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NO. 36567-1-III

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

JEREMY L. MATSON,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES.....2

III. STATEMENT OF FACTS.....2

 A. Overview of Applicable Workers’ Compensation Standards.....2

 B. Matson Timely Protested an Earlier Wage Order But Did Not Protest or Appeal the May 2012 Wage Order Within 60 Days3

 C. Matson’s Doctors Sent Treatment Notes to the Department in June 2012 That Did Not Mention Matson’s Wages or the May 2012 Wage Order.....5

 D. The Board and Superior Court Affirmed the Department’s Decision That the May 2012 Order Was Final and Binding.....6

IV. STANDARD OF REVIEW.....7

V. ARGUMENT8

 A. The May 2012 Wage Order Became Final and Binding When Matson Did Not Appeal Within 60 Days9

 1. Under *Marley*, an unappealed wage order is res judicata even if it contains a clear legal error9

 2. The doctors’ passing statements about Matson’s work status and history 13 months after the injury were not inconsistent with the wage order11

 3. The doctors were not aggrieved by the wage order and so could not protest it.....14

B. The May 2012 Wage Order Provided a Factual Basis for the Department’s Decision So It Is Not Vague and Res Judicata Applies	15
C. Matson Is Not Entitled to the Extraordinary Remedy of Equitable Relief	24
VI. CONCLUSION	26

TABLE OF AUTHORITIES

Cases

<i>Boguch v. Landover Corp.</i> , 153 Wn. App. 595, 224 P.3d 795 (2009).....	8
<i>Boyd v. City of Olympia</i> , 1 Wn. App. 2d 17, 403 P.3d 956 (2017), <i>review denied</i> , 190 Wn.2d 1004 (2018).....	12, 15
<i>Chavez v. Dep’t of Labor & Indus.</i> , 129 Wn. App. 236, 118 P.3d 392 (2005).....	21
<i>City of Bellevue v. Raum</i> , 171 Wn. App. 124, 286 P.3d 695 (2012).....	25
<i>Dep’t of Labor & Indus. v. Shirley</i> , 171 Wn. App. 870, 288 P.3d 390 (2012).....	16, 17
<i>Ehman v. Dep’t of Labor & Indus.</i> , 33 Wn.2d 584, 206 P.2d 787 (1949).....	25
<i>Groff v. Dep’t of Labor & Indus.</i> , 65 Wn.2d 35, 395 P.2d 633 (1964).....	23
<i>Harris v. Dep’t of Labor & Indus.</i> , 120 Wn.2d 461, 843 P.2d 1056 (1993).....	25
<i>Hastings v. Dep’t of Labor & Indus.</i> , 24 Wn.2d 1, 163 P.2d 142 (1945).....	25
<i>Hemenway v. Miller</i> , 116 Wn.2d 725, 807 P.2d 863 (1991).....	23
<i>In re Joanne Tolonen</i> , No. 02 18722, 2003 WL 23201546 (Wash. Bd. Indus. Ins. Appeals Oct. 20, 2003)	16

<i>In re Randy Jundul</i> , No. 98 21118, 1999 WL 1446257 (Wash. Bd. Indus. Ins. Appeals Dec. 28, 1999).....	14
<i>Kingery v. Dep't of Labor & Indus.</i> , 132 Wn.2d 162, 937 P.2d 565 (1997).....	10, 11, 14, 25
<i>Lynn v. Dep't of Labor & Indus.</i> , 130 Wn. App. 829, 125 P.3d 202 (2005).....	20, 21
<i>Malang v. Dep't of Labor & Indus.</i> , 139 Wn. App. 677, 162 P.3d 450 (2007).....	7
<i>Marley v. Dep't of Labor & Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994).....	passim
<i>Pearson v. Dep't of Labor & Indus.</i> , 164 Wn. App. 426, 262 P.3d 837 (2011).....	24
<i>Pederson v. Potter</i> , 103 Wn. App. 62, 11 P.3d 833 (2000).....	9
<i>Rodriguez v. Dep't of Labor & Indus.</i> , 85 Wn.2d 949, 540 P.2d 1359 (1975).....	26
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	7
<i>Romo v. Dep't of Labor & Indus.</i> , 92 Wn. App. 348, 962 P.2d 844 (1998).....	7
<i>Singletery v. Manor Healthcare Corp.</i> , 166 Wn. App. 774, 271 P.3d 356 (2012).....	10
<i>Somsak v. Criton Technologies/Heath Tecna, Inc.</i> , 113 Wn. App. 84, 52 P.3d 43 (2002).....	16, 17
<i>Spokane Research & Def. Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	9

