

71346-9

71346-9

No. 71346-9-1

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

LEROY DOPPENBERG,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent.

APPELLANT'S OPENING BRIEF

FOSTER | STATON, P.C.

Tara Jayne Reck
Tara Jayne Reck, Esq.

WSBA No. 37815
of Attorneys for Appellant
8204 Green Lake Drive North
Seattle, WA 98103
(206) 682-3436

2014 JUN -3 AM 10:55
FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
A. SUPERIOR COURT ERRED IN AWARDING STATUTORY ATTORNEYS FEES AND COSTS TO THE DEPARTMENT	2
B. SUPERIOR COURT AND THE BOARD ERRED IN FINDING AND CONCLUDING THAT LEROY DOPPENBERG'S INDUSTRIALLY ACCEPTED RIGHT PERONEAL NERV INJURY DID NOT OBJECTIVELY WORSEN BETWEEN TERMINAL DATES BASED UPON AN ERROR OF LAW THAT WAS OBJECTED TO AT THE TIME OF TRIAL	2
III. ISSUES	2
IV. STATEMENT OF THE CASE	3
A. FACTUAL AND PROCEDURAL HISTORY	3
1. <u>Jurisdictional Background</u>	3
2. <u>Factual Background</u>	5
V. ARGUMENT	12
A. STANDARD OF REVIEW	14
B. THE DEPARTMENT IS NOT ENTITLED TO RECOVERY OF STATUTORY ATTONREY FEES OR COSTS IN A SUCCESSFUL SUPERIOR COURT APPEAL	15

1. <u>The Department is not entitled to statutory attorney fees because RCW 4.84.010, RCW 4.84.030, and RCW 4.84.080 do not apply to workers' compensation appeals</u>	15
2. <u>The Department is not entitled to the transcription costs of its perpetuation depositions because such costs are not included in RCW 4.84.010</u>	20
3. <u>The Department is not entitled to recovery for its jury demand filing fee under RCW 4.84.010</u>	22
C. SUPERIOR COURT AND THE BOARD ERRED IN FINDING AND CONCLUDING THAT LEROY DOPPENBERG'S INDUSTRIALLY ACCEPTED RIGHT PERONEAL NERV INJURY DID NOT OBJECTIVELY WORSEN BETWEEN TERMINAL DATES BASED UPON AN ERROR OF LAW THAT WAS OBJECTED TO AT THE TIME OF TRIAL	23
1. <u>The Board and Superior Court Erred in not applying the principle of <i>res judicata</i> to the Department's prior acceptance of "right peroneal nerve injury"</u>	23
2. <u>Failure to give a jury instruction that the Act applies to all persons regardless of the previous condition of their health constitutes reversible legal error</u>	27
VI. ATTORNEY'S FEES ON APPEAL	29
VII. CONCLUSION	29

TABLE OF AUTHORITIES

	<u>Pages</u>
A. Table of Cases	
<i>Brand v. Department of Labor and Industries</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999)	17, 18, 29
<i>Chavez v. Department of Labor and Industries</i> , 129 Wn. App. 236, 241, 118 P.3d 392 (2005)	16
<i>Clauson v. Department of Labor and Industries</i> , 130 Wn. 2d 580, 925 P.2d 624 (1996)	13
<i>Cockle v. Department of Labor and Industries</i> , 142 Wn.2d 801, 811, 16 P.3d 583 (2001)	16
<i>Dennis v. Department of Labor and Industries</i> , 109 Wn.2d 467, 469, 745 P.2d 1295 (1987)	15, 16
<i>Fochtman v. Department of Labor and Industries</i> , 7 Wn. App. 286, 499 P.2d 255 (1972)	28
<i>Hastings v. Department of Labor and Industries</i> , 24 Wn.2d 1, 163 P.2d 142 (1945)	13
<i>Hilding v. Department of Labor and Industries</i> , 162 Wash. 168, 298 P. 321 (1931)	13
<i>In re Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004)	18
<i>Landmark Development, Inc. v. City of Roy</i> , 138 Wn.2d 561, 980 P.2d 1234 (1999)	18
<i>LeBire v. Department of Labor and Industries</i> , 14 Wn.2d 407, 128 P.2d 308 (1942)	23
<i>Marley v. Department of Labor and Industries</i> , 125 Wn.2d.533, 886 P.2d 189 (1994)	23, 24

