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62516-1

No. 62516-1-I

COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON

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DON M. HERRON,

APPELLANT,

V.

COMMUNITY TRANSIT,

RESPONDENT.

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RESPONDENT'S BRIEF OF  
COMMUNITY TRANSIT

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COURT OF APPEALS  
STATE OF WASHINGTON  
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## I. INTRODUCTION

Community Transit (“employer”) submits this brief in response to claimant's counsel's second Opening Brief filed July 24, 2009.<sup>1</sup>

## II. ANSWERS TO ASSIGNMENTS OF ERROR

A. Answer to First Assignment of Error. Superior Court Judge Bowden reviewed the complete Certified Appeal Board Record and found he had jurisdiction to review the Board's Proposed Decision and Order. The portion of the CABR claimant arranged to have transferred to this Court does not indicate otherwise.

Issue Raised: Did claimant fail to provide the Court with an adequate record to consider this assignment of error and therefore bear “the consequences” as ordered by Commissioner Verellen? (App-47). (See Supplemental Statement of the Case below.)

B. Answer to Second Assignment of Error. The findings and conclusions entered by Judge Bowden in his oral and written decisions reflected a correct application of the pertinent legal standards and were supported by substantial evidence in the record.

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<sup>1</sup> Claimant’s counsel filed two briefs with the Court (neither of which complied with the rules), but never accomplished or proved appropriate service of the second brief on employer. In response to employer’s request for guidance, Commissioner Verellen issued a letter ruling on December 15, 2010 specifying that employer should address its Respondent’s Brief to the July 24, 2008 version. (App-47).

Issues Raised: Does the record contain medical testimony sufficient to support the trial court's findings and conclusions concerning causation under the applicable legal standards?

### III. SUPPLEMENTAL STATEMENT OF THE CASE

#### A. Supplemental Procedural History

Claimant did not raise any challenges to the Board's jurisdiction until his second Court of Appeals Opening Brief in July 2008. That brief for the first time argues that the record before the Court lacks documentation to establish whether employer perfected its appeal to the Superior Court.

It is important for the Court to appreciate how this happened. Below, employer has chronicled claimant's counsel's troubling and persistent disregard of employer's motions and this Court's orders to either complete the record or conform the issues to the record materials that were previously provided. As described below, counsel's dilatory conduct continued until Commissioner Verellen finally refused to delay matters further and ordered that claimant would have to "bear the consequences" if the record did not contain adequate documents to address his assignments of error.<sup>2</sup> (App-47).

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<sup>2</sup> Most of the referenced documents are in the Court's file (which employer procured). For the Court's convenience, employer has appended

- On October 20, 2008, claimant's counsel filed a Notice of Appeal from Judge Bowden's Superior Court decision. (App-1). The Court Administrator responded with a notice detailing the timelines for submission of record documents on November 5, 2008. (App-7).
- On December 2, 2008, the Court notified claimant's counsel she had missed the deadline for designating Clerk's Papers and extended it through December 12, 2008. (App-9).
- On December 17, 2008 (five days late), claimant's counsel filed a Statement of Arrangements and Designation of Clerk's Papers although they were apparently signed by counsel a month earlier, on November 19, 2008. (App-10).
- On December 30, 2008, defense counsel wrote claimant's counsel noting she had only arranged for a partial record to be transmitted and requesting clarification of the issues to be raised pursuant to RAP 9.2(c). Counsel never responded to this letter. (App-14).
- On January 29, 2009, the Superior Court Clerk filed a Verbatim Report of Judge Bowden's oral ruling of September 18, 2008. (App-15).
- On February 9, 2009, the Court Administrator noted that Clerk's Papers had not been filed and gave claimant's counsel until February 19, 2009 to advise of their status. (App-16). Counsel never responded.
- On April 13, 2009, employer's previous counsel wrote the Court Administrator indicating he had not filed any Respondent's Brief because he had yet to receive claimant's Opening Brief – which had been due March 2, 2009. (App-17).
- On May 6, 2009, the Court Administrator advised claimant's counsel that sanctions would be imposed if the Opening Brief was not filed by May 18, 2009. (App-18).

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copies of the referenced documents to this brief although the accompanying cover letters or service certifications have been omitted where unnecessary.

- On May 18, 2009, claimant's counsel filed a motion for extension of time to file the Opening Brief, citing a month-old hand injury. (App-19).
- On May 21, 2009, claimant was allowed a further extension through June 19, 2009, with the notation “no further extensions.” (App-20).
- On June 19, 2009, claimant's counsel filed her first Opening Brief, which challenged Judge Bowden’s decision on the merits but raised no jurisdictional issues (not appended).
- On June 22, 2009, the Court rejected claimant’s brief for noncompliance with the rules and set a deadline of July 2, 2009 for submission of a complying Opening Brief. (App-21).
- On July 10, 2009, the Court Administrator noted claimant’s counsel had not filed a second Opening Brief and allowed until July 20, 2009 to do so. (App-22). No brief was filed by that date and the Court scheduled a hearing for sanctions.
- On July 23, 2009, claimant's counsel submitted a Declaration reciting various personal problems and promising to file a compliant brief by July 24, 2009. (App-23) Claimant’s counsel subsequently filed (but never appropriately served) a brief on that date.
- On July 30, 2009, the Court Administrator noted that claimant's second Opening Brief was still not compliant, but would be accepted anyway. (App-25).
- On August 17, 2009, employer’s former counsel filed a motion for extension of time to file its Respondent's Brief accompanied by a Declaration that:
  - (a) it did not appear a complete copy of the CABR had been transmitted to the Court sufficient to review claimant's new Assignment of Error challenging jurisdiction;

(b) employer had unsuccessfully attempted to arrange a clarification of the issues and any needed supplementation of the record from claimant's counsel as early as December 2008 with no response;

(c) employer had never been appropriately served with claimant's second Opening Brief; and

(d) contrary to the new assertions in claimant's brief, employer had obtained an extension of time to file its 2007 petition for review with the Board (documentation of which was appended to the Declaration).

Employer's motion specifically requested the Court to order claimant to properly serve the Opening Brief and either "properly provide for the entire CABR or limit his issues to the record provided to [the] court." (App-26).

- On August 27, 2009, the Court Administrator ordered claimant to serve the Opening Brief on employer and to respond to employer's motion "regarding whether the Certified Appeal Board Record is complete." (App-33).
- On September 4, 2009, claimant's counsel filed an Amended Statement of Arrangements and Amended Designation of Clerk's Papers accompanied by a Response to employer's motion indicating the former "now includes the issues the Appellant's Brief intends to raise on Appeal." (App-34).

Claimant's counsel's Amended Statement of Arrangements related that she had originally ordered a complete transcript and copy of the CABR from the Superior Court file. It also advised that claimant's counsel had, as of the date of the September 4, 2009 response, ordered copies of the pertinent Board pleadings. (*Id.*).

- A September 17, 2009 handwritten note by the Commissioner on the Administrator's August 27, 2009 notice indicates a "Court's Motion" hearing was scheduled for October 2, 2009 for "failure to comply with the August 26 [*sic*], 2009 ruling." (App-36).

- On October 12, 2009, the Court Administrator issued a notice stating “no one appeared or responded to the motion set for October 2, 2009” and setting another hearing for October 30, 2009. (App-37).
- On October 21, 2009, the Court Administrator notified the parties that the documents identified in claimant's September 4, 2009 Amended Designation of Clerk’s Papers had still not been received by the Court and instructed claimant's counsel to report on their status by November 2, 2009. (App-38).
- On October 30, 2009, claimant's counsel responded in a letter that, among other things, emphatically indicated she believed the Certified Appeal Board Record “IS COMPLETE.” She also indicated she felt she had “addressed the potential that the Record was not complete by way of the Amended Designation of Clerk’s Papers, sent on September 4, 2009.” It closed by indicating claimant's counsel felt she had complied with the court’s previous instructions and requests. (App-39).
- On November 4, 2009, the Commissioner entered a ruling striking its previous notices and ordering submission of the Respondent's Brief by November 30, 2009. (App-41).
- On November 13, 2009, employer filed a motion for extension of time accompanied by former defense counsel’s affidavit indicating claimant's counsel still had not properly served it with the version of the Respondent's Brief she intended to rely upon nor provided the Court with any copies of the CABR documents referenced in counsel’s September 4, 2009 Amended Statement of Arrangements or Amended Designation of Clerk’s Papers. (App-42).
- On November 24, 2009, the Court Administrator instructed claimant's counsel to file a response to employer’s November 13, 2009 motion by December 4, 2009 and, absent a timely response, scheduled a hearing for imposition of sanctions for December 11, 2009. Claimant's counsel did not respond or appear at the subsequent hearing. Employer’s former defense counsel did attend. (App-46).

In a letter order dated December 15, 2009, the Court Administrator conveyed Commissioner Verellen's decision from the December 11, 2009 hearing. (App-47). After summarizing claimant's counsel's previous, incomplete submissions for the record, the Commissioner ruled:

It appears that that the only record that has been received in this court is the 130 page of clerk's papers received on April 15, 2009 and a verbatim report of proceedings of a September 18, 2008 hearing before Superior Court Judge Bowden. It does not appear that any of the five documents identified in the Amended Designation of Clerk's papers or Amended Statement of Arrangements have been filed after April 15, 2009.

It is not the obligation of the court to check the existing clerk's papers to determine whether those 130 pages include documents appellant wants to include on appeal, or to shepherd an amended designation of clerk's papers or amended statement of arrangements through the trial court. Counsel for appellant has not responded to this court's direction to file an answer to Respondent's November 16, 2009 motion to extend time to file the respondent's brief.

**Rather than delay this matter any further, I conclude that the appeal will go forward with the record consisting of the 130 pages of clerk's papers filed on April 15, 2008 and the verbatim report of proceedings of a September 18, 2008 hearing before Superior Court Judge Bowden. If that record is inadequate to allow full review of the issues raised by appellant, then appellant will bear the consequences of providing an inadequate record on appeal.**

(App-47, -48; boldface added). The Commissioner then ordered employer to file its Respondent's Brief. (*Id.*).

### B. Supplemental Summary of Claims Facts

The Opening Brief offers no summary of the evidence pertaining to the merits of the claim, and the Superior Court's order only recites essential findings.

