NO. 35973-5-III

97389-0

COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON

ASPLUNDH TREE EXPERT, CO,

Appellant,

v.

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

Respondents.

PETITION FOR REVIEW TO THE SUPREME COURT OF WASHINGTON

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I. IDENTITY OF PETITIONER

The Petitioner/Appellant, Asplundh Tree Expert Co., petitions the Supreme Court of the State of Washington for review of the Unpublished Opinion of the Court of Appeals, Division III, filed on June 4, 2019.

II. ISSUES PRESENTED

1. Under RCW 51.52.115, does erroneous denial of CR 35 motions by the Board of Industrial Insurance Appeals constitute "procedural defects" such that superior courts may remand to the Board for the taking of further evidence after a Party appeals the Board's Decision and Order?
2. Whether the Court of Appeals' June 4, 2019 Unpublished Opinion conflicts with *Ivey v. Dep't of Labor & Indus.*, 4 Wn.2d 162, 102 P.2d 683 (1940).
3. Whether the Court of Appeals' June 4, 2019 Unpublished Opinion conflicts with *Surina v. Dep't of Labor & Indus*., 34 Wn.2d 839, 210 P.2d 403 (1949).
4. Whether the Court of Appeals' June 4, 2019 Unpublished Opinion conflicts with *Dep't of Labor & Indus. v. BIIA*, 186 Wn. App. 240, 243, 347 P.3d 63 (Div. I 2015).

5. Whether the Court of Appeals' June 4, 2019 Unpublished Opinion is in conflict with the promise of RCW 51.04.010 to provide "sure and certain relief" to injured workers.

III. STATEMENT OF THE CASE

On September 15, 2011, the Department issued an order allowing this workers' compensation claim for "the injury on 02/03/11," which was later determined to have caused a worsening of Mr. Galvez's preexistent cervical myelopathy. CP at 119, 187. Lumbar conditions had never been allowed under this claim, despite having been previously litigated. *See id*. at 178-180; *see also id*. at 187.

On July 2, 2015 (while the claim was still being administered before the Department), Dr. Eugene Toomey, an orthopedic surgeon, conducted an Independent Medical Examination ("IME") of Mr. Galvez. *Id*. at 190-99. Dr. Toomey's IME report indicated that there was no further treatment recommended under this claim, and that a category 4 permanent impairment rating was appropriate. *Id*. at 198-99. On July 10, 2015, the Employer sent a letter to Dr. You, the Claimant's attending physician, requesting review of Dr. Toomey's July 2, 2015 report. *Id*. at 335-36. Dr. You signed the letter and indicated her concurrence with the IME report, and its contents. *Id*. at 336.

On June 13, 2016, the Department issued an order closing this claim with a category 4 cervical and cervico-dorsal permanent partial disability. *Id*. On September 13, 2016, the Department affirmed the June 13, 2016 closing order. *Id*. at 239. On November 4, 2016, the Claimant filed a Notice of Appeal to the Board of Industrial Insurance Appeals ("Board"), which was granted on November 14, 2016. *Id*. at 279, 273.

On December 23, 2016, the Employer timely served Interrogatories and Requests for Production upon the Claimant. *See, e.g., id.* at 12, 256, 263. On February 10, 2017, Asplundh received Mr. Galvez's Responses to the Self-Insured Employer's First Interrogatories and Requests for Production of Documents. *Id*. at 19-30. These Answers and Responses included one Memorex CD-RW disc containing electronic files/documents being disclosed to the Employer. *Id*. at 19. Mr. Galvez failed to disclose any anticipated expert witnesses or post-appeal medical or vocational evidence, and merely directed Asplundh to other documents produced or those already in Asplundh's possession. *Id*. at 19-29; *see also, id*. at 31-36.

On March 10, 2017, Asplundh received "Claimant's Supplemental Answers to Self-Insured Employer's First Set of Interrogatories and Requests for Production" via email, including a December 29, 2016 report and January 10, 2017 addendum requested by Galvez's counsel, and a

February 6, 2017 concurrence by Dr. Jean You with the December 2016 report and January 2017 addendum. *Id*. at 14; *see also, id*. at 102, 257. The December 29, 2016 Inland Medical Evaluations report cited lumbar conditions as allegedly related to this claim, a category III lumbar permanent disability, and total disability. *Id*. at 15; *see also, id*. at 365-66, 380-84, 445, 456-58, 462, 464.

