No. 48390-4-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ANDREW AHRENS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

CORRECTED BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Washington Cases

Federal Case

Statutes

Rules and Regulations

A. ASSIGNMENTS OF ERROR

(1) Assignment of Error

On November 20, 2015, the trial court erred in entering the Order Granting the Department of Labor and Industries' (the "Department") Motion for Summary Judgment fail when it went beyond its function of determining whether a genuine issue of material fact exists and instead resolved the underlying factual issue.

(2) Issues Relating to Assignment of Error

Whether there a genuine issue of material fact as to the sufficiency of the Claimant's August 27, 2013, protest when the factual record demonstrates a reasonable hypothesis that two different individuals believed the August 27, 2013, protest, was sufficient to place the Department on notice of need for action?

B. STATEMENT OF THE CASE

On July 1, 2013, the Department issued an order ending time-loss compensation. CP 284. On July 2, 2013, the Department issued a Notice of Decision canceling the May 28, 2013, order. CP 286. On July 3, 2013, the Department issued a Notice of Decision correcting a March 18, 2013 order and determining the Department was not responsible for the Plaintiff's

lumbar sprain. CP 288. On July 5, 2013, the Department issued its fourth order in five days setting Mr. Ahrens' wage. CP 290.

On August 27, 2013, the Plaintiff submitted a Protest and Request for Reconsideration. CP 293. On October 15, 2013, the Department received a letter from Patrick B. Reddy requesting the Department take action on the August 27, 2013, Protest. CP 299. Specifically, the letter requested the Department reconsider the July 5, 2013, wage order as previously requested. *Id.*

On January 6, 2014, the Department corrected and canceled the July 3, 2013, order setting a new wage. CP 295.

Following the November 20, 2015, hearing, Judge Jerry T. Costello granted the Department's Motion for Summary Judgment. CP 358-359.

C. ARGUMENT

The standard of review orders of summary judgment dismissal is de novo review, and the Court of Appeals engages in the same inquiry as the trial court. *Korslund v. DynCorp Tri–Cities Servs., Inc.*, 156 Wash.2d 168, 177, 125 P.3d 119 (2005); RAP 9.12.

A material fact is one upon which the outcome of the case depends. *Atherton Condo. Apartment-Owners Ass'n Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). If reasonable minds could reach two different conclusions from the evidence, then summary judgment is

inappropriate. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 959 P.2d 1104 (1998).

The evidence and all reasonable inferences from the evidence shall be viewed in the light most favorable to the nonmoving party. *Roger Crane & Associates, Inc. v. Felice*, 74 Wash. App. 875 P.2d 705 (1994). Any doubts as to the existence of a genuine issue of material fact should be resolved against the moving party, and in favor of allowing the case to go to trial. *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62 (3d Cir. 1978).

Here, the factual record indicates that two different individuals believed the August 27, 2013, protest, was sufficient to place the Department on notice of need for action. Thus, there is a genuine issue of material fact at issue and the Department's Motion should have been denied.

RCW 51.52.050 does not require strict compliance in regard to the form or content of a "protest" or "request for reconsideration." **Any written document** will suffice as a protest or request for reconsideration if it is reasonably calculated to put the Department on notice that the party is requesting action inconsistent with the adverse Department decision, and it is sent to the Department within 60 days of the original order. See *In re Mike Lambert,* BIIA Dec., 91 0107 (1991). *Pearson v. State Dep't of Labor & Indus.*, 164 Wn. App. 426, 262 P.3d 837 (2011), as modified (Nov. 28, 2011) (appeal must be taken within 60 days of DLI order).

There are no technical requirements for a protest, it merely must be: 1) in writing, 2) sent within 60 days of the Order, and 3) sufficient to place the Department on notice that action should be taken.

Here, there is no dispute as to the first two elements of a valid protest. The August 27, 2013, protest was: 1) written and 2) sent within 60 days of the July 3, 2013, order.

The final element is a question of fact and is a material fact in dispute: *was the August 27, 2013, protest sufficient to put the Department on notice*. As discussed below, the facts reveal that reasonable persons could ***and did*** reach different conclusions. Therefore, the Department's Motion should of been denied.