In a nutshell, claimant was diagnosed with diabetes mellitus sometime in the 1970s – he was born in 1932 -- and has been on insulin ever since. (CABR 34, 36). Roughly in the mid 1990s, he commenced employment as transit bus driver. Sometime in June or July 2004, claimant (now in his 70s) experienced an onset of intense right foot pain while driving his bus. He recalled, “Absolutely nothing happened. It was just a normal day.” (CABR 25-26). He also testified the “only thing I can think of that can make that pain happen is the air brake pedal on the bus.” He explained that he often had to pump the pedal to “bleed” the breaks upon starting the bus, then press it each time he was required to stop during the route. (*Id.*). Claimant sought treatment and discontinued work for several months. Upon his return, the symptoms recurred. (CABR 28).

Three physicians testified as to the nature and genesis of the condition that caused claimant's symptoms.

**Drs. Robin and Kopp**, a neurologist and orthopedic surgeon respectively, reviewed claimant's treatment records and his imaging

studies in conjunction with an independent medical examination they conducted on December 8, 2004. They diagnosed three conditions: (1) peripheral neuritis of the right peroneal nerve; (2) a tumor or lesion in his posterolateral right hind foot, and (3) severe peripheral neuropathy -- all associated with his underlying, longstanding diabetes condition (a "classic" diabetic foot). (Robin Depo., CABR 65) (Kopp Depo., CABR 81-83). Drs. Kopp and Robin also testified these preexisting conditions were "unrelated" to any "work-related injury" or "work situation" on "a more probable than not basis." (CABR 65, 83-85). These doctors were also aware of a possible, differential diagnosis based on imaging evidence suggesting a partial tear or tendinopathy of claimant's right peroneal longus or brevis tendons (see below). Orthopedist Kobb, however, testified, "I didn't find those conditions. Those were present on MRI; [but] on exam he has no symptomatic tears of his peroneal longus or brevis." (CABR 85).<sup>3</sup>

**Dr. Skalley** was an orthopedist who examined and treated claimant three times in the fall of 2004, then saw him once more in March 2008. (Skalley Depo., CABR 125). While he had not reviewed the report of the independent examiners, he agreed with the three diagnoses they listed with

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<sup>3</sup> Dr. Robin, a neurosurgeon, deferred to Dr. Kopp's opinion on this "orthopedic issue." (CABR 60).

the addition of a possible tear or chronic inflammation in the peroneal tendon suggested by MRI, *any* of which could have accounted for or contributed to claimant's symptoms. (CABR 107-108, 118-119, 123-124).

The question of a work-relationship was broached several times during the deposition, but Dr. Skalley repeatedly hesitated to state a firm opinion based on the diagnostic uncertainties and the fact he had not reviewed the report by the independent examiners. The interaction Judge Bowden found most significant was one in which Dr. Skalley refrained from a direct answer when asked whether he could “actually testify on a more probable than not basis that his *condition* was caused by his driving a bus (*emphasis added*).” (CABR 123; 9/18/08 Tr. 9). Dr. Skalley responded:

I guess – I go back to the history that I was given was that he had sudden onset of these symptoms that particular day while driving the bus. Whether there were preexisting factors or not that seems to be when his symptoms started. So I guess on a more probable than not basis *his symptoms* began that day driving a bus.

(CABR 123; *emphasis added*).

#### IV. ARGUMENTS

##### A. RESPONSE ARGUMENT REGARDING FIRST ASSIGNMENT OF ERROR.

Claimant makes two arguments in support of his request to vacate the Superior Court’s order for lack of jurisdiction. First, he contends the

transmitted documents from the CABR fail to show whether employer obtained an extension of time in which to file its petition to the Board of Industrial Insurance Appeals (the “Board”) for review of its Industrial Appeal Judge’s Proposed Decision & Order. Second, she contends the record lacks evidence to confirm whether employer properly served a copy of its April 3, 2007 Notice of Appeal to the Superior Court once the Board denied its Petition for Review.

Neither of the asserted jurisdictional defects were raised before the Board, Superior Court, or in claimant's original Opening Brief to this Court. Such alleged defects must therefore be proven, if at all, from the record claimant transmitted to this Court on judicial review. Upon review, the Court will discern that claimant failed to arrange for transmission of the necessary documents despite multiple requests by employer and multiple orders by this Court’s officials. Having failed or refused to comply with repeated instructions to repair or complete the transmitted record, Commissioner Verellen has already ordered that claimant must “bear the consequence” of having provided this Court with an “incomplete record.” (App-48).

#### 1. Petition for Board Review

Claimant contends employer “filed a Petition for Review on February 21, 2007” more than 20 days after the IAJ’s Proposed Decision

and Order “dated January 11, 2007” as specified by RCW 51.52.104.

(App Br at 12). That statute states, in pertinent part:

In the event no petition for review is filed as provided herein by any party, the proposed decision and order of the industrial appeals judge shall be adopted by the board and become the decision and order of the board, and no appeal may be taken therefrom to the courts.

Claimant bears the burden to establish the error she asserts, namely the existence and dates of the jurisdictional documents she relies upon to affirmatively establish that “no petition for review [was] filed” with the Superior Court in a timely fashion. *Id.* To meet that burden, claimant argues that the “certified copy of the Appeal Board record does not contain” employer’s motion for an extension of time or an order from the Board granting it. (Opening Br at 13).

Claimant correctly observes that the partial CABR before the Court contains no such documents, but that is not all it lacks. It also lacks any copy of the Proposed Decision & Order or any copy of employer’s subsequent Petition for Review. In fact, the portion of the CABR claimant arranged to be delivered to this Court consists exclusively of documents, orders, and transcribed proceedings dating from after employer filed its Notice of Appeal with the Superior Court on April 3, 2007. (CABR 1-130). Based on this record, claimant has provided the Court with no documentary basis to discern the existence, sequence or timing of events

prior to the Superior Court proceeding that she relies upon to establish that “no petition for review [was] filed” in a timely fashion pursuant to RCW 51.52.104.

The failure to provide such documents was not inadvertent, or at least not unadvised. As chronicled in the Supplemental Statement of the Case above, employer has specifically and repeatedly noted the disconnect between the jurisdictional arguments in claimant's Opening Brief and the CABR documents she had previously submitted to the Court. Indeed, claimant's counsel *herself* evidenced awareness that these specific documents (“if any such documents exist”) were missing from the record when she filed her Amended Designation of Clerk's Papers of September 4, 2009. (App-34, -35). In turn, the Court Administrator and two Appellate Commissioners repeatedly admonished claimant to either complete the record or conform the issues she was raising to the record she had provided. (App-33, -36, -46). Despite continued prompting by employer and the Court thereafter, counsel failed to accomplish or confirm transmission of such documents to this Court. In fact, she insisted the September 4, 2008 Amended Designation of Clerk's Paper's sufficed to

comply with the Court's instructions and insisted that the record was "COMPLETE." (App-39).<sup>4</sup>

Consequently, the Court should reject this component of claimant's assignment of error for lack of a sufficient record to establish the jurisdictional "failures" he has alleged.

## 2. Notice of Appeal to Superior Court

Claimant similarly contends the record lacks documentation to confirm that employer timely served the Board with a copy of its April 3, 2007 Notice of Appeal to Superior Court. (Opening Brief, pp. 14-15). Claimant is incorrect. The Notice of Appeal itself is in the record. (CABR 129). On its face, the Notice indicates the "Board of Industrial Appeals" was among those to whom the original notice was directed. (*Id.*). In addition, Judge Bowden's Superior Court "Findings of Fact,

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<sup>4</sup> Employer also refers the Court to the Declaration of former defense counsel Terry Peterson that accompanied his August 17, 2009 motion for extension of time. (App-26 thru -32). They constituted employer's first response upon learning claimant's counsel was challenging whether the petition for Board review had been timely. In that submission, Mr. Peterson not only noted the absence of relevant documents from the Court of Appeals record, but also attached copies of employer's own file documents reflecting that an extension of time had been requested and obtained from the Board. These documents were not included in the partial CABR forwarded to this Court and are therefore unavailable as a basis for this Court's own findings. Employer mentions them here only to emphasize how counsel failed to confirm transmission of such documents from the CABR despite pointed indications that they existed.

Conclusions of Law and Judgment” of September 18, 2008 affirmatively indicates that the Judge had “reviewed the file herein” and recited the procedural history of the case before the Board. (CABR 5) Judge Bowden then specifically found, “The Court has jurisdiction over the parties to and the subject matter of this appeal.” (CABR 7) These documents in the record constitute substantial evidence in support of a finding that the Superior Court Judge, with the benefit of a complete CABR, did in fact review the relevant documents and confirm his jurisdiction. Claimant has failed to identify any contrary evidence in the record.<sup>5</sup> Again, as Commissioner Verellen has already ruled, claimant must “bear the consequences” if the record transmitted to this Court is not adequate to review the issues raised in the Opening Brief. (App-48).

**B. RESPONSE ARGUMENT REGARDING SECOND ASSIGNMENT OF ERROR.**

Claimant alternatively seeks review of Judge Bowden’s decision on the merits of the claim. Specifically, he challenges Findings of Fact

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<sup>5</sup> Claimant's Opening Brief does refer to a document labeled “Employer’s Declaration of Service” that supposedly states a service date of April 25, 2008. (Opening Brief, p. 14). Employer can find no such document in the record transmitted to this Court for review. Employer objects to this reference to documents or evidence not made part of the record transmitted on review. Employer requests that the Court strike and disregard this reference.

Nos. 4 and 5 in the Court's Judgment and Order. (CABR 7). Those findings read:

4. Mr. Herron's right foot symptoms were more likely than not ... caused by the diabetic condition and/or the tumor that remained untreated at the time he became symptomatic. The symptomatic condition was not the result of a sudden and tangible happening of a traumatic nature while Mr. Herron was in the course of his employment with Community Transit. There is no medical evidence to support a tendon tear as found by the Board.
5. The right foot symptoms that Mr. Herron developed on July 9, 2004, during the course of his employment with Community Transit and for which he sought medical treatment, did not arise naturally and proximately from distinctive conditions of his employment with Community transit.

Finding No. 4 essentially relates to claimant's contention that he proved an industrial injury. Finding No. 5 essentially relates to his alternative theory alleging an occupational disease.

This Court conducts limited review of Superior Court decisions in workers' compensation cases. It may only reverse such decisions upon a determination the trial court judge either committed an error of law or rendered findings unsupported by any reasonable evidence in the record. *Young v. DLI*, 81 Wn.App. 123, 128, *review denied* 130 Wn.2d 1009 (1996); *Grimes v. Lakeside Industries*, 78 Wash.App. 554, 560-561 (1995).

