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72462-2

NO. 72462-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent,

v.

BOARD OF INDUSTRIAL INSURANCE APPEALS OF THE STATE
OF WASHINGTON; MARK JAFFE, in his official capacity;
JANET WHITNEY, in her official capacity;
CHARLES MCCULLOUGH, in his official capacity,

Defendants,

TESORO REFINING & MARKETING COMPANY, LLC,

Intervenor/Appellant,

and

UNITED STEEL WORKERS OF AMERICA,

Intervenor.

ON APPEAL FROM SKAGIT COUNTY SUPERIOR COURT
(Hon. Michael E. Rickert)

**OPENING BRIEF OF APPELLANT/INTERVENOR TESORO
REFINING & MARKETING COMPANY LLC**

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

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ASSIGNMENTS OF ERROR

Appellant, Intervenor Tesoro Refining & Marketing Company, LLC, assigns the following errors:

1. The Superior Court erred in granting a writ of review to reverse interlocutory evidentiary orders in an ongoing administrative proceeding where the Superior Court found—and plaintiff conceded—that plaintiff had a right of appeal from the final order in the administrative proceeding. CP 752-54.
2. The Superior Court erred by finding that the administrative tribunal committed probable error and acted illegally by denying plaintiff's request to spend one month of trial presenting evidence on claims that have already been resolved through summary judgment. CP 752-54.
3. The Superior Court erred by finding that the administrative tribunal substantially altered the plaintiff's status quo and limited the plaintiff's freedom to act where the tribunal's orders have no impact beyond the immediate litigation. CP 752-54.
4. The Superior Court erred in granting plaintiff final relief on a writ of review before issuance of a preliminary writ of review, certification of the record, and affording the parties an opportunity to be heard on the merits. CP 752-54.
5. The Superior Court erred in failing to dismiss plaintiff's action for lack of venue where the challenged official actions—orders issued by administrative judges in King and Thurston Counties—took place in counties other than Skagit County. CP 750-51.

STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. Where a party to an appeal pending before the Board of Industrial Insurance Appeals may appeal the Industrial Appeals Judge's ("IAJ") proposed decision to the full Board, and may further appeal the Board's final order to the superior court, may the party seek a writ of review to challenge an interlocutory order of the IAJ concerning evidentiary issues? (Assignment of Error 1.)
2. Where an IAJ has granted summary judgment on certain claims, may the IAJ properly decline to permit a party to spend one month of trial presenting evidence on such claims through the colloquy (offer of proof) procedure? (Assignment of Error 2.)
3. Where the challenged orders have no effect beyond the immediate litigation, does a superior court err by concluding that such orders substantially alter the status quo and limit the freedom to act? (Assignment of Error 3.)
4. May a superior court grant final relief on a writ of review before a preliminary writ has been issued or returned, before the record has been certified, and before the parties have been afforded an opportunity to be heard on the merits? (Assignment of Error 4.)
5. Does the Skagit County Superior Court have venue to consider a request for writ of review challenging official actions that occurred in Thurston and King Counties? (Assignment of Error 5.)

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises from the Skagit County Superior Court's orders reversing interlocutory evidentiary rulings in an on ongoing administrative proceeding before the Board of Industrial Insurance Appeals (the "Board") and denying Intervenor Tesoro Refining & Marketing Company LLC's ("Tesoro") motion to dismiss the writ of review filed by the Department of Labor and Industries (the "Department"). CP 750-54. In granting the Department's writ of review, the Superior Court found that two Industrial Appeals Judges ("IAJ") acted illegally in denying a request by the Department to spend a month of trial in the administrative proceeding introducing evidence on claims that have already been resolved by summary judgment. CP 752-54. The Superior Court committed at least four separate legal errors.

First, RCW 7.16.040 only authorizes a writ of review if "there is no appeal" But here it is undisputed that the Department has the right to appeal the IAJ's evidentiary orders to the full Board under RCW 51.52.104 at the end of the case, and the Board's final decision may be appealed to the superior court under RCW 49.17.150(1). The Superior Court itself expressly acknowledged these rights of appeal during oral argument:

I understand, of course, that there is an appeal process that the Industrial Appeals Judge Jaffe, I believe it was, his decision to dismiss I think twenty-nine (29) out of thirty-nine (39), that could be appealed to the full board and then the board makes its ruling and that board's ruling I understand is appealable in superior court, so there is an avenue for appeal for the judges [sic] principle [sic] decision, which was the granting of the summary judgment, the twenty-nine (29) counts.

RP (9/11/14) at 21-22.

Nonetheless, because the IAJ's evidentiary rulings are not themselves appealable orders, the Superior Court found that a writ of review was appropriate under RCW 7.16.040. CP 752-54; RP (9/11/14) at 21-23. Under the Superior Court's rationale, the extraordinary remedy of a writ of review would be available to challenge *any* interlocutory ruling by a court or administrative tribunal, even when that party has a right to appeal the final judgment. The Superior Court's ruling is in direct conflict with both the unambiguous language of RCW 7.16.040 and decisions of the Supreme Court that a writ of review is not available to challenge interlocutory orders where the parties may appeal a final judgment.

Second, the Superior Court erred in finding the Board acted illegally in denying the Department's request to invoke the Board's colloquy regulation (WAC 263-12-115(9)) in order to present evidence at trial on issues already resolved through summary judgment. *See* CP 752-54. As a matter of law, issues resolved through summary judgment are

deemed established for the trial, and evidence on such issues is inadmissible. Nor would such evidence assist in appellate review of the summary judgment rulings, which is limited to the summary judgment record and already includes the Department's evidence on the resolved claims. The Board therefore correctly ruled that "[o]ffers of testimony in colloquy, in an attempt to litigate issues that have been previously decided on a partial summary judgment, [have] never been the purpose of WAC 263-12-115(9)." CP 597.