<i>McIndoe v. Department of Labor and Industries</i> , 100 Wn. App. 64, 995 P.2d 616 (2000), review granted 141 Wn.2d 1025, 11 P.3d 826, affirmed 144 Wn.2d 252, 26 P.3d 903 10 (2001)	13, 15
<i>Miller v. Department of Labor and Industries</i> , 200 Wash. 674, 94 P.2d 764 (1939)	28
<i>Mt. Baker Roofing, Inc. v. Department of Labor and Industries</i> , 146 Wn. App. 429, 191 P.3d 65 (2008)	14
<i>Nelson v. Department of Labor and Industries</i> , 9 Wn.2d 621, 115 P.2d 1014 (1942)	13
<i>Pennsylvania Life v. Employment Security</i> , 97 Wn.2d 412, 645 P.2d 693 (1982)	20, 22
<i>Perry v. Department of Labor and Industries</i> , 48 Wn.2d 205, 292 P.2d 366 (1956)	23, 24
<i>Rogers v. Department of Labor and Industries</i> , 151 Wn. App. 174, 210 P.3d 355 (2009)	15
<i>Seattle School District No. 1. v. Department of Labor and Industries</i> , 116 Wn.2d 352, 804 P.2d 621 (1991)	18
<i>Seattle Aerie v. Commissioner</i> , 23 Wn.2d 167, 160 P.2d 614 (1945)	19, 20
<i>Shufeldt v. Department of Labor and Industries</i> , 57 Wn.2d 758, 359 P.2d 495 (1961)	13
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003)	19, 21
<i>Tombari v. Blankenship-Dixon Co.</i> , 19 Wn. App. 145, 574 P.2d 401 (1978)	21
<i>Wendt v. Department of Labor and Industries</i> , 18 Wn. App 674, 571 P.2d 229 (1977)	28

<i>Wilber v. Department of Labor and Industries</i> , 61 Wn.2d 439, 378 P.2d 684 (1963)	13
--	----

B. Statutes

Wash. Rev. Code 4.84.010	15, 18, 19, 20, 21, 22, 23, 29
Wash. Rev. Code 4.84.030	15, 18, 19, 20, 23, 29
Wash. Rev. Code 4.84.080	15, 18, 19, 20, 23, 29
Wash. Rev. Code 4.84.130	19
Wash. Rev. Code 51.04.010	16
Wash. Rev. Code 51.12.010	13, 16
Wash. Rev. Code 51.52.030	17, 18
Wash. Rev. Code 51.52.060	16
Wash. Rev. Code 51.52.110	16
Wash. Rev. Code 51.52.130	16, 17, 29, 30
Wash. Rev. Code 51.52.140	19, 20

C. Other

<u>Black's Law Dictionary</u> , 1335 (1968)	19, 20
Philip A. Trautman, <i>Claim and Issue Preclusion in Civil Litigation in Washington</i> , 60 Wash. L. Rev. 805, 825-26 (1985)	24
Rules of Appellate Procedure 18.1	29

I. INTRODUCTION

Appellant Leroy Doppenberg, the plaintiff in the trial court action, by and through his attorney of record, Tara Jayne Reck of Foster | Staton, P.C., offers this opening brief in support of his appeal.

This case originates from an administrative law review (ALR) appeal from a Decision and Order of the Board of Industrial Insurance Appeals (Board) dated November 30, 2012, wherein the Board concluded that the Department of Labor and Industries (Department) properly denied Mr. Doppenberg's application to reopen his workers' compensation claim on the basis that his industrially accepted and related condition(s) did not objectively worsen between the relevant terminal dates, May 12, 2009 and June 2, 2011. He appealed the Board decision to Superior Court on the basis that his industrially accepted right peroneal nerve condition objectively worsened between the terminal dates. The Board's decision was affirmed at Superior Court and the Department's proposed judgment and order was entered awarding the Department statutory attorney's fees and costs.

Mr. Doppenberg seeks appellate review on the grounds that the Department is not entitled to recovery of statutory attorney fees or costs in a successful superior court appeal and that a new trial should have been granted because an error of law occurred during the trial to which appellant objected at the time of trial.

II. ASSIGNMENTS OF ERROR

- A. THE SUPERIOR COURT ERRED IN AWARDING STATUTORY ATTORNEYS FEES AND COSTS TO THE DEPARTMENT.
- B. THE SUPERIOR COURT AND THE BOARD ERRED IN FINDING AND CONCLUDING THAT LEROY DOPPENBERG'S INDUSTRIALLY ACCEPTED RIGHT PERONEAL NERV INJURY DID NOT OBJECTIVELY WORSEN BETWEEN TERMINAL DATES BASED UPON AN ERROR OF LAW TO WHICH APPELLANT OBJECTED AT THE TIME OF TRIAL.

III. ISSUES

- A. Whether the Department is entitled to recover statutory attorney fees or costs in a successful superior court appeal.
- B. Whether Superior Court and the Board of Industrial Insurance Appeals erred in deciding that Leroy Doppenberg's industrially related right peroneal nerve injury did not objectively worsen between May 12, 2009 and June 2, 2011.

IV. STATEMENT OF THE CASE

A. FACTUAL AND PROCEDURAL HISTORY

1. Jurisdictional Background

On or about April 3, 2007, Leroy Doppenberg filed an application for benefits for an injury he sustained during the course of his employment with Eagle Hydraulics, Inc. on March 16, 2007. Mr. Doppenberg was injured when a heavy steel plate fell onto his right calf and rolled around smashing his right ankle and foot. On April 10, 2007, the Department issued an order accepting the claim. Mr. Doppenberg was provided with treatment and other benefits under the Industrial Insurance Act (Act). On June 26, 2008, the Department issued an order that stated:

The Department of Labor and Industries is responsible for the condition diagnosed as Right Peroneal Nerve Injury.