Claimant's assignment of error maintains that Finding of Fact No. 4 was "contrary to the standards and practices employed by the Department of Labor and Industries of this State when assessing an application of benefits," (Opening Brief, p. 5).<sup>6</sup> Similarly, it contends Finding of Fact No. 5 is "contrary to the Industrial Insurance Laws of this State." (*Id.*, p. 7). In argument, claimant contends both of these findings "strayed from the statutes, caselaw and significant decisions of the Board in workers' compensation cases." (Opening Brief, p. 16). These broad complaints appear to charge Judge Bowden with legal error, but the fragmented discussion that follows might also be construed as an attack on the reasonableness of his factual findings. The result is a scattered narrative that is decidedly hard to follow or to organize for purposes of providing the Court with a helpful rebuttal. Here is employer's best effort.

#### 1. Substantial Evidence

This record provides this Court with no adequate basis to conclude Judge Bowden's causation findings lacked support by substantial evidence. As summarized in employer's Supplemental Statement of the Case above, two of the three medical experts to address causation ascribed

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<sup>6</sup> Taken literally, this procedural assertion is irrelevant to the assignment of error. Employer interprets it loosely as an allegation that Judge Bowden's decision reflected error in the substantive legal standards he applied to the evidence.

claimant's 2004 onset of symptoms and ensuing need for treatment to his longstanding diabetes condition and attendant pathology, including neuritis, vascular compromises, and a likely associated tumor – entirely “unrelated” to claimant's employment. If accepted as the most persuasive medical testimony in the record, the opinions expressed by Drs. Kopp and Robin more than sufficed to provide reasonable evidentiary support for Judge Bowden's findings. In particular, employer refers the Court to Dr. Robin's testimony at CABR 58 where this exchange occurred:

- Q. Doctor, based on your education, training, experience, your review of the records, and your examination of the claimant, did you form an opinion on a more probable than not basis as to whether the claimant suffered an industrial injury or occupational disease on or about July 9, 2004?
- A. In combining an opinion with the orthopedist, there was no indication that he sustained an occupational injury.
- Q. And why do you say that?
- A. Well, there really wasn't an injury; what he has is some sort of lesion in his hind foot and ankle on the right side that became symptomatic, and this is the thing that is, probably caused his problem [although] it's not been totally clarified. The other thing is the man has severe peripheral neuropathy that I identified on him. So, there wasn't anything that we see that actually caused, you know, his complaints. It was [a] degenerative problem that just came to light and could have come to light in any fashion (emphasis added).

In his oral ruling on September 18, 2008, Judge Bowden offered a conscientiously detailed explanation for his conclusion that the firm and

well-reasoned opinions of the independent examiners were more persuasive than the tentative and qualified testimony from Dr. Skalley. (9/18/08 Tr. 5-11). Employer adopts his reasoning and incorporates it by reference herein.

In contrast, the only place the Opening Brief even acknowledges the presence of conflicting medical opinions is when it asserts “the testimony of Mr. Herron’s attending physician, orthopedic surgeon Dr. Skalley should be given more weight than that of the independent examiners.” (Opening Brief, p. 30). Judge Bowden evinced awareness and proper consideration of Dr. Skalley’s status in presenting his oral ruling. (9/18/08 Tr. 6). More importantly, claimant forgets that this Court does not review workers' compensation cases *de novo* and does not second-guess findings by the Superior Court that involve “weighing” the relative persuasive value of conflicting medical opinions. *Grimes, supra*. The pertinent review standard was aptly summarized by the Court in *Bowman v. DLI*, 124 Wash.App. 1022 (2004), as follows:

On appeal to this court, our review is limited to examining the Board's record to determine whether the superior court's conclusions of law flow from findings which are supported by substantial evidence. *See Young v. Dep't of Labor & Industries, ... [supra]*. To determine if substantial evidence supports the superior court's findings of fact, we view the evidence in the light most favorable to the prevailing party. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn.App. 475, 485, 40 P.d 1221 *review denied*, 147 Wn.2d 1011 (2002). Substantial evidence is ‘evidence of

sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.’ *Grimes v. Lakeside Indus.* [supra].

The evidence in this record and Judge Bowden’s interpretation thereof both are ample to pass muster under these standards.

Finally, employer notes claimant's reference to the statutory imperative to construe the Industrial Insurance Act liberally to accomplish its remedial goals. (Opening Brief, p. 16). That principle applies when interpreting ambiguous law, not when weighing conflicting evidence. With regard to the latter, a converse standard actually applies. Claimant was the proponent of the facts necessary to secure compensation and therefore bore the affirmative burden to establish those facts by preponderant evidence. *Olympia Brewing v. DLI*, 34 Wn.2d 498 (1949). In this case, the trial court reasonably reached and articulated its basis for determining claimant failed to prove causation by a preponderance of the medical testimony.

## 2. Legal Error

Claimant’s scatter-shot exposition essentially boils down to a single assertion -- that by virtue of accepting claimant’s testimony that he first experienced an intense onset of pain “while driving his bus,” Judge Bowden was legally compelled to conclude he sustained an industrial

injury or an occupational disease.<sup>7</sup> In short, claimant relies on a form of *res ipsa loquitur* principle to contend the circumstances of claimant's symptomatic onset established the elements of a compensable condition, including medical causation, as a matter of law.

This argument is not well taken. It has long been settled that a worker must affirmatively prove a causal relationship between a "happening" and a "result." *Peterson v. DLI*, 40 Wn.2d 635 (1952). Persuasive medical testimony is required to prove such a causal relationship, and the mere "possibility" of such a relationship is insufficient to meet that burden. *Chalmers v. DLI*, 72 Wn.2d 595 (1967). Judge Bowden's oral ruling removed any doubt that he appropriately

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<sup>7</sup> This position is embodied and best exemplified by claimant's argument at Opening Brief, p. 22:

To say that the onset of extreme pain Mr. Herron experienced *for the first time* while driving a bus for Community Transit, is in no way attributable to the force and repetition required to operate such, but rather due to his diabetes, which he has managed with insulin since 1974 and which never caused him pain in his right foot prior to July 9, 2004, or the tumor in his foot, which wasn't known about by Mr. Herron or his physicians prior to July 9, 2004, or the combination of both of these, is to turn a blind eye to a pillar upon which this system relies (*emphasis in original*).

Elsewhere, claimant's counsel cites these findings when supplying her own medical opinion that it "seems more likely that his foot condition was either an aggravation of a preexisting condition, or his employment potentially lit up his underlying medical conditions." (Opening Brief, p. 29).

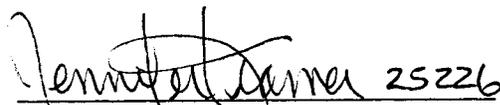
scrutinized the record to discern whether preponderant medical testimony persuasively established a medically probable proximate cause relationship between claimant's work activities. That is exactly what the law requires. *Bowman v. DLI, supra; Ruse v. DLI*, 138 Wn.2d 1, 6 (1999).

In this regard, claimant's brief includes an incidental charge that Judge Bowden's Findings of Fact No. 4 and 5 held claimant and his evidence to an incorrect proof standard of "medical certainty." (Opening Brief, pp. 16, 20). Employer cannot find the basis for this contention in the text of the findings. Finding No. 4 explicitly indicates claimant's right foot symptoms were "more likely than not" caused by his diabetic condition. (CABR 7). Finding No. 5 does not evince reliance on any different standard. (*Id.*).

#### V. CONCLUSION

For the reasons outlined above, employer respectfully seeks a decision from this Court (a) denying claimant's request to vacate the Superior Court decision for lack of jurisdiction; and (b) affirming that decision.

Respectfully submitted,

  
Jerald P. Keene, WSB No. 22271  
of Attorneys for Employer, for  
Community Transit

## APPENDIX

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Correspondence from Terry D. Peterson, AAL (12/30/08) .....	App-14
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Correspondence from Court of Appeals (2/9/09) .....	App-16
Correspondence from Terry D. Peterson, AAL (4/13/09) .....	App-17
Correspondence from Court of Appeals (5/6/09) .....	App-18
Motion for an Extension of Time for Appellant to File Opening Brief (5/18/09).....	App-19
Correspondence from Court of Appeals (5/21/09) .....	App-20
Correspondence from Court of Appeals (6/22/09) .....	App-21
Correspondence from Court of Appeals (7/10/09) .....	App-22
Declaration of Attorney for Appellant and Regarding Receipt of the Court's Notice of Hearing (7/23/09).....	App-23
Correspondence from Court of Appeals (7/30/09) .....	App-25
Motion for Extension to File Respondent's Brief and Motion for Appellant to Comply with RAP 9.2(B) and RAP 9.2(C), with Declaration (8/17/09).....	App-26
Correspondence from Court of Appeals (8/27/09) .....	App-33
Appellant's Response to Respondent's Motion for Extension to File Brief and Amended Statement of Arrangements (9/4/09).....	App-34
Correspondence from Court of Appeals (9/17/09) .....	App-36
Correspondence from Court of Appeals (10/12/09) .....	App-37
Correspondence from Court of Appeals (10/21/09) .....	App-38
Correspondence from Fiona A.C. Kennedy, AAL (10/30/09).....	App-39
Correspondence from Court of Appeals (11/4/09) .....	App-41
Motion for Extension to File Respondent's Brief, with Affidavit (11/13/09).....	App-42
Correspondence from Court of Appeals (11/24/09) .....	App-46
Correspondence from Court of Appeals (12/15/09) .....	App-47

CERTIFIED  
COPY

FILED



CL13369462

2008 OCT 20 PM 4:49

SNOHOMISH COUNTY CLERK  
SNOHOMISH CO. WASH

Snohomish County Superior Court  
Sonya Kraski  
County Clerk  
Everett WA

07-2-03579-4

Recpt. Date	Acct. Date	Time
10/20/2008	10/21/2008	04:47 PM

Receipt/Item #	Tran-Code	Docket-Code
2008-04-09678/01	1116	\$AFF

Cashier: SNH

The Honorable Gary N. Bowden

Paid By: KENNEDY, FIONA

SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

Transaction Amount: \$250.00

COMMUNITY TRANSIT )

Plaintiff. *mas* )

*02510-1*

No. 07-2-03579-4

v. )

*PPP*  
DON HERRON & THE STATE OF  
WASHINGTON, DEPARTMENT OF  
LABOR & INDUSTRIES )

NOTICE OF APPEAL

Defendant. )

FILED  
COURT OF SUPERIOR  
STATE OF WASHINGTON  
2008 OCT 23 PM 10:15

DON HERRON, seeks review by the designated appellate court of the

Findings of Fact, Conclusions of Law and Judgment, dated September 18,

2008, a copy of which is attached to this notice.