<i>Vanhess v. Dep't of Labor & Indus.</i> , 132 Wn. App. 304, 130 P.3d 902 (2006).....	20
<i>Walsh v. Wolff</i> , 32 Wn.2d 285, 201 P.2d 215 (1949).....	9
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	8

Statutes

RCW 34.05.030(2)(c)	7
RCW Title 51	26
RCW 51.08.178	3, 15
RCW 51.08.178(1).....	3, 13, 15, 23
RCW 51.32.010	2
RCW 51.32.060	3, 4
RCW 51.32.090	2, 3, 4
RCW 51.52.050	3, 9
RCW 51.52.050(1).....	4, 9, 10, 25
RCW 51.52.050(2)(a)	14
RCW 51.52.060	3, 10
RCW 51.52.140	7

Rules

CR 56(c).....	8
CR 56(e).....	8

Regulations

WAC 296-14-522..... 17

I. INTRODUCTION

A party cannot escape an administrative order's finality with a late appeal. Jeremy Matson waited over three years after his May 2012 wage order became final and binding before he protested it. As a party has 60 days to protest or appeal an order, the superior court correctly applied res judicata to conclude that the wage order was final and binding.

The Department of Labor and Industries received no information within 60 days of the wage order to notify it that the wage order was incorrect. The two treatment notes Matson now relies on to argue there was a timely protest do not mention his employment status at the time of the injury, his wages, or the wage order, and they do not argue that Matson's wages should not be calculated based Matson's commissions. The treatment notes are not protests to the wage order.

Matson now raises factual and legal challenges to the May 2012 wage order, but res judicata applies finality to an order even if it contains factual or legal errors. The wage order provides a factual basis for the Department's determination of wages. Matson could have protested it if he disagreed with it, and he is therefore wrong that the order is vague or that its finality is fundamentally unfair. Matson, like all parties in workers' compensation appeals, must appeal within 60 days if he disagrees with a

decision of the Department. He did not. As a result, the superior court correctly applied res judicata principles and this Court should affirm.

II. ISSUES

1. Did the trial court correctly find that the May 7, 2012 wage order is final and binding when the Department had jurisdiction to issue the order and when Matson did not timely appeal within the 60 days required by statute?
2. Did Dr. Rempel's and Dr. Long's treatment notes put the Department on notice that they sought action inconsistent with the May 7, 2012 wage order when those treatment records regarded a lower back examination and did not mention the Department's wage order, the worker's wages, or the worker's employment status at the time of injury?
3. Does a wage order that informs the worker of their total monthly wage amounts and that is based on their commission earnings provide a worker with reasonable notice that the Department calculated the worker's wages based only on the worker's receipt of commissions, such that res judicata applies?

III. STATEMENT OF FACTS

A. Overview of Applicable Workers' Compensation Standards

Workers receive industrial insurance benefits when they are injured on the job. RCW 51.32.010. Workers who are unable to work due to an injury are eligible to receive wage replacement benefits, such as time-loss compensation, which is awarded to workers who have temporary total disability. RCW 51.32.090. The Department determines the wages the worker was earning at the time of an injury to calculate wage

replacement benefits. RCW 51.08.178. The worker’s “wages” include cash wages, health care benefits, and the reasonable the value of board, housing, fuel, or other consideration paid to the worker as part of the contract of hire. RCW 51.08.178(1).

The Department issues an order that sets a worker’s wage rate. RCW 51.52.050 requires an order to communicate the decision it reflects and to give clear notice that the order “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... or an appeal is filed with the Board of Industrial Insurance Appeals.” A party may protest or appeal a Department order within 60 days. RCW 51.52.050, .060.

B. Matson Timely Protested an Earlier Wage Order But Did Not Protest or Appeal the May 2012 Wage Order Within 60 Days

In May 2011, Matson was injured at work and the Department allowed his workers’ compensation claim. AR 58, 63. The Department issued a wage order in September 2011 setting his total monthly wages at \$955.15.¹ AR 59, 63. The wage order explained that it would become “final” if there was no protest to the Department or appeal to the Board of

¹ By establishing the worker’s wages at the time of injury, a wage order determines the worker’s time-loss compensation rate. *See* RCW 51.32.090; RCW 51.32.060.

