No. 71101-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

WILFRED A. LARSON

Respondent,

v.

CITY OF BELLEVUE AND THE DEPARTMENT OF LABOR AND INDUSTRIES FOR THE STATE OF WASHINGTON,

Appellants.

RESPONDENT WILFRED LARSON'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The Department of Labor & Industries ("Department") did not file a Notice of Appeal to this Court and is not the Appellant. The Department is not the Respondent. The Department did not file or get permission to file an amicus curiae brief. The Department gave almost no participation at the Board level, and almost no participation at the Superior Court level -- not even attending or participating in the trial. The Department did not have authority to file its appeal brief.

II. STATEMENT OF THE CASE

In the Superior Court, the Department filed no trial brief, proposed no jury instructions, filed no motions in limine or other pre-trial motions, and produced no representative or attorney at the jury trial. At the Board level, the Department did not conduct any written discovery and took no depositions. The Department was also not present for the perpetuation depositions of Captain Larson (CP 1292), Alexandra Schmidek MD, (CP 236, 1033), Sara Dick MD, (CP 230, 1362), or John Hackett MD, (CP 1410), and was neither present nor represented at (a) the City of Tacoma and Captain Larson's July 29, 2011 cross motions for summary judgment, (CP 807) or (b) the City of Bellevue's August 4, 2011 motion to quash, CP 821 or (c) the live testimony of the City of Bellevue witnesses at the June 14, 2012 Board

hearing, (CP 829). The Department also was not present for the live testimony of Melody Larson, Randy Hart and Doug Halbert on June 15, 2012, (CP 960).

The Department did not file a Notice of Appeal to this Court, and is therefore not the party seeking review, and is therefore not an Appellant. The Department has admitted that it is not the Respondent, by virtue of admitting that its interests are aligned with Appellant City of Bellevue. The Department did not file an Amicus Curiae brief, nor did it even get permission to file such a brief. Even if the Department believed itself a party to this appeal, it cannot participate in this appeal in a manner that violates the Rules of Appellate Procedure. The Department, by its own disregard of the Rules of Appellate Procedure, was not authorized to file a brief.

III. ARGUMENT

A. The Rules of Appellate Procedure do not authorize submission of the Department's brief.

The Department relies on RAP 10.1(g) and claims that it is a "party" and because it is a party, it can file a separate brief. This is misguided and puts the cart before the horse. Before reaching this argument, the Department must show that it is either an appellant, a respondent, or that its brief was filed with the Court's permission as an Amicus Curiae brief.

RAP 10.1(a) entitled "Scope of Title" states:

> The rules in this title apply *only to the briefs referred to* in this rule, unless a particular rule indicates a different application is intended. [emphasis added].

The briefs *referred to* in RAP 10.1 are (1) brief of appellant/petitioner; (2) brief of respondent and/or cross appellant; (3) amicus curiae brief and answer thereto; and (4) reply briefs of appellant or respondent and cross respondent and cross appellant. The Department is none of the above.

RAP 10.1(g) does not create "briefing rights" for non-appellants and non-respondents. That distinction, and those briefing rights, have already been addressed by RAP 10.1(e) entitled "Amicus Curiae Brief." RAP 10.1(g) simply exists to give those *who have the right to submit briefs* in cases involving multiple parties an option to join in submitting one brief, or file a separate brief.

It is clear by RAP 10.1, 10.2, 10.3 and 10.4, that authorized briefs on appeal are those of the appellant/petitioner, the respondent, or amicus curiae.

For example, RAP 10.3 addresses specifically the content of briefs to the Appellate Court. The briefs on appeal contemplated by RAP 10.3 are (1) the Brief of Appellant or Petitioner; (2) the Brief of Respondent; (3) Reply Brief; (4) Amicus Curiae Brief and brief in answer thereto. *RAP 10.3(a)-(h).*

As another example, RAP 10.4, which has"party" in its title, clearly

contemplates briefs on appeal as those from the appellant/petitioner, respondent, or amicus curiae.

> **(b) Length of Brief.** A brief of appellant, petitioner, or respondent should not exceed 50 pages. Appellant's reply brief should not exceed 25 pages. An amicus curiae brief, or answer thereto, should not exceed 20 pages. In a cross-appeal, the brief of appellant, brief of respondent/cross appellant, and reply brief of appellant/cross respondent should not exceed 50 pages and the reply brief of the cross appellant should not exceed 25 pages. *RAP 10.4(b)* [emphasis added].