DATED at Kirkland, Washington this 20th day of October, 2008.

*Fiona Kennedy*  
FIONA A. C. KENNEDY, WSBA #32385  
Attorney for Plaintiff

NOTICE OF APPEAL - 1

ORIGINAL

Law Offices  
FIONA A. C. KENNEDY  
WSBA #32385  
10829 NE 68<sup>th</sup> St. - #C  
Kirkland, WA 98033  
Tel: (425) 889-8670  
Fax: (425) 827-9456

*mn*



1 11. Attorney for Judgment Debtor: Fiona A.C. Kennedy for Don Herron  
 2 Annalisa Gellerman, AAG, for Department of  
 Labor and Industries

3 This matter came on regularly for trial on the 12<sup>th</sup> day of September before the  
 4 Honorable George N. Boston, a judge in the above-entitled court. The plaintiff  
 5 was represented by Terry D. Peterson, Attorney at Law; the defendant, Don Herron was  
 6 represented by attorney Fiona A.C. Kennedy; the defendant Department of Labor & Industries  
 7 was represented (but elected not to participate in the proceedings) by Rob McKenna, Attorney  
 8 General, per Annalisa Gellerman, Assistant Attorney General. The court reviewed the file  
 9 herein, including the evidence presented at the Board of Industrial Insurance Appeals, the  
 10 Plaintiff's Trial Brief ~~and briefing from the other parties~~ as well as the arguments of counsel.  
 11 After review and consideration, the court found that the March 7, 2007 Order of the Board of  
 12 Industrial Insurance Appeals Denying the Employer's Petition for Review and affirming the  
 13 industrial appeals judge's January 11, 2007 Proposed Decision and Order that affirmed the  
 14 Department's September 15, 2005 order allowing the claim was incorrect and not supported by  
 15 the preponderance of the evidence when the record was considered as a whole, and that the  
 16 Department erred when it issued its September 15, 2005 order allowing a claim for industrial  
 17 injury or occupational disease. The matter will be remanded to the Department to reject claim  
 18 No. W-858757.

19 No post-trial motions having been interposed and the court being fully advised, NOW,  
 20 THEREFORE THE COURT MAKES THE FOLLOWING:

21  
 22 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

23 **FACTS**

- 24 1. On or about July 9, 2004, Mr. Herron developed right lower extremity pain during  
 25 the course of his employment with Community Transit. On November 8, 2004, Mr.  
 26

1 Herron filed an application for benefits with the Department of Labor & Industries.

2 The claim was assigned claim No. W-858757.

3 On September 15, 2005, the Department issued an order stating that the worker  
4 sustained an injury or occupational disease while in the course of employment with the  
5 self-insured employer, allowing the claim, directing the self-insured employer to pay all  
6 medical and time loss benefits as indicated in accordance with the Industrial Insurance  
7 Laws, and stating that the accepted conditions include partial tear and tendinopathy of  
8 the peroneus longus and brevis tendons of the right lower extremity.

9  
10 On November 4, 2005, the self-insured employer filed a Notice of Appeal with the  
11 Board of Industrial Insurance Appeals. On November 21, 2005 the Board issued an  
12 order granting the appeal, assigning it Docket No. 05 21696.

13  
14 On January 11, 2007, Industrial Appeals Judge, Michael E. Metzger issued a Proposed  
15 Decision and Order that reversed the Department's September 15, 2005 order and  
16 remanded the matter to the Department to issue an order allowing the claim as an  
17 industrial injury occurring on July 9, 2004, stating that the accepted conditions included  
18 partial tear and tendinopathy of the peroneus longus and brevis tendons of the right  
19 lower extremity, and directing the self-insured employer to provide Mr. Herron with  
20 such benefits as he is entitled to under the facts and the law.

21 On February 21, 2007, Community Transit filed a Petition for Review from the January  
22 11, 2007 Proposed Decision and Order. The Board issued an Order Denying Petition  
23 for Review on March 7, 2007.

24  
25 On April 3, 2007, Community Transit filed the present appeal from the Board's March  
26 7, 2007 order.

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2. Mr. Herron was born on December 17, 1932. He is diabetic and has been on insulin since 1974. At the time of the alleged injury or occupational disease. Mr. Herron was a bus driver for approximately six and a half years; the last five with the self-insured employer, Community Transit, where he worked part-time.

3. Mr. Herron developed pain in his right foot while at work on or about July 9, 2004. ~~There was no known incident of injury and the symptoms may have been present for a number of days prior to July 9, 2004.~~

4. Mr. Herron's right foot symptoms were <sup>more likely than not the caused by the</sup> ~~caused by unrelated diabetic peroneal nerve~~ <sup>diabetic condition and/or the tumor that remained untreated</sup> ~~neuropathy and a cyst or tumor and were, therefore, not the result of a sudden and~~ <sup>time he became symptomatic (the symptomatic condition was)</sup> ~~tangible happening of a traumatic nature while Mr. Herron was in the course of his~~ <sup>employment with Community Transit. There is no medical evidence to support a tendon tear as found by the Board.</sup> ~~employment with Community Transit.~~ the  
GMB  
GMB

5. The right foot symptoms that Mr. Herron developed on July 9, 2004, during the course of his employment with Community Transit, and for which he sought medical treatment, did not arise naturally and proximately from distinctive conditions of his employment with Community Transit.

**CONCLUSIONS OF LAW**

1. The Court has jurisdiction over the parties to and the subject matter of this appeal.
2. Mr. Herron's right foot condition for which he filed Claim No. W-858757 was not the result of an industrial injury within the meaning of RCW 51.08.100.
3. Mr. Herron's right foot condition for which he filed Claim W-858757 was not the result of an occupational disease within the meaning of RCW 51.08.140.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Board's March 7, 2007 Order Denying Petition for Review, which affirmed the Industrial Appeals Judge's

1 Proposed Decision and Order of January 11, 2007, is reversed. The matter is remanded to the  
2 Department of Labor and Industries to issue an order denying Mr. Herron's claim for benefits  
3 under Claim No. W-858757.

4 ///

5 ///

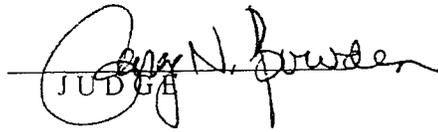
6 ///

7 DONE IN OPEN COURT this 18<sup>th</sup> day of Sept., 2008.

8

9

10

  
JUDGE

11

Presented by:

12

13

\_\_\_\_\_  
Terry D. Peterson  
Attorney for Plaintiff  
WSBA No. 18447

14

15

16

\_\_\_\_\_  
Fiona A.C. Kennedy  
Attorney for Don Herron  
WSBA No. 32385

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26

App - 7

RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals*  
of the  
*State of Washington*  
Seattle  
98101-4170

DIVISION I  
One Union Square  
600 University Street  
(206) 464-7750  
TDD: (206) 587-5505

November 5, 2008

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
10829 NE 68th St Ste C  
Kirkland, WA 98033-4006

CASE # 62516-1-I  
Community Transit, Respondent v. Don Herron, Appellant  
SNOHOMISH COUNTY SUPERIOR COURT No. 07-2-03579-4

**This may be the only notice you will receive concerning due dates. A document filed prior to or after its due date may affect all subsequent due dates. The parties are responsible for determining adjusted due dates by reviewing the appropriate rules of appellate procedure. Failure to comply with the provision of the rules may result in the imposition of sanctions pursuant to RAP 18.9.**

Dear Counsel/Others:

A notice of appeal, filed in the SNOHOMISH COUNTY SUPERIOR COURT on October 20, 2008 was received in this court on October 23, 2008 and was assigned case number 62516-1. **Use this appellate court case number on all correspondence and filings.**

The time periods for compliance with the Rules of Appellate Procedure are as follows:

1. The **designation of clerk's papers** is due to be filed and served with the trial court, with a copy filed in this court, by **November 19, 2008**. RAP 9.6(a).
2. The party seeking review must timely arrange for transcription of the report of proceedings and must file a **statement of arrangements** in this court by **November 19, 2008**. To comply with RAP 9.2(a), the statement should include the name of each court reporter, the hearing dates, and the trial court judge. Serve each court reporter and all counsel of record with a copy of the statement of arrangements, and provide this court with proof of service.

If the party seeking review arranges for less than all of the report of proceedings, all parties must comply with RAP 9.2(c).

If a verbatim report of proceedings will not be filed, you must notify this court, in writing, by **November 19, 2008**. RAP 9.2(a).

3. The **verbatim report of proceedings** must be filed with the clerk of the trial court no later than 60 days after service of the statement of arrangements. The court reporter's notice of filing and proof of service must be filed in this court the same day. RAP 9.5(a).

RECEIVED

NOV 06 2008

Page 2 of 2  
62516-1-I, Community Transit v. Don Herron  
November 5, 2008

4. **Appellant's brief** is due in this court 45 days after the report of proceedings is filed in the trial court. RAP 10.2(a).

Appellant should serve one copy of the brief on every other party and on any amicus curiae and should file proof of service with this court. RAP 10.2(h).

If the record on review does not include a report of proceedings, the appellant's brief is due 45 days after the designation of clerk's papers has been filed. RAP 10.2(a).

5. **Respondent's brief** is due in this court 30 days after service of the appellant's brief. RAP 10.2(c).

Respondent should serve one copy of the brief on every other party and on any amicus curiae and should file proof of service with this court. RAP 10.2(h).

If a **Motion on the Merits** is to be filed in lieu of the respondent's brief, the motion is due the same date as the respondent's brief. If the motion is denied, respondent's brief is due 30 days after the date of the order. RAP 18.14.

6. A **reply brief**, if any, is due 30 days after service of respondent's brief. RAP 10.2(d).

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

c: Snohomish County Clerk

**RECEIVED**

NOV 06 2008

COMPREHENSIVE RISK MGT.