Sixty days later, the June 26, 2008 order became final and binding because no protest or appeal was made by any interested party. In addition, the Department never took steps on its own initiative to modify or change the order in any way.

On March 13, 2009, the Department issued an order closing Mr. Doppenberg's claim without award for permanent partial disability, which decision was affirmed on May 12, 2009. On

November 12, 2010, Mr. Doppenberg filed an application to reopen his claim. The Department initially denied the application on January 28, 2011, and affirmed it on June 2, 2011. Mr. Doppenberg timely appealed the June 2, 2011 order to the Board.

Before the Board, Mr. Doppenberg presented testimony from himself, his sister Missy Doppenberg, his brother Dirk Doppenberg, his ex-wife Karen Kopp, and his attending physician Dr. Darren Wardle. The Department presented Dr. Soo and Dr. Almaraz. This same evidence was read to the Superior Court jury from the Certified Appeal Board Record (CABR). After hearing the evidence presented, the Board issued a proposed decision and order on September 26, 2012. While this decision addressed the evidentiary reasons for the decision, it was completely silent regarding the *res judicata* effect of the Department's June 26, 2008 order accepting right peroneal nerve injury under the claim.

Mr. Doppenberg timely filed a petition for review but the Board denied his petition and adopted the proposed decision and order as its final decision on November 30, 2012. Mr. Doppenberg timely filed an appeal from the November 30, 2012 Board Decision and Order in the King County Superior Court.

(Clerks Papers, hereinafter CP, at pp. 1-14) Following a trial before the Honorable Richard D. Eadie, which began on September 10, 2013, a 12-person jury rendered a verdict that Mr. Doppenberg's industrially related conditions did not worsen between the terminal dates. Both parties submitted proposed versions of the judgment and order for the trial court's consideration. On October 10, 2013, the trial court entered the Department's version of the Judgment and Order as the final determination in this matter. (CP at pp. 192-199) Mr. Doppenberg's counsel did not receive a copy of the October 10, 2013 Judgment and Order until October 15, 2013, via email. On October 18, 2013, Mr. Doppenberg filed a motion for new trial and reconsideration pursuant to Superior Court civil rules 50 and 59. (CP at pp. 200-213) On December 3, 2013, the trial court entered an order denying Mr. Doppenberg's motion. (CP at pp. 253-254) As a result, Mr. Doppenberg appealed to the Washington State Court of Appeals, Division One. (CP at pp. 255-266)

2. Factual Background

Mr. Doppenberg was injured during the course of his employment. He was in the process of putting a protective plate of

steel over a hydraulic cylinder when it fell off, slid down his leg, and smashed his right foot. The steel plate weighed between 350 and 400 pounds. (CABR - Testimony of Leroy Doppenberg at p. 5; CABR - Deposition of Dr. Almaraz at p. 43) Mr. Doppenberg received treatment for his right leg and foot injury including physical therapy and diagnostic tests including nerve testing. (CABR - Testimony of Mr. Doppenberg at pp. 6-7) As a result of abnormal diagnostic test results, on June 26, 2008, the Department issued an order stating:

The Department of Labor and Industries is responsible for the condition diagnosed as Right Peroneal Nerve Injury.

None of the interested parties (Mr. Doppenberg, the employer, the attending physician, and the Department) took any steps to alter this order. As a result, the June 26, 2008 order became final and binding sixty days after its issuance.

Mr. Doppenberg described his right lower extremity problems just after the injury as feeling like someone was beating on his foot with a sledgehammer. (CABR - Testimony of Mr. Doppenberg at p. 7) He treated with Dr. Soo in 2007 and 2008 and, by the time his claim closed, his symptoms had improved such that he experienced just a tingling or needle pin prick sensation. (CABR - Testimony of

Mr. Doppenberg at pp. 7-8 and 13-14) However, upon filing the application to reopen his claim, Mr. Doppenberg had begun to experience a foot drop and his foot sensation symptoms worsened from feeling like pin pricks to feeling like he was stepping on nails jabbing into his foot. (CABR - Testimony of Mr. Doppenberg at p. 8) Because of the worsening of his symptoms, Mr. Doppenberg sought evaluation by Dr. Wardle, who assisted him with filing an application to reopen his claim. (CABR - Testimony of Mr. Doppenberg at pp. 8-9)

