NO. 97389-0

SUPREME COURT OF THE STATE OF WASHINGTON

ASPLUNDH TREE EXPERT, CO.,

Petitioner,

v.

LUCIANO M. GALVEZ, and DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

It is blackletter law in an industrial insurance case that a party cannot appeal from an interlocutory order of the Board of Industrial Insurance Appeals. RCW 51.52.110 allows appeals only from a final Board decision, and Asplundh Tree Expert, Co. concedes the order it appealed from is not final. For this reason, the trial court properly declined to consider Asplundh's interlocutory appeal of an order denying a motion for CR 35 examination.

Asplundh claims that the Court of Appeals decision conflicts with three cases, but none of them hold that a party may appeal an interlocutory order. Having shown no conflict, this Court should deny the petition for review.

II. ISSUE

RCW 51.52.110 allows for an appeal within 30 days of a final decision of the Board. Asplundh appeals from an interlocutory order. Did the trial court properly decide it lacked authority to consider the appeal?

III. STATEMENT OF THE CASE

A. Background of Applicable Workers' Compensation Principles

The Board of Industrial Insurance Appeals is a three-member board that decides workers' compensation appeals and other matters. RCW 51.52.010. Industrial appeals judges conduct preliminary hearings

on appeals from Department of Labor & Industries' orders. RCW 51.52.100, .104, .106. After considering the evidence in a case, the industrial appeals judge will issue a proposed decision and order. RCW 51.52.104. A party may challenge the proposed decision by petitioning the full Board for review. *Id*. The Board either adopts or replaces the proposed decision. RCW 51.52.106. A party may object to a procedural matter in its petition for review to the Board. RCW 51.52.104.

Ordinary civil practice applies to proceedings at the Board. RCW 51.52.104. So a party can move for a CR 35 examination to have a medical expert examine a worker. The industrial appeals judge will rule on the motion in an interlocutory order. A party can request a review of that decision by an assistant chief industrial appeals judge. WAC 263-12-115(6)(a). If the party does not prevail before the assistant chief judge, the party can still raise the objection later. WAC 263-12-115(6)(b).

A party cannot appeal to the Board from the interlocutory review decision, but can re-raise the issue if the party chooses to petition the full Board for review of the proposed decision and order. *Dep't of Labor & Indus. v. Bd. of Indus. Ins. Appeals*, 186 Wn. App. 240, 245, 347 P.3d 63 (2015). The Board may either deny the petition or may accept the petition and will issue either an order remanding for more evidence to be taken or render a final decision and order. *See* RCW 51.52.104, .106. If a party is

aggrieved by the Board's final decision, the party may appeal to the superior court. RCW 51.52.110.

B. Asplundh Sought a CR 35 Examination Related to a Back Condition, Which the Industrial Appeals Judge Denied in an Interlocutory Order

Luciano Galvez suffered an industrial injury in 2011. CP 275. He had a neck condition and complained of back problems. CP 250. In September 2016, the Department closed his claim, with a permanent partial disability award for his neck. CP 281, 283. He appealed to the Board, seeking various remedies, ranging from treatment to a pension. CP 279-80. One of his issues was whether he had a back condition proximately caused by his injury. CP 269.

In December 2016, after the claim had closed, Galvez obtained, at his own request, a functional capacities evaluation and had a medical examination performed by Inland Medical Evaluations that found a low-back impairment caused by the industrial injury. CP 258, 361, 379-80. He had an earlier functional capacities examination and previous independent medical examinations ordered by Asplundh, his employer, when the claim was open. CP 190, 372, 374-77, 384-85.

At the Board, Asplundh requested a CR 35 examination to provide an updated functional capacities evaluation and independent medical examination to respond to the new medical information provided by

Galvez. CP 254, 261, 290. The industrial appeals judge denied the request because the CR 35 motion sought to compel Galvez to travel six hours to attend the examinations and because Galvez had submitted before to previous independent medical examinations. CP 40. The industrial appeals judge concluded that the employer failed to show the good cause necessary to compel Galvez to attend the new examinations. CP 40.