The documents supplemented by the Claimant on March 10, 2017 also included a Functional Capacity Evaluation dated December 1, 2016 that factored in Galvez's ostensible lumbar issues, and supported a finding of total permanent disability and award for pension. *Id*. at 16, 46-69. The December 1, 2016 Functional Capacity Evaluation occurred over two (2) years after the previous vocational evaluation in 2014. *Id*. at 16, 65, 216-237.

On March 31, 2017, the Employer filed a CR 35 motion for neurological and orthopedic panel examination, and a CR 35 motion for a functional capacity evaluation to encompass Galvez's alleged-but-not-accepted lumbar condition. *Id.* at 254-67. The Employer argued that the CR 35 examinations were necessary and proper to enable Asplundh to verify or rebut the Claimant's new post-appeal evidence alleging permanent total disability, and for Asplundh to be capable of presenting a meaningful defense with contemporaneous information. *Id*. at 17; *see also*,

id. at 265-66. The Employer also argued that the CR 35 examinations were necessary and proper to the Board fulfilling its purpose of developing a full and complete record for appeal. *Id*.

On April 12, 2017, Industrial Appeals Judge ("IAJ") John Dalton issued an Order Denying Employer's Motions to Compel CR 35 Examinations, finding that the Employer did not present "good cause" to grant the CR 35 examinations, and favoring the arguments advanced by Galvez. *Id*. at 40-41.

On April 14, 2017, the Employer filed with the Board a Petition for Interlocutory Review of the IAJ's April 12, 2017 order denying the Employer's CR 35 examinations of the Claimant. *Id*. at 11-18. On April 25, 2017, the Board issued an Order Denying Review of Interlocutory Appeal, concluding that the Employer did not show good cause for granting its CR 35 motions. *Id*. at 10.

On May 26, 2017, Asplundh's filed an appeal with Benton County Superior Court of the April 25, 2017 Board Order Denying Review of Interlocutory Appeal. *Id*. at 1-3.

On September 12, 2017, Asplundh filed with Benton County Superior Court a Motion to Reverse Board of Industrial Insurance Appeals Denial of CR 35 Examination and Petition for Interlocutory Review. *Id*. at 491-509. Asplundh presented two main arguments: the Employer

argued that the superior court had jurisdiction to entertain the Employer's appeal, despite the otherwise interlocutory character of the Board order; and the Employer argued the merits of its CR 35 motions. *See id*. at 499-508.

The Employer also filed a motion for a stay of proceedings with the Board, pending the resolution of the Employer's appeal to Superior Court. *See id.* at 553-54. On September 26, 2017, the Board issued its Order Denying Motion for a Stay. *Id*. The Board Order denying the Employer's motion noted that "It is the employer's position that unless it receives a decision from the Superior Court prior to the issuance of the Proposed Decision and Order, it will lose its right to contest Judge Dalton's decision and present evidence based on a new examination." *Id*. at 553. "Though the employer presents a compelling argument, its motion is denied." *Id*.

The Order Denying Motion for a Stay reasoned that "[e]ven if the Board agrees with the IAJ, the employer can still raise the issue in Superior Court and that court can remand it to the Board for further proceedings since it will be an appeal from an appealable Board order." CP at 553-54 (citing *Dep't of Labor & Indus. v. BIIA*, 186 Wn. App. 240, 347 P.3d 63 (2015) as authority, no pin citation provided).

On October 3, 2017, IAJ Dalton issued his Proposed Decision and Order, finding Mr. Galvez to be totally and permanently disabled, and

awarding him a pension. *Id*. at 556-66. The IAJ concluded that the preponderance of the credible evidence, including Dr. You's post-appeal reversal of opinion in Galvez's favor, supported his ruling. *Id*. at 564-65.

On October 20, 2017, the Parties presented oral argument before the Honorable Carrie Runge in Benton County Superior Court. RP at 4. Counsel for Mr. Galvez proposed dismissal of the Employer's appeal, but Judge Runge declined, and instead ordered a continuance pending the Board's issuance of its Decision and Order. *Id*. at 41-43, CP at 578-79.