Industrial Insurance Appeals within 60 days as RCW 51.52.050(1) requires. AR 68-69; RCW 51.52.050(1).

Matson timely protested the September 2011 wage order. AR 59, 64. The Department reconsidered the order and issued a new wage order on May 7, 2012. AR 59, 64. This new order set Matson's gross monthly wages at \$776.29. AR 59, 64. The order listed a series of facts to explain the basis for the Department's determination. AR 82. It stated that he earned total monthly wages of \$776.29, based on him earning \$776.29 in commissions per month but earning no health care benefits, tips, bonuses, overtime, housing, board, or fuel. AR 82. It also stated that he was single with one dependent. AR 82.²

The May 2012 wage order also included notice of the 60-day window for appeal, the consequences of failing to do so, and specified it would issue a new order if the order was protested:

This order becomes final 60 days from the date it is communicated to you unless you do one of the following: file a written request for reconsideration with the Department or file a written appeal with the Board of Industrial Insurance Appeals. If you file for reconsideration, you should include the reasons you believe this decision is wrong and send it to [the Department] We will review your request and issue a new order.

² A worker receives more benefits if the worker is married or has children. RCW 51.52.060, .090.

AR 82. Along with the wage order, the Department sent Matson a letter on May 7, 2012, asking him to review carefully the new wage order and to protest within 60 days if he disagreed with any of its contents. AR 64, 85. Matson did not protest or appeal the May 2012 order.

C. Matson’s Doctors Sent Treatment Notes to the Department in June 2012 That Did Not Mention Matson’s Wages or the May 2012 Wage Order

Matson saw John Long, MD on June 4, 2012 and Terrence Rempel, MD on June 8, 2012. AR 87-94. Both doctors sent treatment notes for these visits to the Department that summarized their examination of Matson’s low back. AR 87-94. Neither treatment note mentioned Matson’s wages at the time of the injury or his wages at any other time. Neither mentioned the Department’s May 2012 wage order. AR 87-94.

The treatment notes contained information about Matson’s occupational history. AR 87-94. In the “history of present illness” section of his treatment note, Dr. Long stated that Matson “is working full time” and “is working full time doing carpet cleaning and running a carpet business and he also I believe, has another job.” AR 87. In the background section of that note, Dr. Long wrote: “Patient’s occupation: Carpet cleaning/catering. Hours worked per week: 40+.” AR 88.

In the occupational history section of his note, Dr. Rempel stated: “The patient is self-employed with a carpet cleaning service. Job of injury:

Carpet cleaning and window cleaning.” AR 93. For his treatment plan, Dr. Rempel noted “1. Return to Work: The patient working on a full-time basis without restrictions.” AR 94.

Neither doctor commented on Matson’s wage status at the time of the injury, which occurred 13 months before the chart notes.

In 2013, the Department closed Matson’s claim. AR 65. Matson did not protest or appeal this order, which also became final and binding. *See* AR 59-60. Matson’s claim remained closed for two years before he applied to reopen the claim. AR 59-60.

D. The Board and Superior Court Affirmed the Department’s Decision That the May 2012 Order Was Final and Binding

In July 2015, the Department reopened Matson’s claim at his request. AR 59-60. After reopening, Matson asked the Department to reconsider the May 2012 wage order. AR 59, 60, 65. The Department issued an order denying this request, which stated that the unprotested May 2012 order was final. AR 59, 60, 65.

Matson appealed the December 2016 order to the Board. AR 60. He argued that Dr. Long’s and Dr. Rempel’s treatment notes constituted protests to the May 2012 wage order. AR 480. The hearings judge rejected this argument:

Neither report mentions the May 7, 2012 order, by date or otherwise. Neither report mentions “wages.” Neither report

asked for “anything inconsistent” with the May 7, 2012 order. Both reports were based on examinations conducted 13 months after the injury. The fact Mr. Matson was then working full-time would have no bearing on what his monthly wage was at the time of the May 5, 2011 injury.

AR 17. The full Board rejected the worker’s petition for review and adopted the judge’s proposed decision as its final decision. AR 4.

Matson appealed to superior court. CP 1-3. The Department moved for summary judgment. CP 36-48, 70. The superior court granted the Department’s motion, finding the May 2012 wage order was legally valid, Matson failed to enter a timely protest, and thus the issues contained in the order were binding on appeal. CP 71-76. Matson appeals. CP 77.