Dr. Wardle testified that he is a foot and ankle podiatrist, board-certified by the American College of Foot and Ankle Surgeons. (CABR - Deposition of Dr. Wardle at pp. 4-5) He further testified that he is generally familiar with the rules and regulations of the Department as they relate to the care of injured workers. (CABR - Deposition of Dr. Wardle at p. 6) Dr. Wardle first saw Mr. Doppenberg on November 1, 2010. At that time, Mr. Doppenberg presented with discomfort surrounding his right foot. Dr. Wardle testified that, on examination, the findings he could see and observe included edema around the ankle and mid foot, and diminished sensation over the right when compared to left foot. (CABR - Deposition of Dr. Wardle at p. 8) While Dr. Wardle filed

the reopening application based on his initial examination of Mr. Doppenberg, by December 2010, an MRI had been obtained which revealed "chronic injury to his lateral collateral ligaments and bone abnormality and the tendons were intact." (CABR - Deposition of Dr. Wardle at p. 10) The collateral ligaments are the ligaments on the outside of the ankle that are responsible for ankle stability. (CABR - Deposition of Dr. Wardle at p. 10) Dr. Wardle further testified that "there was nothing that showed such as arthritis or fracture or other defects." (CABR - Deposition of Dr. Wardle at p. 11) Based on his examination and the MRI findings, Dr. Wardle concluded that the nerves crossing the ankle joint had been injured as a result of Mr. Doppenberg's industrial injury. (CABR - Deposition of Dr. Wardle at p. 11) Dr. Wardle opined that Mr. Doppenberg sustained a nerve contusion and, after reviewing the records of treatment previously rendered, concluded that the current nerve injury being discussed and the subsequent pain that continued down across the ankle and into the foot is related to Mr. Doppenberg's industrial accident on a more-probable-than-not basis. (CABR - Deposition of Dr. Wardle at p. 17) Dr. Wardle further testified that the industrially related condition worsened

between the terminal dates on a medically-more-probable-than-not basis. (CABR - Deposition of Dr. Wardle at p. 17)

Dr. Soo testified at the request of the Department that he is a licensed podiatrist certified by the American Board of Podiatric Surgery. (CABR - Deposition of Dr. Soo at pp. 6-7) He began treating Mr. Doppenberg on April 9, 2007, for conditions related to his industrial injury, including contusion of the right foot with a neuropraxia of the peroneal nerve. (CABR - Deposition of Dr. Soo at p. 9) Dr. Soo testified initially that there are two peroneal nerves, the superficial peroneal nerve and the common peroneal nerve. (CABR - Deposition of Dr. Soo at p. 10) Dr. Soo evaluated Mr. Doppenberg for the paresthesia he was experiencing in his right lower extremity including the leg and foot. (CABR - Deposition of Dr. Soo at p. 12) By July 2007, Mr. Doppenberg was experiencing right ankle weakness and foot drop. (CABR - Deposition of Dr. Soo at p. 14) Dr. Soo also noted that Mr. Doppenberg had some neuropathy bilaterally in the lower extremities, which he attributed to other systemic causes such as alcohol use. (CABR - Deposition of Dr. Soo at p. 18) Mr. Doppenberg testified that, while he had consumed alcohol, at times in excess, in the past year, he had been attending AA meetings and reduced his alcohol intake, and

yet his right lower extremity symptoms had not improved. (CABR - Deposition of Mr. Doppenberg at pp. 10-11) Dr. Soo did not explain why ceasing alcohol use had not improved Mr. Doppenberg's symptoms, nor did he explain the reason the neuropathy symptoms were worse on the right side than on the left. Furthermore, on cross examination, Dr. Soo acknowledged that the peroneal nerve refers to a branch of the sciatic nerve that wraps around the fibular head near the knee and innervates the muscles that lift the foot and toes. (CABR - Deposition of Dr. Soo at p. 33) Dr. Soo insisted there are two peroneal nerves, the common and superficial. However, when shown the Department's letter addressed to him and informing him that "right peroneal nerve injury" had been accepted under the claim, Dr. Soo admitted he reviewed the letter and never disputed its accuracy with the Department. (CABR - Deposition of Dr. Soo at pp. 34-35) Dr. Soo also testified that, based on EMG data collected at his request prior to claim closure, there was damage to both branches of Mr. Doppenberg's right peroneal nerve. (CABR – Deposition of Dr. Soo at pp. 42-44)

At the Department's request, Dr. Almaraz testified that he is a board-certified neurologist who completed an independent medical evaluation of Mr. Doppenberg. (CABR - Deposition of Dr. Almaraz

at pp. 5, 7, and 12) Dr. Almaraz saw Mr. Doppenberg on only one occasion, on December 21, 2010. (CABR - Deposition of Dr. Almaraz at p. 12) Dr. Almaraz testified that 80 to 90 percent of his current practice is performing independent medical examinations typically at the request of the Department or self-insured employers. (CABR - Deposition of Dr. Almaraz at pp. 39-40) In fact, Dr. Almaraz testified that he has never been called to testify at the request of an injured worker or an injured worker's attorney. (CABR - Deposition Dr. Almaraz at p. 40) According to his report, the only condition Dr. Almaraz acknowledged as having been accepted under Mr. Doppenberg's claim was "right foot ankle strain." (CABR - Deposition of Dr. Almaraz at p. 41) The doctor further testified that the stated purpose of his examination was to "determine if there is objective worsening to the accepted condition of the right foot and ankle strain since closure of the claim on March 13, 2009." (CABR - Deposition of Dr. Almaraz at p. 42) Dr. Almaraz also testified that based on his extensive records review, there is no evidence that Mr. Doppenberg suffered from **any** type of neuropathy prior to his industrial injury. (CABR - Deposition of Dr. Almaraz at p. 54)