Asplundh moved for interlocutory review under WAC 263-12-115(6)(a). In such a review, a chief industrial appeals judge decides whether to reverse an interlocutory decision. WAC 263-12-115(6)(a). An assistant chief industrial appeals judge denied the request for review. CP 10. This order did not preclude Asplundh from raising the objection again as it could raise the issue in a petition for review from the proposed decision. WAC 296-12-115(6)(b); *Bd. of Indus. Ins. Appeals*, 186 Wn. App. at 245. Rather than wait for a final Board decision, Asplundh appealed the interlocutory decision to the superior court. CP 1.

C. The Superior Court Did Not Consider Asplundh's Appeal Because It Lacked Jurisdiction to Consider an Interlocutory Appeal; and the Court of Appeals Affirmed

The superior court ruled that it lacked jurisdiction to consider the appeal from the interlocutory order. CP 599. Asplundh appealed. The Court of Appeals affirmed. It held that "An appeal to the superior court lies only if the BIIA has made a final decision." *Asplundh Tree Expert Co.*

v. Galvez, No. 35973-5-III, slip op. 4 (Wash. Ct. App. June 4, 2019) (unpublished). It concluded that because of this, the superior court had no jurisdiction to consider Asplundh's appeal.

IV. ARGUMENT

This case presents no meritorious issue for review. Asplundh did not perfect the superior court's appellate jurisdiction because RCW 51.52.110 requires a final decision from the Board before a party can appeal. Asplundh failed to appeal from a final order of the Board and a final order of the Board is a procedural requirement to obtain the appellate jurisdiction of the superior court. None of the cases it cites conflict with the Court of Appeals decision.

A. None of the Cases Asplundh Cites Show a Conflict with the Court of Appeals Decision

Under RCW 51.52.110, a party may only appeal from a final decision of the Board:

> *Within thirty days after a decision of the board* to deny the petition or petitions for review upon such appeal has been communicated to such worker, beneficiary, employer or other person, or *within thirty days after the final decision and order of the board* upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the appeal is denied as herein provided, such worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal to the superior court. If such worker, beneficiary, employer, or other person fails to file with the superior court its appeal as provided in this section within

> said thirty days, the *decision of the board* to deny the petition or petitions for review or the *final decision and order of the board* shall become final. (Emphasis added.)

That a party may only appeal a decision of the Board is reflected in the plain language of RCW 51.52.110 that discussed the "decision of the Board" and the "final decision and order of the Board." An interlocutory decision by an industrial appeals judge is not a decision of the Board. *See Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 79, 459 P.2d 651 (1969) ("A hearing examiner is merely an employee of the Board," not the Board).

The courts have repeatedly concluded that they cannot review interlocutory orders of industrial insurance appeals judges; as *Callihan* observed, "There is no review from an interlocutory order to the superior court." *Callihan v. Dep't of Labor & Indus.*, 10 Wn. App. 153, 158, 516 P.2d 1073 (1973); *Bd. of Indus. Ins. Appeals*, 186 Wn. App. at 245; *see Gen. Elec. Co. v. Scofield*, 51 Wn.2d 336, 337, 317 P.2d 1058 (1957), *overruled on other grounds by Allied Stores Corp. v. Dep't of Labor & Indus.*, 60 Wn.2d 138, 372 P.2d 190 (1962).

Despite the plain language of RCW 51.52.110 and the cases finding no right to an interlocutory appeal, Asplundh argues that there is a conflict between the Court of Appeals decision and three other cases.

First, Asplundh cites *Ivey v. Department of Labor & Industries*, 4 Wn.2d 162, 163-64, 102 P.2d 683 (1940), for the proposition that the superior court cannot remand for evidence and so the only remedy Asplundh had was to appeal the interlocutory decision. Pet. 10-11. Asplundh is correct that in *Ivey*, the Court held that the superior court could not order the Board to take new evidence to meet an evidentiary burden. But it does not follow that if the superior court could not remand the case in an appeal of a final Board decision, that this means there must be an interlocutory appeal here. Asplundh ignores that it could have petitioned for review with the Board asking it to overturn the judge's ruling about the CR 35 exam: had it done so, and had the Board agreed, the Board could have remanded the case for further hearings to allow for a CR 35 exam. And in that situation, Asplundh would not need to file a superior court appeal to obtain a CR 35 exam.