On February 8, 2018, following the Board's adoption of the Proposed Decision and Order and refusal to reverse its prior CR 35 rulings, the Employer re-noted the superior court matter for further argument to occur on March 16, 2018. CP at 595, RP at 44-46. No additional briefing was submitted to the Benton County Superior Court in anticipation of the re-noted argument.

On March 16, 2018, the Parties present argument to the Honorable Sam Swanberg in Benton County Superior Court. CP at 598-99; *see also*, RP at 44-61. Judge Swanberg declined to rule on "whether or not the Court can entertain an appeal of the -- the – of the denial of the 35 examination," but did rule "that for purposes of jurisdictional requirements, that this Court does not have jurisdiction to make that determination under this cause number because it's not a final decision." RP at 60. Judge Swanberg

signed the Order dismissing the Employer's appeal under 17-2-01421-1 for lack of "general jurisdiction" on March 16, 2018. CP at 598-99.

On April 16, 2018, Asplundh filed a Notice of Appeal to the Court of Appeals of the superior court's dismissal for lack of jurisdiction under 17-2-01421-1. *Id*. at 600. On June 4, 2019, the Division III Court of Appeals affirmed the superior court's dismissal of Asplundh's appeal for lack of jurisdiction under Case No. 35973-5-III.

IV. ARGUMENT

RCW 51.52.115 guarantees parties the right to seek superior court review of issues of law or fact contained in the Board record, and to a trial de novo on the evidence. RCW 51.52.115 also provides that "the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court." It is axiomatic that meaningful court review of "issues of law or fact" necessitates the courts' ability to provide a remedy. There is zero authority for the proposition that Board denial of CR 35 motions are immune from review by our courts.

The legal ambiguity with respect to court review of CR 35 motion denial, however, lies with *when* the courts may review these Board decisions. RCW 51.52.115 and related case law appear to create a paradox

wherein employers have the right to review of CR 35 denial, but our superior courts lack the statutory authority to provide a remedy.

Asplundh argues that the Court of Appeals' June 4, 2019 Unpublished Opinion failed to resolve this apparent paradox, is inconsistent with Washington Supreme Court and Court of Appeals case law, and is inconsistent with RCW 51.52.115 and RCW 51.04.010's promise of "sure and certain relief" to injured workers.

Asplundh petitions the Court for Review to settle the law on when our courts are permitted to review Board CR 35 denial and remand for the taking of examiner testimony. The Court's Acceptance of Review is warranted under RAP 13.4(b)(1), (2) and (4).

A. The Decision of the Court of Appeals Conflicts with *Ivey v. Dep't of Labor & Indus.*, 4 Wn.2d 162 (1940) and RCW 51.52.115.

In *Ivey*, the superior court found that the record brought before it was "incomplete" because the "authorities" were in conflict as to whether the workers' treatment was necessary. *Ivey*, 4 Wn.2d at 163. The superior court judgment directed the Department to reopen the case and "have the claimant examined by three (3) disinterested physicians for their recommendation and that this matter be further held open until such examination is made and further action taken by the joint board." *Id.*,

internal quotations omitted. The Department of Labor and Industries appealed. *Id*. at 162.

The *Ivey* Court held that

> the [superior] court assumed a directory and supervisory power over the department which it does not possess. It has been consistently and repeatedly held that the superior courts have no original jurisdiction in workmen's compensation cases, but appellate jurisdiction only…the appellate jurisdiction of the superior courts in such cases is very limited. They are given the power to review, and that only.

Id.; *see also, Andreas v. Bates*, 14 Wn.2d 322, 328, 128 P.2d 300 (1942)(citing *Ivey* for the proposition that "in no case does the superior court have the power to remand the case to the commissioner for the purpose of taking further testimony" in an unemployment compensation case). The *Ivey* Court found significant that it was "clear…that the court did not reverse the decision of the department upon the merits, but for the purpose of clearing the way for the taking of additional evidence…The court could not remand the case for the taking of additional evidence." *Id*. at 164.