Finally, with respect to the June 26, 2008 order accepting right peroneal nerve injury, in *colloquy*, during the deposition of Dr. Wardle, Mr. Doppenberg's counsel specifically asked the Department if it disputed that the right peroneal nerve injury is an accepted condition in his claim. The Department indicated it was not disputing this fact, and Mr. Doppenberg presented and rested in his case-in-chief in reliance on the Department's representation. (CABR - Deposition of Dr. Wardle at pp. 16-17) However, during Dr. Almaraz's deposition, the Department's final witness, the Department changed its position stating, "we're not contesting that the peroneal nerve at the top of the foot was injured. It is – we are contesting that the peroneal nerve which is below the knee was injured as well. They're two separate things." (CABR - Deposition of Dr. Almaraz at p. 46) Mr. Doppenberg's counsel objected at that time and preserved that objection in his petition for review and in his appeal to Superior Court.

V. ARGUMENT

The Industrial Insurance Act (Act) is specifically designed to reduce to a minimum the suffering and economic loss arising from injuries occurring in the course of employment. Injured workers are the intended beneficiaries of the Act; its provisions must be

liberally construed with **all** doubts resolved in favor of the injured worker. RCW 51.12.010; *McIndoe v. Dept. of Labor and Indus.*, 144 Wn.2d 252, 256-57, 26 P.3d 903 (2001); *Wilber v. Dept. of Labor and Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963).

In the State of Washington, workers injured during the course of their employment are covered by the protective umbrella of the Act. It is well settled that the Act was established to protect and provide benefits for injured workers. For years, both state courts and the Board have repeatedly upheld the rule that the Act is remedial in nature; the beneficial purpose of the Act is **liberally construed** in favor of the injured worker and/or his beneficiaries. *Wilber v. Dept. of Labor and Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963); *Hastings v. Dept. of Labor and Indus.*, 24 Wn.2d 1, 163 P.2d 142 (1945); *Nelson v. Dept. of Labor and Indus.*, 9 Wn.2d 621, 115 P.2d 1014 (1942); *Hilding v. Dept. of Labor and Indus.*, 162 Wash. 168, 298 P. 321 (1931). As noted by the Washington Supreme Court in *Clauson v. Dept. of Labor and Indus.*, 130 Wn. 2d 580, 925 P.2d 624 (1996), it is mandatory for **any doubt** regarding the meaning of workers' compensation **law** to be resolved in favor of the injured worker and/or his beneficiaries. *Id.*, at 586 (emphasis added).

Interpreting the law in favor of Mr. Doppenberg necessitates the reversal of the December 3, 2013 trial order be reversed because (1) the Department is not entitled to statutory attorney fees or costs in a superior court appeal, and (2) the Department's success is based upon the legally indefensible argument that the worsened condition was not covered despite the final and binding order accepting "right peroneal nerve injury" under the claim. The Department's argument violates the principle of *res judicata* and constitutes an error in law to which Mr. Doppenberg objected while before the Board and at the time of superior court trial.

A. STANDARD OF REVIEW

The trial court's jurisdiction to review a decision of the Board is appellate in nature; the trial court can only decide matters previously decided by the Board. *Shufeldt v. Dept. of Labor and Indus.*, 57 Wn.2d 758, 359 P.2d 495 (1961). Relief from a Board order is proper when the Board has erroneously interpreted or applied the law, the order is not supported by substantial evidence, or it is arbitrary or capricious. *Mt. Baker Roofing, Inc. v. Dept. of Labor and Indus.*, 146 Wn. App. 429, 191 P.3d 65 (2008), amended on reconsideration.

The Court of Appeals' review of a trial court decision is limited to an examination of the record to see whether substantial evidence supports the findings made after the trial court's *de novo* review, and whether the court's conclusions of law flow from the findings made. *Rogers v. Dept. of Labor and Indus.*, 151 Wn. App. 174, 210 P.3d 355 (2009). Because the Department is charged with administering the Act, the Court of Appeals affords substantial weight to the Department's interpretation of the Act. However, the Court of Appeals may substitute its judgment for the Department's because its review of the Act is *de novo*. *McIndoe v. Dept. of Labor and Indus.*, 100 Wn. App. 64, 995 P.2d 616 (2000), review granted 141 Wn.2d 1025, 11 P.3d 826, affirmed 144 Wn.2d 252, 26 P.3d 903 (2001).

B. THE DEPARTMENT IS NOT ENTITLED TO STATUTORY ATTORNEY FEES OR COSTS IN A SUCCESSFUL SUPERIOR COURT APPEAL.

1. The Department is not entitled to statutory attorney fees because RCW 4.84.010, RCW 4.84.030, and RCW 4.84.080 do not apply to workers' compensation appeals.