App - 9

RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals*  
of the  
*State of Washington*  
Seattle  
98101-4170

DM  
DIVISION I  
One Union Square  
600 University Street  
(206) 464-7750  
TDD: (206) 587-5505

December 2, 2008

J  
Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
10829 NE 68th St Ste C  
Kirkland, WA. 98033-4006

CASE #: 62516-1-I  
Community Transit, Respondent v. Don Herron, Appellant

Counsel:

The Court's records indicate the designation of clerk's papers is not of record in this court as required by RAP 9.6(a).

If the designation of clerk's papers is not filed within 10 days, a court's motion to impose sanctions and/or dismiss in accordance with RAP 18.9 is set for **Friday, December 19, 2008, at 10:30 a.m.** The court's motion will be stricken if the designation of clerk's papers or a motion for an extension of time is filed on or before **December 12, 2008.**

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

RECEIVED  
DEC 03 2008  
COMPREHENSIVE RISK MGT

The COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

Don Herron,

Appellant,

vs.

Community Transit,

Respondent.

CASE NO. 62516-1-1

TRIAL COURT CASE NO. 07-2-03579-4

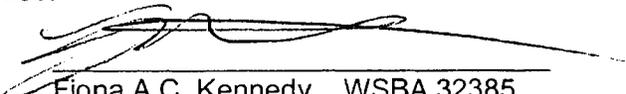
**DESIGNATION OF CLERK'S PAPERS**

TO THE CLERK OF THE COURT

Please prepare and transmit to the Court of Appeals, Division I, the following clerk's papers:

SUB #	Document	Date
	TRIAL COURT'S LIST OF EXHIBITS	
13	NOTICE OF APPEAL (APPELLANT)	10/21/2008
12	ORDER REVERSING WITH FINDINGS OF FACT/CONCLUSIONS OF LAW and ORDER OF REMAND	09/18/2008
9	CERTIFIED APPEAL BOARD RECORD/COPY PF CORRECTED TRANSCRIPTS AND DEPOSITIONS	05/19/2008
2	ORIGINAL APPEAL TO SUPERIOR COURT (EMPLOYER'S)	04/03/2007

DATED this 17<sup>th</sup> day of December, 2008.

  
Fiona A.C. Kennedy, WSBA 32385  
10829 NE 68<sup>th</sup> St., Suite C  
Kirkland, WA 98033  
(425) 889-8670  
Fax (425) 827-9456

**RECEIVED**

**DEC 18 2008**

COMPREHENSIVE RISK MGT

The COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

Don Herron,

Appellant,

vs.

Community Transit,

Respondent.

CASE NO. 62516-1-I  
TRIAL COURT CASE NO. 07-2-03579-4

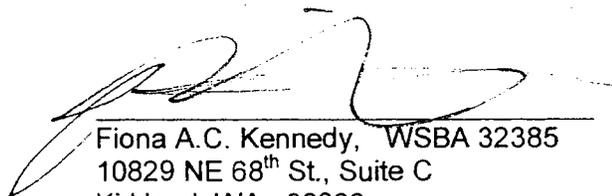
**STATEMENT OF ARRANGEMENTS**

Fiona A.C. Kennedy, attorney for appellant, states that on November 19, 2008, appellant ordered transcription of the original and one copy of the verbatim report of proceedings beginning with the ruling by Judge Bowden through the end of the record in this case from court reporter Stacy Lombardo, and arranged to pay the cost of transcription in full by cash/check/money-order within 60 days from the date ordered.

Hearing date to be transcribed is as follows:

September 18, 2008, approximately 13:30-15:00 hrs Judge George N. Bowden

DATED this 19<sup>th</sup> day of November, 2008.



Fiona A.C. Kennedy, WSBA 32385  
10829 NE 68<sup>th</sup> St., Suite C  
Kirkland, WA 98033  
(425) 889-8670  
Fax (425) 827-9456

**PAID**  
11/19/08 4:04 PM  
C. 10/11/08

**RECEIVED**

DEC 18 2008

COMPREHENSIVE RISK MGT

The COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

Don Herron,

Appellant,

vs.

Community Transit,

Respondent.

CASE NO. 62516-1-1

**CERTIFICATE OF SERVICE**

I, **FIONA A.C. KENNEDY, DECLARE** that I am not the Appellant, Respondent or a witness, and swear that I served the DESIGNATION OF CLERK'S PAPERS AND STATEMENT OF ARRANGEMENTS and attachments by faxing said documents and by depositing in the United States Post Office in King County, State of Washington, a true copy of the above documents, enclosed in a sealed envelope having adequate postage and sent as follows:

**Address of Post Office:**

**721 4th Ave., Kirkland, WA 98033**

**Date Mailed:**

**Wednesday December 17, 2008**

**Addressed to:**

**Terry D. Peterson, Attorney at Law**

**1520 Broadway, Suite 201**

**Everett, WA 98201-1700**

**425-252-2164**

**Facsimile:**

**AND Addressed to:**

**John R. Wasberg, Senior Counsel**

**Attorney General of Washington**

**800 Fifth Avenue, Suite 2000**

**MS TB-14**

**Seattle, WA 98104-3188**

**Facsimile:**

**206-587-4290**

I, the undersigned, declare under penalty of perjury that the foregoing is true and correct and that I was at the time of service of the above notice(s) a resident of the State of Washington over the age of 18 years and not a party to the above numbered case.

**RECEIVED**

**DEC 18 2008**

App - 14

**Terry D. Peterson**  
Attorney at Law

1520 Broadway, Suite 201  
Everett, Washington 98201-1700  
(425) 252-7623  
Fax: (425) 252-2164

December 30, 2008

Ms. Fiona A.C. Kennedy  
The Law Office of Fiona Kennedy, LLC  
10829 NE 68<sup>th</sup> St., Building C  
Kirkland WA 98033

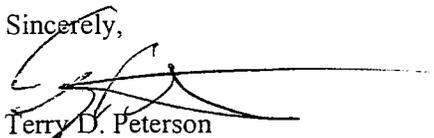
Re: Community Transit v. Don Herron and Dept. of Labor & Industries  
Snohomish County Cause No.: 07-2-03579-4  
Court of Appeals No.: 62516-1-I

Dear Ms. Kennedy:

We are in receipt of your Designation of Clerk's Papers and Statements of Arrangements. There are two issues that I would like to bring to your attention.

1. It appears that you have arranged to have the verbatim report of proceedings reproduced only from the time of the judge's oral ruling. Per RAP 9.2(c) if a party makes arrangements for less than all of the verbatim report of proceedings that party should include in the Statement of Arrangements a statement of the issues that the party intends to present for review. The purpose of this is to allow the non-appealing party the opportunity to determine if additional portions of the report of proceedings need to be transcribed. Would you please issue an amended Statement of Arrangements in compliance with RAP 9.2(c) that either includes provision for all of the record or else states the issues upon which you are seeking review.
2. You may recall that Judge Bowden directed us to file a joint motion to amend the Certified Appeals Board Record, because of the Board's error in submitting transcripts from another unrelated claim. On October 16<sup>th</sup> I sent you a draft joint motion and have since not heard back from you. I assume that you would like the record cleaned up prior to its being sent to the court of appeals. Please let me know the status on that.

Sincerely,



Terry D. Peterson



Snohomish County Clerk

and Ex-Officio Clerk of Superior Court

January 29, 2009

Sonya Kraski  
County Clerk  
M/S #605  
3000 Rockefeller Avenue  
Everett, WA 98201  
(425) 388-3466  
FAX (425) 388-3806

Richard D. Johnson  
Court Administrator/Clerk  
Court of Appeals - Division One  
One Union Square  
600 University St.  
Seattle, WA 98101-4170

RE: Community Transit vs. Don Herron, et al  
Snohomish County Cause No. 07-2-03579-4  
Court of Appeals No. 62516-1-1

Dear Mr. Johnson:

Enclosed please find the Verbatim Report of Proceedings (1 vol. Court's Ruling, September 18, 2008) filed January 16, 2009 in the above-named cause on appeal.

Sincerely,

SONYA KRASKI, Snohomish County Clerk

By: Sharon K. Nicholson  
Sharon K. Nicholson, Deputy Clerk

SK: skn  
Encl: 1

FILED  
COURT OF APPEALS DIVISION 1  
STATE OF WASHINGTON  
2009 FEB - 2 AM 11:40

App - 16

RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals*  
of the  
*State of Washington*  
*Seattle*  
98101-4170

DIVISION I  
One Union Square  
600 University Street  
(206) 464-7750  
TDD: (206) 587-5505

February 9, 2009

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
10829 NE 68th St Ste C  
Kirkland, WA. 98033-4006

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-1  
Community Transit, Respondent v. Don Herron, Appellant  
Snohomish County No. 07-2-03579-4

Counsel:

The Court's records indicate the clerk's papers are not of record in this court.  
Please contact the trial court immediately, to ensure the timely transmittal of the  
record on appeal.

Please advise the court in writing regarding the status of the clerk's papers within  
10 days of the date of this letter i.e. **February 19, 2009.**

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

c: Snohomish County Clerk's Papers

RECEIVED  
FEB 10 2009  
COMPREHENSIVE RISK MGT.

App - 17

**Terry D. Peterson**

**Attorney at Law**

1520 Broadway, Suite 201  
Everett, Washington 98201-1700  
(425) 252-7623  
Fax: (425) 252-2164

April 13, 2009

Mr. Richard D. Johnson  
Court Administrator/ Clerk  
Court of Appeals/ Division 1  
600 University Street  
Seattle WA 98101 4170

Re: Community Transit, Respondent v. Don Herron, Appellant  
Snohomish County Superior Court No. 07 2 03579 4

Dear Mr. Johnson:

I have confirmed with the court that the Appellant's brief was due March 2, 2009. To date, we have not yet received a copy of the Appellant's brief and it is my understanding that the court has also not yet received Mr. Herron's brief.

The Respondent's brief should have been due April 2, 2009; however, since we have not yet received any briefing from the Appellant we have nothing to which we can respond.

Please let us know if a brief has been filed and we will respond accordingly.

Sincerely,



Terry D. Peterson

cc: Fiona Allison Crinks Kennedy  
Mike Burrell, Community Transit  
Hiller Payne, Community Transit  
Karen Haunreiter, Berkley Risk Administrators Company, LLC

App - 18

*The Court of Appeals*  
of the  
*State of Washington*

RICHARD D. JOHNSON,  
Court Administrator/Clerk

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

May 6, 2009

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
10829 NE 68th St Ste C  
Kirkland, WA. 98033-4006

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-1  
Community Transit, Respondent v. Don Herron, Appellant

Counsel:

The Court's records indicate the appellant's brief is not of record in this court as required by RAP 10.2(a).