Here, the Court of Appeals' June 4, 2019 Opinion forecloses Asplundh from obtaining superior court review of Board CR 35 denial while the substantive appeal was still pending before the Board, thereby avoiding remand of the Board Decision and Order for the taking of further

evidence. The only road left open by the Court of Appeals' opinion below is for Asplundh to seek review of CR 35 denial upon its present appeal of the Board's Decision and Order under Case No. 18-2-00002-2, which appears foreclosed by *Ivey*.

B. The Decision of the Court of Appeals Conflicts with *Surina v. Dep't of Labor & Indus.*, 34 Wn.2d 839, 840, 210 P.2d 403 (1949) and RCW 51.52.115.

In *Surina*, the claimant presented the testimony of a physician and herself, and then her attorney rested. *Surina*, 34 Wn.2d at 840. After the Department presented its one medical witness, then rested, the joint board "apparently assuming that the claimant had no further evidence, entered an order adverse to the claimant." *Id*. Upon appeal to the superior court, the claimant "moved to return the case to the joint board for further proceedings, on the theory that she had been denied the opportunity to present any rebuttal evidence." *Id*. The superior court reversed and remanded for the taking of rebuttal testimony. *Id*. at 841. The Department appealed. *Id*.

In affirming the superior court, the Court held,

> A remand to the joint board for the purpose of permitting the claimant to present any rebuttal evidence she may have is not in conflict with our holding in *Ivey v. Department of Labor & Industries*, 4 Wn. (2d) 162, 102 P. (2d) 683, because the superior court in the present case did not direct the taking of additional testimony by the joint board after a case had been closed, but directed that the joint board give

> the claimant an opportunity to present rebuttal evidence, which opportunity the claimant should have had before the joint board passed upon the merits of her claim.

Id. at 843-44.

Here, Asplundh had filed CR 35 motions in response to new evidence disclosed by Galvez in discovery, not at hearing. Preventing the case from becoming "closed" was the impetus behind Asplundh's immediate and direct appeal of the Board's Order Denying Interlocutory Review to superior court and for filing its motion for a stay of Board proceedings.

Unlike *Surina*, Asplundh's case became closed at the Board when the IAJ refused to grant the requested stay of proceedings, issued his Proposed Decision and Order, and thereby triggered the statutory timelines for seeking Board Review of the Proposed Decision and Order (RCW 51.52.104) and subsequent appeal to superior court (RCW 51.52.110). But for Asplundh's direct appeal of the Board Order Denying Interlocutory Review and subsequent appeals, *Surina* would not be analogous to the controlling facts of this case. The Court of Appeals' affirmance of the superior court's dismissal of Asplundh's appeal is therefore inconsistent with the *Surina* exception to *Ivey*.

C. The Decision of the Court of Appeals Conflicts with *Dep't of Labor & Indus. v. BIIA*, 186 Wn. App. 240 (Div. I 2015).

In *Dep't of Labor & Indus. v. BIIA*, Tesoro appealed numerous citations from the Department of Labor and Industries to the Board. 186 Wn. App. at 243. On appeal, the Department sought to present testimony in colloquy regarding vacated citations issued to Tesoro, but "IAJ Jaffe denied the Department's request to place evidence in colloquy." *Id*. The Board's interlocutory review of the IAJ's denial of colloquy evidence denied the Department relief. *Id*. at 244.

The Department sought a statutory writ of review in superior court of the Board's denial of colloquy evidence, Tesoro intervened in the superior court matter, and "[t]he superior court granted the statutory writ of review and directed the Board to allow the testimony in colloquy." *Id*. Tesoro appealed the superior court ruling to the Court of Appeals. *Id*.

Tesoro argued that the writ of review was not available to the Department because "the Department has an adequate remedy by appeal" of the Proposed Decision and Order to the Board, and Division I agreed. *Id*. at 245. Division I held, "The Department has an adequate remedy by appeal from the IAJ's proposed decision and order. The statutory writ of review should not have issued because the Department failed to establish a statutory prerequisite." *Id*. at 248.