The Act resulted from a compromise between employers and workers wherein employers accepted limited liability for claims that might not have been compensable under the common law and, in exchange, workers forfeited common law remedies. *Dennis v.*

Dept. of Labor and Indus., 109 Wn.2d 467, 469, 745 P.2d 1295 (1987). This compromise is reflected in RCW 51.04.010, which states "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." In furtherance of this policy, the Act is to "be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010; *Cockle v. Dept. of Labor and Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

The Department is the trustee of the fund created, established, and maintained for the purpose of providing compensation to workers and their dependents under the Act. *Chavez v. Dept. of Labor and Indus.*, 129 Wn. App. 236, 241, 118 P.3d 392 (2005). Any party aggrieved by a Department order must appeal to the Board before appealing to superior court. RCW 51.52.060; RCW 51.52.110.

RCW 51.52.130 addresses attorney fees and costs when a Board decision is appealed to superior court. It states, in pertinent part:

If, on appeal to the superior or appellate court from the decision and order of the Board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the Board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the Department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

The purpose of RCW 51.52.130 is to ensure that injured workers have adequate legal representation without diminution of their benefits. *Brand v. Dept. of Labor and Indus.*, 139 Wn.2d 659, 667, 989 P.2d 1111 (1999). Courts have reasoned that while having to pay attorney fees may have a substantial adverse impact on a disabled employee, attorney fees are a cost that employers

can pass on to consumers. *Seattle School District No. 1 v. Dept. of Labor and Indus.*, 116 Wn.2d 352, 363-4, 804 P.2d 621 (1991).

In light of the Act's remedial purpose and the concern that injured workers have access to adequate legal representation, the legislature intended for RCW 51.52.030 to be the exclusive statutory provision for attorney fees and costs in a workers' compensation appeal to superior court. "Unlike other statutes, the Industrial Insurance Act is a self-contained system that provides specific procedures and remedies for injured workers." *Brand v. Dept. of Labor and Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999). A specific statute trumps a more general one. *In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004). Consistent with the Act's remedial purpose and the legislature's intent that injured workers have access to adequate legal representation in appeals to superior court, the Act does **not** provide attorney fees or costs on appeal to superior court to employers or to the Department. In matters of statutory interpretation, "the expression of one is the exclusion of the other." *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999).

Applying RCW 4.84.010, RCW 4.84.030 and RCW 4.84.080 to workers' compensation appeals, conflicts with the Act's purpose

and with legislative intent. If the legislature had intended for RCW 4.84.010, RCW 4.84.030 and RCW 4.84.080 to apply, it would not have enacted a separate provision specifically addressing costs in appeals from a district court. Under RCW 4.84.130, in “civil actions” tried before a district court, a party who unsuccessfully appeals to superior court is liable for attorney fees and costs. Statutes must be interpreted and construed so that all provisions are given effect, with no portion rendered meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). There is no provision similar to RCW 4.84.130 making injured workers who unsuccessfully appeal to superior court liable for the Department’s attorney fees and costs.

While it is true that RCW 51.52.140 provides that, “[e]xcept as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter,” this does not mean that RCW 4.84.010, RCW 4.84.030, and RCW 4.84.080 apply in such appeals because the Act **does** “otherwise” provide for attorney fees and costs. Furthermore, RCW 51.52.140 refers to the “practice” in civil cases. “Practice” means “the form or mode of proceeding in courts of justice for the enforcement of rights or the redress of wrongs, as distinguished from the substantive law which gives the

right or denounces the wrong.” Black’s Law Dictionary, 1335 (1968). Entitlement to statutory attorney fees is a substantive right; it is **not** a procedural remedy. *Pennsylvania Life v. Employment Security*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982) (citing *Seattle Aerie v. Commissioner*, 23 Wn.2d 167, 160 P.2d 614 (1945)). While RCW 51.52.140 states that the Civil Rules apply in workers’ compensation appeals to superior court, it does not mean that RCW 4.84.010, RCW 4.84.030 and RCW 4.84.080 necessarily apply in light of the Act’s express fee shifting statute under RCW 51.52.130 and the trial court in this case erred in awarding attorney fees and costs to the Department under RCW 4.84.010, RCW 4.84.030 and RCW 4.84.080.

2. The Department is not entitled to the transcription costs of its perpetuation depositions because such costs are not included in RCW 4.84.010.

The trial court erred in awarding the Department perpetuation deposition transcription costs. The Department is not entitled to the transcription costs of its perpetuation depositions published by the Board before any appeal was made to superior court. If it were deemed to apply, RCW 4.84.010(7) provides that a prevailing party is entitled to cost expenses as follows:

To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

Statutory interpretation requires discerning and implementing the intent of the legislature. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The plain language of 4.84.010(7) does not include perpetuation depositions published by the Board. Depositions contained in the Certified Appeal Board Record have nothing to do with costs in superior court. Transcription costs of depositions published by the Board are a Department cost of litigation before the Board. The Department incurs these costs in its role as the trustee of Washington State's workers' compensation fund. These costs remain whether or not an appeal to superior court is ever filed.

In some cases, an award for deposition costs may be appropriate where the deposition was published in the trial court. This is because the "record indicates these depositions were taken and used for trial purposes." *Tombari v. Blankenship-Dixon Co.*, 19 Wn. App. 145, 150, 574 P.2d 401 (1978). Perpetuation depositions

published by the Board are taken for administrative hearing purposes; they are not taken for superior court appeal purposes.