If the appellant's brief is not filed within 10 days, a court's motion to impose sanctions and/or dismiss in accordance with RAP 18.9 is set for **Friday, May 29, 2009, at 10:30 a.m.** The court's motion will be stricken if the appellant's brief or a motion for an extension of time is filed on or before **May 18, 2009.**

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

RECEIVED  
MAY 07 2009  
COMPREHENSIVE RISK MGT

THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

DON HERRON,	)	CASE NO. 62516-1
	)	
Appellant,	)	
vs.	)	Motion For An Extension
	)	Of Time For Appellant To
COMMUNITY TRANSIT,	)	File Opening Brief
	)	
Respondent.)	)	

1. Identify of Moving Party: FIONA A.C. KENNEDY, Counsel of Record for Appellant DON HERRON, asks for the relief designated in Part 2.
2. Statement of Relief Sought: An Order GRANTING Appellant a 30 day Extension to File the Opening Brief.
3. Facts Relevant to Motion: Counsel for Appellant has not yet filed an Opening Brief, and was notified by letter dated May 6, 2009 that the Court may impose sanctions and/or dismiss this Appeal on May 29, 2009 unless Appellant files such brief or requests an extension in which to file it.

Counsel for Appellant severed the flexor tendons in her hand on April 14, 2009, and is currently recovering from reparative surgery which was performed on April 26, 2009. Counsel has been advised by the surgeon that a splint must be worn for 12 weeks, so Counsel must therefore rely on an assistant to do all typing. Counsel is a solo- practitioner and does not have such an assistant in her employ, however Counsel now has a resource to ensure that the Opening Brief of Appellant will be typed and filed in the next 30 days.

4. Grounds for Relief and Argument: RAP 18.8 gives this Court the authority to enlarge the time within which an act must be done in order to serve the ends of justice. The medical restriction of Appellant's Counsel was unforeseen and unavoidable, and should not result in sanctions on Counsel or a dismissal of this appeal.

May 18, 2009

Respectfully submitted,

  
 \_\_\_\_\_  
 Fiona A.C. Kennedy, WSBA 32385  
 Attorney for Appellant  
 10829 NE 68<sup>th</sup> Street, Suite C  
 Kirkland, WA 98033  
 (425)889-8670 Office  
 (425)827-9456 Fax  
 (509)951-1280 Cellular

App - 20

*The Court of Appeals*  
of the  
*State of Washington*

TJ

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

May 21, 2009

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
10829 NE 68th St Ste C  
Kirkland, WA. 98033-4006

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-I  
Community Transit, Respondent v. Don Herron, Appellant

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on May 20, 2009, regarding appellant's motion for an extension of time for appellant to file opening brief until 30 days:

Granted to June 19, 2009. However, no further extensions.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

RECEIVED

MAY 22 2009

COMPREHENSIVE RISK MGT

*The Court of Appeals  
of the  
State of Washington*

RICHARD D. JOHNSON,  
Court Administrator/Clerk

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

June 22, 2009

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
10829 NE 68th St Ste C  
Kirkland, WA. 98033-4006

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-I  
Community Transit, Respondent v. Don Herron, Appellant

Counsel:

The Appellant's brief filed in the above case on June 19, 2009, along with the attached checklist, is being returned for failure to comply with the Rules of Appellate Procedure. Appellant is directed to refile and re-serve the brief in compliance with the checklist on or before **July 2, 2009**.

Failure to timely comply with the Rules of Appellate Procedure may result in the imposition of sanctions pursuant to RAP 18.9.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

Enclosures

App - 22

*The Court of Appeals*  
of the  
*State of Washington*

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
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July 10, 2009

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
10829 NE 68th St Ste C  
Kirkland, WA. 98033-4006

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-1  
Community Transit, Respondent v. Don Herron, Appellant

Counsel:

The Court's records indicate the appellant's brief is not of record in this court as required by RAP 10.2(a).

If the appellant's brief is not filed within 10 days, a court's motion to impose sanctions and/or dismiss in accordance with RAP 18.9 is set for **Friday, July 24, 2009, at 10:30 a.m.** The court's motion will be stricken if the appellant's brief or a motion for an extension of time is filed on or before **July 20, 2009.**

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

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JUL 13 2009

COMPREHENSIVE RISK MGT

THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

DON HERRON,	)	CASE NO. 62516-1
	)	
Appellant,	)	
vs.	)	Declaration of Attorney for
	)	Appellant and Regarding Receipt
COMMUNITY TRANSIT,	)	of the Court's Notice of Hearing
	)	
Respondent.	)	

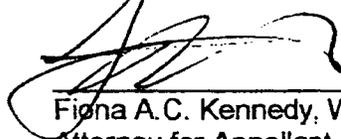
FIONA A.C. KENNEDY, Counsel of Record for Appellant DON HERRON hereby declares the following:

1. As Counsel for Appellant, Don Herron, I have not yet filed an acceptable Opening Brief in the above captioned case.
2. As Counsel for Appellant, Don Herron, I Motioned this Court for an extension to file the brief due to an unexpected surgery on my hand at the end of April.
3. An extension was granted.
4. I filed my brief within the extended timeframe, but my brief was returned by the clerk because the format was not proper.
5. The clerk requested the brief be re-filed, in the proper format, by July 3, 2007.
6. I intentionally took most of June and July off to spend the summer with my two children, ages 4 and 6, who had recently been the center of a very long custody battle.
7. The clerk sent a letter dated July 10, 2009, which stated in part that a hearing would be held on July 24, 2007, if the Appellant's brief was not filed within 10 days.
8. This letter was not received until July 16, 2009, due to the recent move of my Kirkland office. Upon receiving the letter, my assistant telephoned me stating I had until July 24, 2009 to file my brief.
9. On July 22, 2009, my assistant emailed this letter to me through her personal email, because the office email was not yet working properly (see attached)
10. My children return to their father tonight, July 23, 2009, to spend the remainder of the summer with him, and it was my intention to finish the brief before close of business tomorrow, which I understood from my assistant was my deadline.
11. I am still not completely healed from the surgery, but will have this brief filed by close of the court on Friday July 24, 2009 without fail.

RAP 18.8 gives this Court the authority to enlarge the time within which an act must be done in order to serve the ends of justice. Based on this Counsel for Appellant asks this Court to not dismiss this case or impose sanctions unless the Appellant's brief is not received as stated.

July 23, 2009

Respectfully submitted,



---

Fiona A.C. Kennedy, WSBA 32385  
Attorney for Appellant  
11417 124<sup>th</sup> AVE NE, Suite 100  
Kirkland, WA 98033  
(425)889-8670 Office  
(425)827-9456 Fax  
(509)951-1280 Cellular

App - 25

*The Court of Appeals  
of the  
State of Washington*

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

July 30, 2009

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
10829 NE 68th St Ste C  
Kirkland, WA. 98033-4006

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-1  
Community Transit, Respondent v. Don Herron, Appellant

Counsel:

The following notation ruling by Commissioner William Ellis of the Court was entered on July 29, 2009, regarding court's motion to impose sanctions and/or dismiss for failure to file appellant's brief:

A brief has been filed. Although it is not fully compliant, it will be accepted.  
The court's motion is denied.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

RECEIVED  
JUL 31 2009  
COMPREHENSIVE RISK MGT

NO. 62516-1  
THE COURT OF APPEALS, DIVISION 1  
STATE OF WASHINGTON

DON HERRON,	)	
Appellant,	)	
And	)	
COMMUNITY TRANSIT	)	MOTION FOR EXTENSION
Respondent	)	TO FILE RESPONDENT'S
	)	BRIEF AND MOTION FOR
	)	APPELLANT TO COMPLY
	)	WITH RAP 9.2(B) AND RAP
	)	9.2(C)
	)	
	)	
	)	
	)	

**I. IDENTITY OF MOVING PARTY**

The moving party is Community Transit

**II. STATEMENT OF RELIEF SOUGHT**

- a. Community Transit requests an order directing the Appellant to serve his brief on Community Transit. Community Transit requests at least a thirty-day extension of time from the date the brief would ordinarily be due assuming that it is properly served on Community Transit by the Appellant and that a confirmation of the issues is received from the Appellant.
  
- b. Community Transit requests an order directing the Appellant to comply with his duties under RAP 9.2(b) and RAP 9.2(c) to insure that a complete copy of the Certified Appeals Board

Record (CABR) has been filed with the court or to limit his issues to the portions of the CABR that have been transmitted to the court.

**III. FACTS RELEVANT TO MOTION**

The circumstances in support of this motion are set forth in the attached declaration of Terry D. Peterson.

**IV. GROUNDS FOR RELIEF**

RAP 18.8(a) authorizes the court to extend the period of time to file the Respondent's brief under RAP 10.2(b). By declaration attached hereto, counsel for Community Transit has explained the circumstances which support its motion for a filing extension. Counsel does not believe that Herron will be prejudiced by granting this request.

Respectfully submitted this 15<sup>th</sup> day of August, 2009

  
\_\_\_\_\_  
Terry D. Peterson  
Attorney for Community  
Transit  
WSBA #18447

NO. 62516-1  
THE COURT OF APPEALS, DIVISION 1  
STATE OF WASHINGTON

<b>DON HERRON,</b>	)	
Appellant,	)	<b>DECLARATION OF</b>
And	)	<b>RESPONDENT'S ATTORNEY</b>
	)	<b>SUPPORTING MOTION FOR</b>
<b>COMMUNITY TRANSIT</b>	)	<b>EXTENSION TO FILE</b>
Respondent	)	<b>RESPONDENT'S BRIEF AND</b>
	)	<b>MOTION FOR APPELLANT</b>
	)	<b>TO COMPLY WITH RAP 9.2(B)</b>
	)	<b>AND RAP 9.2(C)</b>
	)	
	)	

The undersigned declares under penalty of perjury under the laws of the State of Washington, that the following is true and correct and based on personal knowledge.