Here, the Court of Appeals' reliance upon *BIIA* is misplaced. *BIIA* involved Division I's "writ of review" analysis that presumed the Department had remedy at law because "The Board reviews an IAJ's proposed decision and order de novo and can substitute its judgment for that of the IAJ." *Id*. at 245. However, Division I's BIIA decision did not address RCW 51.52.115's apparent preclusion of court remedy in a CR 35 context, *Surina*'s exception that allows the taking of additional evidence before the case is closed, or how court review could be preserved after the Board issued its Decision and Order or declined review entirely. *BIIA* held "because the Department has an adequate remedy by appeal, we conclude that the superior court erred in granting a statutory writ of review." 186 Wn. App. at 247.

As applied by Division III here, the *BIIA* opinion is incorrect and lacks authority demonstrating that Asplundh would have an available remedy if the Board's CR 35 denial were reversed upon appeal of the Board's Decision and Order to superior court.

D. The Decision of the Court of Appeals Conflicts with RCW 51.52.115's Guarantee of Court Review and the Act's Promise to Provide "Sure and Certain Relief" to Injured Workers.

The June 4, 2019 Court of Appeals opinion requiring that CR 35 denial be reviewed only upon appeal of a Board Decisions and Order to superior court is inconsistent with RCW 51.04.010's policy of providing

"sure and certain relief" to injured workers, and could materially prejudice both workers and employers.

Division I's *Dep't of Labor & Indus. v. BIIA* decision asserts that "Although the writ [of review] may be convenient, no authority supports its use as a matter of expediency." *BIIA*, 186 Wn. App. at 246-47 (quoting *Commanda v. Cary*, 143 Wn.2d 651, 656, 23 P.3d 1086 (2001)). *Commanda* was a criminal case and did not involve the statutes and policies of the Industrial Insurance Act. Division I's reliance upon *Commanda* was mistaken, as was Division III's reliance upon *BIIA* in this case.

RCW 51.04.010 is the statute that memorializes the "Great Compromise" of the Industrial Insurance Act, and abolishes common law causes of action arising from workplace injury or illness. "Sure and certain relief for workers, injured in their work…is hereby provided regardless of questions of fault and to the exclusion of every other remedy." RCW 51.04.010. The Industrial Insurance Act's policy of "sure and certain relief" favors writs of "expediency" in resolving evidentiary disputes while an appeal is being actively litigated before the Board.

Requiring parties to wait months or years to seek review of CR 35 denial (or denial of testimony in colloquy) in superior court is inconsistent with RCW 51.04.010 and the atypical nature of workers' compensation

litigation and de novo (yet appellate) superior court statutory authority. Reversal of CR 35 denial only upon appeal of the Board's Decision and Order would result in a potentially lengthy delays of superior court proceedings and trial verdicts.

The belated CR 35 exam and testimony would result in medical/vocational evidence post-dating the Board's decision on appeal by many months, and post-dating the Department order originally appealed to the Board by years. This much-belated medical evidence could also prejudice the worker insofar as the newer evidence could be seen as more probative of the worker's present condition, and more contemporaneous than the findings of his expert witnesses. Conversely, this new medical evidence could also prejudice employers due to decreased probative value arising from the passage of time and unnecessary delay.

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V. CONCLUSION

The Unpublished June 4, 2019 Opinion of the Division III Court of Appeals is in conflict with existing Washington State Supreme Court and Court of Appeals precedent, is inconsistent with RCW 51.52.115 and policies underlying the Industrial Insurance Act, fails to clarify existing ambiguity in pertinent case law, and should be reversed.

RESPECTFULLY SUBMITTED this 5th day of July, 2019.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ASPLUNDH TREE EXPERT CO.,	)	
	)	No. 35973-5-III
Appellant,	)	
	)	
v.	)	
	)	
LUCIANO M. GALVEZ, and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,	)	UNPUBLISHED OPINION
	)	
Respondents.	)	

KORSMO, J. — Asplundh Tree appeals from the dismissal of its appeal to superior court from Department of Labor and Industries (DLI) administrative rulings. Concluding that the superior court had no jurisdiction to consider an interlocutory administrative order, we affirm.

FACTS

The operative facts are primarily procedural in nature. Respondent Luciano Galvez was injured in 2011 while working for Asplundh. DLI ordered benefits for Mr. Galvez,

and the Board of Industrial Insurance Appeals (BIIA) affirmed that ruling. After a jury trial, the Benton County Superior Court affirmed the BIIA. Mr. Galvez was granted a permanent partial disability award and DLI closed his claim.