While it is true that the depositions were read to the Superior Court jury, the Department incurred no additional cost in before the trial court because the depositions were previously published by the Board and are contained in the Certified Appeal Board Record. Moreover, portions of the depositions in this case were redacted by agreement of the parties and by order of the trial court and were not read to the jury. If RCW 4.84.010(7) was held to apply, the expense of these Board depositions would only be allowed on a *pro rata* basis for those "portions of the depositions introduced into evidence or used for purposes of impeachment." RCW 4.84.010(7).

3. The Department is not entitled to recovery for its jury demand filing fee under RCW 4.84.010.

Superior Court erred in awarding the Department its jury demand filing fee. Attorney fees will be awarded to a prevailing party only on the basis of a private agreement, statute, or recognized ground of equity. *Pennsylvania Life v. Employment Security*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982). The Department is not entitled to its jury demand filing fee under any of these three mechanisms. Furthermore, a jury demand filing fee is

not included in the specific costs listed in RCW 4.84.010. Neither RCW 4.84.030 nor RCW 4.84.080 provide that a prevailing party is entitled to a jury demand filing fee.

C. SUPERIOR COURT AND THE BOARD ERRED IN FINDING AND CONCLUDING THAT LEROY DOPPENBERG'S INDUSTRIALLY ACCEPTED RIGHT PERONEAL NERV INJURY DID NOT OBJECTIVELY WORSEN BETWEEN TERMINAL DATES BASED UPON AN ERROR OF LAW THAT WAS OBJECTED TO AT THE TIME OF TRIAL.

1. The Board and Superior Court erred in not applying the principle of *res judicata* to the Department's prior acceptance of "right peroneal nerve injury".

According to the court in *Marley v. Dept. of Labor and Indus.*, 125 Wn.2d.533, 539-541, 886 P.2d 189 (1994), claim preclusion applies to a final judgment by the Department as it would to an unappealed order of a trial court. An order or judgment of the Department resting upon a finding or findings of fact becomes a complete and **final adjudication**, binding upon both the Department and the claimant unless such action is set aside upon appeal or is vacated for fraud or something of like nature. *Marley v. Dept. of Labor and Indus.*, 125 Wn.2d.533, 539-541, 886 P.2d 189 (1994); *LeBire v. Dept. of Labor and Indus.*, 14 Wn.2d 407, 415, 128 P.2d 308 (1942); *see also Perry v. Dept. of Labor and Indus.*, 48 Wn.2d 205, 209, 292 P.2d 366 (1956) ("no appeal having been

taken therefrom, all matters determined by [departmental order] became final"); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 825-26 (1985) (common example of binding agency decisions are Department's determinations of workers' compensation claims). **An un-appealed final order from the Department precludes the parties from rearguing the same issue in subsequent adjudication and/or litigation.** If a party to a claim believes the Department erred in its initial decision, that party **must** appeal the adverse ruling within the 60-day time period allotted. The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any re-argument of the same claim. *Id.*

Here, the entire theory upon which the Department's case rests requires re-litigation of causally related conditions. It is *res judicata* that the condition diagnosed as "right peroneal nerve injury" is accepted under Mr. Doppenberg's claim. However, the Department introduced a myriad of evidence designed to call this *res judicata* acceptance of right peroneal nerve injury into question. At its most extreme point, the Department introduced evidence through Dr. Soo that the right peroneal nerve does not exist. At less extreme points, the Department introduced evidence that the

accepted industrially related condition is only “a part” of the right peroneal nerve, the right superficial peroneal nerve as opposed to the right common peroneal nerve. At the same time, both of the Department’s expert witnesses acknowledged that these two branches originate from the same, *single* “right peroneal nerve.” The Department’s sole purpose for introducing this evidence was to confuse the evidence and force a re-litigation of causal relationship of right peroneal nerve injury.

If the Department’s order accepting responsibility for “right peroneal nerve” injury was inaccurate, it was incumbent upon either the doctor or the Department itself to correct the order within the 60-day time period allotted for protesting or correcting orders. The Department should not have been permitted at the Board level or in Superior Court to present evidence that its order was not correct and should not be given the appropriate *res judicata* effect; the Department should not have been permitted to re-litigate this issue. In addition to being contrary to the law relating to the *res judicata* effect of un-appealed orders, allowing this testimony over Mr. Doppenberg’s repeated objections is also contrary to the very beneficial purpose of the Act. Allowing the re-litigation of causally related conditions openly invites a slippery slope of endless

litigation regarding the causal relationship of conditions that have already been accepted under claims.

As a matter of law, Mr. Doppenberg's right peroneal nerve injury *is* an accepted condition and there is no dispute that his right peroneal nerve condition objectively worsened based upon findings of edema, positive Tinel's signs, additional paresthesia, and foot drop. However, the Department's presentation of testimony regarding causal relationship opened the door for the jury to decide not only whether Mr. Doppenberg's industrially related conditions worsened between terminal dates but also which parts of the right peroneal nerve were damaged by Mr. Doppenberg's industrial injury. This constitutes legal error and must be reversed.