There is no rule for the length of a brief from a non-appellant, non-respondent, non-amicus curiae in RAP 10.4(b) because no such brief is authorized. Even when referring to the term "party" in the context of briefs on appeal, RAP 10.4(e) contemplates the "party" as the appellant or respondent, but encourages use of the actual names of the party such as injured worker or employer.

> **(e) Reference to Party.** References to parties by such designations as "appellant" and "respondent" should be kept to a minimum. . . . *RAP10.4(e).*

As another example, RAP 10.2 addresses the time for filing briefs. Similar to RAP 10.1, 10.3 and 10.4, this rule also contemplates that the briefs on appeal are those from the appellant/petitioner, respondent and amicus curiae. *See headings in RAP 10.2 (a) - (g).*

Even RAP Form 5 entitled "Title Page for all Briefs and Petition for Review" directs that the title page show the "title of trial court proceeding

with parties designated as in rule 3.4 ...". *RAP Form 5.* [Emphasis added]. To that end, RAP 3.4, directs that the party seeking review by appeal is called an appellant, the party seeking review by discretionary review is called a petitioner, and an adverse party on review is called a respondent. *RAP 3.4.* As is discussed below, the Department is not an appellant, petitioner, or a respondent in this appeal, nor is the Department's brief an amicus curiae brief.

B. The Department is not an Appellant, Petitioner, Respondent, nor is its brief an Amicus Curiae Brief. The Department has no authority to file its brief on appeal.

The party seeking review by appeal is called an "appellant'". *RAP 3.4.* The Department has never filed Notice of Appeal or Notice for Discretionary Review in this case as is required by RAP 5.1(a) for a party seeking review of a trial court decision. The Department is therefore not seeking review, and is not an "appellant" (or Petitioner).

An adverse party of review is called a "respondent". *RAP 3.4.* The Department is not an adverse party to the City's appeal. In fact, the Department's Supplemental Brief admits that the Department is *aligned with* the appellant in this case. *See Department Supplemental Brief.* Accordingly, the Department is not a Respondent.

The Department's brief on appeal is not an amicus curiae brief. First, the Department never moved the Court to grant permission to file an amicus

curiae brief and the Court never requested on its own motion such a brief from the Department. *See RAP 10.6.* Moreover, the Department titled its brief, "Brief of Respondent Department of Labor and Industries." *See Cover Page of Department's Brief on Appeal.* The Department is not an appellant, is not a respondent, and did not file an amicus brief. The Department had no authority to file its brief.

C. The Department's reliance on RCW 51.52.100, 110, and cases such as *Aloha Lumber Corp* and *Pybus Steel Co.* is not controlling on whether its brief was authorized

The Department relies on RCW 51.52.110 and claims that it "may appear as a 'party' before this Appellate Court. First, RCW 51.52.110 only refers to Superior Court proceedings - not appellate court proceedings. More importantly, RCW 51.52.110 does not permit the Department to participate in the appellate court in a way that violates the Rules of Appellate Procedure.

RCW 51.52.110 is entitled "Court appeal – Taking the appeal." Referring to cases involving a self-insurer, RCW 51.52.110 states, " In such cases the department may appear and take part in any proceedings." The Department favors this sentence because it says "any proceedings," but the Department fails to place this one sentence in the context of the remainder of the statute – including the immediately proceeding sentence.

When RCW 51.52.110 states, "In such cases the department may

appear and take part in any proceedings," it is referring to an appeal to the Superior Court on a case involving a self-insured employer.

> If the case is one involving a self-insurer, such self-insurer shall, within twenty days after receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed to be at issue. In such cases the department may appear and take part in any proceedings. *RCW 51.52.110*

The "proceedings" contemplated by this statute to which the Department may appear and take part in are any *Superior Court* proceedings. RCW 51.52.110 applies specifically and only to appeals *to the Superior Court*. Specifically, this statute provides in pertinent part:

> Within thirty days after a decision of the board . . . such worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal **to *the superior court.***
>
> In cases involving injured workers, an appeal ***to the superior court*** shall be to . . . In all other cases the appeal shall be ***to the superior court*** of Thurston county.