1. I am the attorney representing the Respondent, Community Transit.
2. On December 17, 2008 Appellant's counsel filed a Designation of Clerk's Papers. It appeared to me that the entire Certified Appeals Board (CABR) had been transmitted to the court but I could not be absolutely certain based on the way the Designation of Clerk's Papers was drafted.
3. In light of my uncertainty regarding the nature of the record forwarded to the court, on December 30, 2008 I sent counsel a request pursuant to RAP 9.2(c) to either provide for the complete

Board record and or provide a statement of the issues so that I could make arrangements to ensure the necessary elements of the CABR had been forwarded to the Court to address the issues that would be raised by the Appellant. I never received a response to this request.

4. On or about April 13, 2009 I contacted the court to notify it that we had not yet received the Appellant's brief which should have been filed on or before March 2, 2009. I advised that Community Transit would not be filing its brief until we had received the Appellant's brief.
5. On May 6, 2009, the court gave the Appellant until May 29, 2009 in which to file his brief. On May 18, 2009 Appellant's counsel filed a motion for an extension in which to file her brief.
6. Apparently another extension request was granted that directed the Appellant to file his brief prior to July 3, 2009. We do not have a copy of the extension request or the order granting that request in our file.
7. A brief was filed by the Appellant sometime prior to July 3, 2009 but was rejected as non-compliant with court rule. That brief was never properly served on the respondent although at one point we did receive a faxed copy.

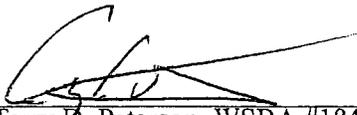
8. The court directed the Appellant to file a complying brief on or before July 20, 2009. The Appellant failed to meet that deadline but apparently filed a brief on July 24, 2009.
9. Although the brief was filed with the court, it was never properly served on the Respondent Employer. On July 30, 2009 the court notified the parties that the Appellant's brief had been accepted although it was "not fully compliant" with court rule. At that point, it was not clear to me if the court had accepted the Appellant's original non-compliant brief or if the court had accepted another brief that was also non-compliant.
10. By August 6, 2009, we had still not received a copy of the brief filed with the court on July 24, 2009. My office made contact with Appellant's counsel's office and we then received a faxed copy of a thirty-two page brief that was signed by Appellant's counsel on July 24, 2009. To date we have still not received a Proof of Service of the July 24, 2009 brief and do not know if this brief or the Appellant's earlier non-complying brief is the brief served upon and accepted by the court.
11. I am not able to adequately brief this case at present. This is because I do not know with certainty what issues are before the court. In addition, I am concerned that perhaps only a portion of CABR was filed with the court based on the arguments made by

counsel in the July 24, 2009 brief challenging the superior court's jurisdiction to hear the employer's appeal. Since documentation of the employer's timely petition for review and appeal to Snohomish County Superior Court is contained in my copy of the CABR it is of concern that Appellant's counsel alleges in her July 24, 2009 brief that there is no record of this in CABR transmitted to the court.

12. The Appellant should be directed to properly serve on the Respondent the version of his brief that was accepted by the Court.
13. The Appellant should be directed to submit to the court a complete copy of the CABR if the Appellant intends to address issues regarding jurisdiction.
14. I respectfully request an extension of time in which to file Community Transit's brief after the Appellant has been directed to properly provide for the entire CABR or to limit his issues to the record provided to court.
15. Documents establishing the Board's and the Superior Court's jurisdiction in support of this motion are attached including the Board's order granting an extension of time in which to file a Petition for Review which is not typically included in the CABR

since the Board's Order Denying Petition for Review is  
acknowledgment of timely receipt of the petition.

Respectfully submitted this 17<sup>th</sup> day of August, 2009

  
Terry D. Peterson, WSBA #18447  
Attorney for Respondent,  
Community Transit

*The Court of Appeals  
of the  
State of Washington*

RICHARD D. JOHNSON,  
Court Administrator/Clerk

TJ  
DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

August 27, 2009

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
10829 NE 68th St Ste C  
Kirkland, WA. 98033-4006

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-I  
Community Transit, Respondent v. Don Herron, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on August 26, 2009, regarding respondent's motion for extension to file respondent's brief and motion for appellant to comply with RAP 9.2(b) and RAP 9.2(c):

By September 8, 2009 appellant shall serve respondent Community Transit with appellant's brief accepted by this court and shall file proof of service. By the same date appellant shall respond to Community Transit's motion regarding whether the Certified Appeal Board Record is complete. A new due date for respondent's brief will be set when the issue regarding the record is resolved.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

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AUG 28 2009

COMPREHENSIVE RISK MGT

The COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

Don Herron,

Appellant,

vs.

Community Transit,

Respondent.

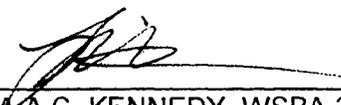
CASE NO. 62516-1-I  
TRIAL COURT CASE NO. 07-2-03579-4

**APPELLANT'S RESPONSE TO  
RESPONDENT'S MOTION FOR  
EXTENSION TO FILE BRIEF**

COMES NOW the Appellant Don Herron, by and through his Attorney of Record, Fiona A.C. Kennedy, provides the following Response to the Respondent's Motion for an Extension to file brief:

1. An Amended Statement of Arrangements and an Amended Designation of Clerk's Papers was filed with the trial court on September 4, 2009, with the intent of clearing up any ambiguities that may have arisen from these prior documents.
2. The Amended Statement of Arrangements now includes the issues of which Appellant intends to raise on Appeal.
3. Appellant has no objection to Respondent's Motion for Extension.

Dated this 4<sup>th</sup> day of September, 2009.

  
\_\_\_\_\_  
FIONA A.C. KENNEDY, WSBA 32385  
11417 124<sup>th</sup> AVE NE, Suite 100  
Kirkland, WA 98033  
Office (425)889-8670  
Cell (509)951-1280  
Fax (425)827-9456

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SEP 08 2009

COMPREHENSIVE RISK MGT.



The COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

Don Herron,

Appellant,

vs.

Community Transit,

Respondent.

CASE NO. 62516-1-1

TRIAL COURT CASE NO. 07-2-03579-4

**AMENDED STATEMENT  
OF ARRANGEMENTS**

COMES NOW Fiona A.C. Kennedy, attorney for Appellant, states that on November 19, 2008, Appellant ordered transcription of the original and one copy of *the verbatim report of proceedings beginning with the Court's ruling through the end of the record* as well as other documents contained in the clerk's file.

FURTHER, Appellant states that on September 4, 2009, Appellant ordered, for clarification purposes, the documents, if any, from the Superior Court:

1. The Employer's Petition for Review to Board of Industrial Insurance Appeals;
2. The Employer's request for an extension in which to file the Petition for Review;
3. The Board's Order granting the extension;
4. The Board's Order denying the Petition for Review; and
5. The Employer's Appeal of the Board's Decision and Order to Superior Court.

Appellant hereby states the issues to be raised by Appellant on Appeal are as follows:

1. Whether the Superior Court had jurisdiction to hear the Appeal; and
2. Whether Mr. Herron's application for benefits should be allowed, and if so, whether he suffered from an occupational disease or an industrial injury, or both.

Dated this 4<sup>th</sup> day of September, 2009.

**RECEIVED**  
**SEP 08 2009**  
COMPREHENSIVE RISK MGT.

  
FIONA A.C. KENNEDY, WSBA 32385  
11417 124<sup>th</sup> AVE NE, Suite 100  
Kirkland, WA 98033  
Office (425)889-8670  
Cell (509)951-1280  
Fax (425)827-9456

App - 36

*The Court of Appeals  
of the  
State of Washington*

RICHARD D. JOHNSON,  
Court Administrator/Clerk

  
DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

September 17, 2009

Terry Dale Peterson ✓  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
10829 NE 68th St Ste C  
Kirkland, WA. 98033-4006

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-I  
Community Transit, Respondent v. Don Herron, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on September 17, 2009, regarding appellant's failure to comply with the August 26, 2009 commissioner's ruling:

A court's motion is set for October 2, 2009 for failure to comply with the August 26, 2009 ruling.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

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SEP 18 2009  
COMPREHENSIVE RISK MGT

*The Court of Appeals  
of the  
State of Washington*

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
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October 12, 2009

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
11417 124th Ave NE  
Kirkland, WA. 98033-4677

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-1  
Community Transit, Respondent v. Don Herron, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on October 12, 2009, regarding court's motion to impose sanctions for failure to comply with the August 26, 2009 ruling:

No one appeared or responded to the court's motion set on October 2, 2009. Sanctions of \$250 will be imposed against appellant if he fails to serve respondent Community Transit with appellant's brief, file proof of service and respond to Community Transit's motion regarding whether the Certified Appeal Board Record is complete. The court's motion is continued to **October 30, 2009 at 10:30 a.m.**

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

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OCT 14 2009  
COMPREHENSIVE REG. UNIT

*The Court of Appeals*  
of the  
*State of Washington*

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
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TDD: (206) 587-5505

October 21, 2009

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
11417 124th Ave NE  
Kirkland, WA. 98033-4677

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-1  
Community Transit, Respondent v. Don Herron, Appellant  
Snohomish County No. 07-2-03579-4

Counsel:

The Court's records indicate appellant's supplemental clerk's papers (Amended Designation of Clerk's Papers filed September 4, 2009) are not of record in this court. Please contact the trial court immediately, to ensure the timely transmittal of the record on appeal.

Please advise the court in writing regarding the status of appellant's supplemental clerk's papers within 10 days of the date of this letter i.e. **November 2, 2009.**

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

c: Snohomish County Clerk's Papers

RECEIVED

OCT 22 2009

COMPREHENSIVE RISK MGT.

App - 39

FROM (FRI) > OCT 30 2009 16:58/ST. 16:58/No. 7515168863 P 1

FIONA A.C. KENNEDY

*Attorney at Law*

11417 124<sup>TH</sup> AVE NE, SUITE 100, KIRKLAND, WA 98033  
OFFICE (425) 889-8670 CELLULAR (509) 951-1280 FAX (425) 827-9456

October 30, 2009

Court of Appeals, Division I  
One Union Square  
600 University Street  
Seattle, WA 98101-4170

Terry Dale Peterson  
Attorney for Community Transit  
1520 Broadway, Suite 201  
Everett, WA 98201-1700

John R. Washberg  
Office of the Attorney General  
800 5<sup>TH</sup> AVE, Suite 2000  
Seattle, WA 98104-3188

RE: Change of address

62516-1

Dear Clerk and Counsel,

Please accept this as Appellant's response to the October 12, 2009 correspondence from the Court, addressing the Appellant's "failure to comply with the August 26, 2009 ruling"

Respondent was served with Appellant's brief via UPS Overnight, sent on September 4, 2009. Also sent was the certificate of service and the Appellant's response to Respondent's Motion. All of these documents were also sent to the Court via facsimile on the same date.