Mr. Doppenberg timely and repeatedly objected to testimony regarding the different branches of the right peroneal nerve during the taking of testimony before the Board and re-raised these objections both orally and in writing in "Plaintiff's Renewed Objections" before the trial court. (See CP at pp.147-156) However, all objections on this issue were overruled and the jury was permitted to hear all of the testimony supporting the Department's theory regarding causal relationship of right peroneal nerve damage. Allowing the jury to hear this testimony materially

affected Mr. Doppenberg's substantial rights under appeal. Because the Department was allowed to circumnavigate its own order accepting "right peroneal nerve injury" and re-litigate causal relationship in contravention of *res judicata* principles, legal error occurred and substantial justice was not done.

2. Failure to give a jury instruction that the Act applies to all persons regardless of the previous condition of their health constitutes reversible legal error.

Mr. Doppenberg proposed that Superior Court give the following instruction to the jury:

The Worker's Compensation Act of this state applies to all persons engaged in employment, regardless of their age or the previous condition of their health.

In determining the effect of an industrial accident upon a worker, such effect must always be determined with reference to the particular worker involved, rather than what effect, if any, such an accident would have had, if any, upon some other person.

(See CP at pp. 88-146)

This instruction is based on the well-established legal principle of workers' compensation law that the provisions of the Act are not limited in their benefits to persons who are completely free from disease or physical or mental abnormalities at the time of injury. If the injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical

condition of the workman is immaterial and recovery may be had for the full disability, independent of any physical or congenital weakness. The theory upon which this principle is founded is that the worker's prior physical condition is not deemed the cause of the injury but merely a condition upon which the real cause operated. *Miller v. Dept. of Labor and Indus.*, 200 Wash. 674, 94 P.2d 764 (1939); *Fochtman v. Dept. of Labor and Indus.*, 7 Wn. App. 286, 292, 499 P.2d 255 (1972); *Wendt v. Dept. of Labor & Indus.*, 18 Wn. App 674, 571 P.2d 229 (1977).

Failure to give this proposed instruction to the jury deprived the jury of the knowledge that under the Act, the prior physical condition of the injured worker should not be used to deny benefits. In this case, the Department's case theory was based on an argument that one of Mr. Doppenberg's *prior* physical conditions worsened rather than the industrially related condition despite the fact that "right peroneal nerve injury" is an undisputedly accepted condition under the claim. In addition to the fact that this testimony should not have been admitted based on the principles of *res judicata*, failure to give the above requested instruction constitutes further legal error and resulted in a failure of substantial justice to be done and reversal is required.

VI. ATTORNEY'S FEES ON APPEAL

Mr. Doppenberg is entitled to an award of attorney fees and expenses on appeal pursuant to RCW 51.52.130. See *also* RAP 18.1. This statute provides that “a reasonable fee for the services of the worker’s or beneficiary’s attorney” shall be awarded, if a decision order is “reversed or modified and additional relief is granted to a worker or beneficiary.” RCW 51.52.130. Here, Mr. Doppenberg seeks to reverse the Superior Court and Board decisions that denied the reopening of his claim for worsening of his industrially related “right peroneal nerve injury.” Thus, Mr. Doppenberg should be awarded attorney fees and costs for his attorney’s work on the matter before this Court and the trial court or the opportunity to file a supplemental motion for attorney fees and costs in the event she is successful in reversing the Department order, thereby securing additional relief as a direct consequence of his success before this Court. See *Brand v. Dept. of Labor and Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999).

VII. CONCLUSION

In conclusion, Superior Court erred in awarding the Department attorney fees and costs pursuant to RCW 4.84.010, RCW 4.84.030 and RCW 4.84.080 when the Act contains an express

fee shifting statute under RCW 51.52.130 that does not provide for attorney fees and costs to be awarded to the Department in this circumstance. Furthermore, both the Board and Superior Court erred in not applying *res judicata* and thereby allowing the Department to circumnavigate its prior order accepting "right peroneal nerve injury" under Mr. Doppenberg's claim and permitting re-litigation of this issue. This error was further compounded by Superior Court's failure to give Mr. Doppenberg's the requested jury instruction informing the jury that the prior physical condition of the injured worker should not be used as a basis to deny benefits. Reversal is appropriate and Mr. Doppenberg's application to reopen his claim should be allowed.

CERTIFICATE OF MAILING

SIGNED at Seattle, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 2nd day of June, 2014, the original and one copy of the document to which this certificate is attached, Appellant's Opening Brief, was mailed to each recipients in the manner stated below:

VIA POSTAGE
PRE-PAID FIRST,
CLASS MAIL TO: Richard D. Johnson, Court Administrator
Court of Appeals, Division I,
of the State of Washington
One Union Square
600 University Street
Seattle, WA 98101-4170

VIA POSTAGE
PRE-PAID FIRST,
CLASS MAIL TO: Paul Weideman, AAG
Labor & Industries Division
Office of the Attorney General
800 Fifth Ave., Suite 2000
Seattle, WA 98104-3188

FOSTER | STATON, P.C.


EMILY HIGGINS, Paralegal

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUN -3 AM 10:56