Mr. Galvez sought to reopen the award in 2016 on the basis that his condition had worsened. DLI initially denied the request. On appeal, the BIIA ordered that the claim be reopened. Asplundh then sought to have Galvez, a Benton County resident, travel to Everett and Seattle for both a functional capacity evaluation and an orthopedic and neurological examination. Industrial Appeals Judge (IAJ) John Dalton denied the request. Asplundh then petitioned for review of IAJ Dalton's order. Assistant Chief IAJ Cheryl Carlson denied Asplundh's petition.

Asplundh then filed a notice of appeal of the two IAJ rulings to the Benton County Superior Court. While that action was pending, Asplundh unsuccessfully sought to have the administrative proceedings stayed. Subsequently, the BIIA granted Mr. Galvez an additional award.

The superior court then dismissed this case, concluding that it lacked jurisdiction. Asplundh appealed to this court. A panel considered its appeal without conducting argument.

ANALYSIS

The sole issue[1] we need to address is whether the superior court had jurisdiction to consider an "appeal" from the ruling of the Assistant Chief ALJ. We agree that it did not.

Primarily at issue is RCW 51.52.110, the statute authorizing appeals from the industrial insurance administrative realm to the superior court. In part, it states:

> 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 . . . . 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.) The term "board" refers to the three members of the "board of industrial insurance appeals." RCW 51.52.010 (first sentence).

Administrative law judges are employees of the board, but are not members of the board. *Stratton v. Dep't. of Labor & Indus.*, 1 Wn. App. 77, 79, 459 P.2d 651 (1969). An interlocutory ruling by an IAJ is not appealable to the BIIA. WAC 263-12-115(6)(a). However, the BIIA can consider in its determination of a case an objection that is related

[1] Mr. Galvez seeks an award of attorney fees pursuant to RCW 51.52.130. However, his argument fails for the same reason that Asplundh's fails. Attorney fees are available under this statute only if there is an appeal to the courts from a decision of the BIIA.

to an interlocutory ruling made by an IAJ. WAC 263-12-115(6)(b). In other words, an interlocutory IAJ ruling is not given preclusive effect before the board.[2]

The appeals statute is quite clear. An appeal to the superior court lies only if the BIIA has made a final decision. RCW 51.52.110. An IAJ is not the BIIA. Accordingly, our cases recognize that there is no appeal from a decision by an IAJ. *Dep't of Labor & Indus. v. Bd. of Indus. Ins. Appeals*, 186 Wn. App. 240, 245, 347 P.3d 63 (2015); *Callihan v. Dep't of Labor & Indus.*, 10 Wn. App. 153, 158, 516 P.2d 1073 (1973).[3]

Asplundh argues that because the superior court has authority to remand a BIIA decision in some circumstances, the superior court has jurisdiction to do so here. The argument is a non sequitur and relies on authority that is not apropos. Asplundh relies on the discussion and ruling in *Allied Stores Corp. v. Dep't of Labor & Indus.*, 60 Wn.2d 138, 372 P.2d 190 (1962), without acknowledging that the case was appealed from a final order of the BIIA.

Asplundh had no right of appeal from the decisions of the two IAJs. The trial court correctly recognized that it had no jurisdiction to consider the "appeal."

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[2] A decision and order from an IAJ becomes an order of the BIIA when either (1) it is a substantive ruling on the merits of a claim and no review is sought from the board, or (2) the board adopts the proposed decision on its own. RCW 51.52.104; RCW 51.52.106.

[3] Similarly, there is no appeal to the courts from an interlocutory order of the BIIA. *General Elec. Co. v. Scofield*, 51 Wn.2d 336, 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).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Pennell, A.C.J.

Siddoway, J.

RCW 51.04.010. Declaration of police power – Jurisdiction of courts abolished.

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

History

1977 ex.s. c 350 § 1; 1972 ex.s. c 43 § 1; 1961 c 23 § 51.04.010. Prior: 1911 c 74 § 1; RRS § 7673.

RCW 51.52.104. Industrial appeals judge – Recommended decision and order – Petition for review – Finality of order.