RCW 51.52.110. [emphasis added]. In such cases (appeals to the Superior Court involving SIEs), the department may appear and take part in any proceedings. This is important, because in the present case, the Department took almost no part in the proceedings before the Superior Court – or before the Board. In the Superior Court, the Department filed no trial brief, proposed no jury instructions, filed no motions in limine or other pre-trial motions, and

produced no representative or attorney at the jury trial. VRP Page 2.

The Department also relies on RCW 51.52.100 in support of its argument that the Department is a party to this appeal. RCW 51.52.100 provides in pertinent part that, "The department shall be entitled to appear in all proceedings before the board and introduce testimony in support of its order." Just because the Department could have participated at the Board level, does not mean that it did in any material way.

The Superior Court hearing is based on the record before the Board. Notably, at the Board level, the Department did not conduct any written discovery, took no depositions and was not present for the perpetuation depositions of Captain Larson (CP 1292), Alexandra Schmidek MD, (CP 236, 1033), Sara Dick MD, (CP 230, 1362), or John Hackett MD, (CP 1410). Also at the Board level, the Department was neither present nor represented at (a) the City of Tacoma and Captain Larson's July 29, 2011 cross motions for summary judgment, CP 807 or (b) the City of Bellevue's August 4, 2011 motion to quash, (CP 821) or (c) the live testimony of the City of Bellevue witnesses at the June 14, 2012 Board hearing, (CP 829). The Department also was not present for the live testimony of Melody Larson, Randy Hart and Doug Halbert on June 15, 2012, (CP 960).

The Department argues that it need not appeal in a worker's

compensation matter to be a party. This misses the point. The issue is whether the Department had authority to file a brief to the Appellate Court. By choosing not to file a Notice of Appeal, the Department is not an appellant. Because the Department is aligned with the City of Bellevue on this appeal, the Department is not a Respondent. The Department also did not take the appropriate steps to file an Amicus Curiae brief. It is the Department that is to blame for ignoring the Rules of Appellate Procedure, which must be followed to have a right to submit a brief to this Court.

RCW 51.52.110 and the cases cited by the Department such as *Aloha Lumber Corp v. Department of Labor & Industries* concern appeals *to the Superior Court*. An appeal *from* the judgment of the Superior Court may be taken by *any* aggrieved party. *See RAP 3.1.* The Washington State Supreme Court in a case that came after the *Aloha Lumber Corp* case and after the *Pybus Steel Co.* case (both cited by the Department), recognized the distinction between the Department's rights to appeal *to* the Superior Court opposed to *from* the Superior Court.

> The Department can initiate an appeal from a Board decision to the superior court only in limited circumstances not presented here. RCW 51.52.110. Although the Department may be unable to initiate an appeal to the superior court, it is made a necessary party in such an appeal. Aloha Lumber Corp. v. Department of Labor & Indus., 77 Wash.2d 763, 775, 466 P.2d 151 (1970). ***Appeal from the judgment of the superior court may be taken by <u>any</u> "aggrieved party".*** *Blue*

Chelan, Inc. v. Dep't of Labor & Indus. of State of Wash., 101 Wash. 2d 512, 516, 681 P.2d 233, 235 (1984); *citing RAP 3.1.*

The Department chose not to file Notice of Appeal to this Court and it is not an appellant. Even if the term "any proceeding" or "all proceedings" in RCW 51.52.110 and 100, respectively, applied to Appellate Court proceedings, the Department's brief cannot be that of an appellant, a respondent or amicus curiae when the Department is neither of the above. The Department is neither of the above due to its own disregard of the Rules of Appellate Procedure. Even if the Department was/is a party, its self-inflicted disregard of the Rules of Appellate Procedure have rendered its brief unauthorized.

IV. CONCLUSION

Based on the foregoing, the Department did not have authority to file an appeal brief. The Department's brief should be stricken and given no consideration by this Court.

DATED: March 2, 2015

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DECLARATION OF SERVICE OF RESPONDENT WILFRED LARSON'S SUPPLEMENTAL BRIEF

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS:
1. RESPONDENT WILFRED LARSON'S SUPPLEMENTAL BRIEF
2. DECLARATION OF SERVICE

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DATED this 2nd day of March, 2015, at Olympia, Washington.

Mindy Leach, Paralegal