IV. STANDARD OF REVIEW

In workers’ compensation cases, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep’t of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). The appellate court reviews the trial court’s decision, not the Board’s decision. *See Rogers v. Dep’t of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The APA does not apply to court appeals from Board decisions. RCW 34.05.030(2)(c); *Rogers*, 151 Wn. App. at 180.

On review of a summary judgment order, an appellate court’s inquiry is the same as the superior court’s. *Romo v. Dep’t of Labor & Indus.*, 92 Wn. App. 348, 354, 962 P.2d 844 (1998). Summary judgment is

appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). The moving party bears an initial burden of demonstrating that no genuine issue of material fact exists. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.* at 226. Once a party seeking summary judgment has made an initial showing that no genuine issues of material fact exist, the nonmoving party must set forth specific facts that, if proved, would establish his or her right to prevail on the merits. *Id.* at 225; CR 56(e). The moving party is entitled to a summary judgment if the opposing party fails to provide proof concerning an essential element of the opposing party’s claim. *Young*, 112 Wn.2d at 225. Speculation and conclusory allegations are insufficient to avoid a summary judgment. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009); CR 56(e).

V. ARGUMENT

The Department’s May 2012 wage order is final and Matson fails to show otherwise. None of Matson’s challenges to the wage rate order show that he is entitled to escape the order’s finality. Maintaining finality

of an order reflects important public policies in Washington. The Legislature directed that an unappealed order is final if not appealed. RCW 51.52.050. Res judicata is a doctrine long applied in the workers' compensation context. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-38, 886 P.2d 189 (1994). It serves an important role in ensuring finality of decisions to benefit workers, employers, and the Department. Finality of decisions avoids piecemeal litigation and provides repose so that matters need not be relitigated. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005); *Pederson v. Potter*, 103 Wn. App. 62, 71, 11 P.3d 833 (2000). "It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings." *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949).

A. The May 2012 Wage Order Became Final and Binding When Matson Did Not Appeal Within 60 Days

1. Under *Marley*, an unappealed wage order is res judicata even if it contains a clear legal error

Under RCW 51.52.050(1), Matson had 60 days to protest or appeal the May 2012 wage order. He did not. It was not until the Department reopened his claim, over three years later, that he protested the wage order as incorrect. But an order is final and binding after 60 days under the Industrial Insurance Act if there is no protest or appeal. RCW 51.52.050,

.060. Absent a written request to the Department for reconsideration or an appeal to the Board, any such order “*shall* become final within sixty days from the date the order is communicated to the parties.” RCW 51.52.050(1) (emphasis added).

A final Department order is res judicata as to the contents of the order. *Marley*, 125 Wn.2d at 537-38. Res judicata prohibits relitigating claims that could have been litigated in a prior action. *Id.* This doctrine “applies to a final judgment by the Department as it would to an unappealed order of a trial court.” *Id.* An unappealed Department order is therefore “res judicata as to the issues encompassed within the terms of the order, absent fraud in [its] entry.” *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997).

These finality principles apply even if the unappealed order contains an error. “The failure to appeal an order, *even one containing a clear error of law*, turns the order into a final adjudication, precluding any reargument of the same claim.” *Marley*, 125 Wn.2d at 538 (emphasis added); see *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 782, 271 P.3d 356 (2012). Department orders, even when erroneous, are “void only when the Department lacks personal or subject matter jurisdiction.” *Marley*, 125 Wn.2d at 542. A final order is therefore binding on the courts when the Department had authority and jurisdiction to render

that order and afforded the aggrieved party adequate notice. *Id.* at 538; *Kingery*, 132 Wn.2d at 173.

Res judicata bars Matson's late challenge to the May 2012 wage order. He concedes that he did not personally protest or appeal the order. AB 6. And he does not assert that the Department lacked personal or subject matter jurisdiction to issue the wage order.³ As discussed below in section V.C. of this response, the order gave notice of how the wages were set.

2. The doctors' passing statements about Matson's work status and history 13 months after the injury were not inconsistent with the wage order

Conceding that he did not "personally protest" (AB 6) the wage order, Matson seizes on passing statements about his work status and history in two treatment notes to assert that his doctors protested his wage calculation. They did not. The treatment notes did not reasonably put the Department on notice that the doctors disputed the use of commissions as a basis for Matson's income at the time of his work injury.