First, the October 15, 2013, letter from Patrick B. Reddy, asks the Department to take action on the Protest previously sent and not yet acted upon. CP 299. This letter was sent due to the fact that Mr. Reddy believed the Protest was sufficient enough to warrant Department action, specifically in regard to the July 5, 2013, order. CP 297.

Additionally, the Department's own actions indicate the protest was sufficient to put it on notice that action was requested. On January 6, 2014, the Department corrected and canceled the July 3, 2013, order, and set a new wage for Mr. Ahrens correcting its previous mistake. CP 295. The Department also reconsidered other orders within the same time period,

calling into question the Department's current claim that it lacked notice of the request for reconsideration.

This contention is especially concerning in a situation where the Department's initial action caused the confusion in the first place—the Department issued a series of orders on different, consecutive days, and pertaining to broad questions involving Mr. Ahrens' entitlement to benefits. Where such confusion and perhaps unnecessary duplication of orders takes place, it is sufficient that the Department received written notice, within 60 days, that a "protest and request for reconsideration" must be acted upon. The claim manager merely needed to address the orders that had been sent within 60 days of the protest, or ask for clarification. Without any request for clarification, on his own initiative, the Plaintiff sent a clarifying letter and then the Department reconsidered.

If all proper inferences were given to the nonmoving Mr. Ahrens, it is clear that reasonable minds can and did reach different conclusions, and thus summary judgment must fail. The trial court erred in its decision on summary judgment when it went beyond its function of determining whether a genuine issue of material fact exists, and instead resolved the factual issue.

In ruling on motion for summary judgment, court's function is not to resolve any existing factual issue, but to determine whether such genuine

issue exists. *Jolly v. Fossum*, 59 Wash.2d 20, 365 P.2d 780 (1961); *Hughes v. Chehalis School Dist.*, 61 Wash.2d 222, 377 P.2d 642 (1962).

It is certainly improper for the court to grant summary judgment based merely on belief that the moving party is likely to prevail at trial. *Meadows v. Grant's Auto Bokers, Inc.*, 71 Wash.2d 874, 882, 431 P.2d 216 (1967).

The summary judgment procedure should not be used to try an issue of fact. *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). Summary judgment must be denied if the record shows even a reasonable hypothesis that would create a genuine issue of material fact. *Mostrom v. Pettibon*, 25 Wash.App 158, 162, 607 P.2d 864 (1980).

The trial court excluded certain evidence that showed a hypothesis that Department believed it had been put on notice to take action, specifically the January 6, 2014, order. CP 295. The order stands for the hypothesis that an actor believed they were put on notice and thus took action. Indeed, the trial judge believed he "must" exclude all evidence except for the letter itself. RP 11, 14-15. Then after excluding evidence, the trial court went on to answer the specific question of whether the August 27, 2013, protest was "reasonably calculated to put the Department on notice." RP 11, 19-20.

Mr. Ahrens deserves his opportunity to present this evidence to a trier of fact. This is especially true, not only because of the policy reasons that support Mr. Ahrens as the non-moving party, but because this matter is within context of Title 51.

Title 51 was the result of a compromise between employers and workers. *Dennis v. Department of Labor and Industries of State of Wash.*, 109 Wash.2d 467, 745 P.2d 1295 (1987). In exchange for limited liability, the employer would pay on some claims for which there had been no common law liability. *Id.* The worker gave up common law remedies and would receive less, in most cases, than he would have received had he won in court in a civil action, and in exchange would be sure of receiving that lesser amount without having to fight as hard for it. *Id.*

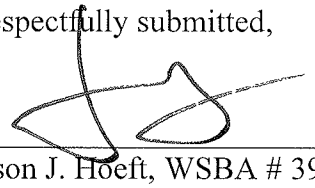
RCW 51.04.010 embodies these principles, and declares, among other things, that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided [by the Act] regardless of questions of fault and to the exclusion of every other remedy." *Id.* To this end, the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Id,* citing multiple sources.

D. CONCLUSION

When all evidence is taken into account, it is clear that an issue of material fact exists based on the actors at the time the protest was filed. There Departments' Motion for Summary Judgment should have been denied. The court's November 20, 2015, Order should be reversed, and this case remanded to be heard on the merits.

DATED this 17 day of June, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kalli Lehmann, under penalty of perjury of the laws of the state of Washington, certify and declare that I caused a true and correct copy of the foregoing document to be served on the following parties as indicated below:

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