After all evidence has been presented at hearings conducted by an industrial appeals judge, who shall be an active or judicial member of the Washington state bar association, the industrial appeals judge shall enter a proposed or recommended decision and order which shall be in writing and shall contain findings and conclusions as to each contested issue of fact and law, as well as the order based thereon. The industrial appeals judge shall file the signed original of the proposed decision and order with the board, and copies thereof shall be mailed by the board to each party to the appeal and to each party's attorney or representative of record. Within twenty days, or such further time as the board may allow on written application of a party, filed within said twenty days from the date of communication of the proposed decision and order to the parties or their attorneys or representatives of record, any party may file with the board a written petition for review of the same. Filing of a petition for review is perfected by mailing or personally delivering the petition to the board's offices in Olympia. Such petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein. 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. If an order adopting the proposed decision and order is not formally signed by the board on the day following the date the petition for review of the proposed decision and order is due, said proposed decision and order shall be deemed adopted by the board and

become the decision and order of the board, and no appeal may be taken therefrom to the courts.

History

2003 c 224 § 2; 1985 c 314 § 1; 1982 c 109 § 5; 1971 ex.s. c 289 § 22; 1963 c 148 § 6.

RCW 51.52.110. Court appeal – Taking the appeal.

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.

In cases involving injured workers, an appeal to the superior court shall be to the superior court of the county of residence of the worker or beneficiary, as shown by the department's records, or to the superior court of the county wherein the injury occurred or where neither the county of residence nor the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county. In all other cases the appeal shall be to the superior court of Thurston county. Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board. If the case is one involving a self-insurer, a copy of the notice of appeal shall also be served by mail, or personally, on such self-insurer. The department shall, in all cases not involving a self-insurer, within twenty days after the receipt of such notice of appeal,

serve and file its notice of appearance and such appeal shall thereupon be deemed at issue. 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. The board shall serve upon the appealing party, the director, the self-insurer if the case involves a self-insurer, and any other party appearing at the board's proceeding, and file with the clerk of the court before trial, a certified copy of the board's official record which shall include the notice of appeal and other pleadings, testimony and exhibits, and the board's decision and order, which shall become the record in such case. No bond shall be required on appeals to the superior court or on review by the supreme court or the court of appeals, except that an appeal by the employer from a decision and order of the board under *RCW 51.48.070, shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay: PROVIDED, HOWEVER, That whenever the board has made any decision and order reversing an order of the supervisor of industrial insurance on questions of law or mandatory administrative actions of the director, the department shall have the right of appeal to the superior court.

History

1988 c 202 § 49; 1982 c 109 § 6; 1977 ex.s. c 350 § 80; 1973 c 40 § 1. Prior: 1972 ex.s. c 50 § 1; 1972 ex.s. c 43 § 36; 1971 ex.s. c 289 § 24; 1971 c 81 § 122; 1961 c 23 § 51.52.110; prior: 1957 c 70 § 61; 1951 c 225 § 14; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.

RCW 51.52.115 Court appeal – Procedure at trial – Burden of proof.

Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the superior court shall refer the same to the department with an order directing it to proceed in accordance with the findings of the court: PROVIDED, That any award shall be in accordance with the schedule of compensation set forth in this title. In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court.

History

1961 c 23 § 51.52.115. Prior: 1957 c 70 § 62; 1951 c 225 § 15; prior: (i) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (ii) 1949 c 219 § 6; 1939 c 184 § 1; Rem. Supp. 1949 § 7697-2.

NO. 35973-5-III

COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON

ASPLUNDH TREE EXPERT CO., Appellant, v. LUCIANO GALVEZ and THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, 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 Petition for Review and this Certificate of Service in the below-described manner:

Via Washington State Appellate Courts' Portal:

Ms. Renee Townsley
Court Administrator/Clerk
Court of Appeals, Division III
500 N Cedar St.
Spokane, WA 99201-1905

Via legal messenger, with electronic copy via Washington State Appellate Courts' Portal:

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Signed this 5th day of July, 2019, in Shoreline, Washington by:

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July 05, 2019 - 8:04 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35973-5
Appellate Court Case Title:	Asplundh Tree Expert Co. v. Luciano M. Galvez and Dept. of Labor & Industries
Superior Court Case Number:	17-2-01421-1

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