Not every statement about a worker's work status or history is a protest to a wage order. To be a protest, a communication "must

³ The Department has broad subject matter jurisdiction over workers' compensation claims, and it has personal jurisdiction over Matson as a workers' compensation claimant. *See Marley*, 125 Wn.2d at 543. The wage order was therefore not void on jurisdictional grounds when entered and Matson makes no jurisdictional argument.

reasonably put the Department on notice that the worker is taking issue with some department decision.” *Boyd v. City of Olympia*, 1 Wn. App. 2d 17, 30, 403 P.3d 956 (2017), *review denied*, 190 Wn.2d 1004 (2018). This is an objective standard that does not rely on the sender’s intentions. *Id.* The court considers “the content of the communication itself and information relevant to it that was in the possession of the department employees or agents involved in handling the claim at the time of the communication.” *Id.* at 30-31. “The use of any specific words or terminology is not required in a protest.” *Id.*

Nothing in Dr. Long’s June 4 treatment note or in Dr. Rempel’s June 8 treatment note put the Department on notice that they disputed Matson’s wage determination. Neither refers to Matson’s wages or the May 2012 wage order. *See* AR 87-94. Neither mentions commissions and neither suggests that the Department should base Matson’s wages at the time of his injury on non-commission income. *See* AR 87-94. Though the notes make passing mention of Matson’s work history and status, the trial court accurately portrayed these treatment notes as “records of the two medical professionals [which] provide information relative to Matson’s medical condition, evaluation, planning, and course of treatment.” CP 75. These treatment notes did not reasonably put the Department on notice that either doctor took issue with the wage order.

Matson’s argument also fails to consider that the date of injury is the relevant date for setting a worker’s wages under the statute. His work status and income at the time he saw Dr. Long and Dr. Rempel, 13 months after the injury, is not relevant to setting his wages at the time of injury. Under RCW 51.08.178(1), “the monthly wages the worker was receiving from all employment *at the time of injury* shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned” (emphasis added).⁴ So Dr. Long’s note that Matson was “working full time” and may have had another job in June 2012—13 months after the injury—did not put the Department on notice that Matson had non-commission income as of his injury in May 2011 that should have been considered in setting his wages. *See* AR 87. The same is true of Dr. Long’s statements that Matson worked “40+” hours per week and that his occupation was “[c]arpet cleaning/catering,” as well as Dr. Rempel’s comments that Matson was self-employed with a job of injury of “carpet cleaning and window cleaning.” AR 88, 93.

Nothing in these doctors’ descriptions of Matson’s present work status in June 2012 or their bare descriptions of his job of injury is inconsistent with the Department’s decision to set his wages at the time of

⁴ The statute does not support setting Matson’s wages on any date besides the date of injury. RCW 51.08.178(1). Matson does not argue otherwise.

injury based on commissions. The trial court's conclusion that these treatment records were "not objectively, reasonably calculated to put the Department on notice that these professionals were requesting action on the May 2012 order" is correct. CP 75. This Court should therefore uphold the superior court's order granting summary judgment.⁵

3. The doctors were not aggrieved by the wage order and so could not protest it

Even if the doctors' notes could be considered inconsistent with the Department's wage order, neither doctor had standing to protest the wage order. The Legislature allows "the worker, beneficiary, employer, *or other person aggrieved*" to protest or appeal a Department action. RCW 51.52.050(2)(a) (emphasis added). So, under the statute, a medical provider must be "aggrieved" by a Department action to protest or appeal it. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (appeal only "[i]f aggrieved" by the Department order") (emphasis added).

Medical providers are not aggrieved by wage orders. Wage orders are used to set the amount of wage replacement or pension benefits a

⁵ An alternative basis for ruling in this case is found in *In re Randy Jundul*, No. 98 21118, 1999 WL 1446257, *2 (Wash. Bd. Indus. Ins. Appeals Dec. 28, 1999). In that case, there were unanswered protests and the Board ruled that the Department answered them in the closing order that was not appealed. Here the Department closed Matson's claim, thus ruling on any unanswered protests. Matson did not appeal that closing order, further supporting there was no protest of the incorporated wage determination.

worker will receive. This determination does not affect medical providers. Medical providers may be aggrieved by Department actions like denying payment for treating an injured worker, but they are not aggrieved by a determination about the amount of benefits a worker received. As Drs. Long and Rempel were not aggrieved by the May wage order, neither had standing to protest that order. Lastly, their status as treating physicians would not give the Department notice that they thought the order was incorrect, as medical providers do not have expertise regarding wage determinations. *Boyd*, 1 Wn. App. 2d at 31 (2017).