But in any event, Asplundh is incorrect that the superior court cannot ever order a remand from a final Board decision. A superior court may remand to the Board if there is a fundamental problem in how the Board proceeded. *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 508, 208 P.2d 1181 (1949), *overruled on other grounds by Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958). *Surina v. Department of Labor & Industries*, 34 Wn.2d 839, 843, 210 P.2d

403 (1949), clarifies that the superior court can remand if there is a procedural flaw in how the Board took evidence. In *Surina*, the court remanded to allow the party to take rebuttal evidence that had been wrongly denied. *Id.* at 843-44. *Surina* and *Olympia Brewing* together clarify that there can be a remand if there is a procedural flaw in how the Board proceeded about the evidence. So if Asplundh could prove that the Board's final decision to deny a CR 35 examination was fundamentally wrong, then it could obtain a remand.

Asplundh also argues that there is a conflict with *Surina* because Asplundh eventually appealed the proposed decision and order that the Board adopted, and so, like the worker in *Surina*, it should receive a remand. *See* Pet. 12. But this case involves Asplundh's appeal from the Board judge's interlocutory appeal, not Asplundh's later appeal from the final decision of the Board. *Surina* only applies if there is a final Board decision. *See Surina*, 34 Wn.2d at 843; RCW 51.52.110. And Asplundh sought review of an interlocutory ruling that denied its CR 35 motion, not review of a final decision of the Board that denied a request to remand the case for more evidence. There is no conflict between this case and *Surina.*

Finally, Asplundh argues that there is a conflict with *Board of Industrial Insurance Appeals*, 186 Wn. App. 240. Pet. at 13. This case refused to allow an interlocutory appeal. *Id.* at 248. So there is no conflict.

Rather, Asplundh argues *Board of Industrial Insurance Appeals* was decided incorrectly, asserting the court in that case was wrong that there was a remedy for a denied interlocutory appeal in the form of a petition for review to the Board. Pet. at 14. But a party who loses an interlocutory decision may in fact seek relief by the Board in a petition for review. RCW 51.52.104; *Bd. of Indus. Ins. Appeals*, 186 Wn. App. at 243. The Board could have remanded to take more evidence. *Callihan*, 10 Wn. App. at 158. *Board of Industrial Insurance Appeals* presents no reason to grant review.

B. Asplundh's Statutory Argument Presents No Ground for Review

Asplundh's final argument is that the Court of Appeals decision conflicts with RCW 51.52.115's guarantee of court review and RCW 51.04.010's provision of sure and certain relief for workers. Pet. 14. These statutory arguments do not state a ground for review under RAP 13.4 and should be disregarded. In any event, Asplundh is incorrect. RCW 51.52.110 provides for an appeal of a final Board decision, and RCW 51.52.115 merely provides the procedures for that appeal and does not give the right to appeal an interlocutory order. And it is true that RCW 51.04.010 provides for "sure and certain relief" for workers, but the Legislature decided that interlocutory decisions may not be appealed to the

superior court, rather relief must be sought at the Board. In essence, Asplundh's complaint is that the Legislature should have provided for interlocutory appeals from interlocutory rulings rather than only providing for court review of final Board decisions, arguing that it causes unnecessary delay for a party to have to wait for a final Board decision to appeal the matter to superior court. Pet. at 15-16. But Asplundh cites no authority that statutory mandates may be ignored and its argument would be better directed to the Legislature.

V. CONCLUSION

Asplundh's attempt to get review of an interlocutory order ignores the governing statute and case law. Its petition should be denied.

RESPECTFULLY SUBMITTED this 4th day of September, 2019.

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SUPREME COURT OF THE STATE OF WASHINGTON

ASPLUNDH TREE EXPERT, CO., Appellant, v. LUCIANO M. GALVEZ and DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Answer to Petition for Review and this Certificate of Service in the below described manner:

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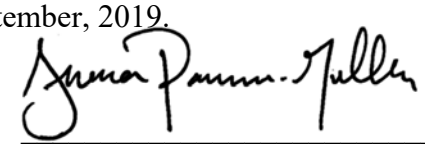
DATED this 4th day of September, 2019.



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