To be certain of compliance, Appellant is again serving Appellant's brief on Respondent today, via facsimile, and a Certificate of Service is attached hereto to be filed with Court.

As to the Respondent's Motion regarding whether the Certified Appeal Board Record is complete, I believe Appellant addressed this issue in his Response also filed and served on September 4, 2009. To be sure, Appellant believes the Certified Appeal

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON

2009 OCT 30 PM 5:03

FROM

App - 40

FROM

(FRI)OCT 30 2009 16:59/ST. 16:56/No. 751516653 P 2

Board Record dated May 22, 2007, IS COMPLETE. Respondent also addressed the potential that the Record was not complete by way of the Amended Designation of Clerks Papers, sent on September 4, 2009.

Appellant has complied with the Court's requests and as such requests no sanctions be imposed. Thank you.

Sincerely,  
  
Fiona A.C. Kennedy

*The Court of Appeals  
of the  
State of Washington*

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
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TDD: (206) 587-5505

November 4, 2009

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
Everett, WA. 98201-1700

Fiona Allison Crinks Kennedy  
Attorney at Law  
11417 124th Ave NE  
Kirkland, WA. 98033-4677

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-1  
Community Transit, Respondent v. Don Herron, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on November 3, 2009, regarding court's motion to impose sanctions for failure to comply with the August 26, 2009 ruling:

The court's motion set on October 30, 2009 is stricken. Respondent's brief is due November 30, 2009.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

RECEIVED

NOV 05 2009

COMPREHENSIVE RISK MGT

NO. 62516-1-I  
THE COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

DON HERRON,	)	
	)	
Appellant,	)	MOTION FOR EXTENSION
And	)	TO FILE RESPONDENT'S
	)	BRIEF
COMMUNITY TRANSIT	)	
Respondent	)	
	)	
	)	
	)	
	)	

**I. IDENTITY OF MOVING PARTY**

The moving party is Community Transit

**II. STATEMENT OF RELIEF SOUGHT**

Community Transit requests a 30-day extension of time in which to file its brief to run from the date that the Appellant complies with the court's October 21, 2009 direction to transmit the Appellant's supplemental clerk's papers by November 2, 2009.

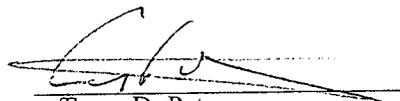
**III. FACTS RELEVANT TO MOTION**

The circumstances in support of this motion are set forth in the attached declaration of Terry D. Peterson.

**IV. GROUNDS FOR RELIEF**

RAP 18.8(a) authorizes the court to extend the period of time to file the Respondent's brief under RAP 10.2(b). By declaration attached hereto, counsel for Community Transit has explained the circumstances which support its motion for a filing extension. Counsel does not believe that Herron will be prejudiced by granting this request.

Respectfully submitted this 13<sup>th</sup> day of November, 2009



---

Terry D. Peterson  
Attorney for Community  
Transit  
WSBA #18447

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NO. 62516-1-I  
THE COURT OF APPEALS, DIVISION 1  
STATE OF WASHINGTON

DON HERRON,	)	
Appellant,	)	DECLARATION OF
And	)	RESPONDENT'S ATTORNEY
COMMUNITY TRANSIT	)	SUPPORTING MOTION FOR
Respondent	)	EXTENSION TO FILE
	)	RESPONDENT'S BRIEF
	)	
	)	
	)	
	)	
	)	
	)	

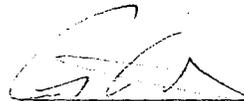
The undersigned declares under penalty of perjury under the laws of the State of Washington, that the following is true and correct and based on personal knowledge.

1. I am the attorney representing the Respondent, Community Transit.
2. On September 8, 2009, the Appellant served me with a September 4, 2009 Amended Designation of Clerk's Papers.
3. On October 21, 2009 the Court requested a status report regarding the status of those additional documents to be provided by November 2, 2009.
4. On October 30, 2009 the Appellant sent a faxed copy of a brief with a Certificate of Mailing indicating that the original was being sent via UPS Overnight Delivery to my attention and also John R.

Wasberg, with the office of the Attorney General. I never received an original copy via UPS.

5. On November 12, 2009 I contacted the court and was informed that these supplemental clerk's papers had not yet been transmitted to the Court.
6. I have never received a copy of the Appellant's brief with a certificate of service certifying that the same brief has been filed with the Court. Since there are two Appellant briefs, of which I am aware, that have been filed with the Court and not all of the clerk's papers have been transmitted to the Court, I feel it is necessary for me to verify the contents of the Court's file and to insure that the supplemental clerk's papers have been transmitted, prior to filing the respondent's brief. To that end, I have requested that the Attorney Information Bureau copy the entire file to forward for our review.
7. I respectfully request that the Respondent's thirty-day briefing due date be run from the date that the supplemental clerk's papers have been transmitted to the Court per the Appellants September 4, 2009 Amended Designation of Clerk's Papers.

Respectfully submitted this 13<sup>th</sup> day of November, 2009

  
Terry D. Peterson, WSBA #18447  
Attorney for Respondent,  
Community Transit

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*The Court of Appeals  
of the  
State of Washington*

RICHARD D. JOHNSON,  
Court Administrator/Clerk

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

November 24, 2009

Terry Dale Peterson  
Attorney at Law  
1520 Broadway Ste 201  
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Fiona Allison Crinks Kennedy  
Attorney at Law  
11417 124th Ave NE  
Kirkland, WA. 98033-4677

John R. Wasberg  
Ofc of The Atty Gen  
800 5th Ave Ste 2000  
Seattle, WA. 98104-3188

CASE #: 62516-1-1  
Community Transit, Respondent v. Don Herron, Appellant

Counsel:

On November 16, 2009, respondent filed a "Motion for Extension of Time to File Respondent's Brief". Counsel for appellant is directed to file a response to the motion on or before **December 4, 2009**. If the response to the motion is not filed by that date, a court's motion to impose sanctions is set for **December 11, 2009 at 10:30 a.m.** Counsel's failure to comply may result in the imposition of sanctions pursuant to RAP 18.9.

*Community Transit*

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

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*The Court of Appeals  
of the  
State of Washington*

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*Court Administrator/Clerk*

DIVISION I  
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December 15, 2009

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CASE #: 62516-1-I  
Community Transit, Respondent v. Don Herron, Appellant

**Counsel:**

The following notation ruling by Commissioner James Verellen of the Court was entered on December 11, 2009, regarding respondent's motion for extension of time to file respondent's brief and appellant's failure to file a response:

Counsel for respondent appeared on December 11, 2009. Counsel for appellant did not appear.

As to the appellant's brief, the brief filed on July 24, 2009 was previously accepted by this court as appellant's opening brief. In response to the inquiry of counsel for respondent, it is the July 24, 2009 brief that respondent should address.

As to the status of the clerk's papers and the Board Certified Record, there continues to be some confusion.

The initial designation of clerk's papers filed by appellant on December 17, 2008 included the Board Certified Record. On April 15, 2009 130 pages of clerk's papers were filed in this court.

On September 4, 2009, appellant filed an Amended Designation of Clerk's Papers in this court, but apparently not in the trial court, identifying five documents "if any such documents exist." Those documents include:

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December 15, 2009

1. The Employer's Petition for Review to Board of Industrial Insurance Appeals;
2. The Employer's request for an extension in which to file the Petition for Review;
3. The Board's Order granting the extension;
4. The Board's Order denying the Petition for Review; and
5. The Employer's Appeal of the Board's Decision and Order to Superior Court.

Counsel for appellant also filed an Amended Statement of Arrangements listing the same five documents, and indicated in other filings with this court that she filed the amended designation and an amended statement of arrangements to clear up any ambiguities.

It appears that the only record that has been received in this court is the 130 page of clerk's papers received on April 15, 2009 and a verbatim report of proceedings of a September 18, 2008 hearing before Superior Court Judge Bowden. It does not appear that any of the five documents identified in the Amended Designation of Clerk's Papers or Amended Statement of Arrangements have been filed after April 15, 2009.

It is not the obligation of the court to check the existing clerk's papers to determine whether those 130 pages include documents appellant wants to include on appeal, or to Shepherd an amended designation of clerk's papers or amended statement of arrangements through the trial court. Counsel for appellant has not responded to this court's direction to file an answer to Respondent's November 16, 2009 motion to extend time to file respondent's brief.

Rather than delay this matter any further, I conclude that the appeal will go forward with the record consisting of the 130 pages of clerk's papers filed on April 15, 2009 and the verbatim report of proceedings of a September 18, 2008 hearing before Superior Court Judge Bowden. If that record is inadequate to allow full review of the issues raised by appellant, then appellant will bear the consequences of providing an inadequate record on appeal. ] !

Therefore, it is

**ORDERED** that the appeal shall go forward based upon the appellant's opening brief filed on July 24, 2009 and limited to the 130 pages of clerk's papers filed on April 15, 2009 and the verbatim report of proceedings of a September 18, 2008 hearing before Superior Court Judge Bowden. It is further

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December 15, 2009

**ORDERED** that the respondent's brief shall be filed by January 15, 2010.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

khn

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DEC 16 2009  
COMPREHENSIVE RISK.MGT.

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be served the foregoing **RESPONDENT'S BRIEF** and this **CERTIFICATE OF SERVICE** on the following individual on February 26, 2010, by mailing to said individual one true copy thereof, certified by me as such, contained in a sealed envelope, with postage prepaid, addressed to said individual at her last known address, to wit:

Fiona A.C. Kennedy  
10829 N.E. 68th Street, Suite C  
Kirkland, WA 98033

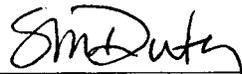
and deposited in the post office at Seattle, Washington on said date.

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

Richard D. Johnson, Clerk/Administrator  
The Court of Appeals of the State of Washington  
Division One  
One Union Square  
600 University Street  
Seattle, WA 98101-1176

by *hand delivery* on the 26<sup>th</sup> day of February, 2010.

**REINISCH MACKENZIE, P.C.**



---

Shannon M. Duty, Legal Assistant to  
Jerald P. Keene, WSEA # 22271  
of Attorneys for Respondent