B. The May 2012 Wage Order Provided a Factual Basis for the Department's Decision So It Is Not Vague and Res Judicata Applies

To calibrate benefits to a worker's earning capacity, the Department calculates a worker's wages at the time the worker was injured. RCW 51.08.178. This calculation must consider any monthly wages the worker received, as well as the value of board, housing, fuel, or other consideration for the contracted service. *See* RCW 51.08.178(1). But this provision does not mandate the words a wage order must contain. *See* RCW 51.08.178(1). The Act therefore directs the underlying calculation but not the resulting order, a critical distinction. While the wage order did not detail every step of the calculation, it did give reasonable notice as to the issues it adjudicated.

The May 2012 wage order detailed several facts that explained why the Department calculated Matson's wages at the level that it did. Matson tries to escape finality by arguing that the wage order was vague so he could not understand it. AB 12. The order was not vague. It unambiguously informed Matson that the Department believed that his total monthly wages were \$776.29, based on him receiving commissions of \$776.29 but no other income. AR 82. If Matson believed that this was incorrect, he could have filed a protest from the wage order. He did not. Because he did not, res judicata precludes him from challenging the wage order now.

To have res judicata effect, a Department order must clearly apprise a worker of the factual basis for its decision. *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84, 92, 52 P.3d 43 (2002). The order gave proper notice of the issues contained, including the Department's understanding of Matson's monthly wage, marital status, and dependent status, along with consideration of any income in the form of healthcare benefits, board, housing, and fuel. *See In re Joanne Tolonen*, No. 02 18722, 2003 WL 23201546, *2 (Wash. Bd. Indus. Ins. Appeals Oct. 20, 2003); CP 76; AR 82.⁶

⁶ Contrary to Matson's assertion, courts may consider both the Board's significant and non-significant decisions as persuasive authority. *See, e.g., Dep't of Labor*

Moreover, the order here informed Matson that the Department believed that his total monthly wages were \$776.29 based on him receiving commissions of \$776.29, thus making it clear both that the Department calculated his wages based only on his receipt of commissions and that the Department believed that his commissions amounted to payments of \$776.29 a month. AR 82. Because commissions are a payment of cash from an employer to a worker for services performed, they are wages. *See* WAC 296-14-522. Since “the notice and letter informed Matson as to the basis for the calculation,” the superior court correctly determined that Matson “failed to timely appeal the wage order, thus it is res judicata.” CP 76; AR 82.

Matson misconstrues case law to support his late appeal. He argues that the facts of his case “are entirely consistent” with those in *Somsak*. AB 9. He misreads *Somsak*.

In *Somsak*, the worker timely appealed their wage order, unlike Matson. In that case, the Department issued a wage order that stated the factual basis (hourly rate of pay, hours of work per day, number of work days per week) for Somsak’s time-loss compensation, and the worker timely appealed that wage order. 113 Wn. App. at 89. Despite this timely

& Indus. v. Shirley, 171 Wn. App. 870, 888-91, 288 P.3d 390 (2012) (citing two non-significant decisions).

appeal, the employer argued that the worker could not challenge the wage order when she failed to appeal three previous orders that paid time-loss compensation but did not explain how this compensation rate was calculated. *Id.* at 92. The employer argued that even though the time-loss payment orders did not explain the basis for the time-loss calculation, those payment orders still prevented the worker from arguing that the time-loss calculation was wrong. *See id.* The Court rejected that argument, observing that the wage order was the “first time” the worker received notice of the factual basis for the wage determination, and held that the worker timely protested that order. *Id.* at 89, 93.

Here, *res judicata* applies to a wage order, not a time-loss payment order. This wage order specified the worker’s total monthly wages, marital status, and number of dependents, as *Somsak* requires for an order to have *res judicata* effect on the worker’s compensation rate. AR 82.

Furthermore, the order not only explains what the Department believed the worker’s total monthly wages were, but how the Department arrived at that total monthly wage calculation. AR 82.

