 9.

CERTIFICATE OF MAILING

I hereby certify that I caused to be served the foregoing **Appellant's Brief** on the following individuals on May 23, 2019, by mailing to said individuals true copies thereof, certified by me as such, contained in sealed envelopes, with postage prepaid, addressed to said individuals at their last known addresses to wit:

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And deposited in the post office at Beaverton, Oregon, on said date.

I further certify that I filed the original of the foregoing with:

Renee S. Townsley, Clerk/Administrator
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by e-filing it on: May 23, 2019.

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