Ignoring the information that the Department’s wage order provided to explain its calculation, Matson argues that the wage order does not “state that wages were earned according to fixed monthly earnings, express Matson’s hourly wage or days worked per month, and does not

“clearly advise” that it adjudicates his wage earning capacity. *See* AB 12-13. But Matson’s argument fails because the Department’s wage order unambiguously advised him that the Department calculated his total monthly wages at \$776.29 based on commissions of \$776.29 a month. AR 82. This made it plain that the Department did not believe Matson was receiving any wages other than those commissions at the time of his injury. Therefore, the order provided that he was not receiving hourly wages, a salary, or any other sort of income that would properly be included in his wages. If Matson thought that that was wrong—if he believed that he *was* receiving other types of wages that should be included in his wage order, or if he believed that the commissions were higher than what the Department’s order said they were—the order was clear it was incumbent on him to protest or appeal the wage order. AR 82. He did not do so.

Furthermore, because the Department determined that Matson’s wages came solely from commissions, it follows that the order would not specify an hourly wage, the numbers of hours worked, a daily wage, or the number of days worked. None of those considerations are applicable to a worker who is not earning an hourly wage. Matson’s argument that the order was vague because it did not include this information is wrong. AB 12-13. Those facts are relevant for a worker who earns an hourly wage,

not one whose earnings come from commissions. And the order effectively informed him that he was not receiving any wages

Indeed, Washington courts have consistently rejected claims that a wage order is not final and binding when it does not expressly address every conceivable form of wage. In *Vanhess v. Department of Labor & Industries*, the Department issued an order that advised the worker of the Department's understanding of the worker's total monthly wages at the time of injury. 132 Wn. App. 304, 307, 130 P.3d 902 (2006). This amount did not include health care benefits, though the order did not expressly say that the worker was *not* receiving health care benefits. *Id.* at 312. The worker argued that this meant that the order did not have res judicata effect with regard to health care benefits. *Id.* at 311-12. The *Vanhess* Court rejected this argument, concluding that "the claimant was not left to guess at how the Department reached the calculation," as the fact that the wage order did not include health care benefits "was readily understood from the explicit statement of what *was* included in the calculation." *Id.* at 312 (emphasis added).

The *Lynn* Court similarly concluded that a wage order stating the claimant's marital status, dependent status, and monthly wage gave enough notice to be entitled to res judicata effect, even though the order did not expressly comment on health care benefits. *Lynn v. Dep't of Labor*

& Indus., 130 Wn. App. 829, 838, 125 P.3d 202 (2005). *Lynn*, like *Vanhess*, rejected the appellant's reliance on *Somsak* for the proposition that the wage order needed to expressly comment on whether the worker was receiving health care benefits in order to be binding on that issue. *Lynn*, 130 Wn. App. at 838. When a final wage order did not expressly mention everything its calculations excluded, the court upheld its preclusive effect because "such was readily understood from the explicit statement of what *was* included." *Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 242, 118 P.3d 392 (2005). Precedent is clear: a worker who disagrees with a wage order must timely protest and that finality for failing to protest is not fundamentally unfair.

Here, unlike the worker in *Somsak*, and like the worker in *Vanhess*, *Lynn*, and *Chavez*, Matson did not protest or appeal the wage order that provided the factual basis for his wages. The order that Matson failed to appeal specifically stated the following facts as a basis for his wage determination:

- Matson's total gross monthly wages at the time of injury were \$776.29;
- Matson received no health care benefits, tips, bonuses, overtime, housing, board, or fuel;
- Matson received \$776.29 in commissions per month;
- Matson was single; and

- Matson had one child.

AR 82. The order thus provided at least as much information regarding Matson's wages at the time of injury as was provided by the orders in *Vanhess*, *Lynn*, and *Chavez*. If anything, the order provided more information than the orders in those cases did, as it not only apprised Matson of the Department's understanding of what his total monthly wages were, but also made it clear that the Department believed that the only wages he received were commissions.

As the superior court found, the May 2012 "notice and letter informed Matson as to the basis for the calculation." CP 76. The superior court, applying the correct standard, found the May 2012 wage order was "not so vague as to not have a res judicata and binding effect." This was especially true since it advised Matson as to the calculated wage rate from six income sources, including food, shelter, fuel, and health care, and considered his marital status and number of dependents in accordance with legal requirements. CP 73; AR 82. The Department's letter accompanying the May 2012 wage order was clear that the calculation was based on review of "the information in [Matson's] file," stating that the order "sets [Matson's] wages," and that those wages "are used in determining the rate of [Matson's] time-loss compensation benefits." AR 85. Lastly, both the

order and the letter gave clear notice that it was Matson's responsibility to file a written protest if he disagreed with the decision, to do so within 60 days, and that his failure to do so would render the decision final. AR 82, 85.⁷

Because the wage order is final, Matson can no longer assert that it contains a legal error. He argues that the May 2012 wage order "did not follow the statutory commands of RCW 51.08.178(1)." AB 5. He further argues that the wage order did not "communicate that the proper legal standard for determining an injured worker's wages entails consideration of a fair 'wage earning capacity.'" AB 6; *see also* AB 11. But when an order is final, a party can no longer argue that the order is legally erroneous. "The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim." *Marley*, 125 Wn.2d at 538. Matson's arguments that the Department applied the statute incorrectly and that it failed to apply the concept of "wage earning capacity" is untimely. These

⁷ Matson is also wrong that the trial court committed reversible error when it did not distinguish *Somsak* in its summary judgment order. *See* AB 20 (citing *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 40, 395 P.2d 633 (1964)). *Groff* addressed what a trial court should include in factual findings to ensure adequate appellate review. *See id.* But this case was decided on summary judgment, and findings of fact are inappropriate. *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991) ("findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court"). *Groff* does not support Matson's argument.

are challenges he had to raise by timely protesting or appealing the wage order.⁸

C. Matson Is Not Entitled to the Extraordinary Remedy of Equitable Relief

Equitable relief is not available to redress Matson's failure to timely appeal the May 2012 wage order. "The equitable exceptions that have been allowed by this state's courts are limited" and such exceptions have been found only when 1) the party was diligent in pursuing his or her rights and when 2) the party was incompetent or otherwise unable to understand a Department order or the appeals process, or where circumstances outside the party's control rendered it impossible to file a timely appeal. *See Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 443-44, 262 P.3d 837 (2011). Matson was not diligent in pursuing his rights, as he did not protest the wage order until two years after his claim closure. AR 59-60. Nor was Matson incompetent or otherwise unable to understand the Department order or appeals process, especially as he correctly and timely protested the prior September wage order. AR 59, 64. Unable to meet the applicable equity standards, Matson is not entitled to the relief he requests.

⁸ Matson seems to claim commission wages cannot form the basis of a wage rate order. *E.g.*, AB 16-17. This is not correct but more significantly this Court cannot reach the question because the case was decided on timeliness of the appeal.

Matson's reliance on liberal construction is misplaced. *See* AB 1, 17, 22. That doctrine does not apply here because there is no ambiguous statute to construe in this case. Liberal construction applies only to the construction of ambiguous statutes and does not apply to unambiguous terms. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993); *City of Bellevue v. Raum*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012). Liberal construction "does not apply to questions of fact but to matters concerning the construction of the statute." *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 13, 163 P.2d 142 (1945). Matson's arguments about the meaning of the protest and the contents of the Department orders are factual and not subject to liberal construction.

More significantly, the Industrial Insurance Act is unambiguous that it gives aggrieved parties 60 days to dispute Department actions. RCW 51.52.050(1). When a claimant fails to protest an order, it becomes final and binding on all tribunals and cannot be escaped on appeal. *Kingery*, 132 Wn.2d at 170. This finality applies even to an erroneous decision, provided the Department had the jurisdiction to make that decision in the first place. *Marley*, 125 Wn.2d at 542.

Applying these standards to the record on appeal, Matson is not entitled to relief from the May 2012 wage order. Matson could understand the contents of the wage order and the appellate process, especially as he timely appealed the earlier September wage order. *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 954, 540 P.2d 1359 (1975); CP 74; AR 59, 63. Matson shows no reason to disturb the finality of the order.

VI. CONCLUSION

Matson cannot evade his responsibility under RCW Title 51 to appeal the Department order that aggrieved him outside of the 60-day window set by statute. The May 7, 2012 wage order was a proper exercise of the Department's jurisdiction over Matson's claim for industrial insurance benefits under RCW Title 51, and is therefore final and binding before all tribunals. The order itself contained sufficient information to put Matson on notice as to the issues it decided, and his failure to dispute this order rendered it final. The treatment reports from Drs. Long and Rempel

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cannot fairly be considered protests to the wage order under any reading of the record.

RESPECTFULLY SUBMITTED this 2nd day of October, 2019.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "R. Gompertz", written over a horizontal line.

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

JEREMY LEE MATSON,

Appellant,

v.

CLEAN GREEN SPOKANE,

Respondent.

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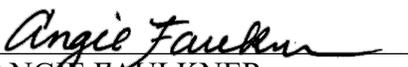
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DATED this 2nd day of October, 2019.


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