The Board went on to find that allowing the Department to present such evidence would be "a frivolous waste of the opposing parties resources" and "would only serve to add disorder." CP 597. The Superior Court itself found that an exhaustive review of legal authority on colloquy uncovered no instance where the procedure had been used in these circumstances. RP (9/11/14) at 21 ("Our law clerk was doing some additional work on this. He did a Westlaw Search and I think he found one hundred and nineteen (119) cases or something that involved colloquy procedures but not involved with anything like this, so we assumed this was extraordinary at the time. It might be the first time at bat for this particular endeavor."). The Board therefore acted properly in denying the Department's request to present evidence in colloquy on issues resolved by summary judgment.

Even if the Board committed error in denying the Department's request, any such error would not support a writ of review. The Supreme Court has held that the standard for discretionary review in RAP 2.3(b) informs the determination of whether a tribunal has "acted illegally" for purposes of RCW 7.16.040. This Court recently clarified that "where a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2)." Here, the Board's orders related exclusively to presentation of evidence at trial and had no impact beyond the litigation. As a result, even if the orders were in error, they do not satisfy the "acting illegally" requirement of the writ statute.

Third, the Superior Court's ruling short-circuited the statutory procedure by granting final relief on the merits without first issuing a preliminary writ directing the Board to prepare, certify, and transmit the administrative record as required by the writ statute. As a result, the Superior Court entered judgment without the benefit of the full administrative record and without affording the parties an opportunity to be heard on the merits. In so doing, the Superior Court contravened both the express statutory requirements and the parties' rights to be heard on the merits before entry of a final judgment.

Fourth, the Superior Court lacked venue over the Department's writ action. Venue in actions against public officials lies in the county where the challenged official acts occurred. It is undisputed that the actions challenged here—issuance of interlocutory orders by the Board—occurred in King and Thurston Counties, not in Skagit County.

For each of these reasons, the Superior Court committed clear legal error and should be reversed with instructions to grant Tesoro's motion to dismiss.

II. STATEMENT OF THE CASE

A. Tesoro's Appeal of the Citation Arising from the April 2010 Anacortes Refinery Incident.

On April 2, 2010, there was a sudden and unexpected failure of a heat exchanger at Tesoro's Anacortes oil refinery, which fatally injured seven Tesoro employees. CP 64. Following a six-month investigation, the Department issued a citation to Tesoro alleging 39 willful and five serious violations of the Washington Administrative Code and assessing a penalty of \$2.39 million (the "Citation"). CP 64. In January 2011, Tesoro timely appealed the Citation to the Board under RCW 51.52.060. CP 763.

The Board assigned Assistant Chief Industrial Appeals Judge Mark Jaffe as the hearing officer for Tesoro's appeal. CP 5. Under WAC 263-12-125, such appeals are conducted in accordance with the Civil Rules of

the Superior Courts unless the Board has adopted a different procedure. Because the Board has not adopted any contrary rule, CR 56 establishes the summary judgment procedures for appeals pending before the Board.

B. Tesoro's Summary Judgment Motion

On March 16, 2012, over one year after commencement of Tesoro's appeal, Tesoro moved for partial summary judgment under CR 56. CP 57-129. The Department filed an application under CR 56(f) seeking additional time to conduct discovery in order to oppose Tesoro's summary judgment motion. CP 137-49. Judge Jaffe granted the application, affording the Department a full three months—until June 15, 2012—in which to conduct discovery and prepare its opposition. CP 151-52. Following completion of briefing, a full-day summary judgment hearing was held on July 26, 2012. CP 284-465.

By orders dated September 5, 2013 and November 26, 2013, Judge Jaffe granted in part and denied in part Tesoro's summary judgment motion. CP 502-21, CP 552-56. Among other things, Judge Jaffe found as follows:

- In seven separate willful Citation items, the Department alleged that Tesoro violated WAC 296-800-16015(1) by failing to select appropriate personal protective equipment (“PPE”) for the seven deceased workers. As a basis for these claims, the Department

asserted that Tesoro (1) failed to conduct a PPE hazard assessment; and (2) failed to provide the workers PPE sufficient to protect them for them the unanticipated explosion and fire. However, the Department itself conceded (1) that a failure to conduct a PPE hazard assessment did not constitute a violation of WAC 296-800-16015(1) and (2) that there was no PPE that could have protected the employees from the explosion and fire on April 2, 2010. As a result, Judge Jaffe found that the Department had failed to raise a genuine issue of material fact on the seven PPE claims. CP 509-10.

- In six separate willful Citation items, the Department alleged that Tesoro violated WAC 296-67-025(1) by failing to train six of the deceased workers in the activities they were conducting at the time of the incident. The Department claimed that each of the six employees was turning valves and operating steam lances on the night of the incident. Although finding that the Department had offered no admissible evidence to establish that the employees were performing these activities on the night of the incident, Judge Jaffe also found the uncontroverted evidence demonstrated that each of the six employees was in fact trained in turning valves and operating steam lances. As a result, Judge Jaffe held that the

Department had failed to raise a genuine issue of material fact on the six training claims. CP 510.

- In four separate willful Citation items, the Department alleged that Tesoro violated WAC 296-67-037(4)(b), because its heat exchanger inspection procedure did not follow recognized and generally accepted good engineering practices. At deposition, the Department's designated witness acknowledged that this regulation only applies to written inspection procedures and that the Department did not claim that Tesoro's written inspection procedures were non-compliant. Although the Department attempted to remedy this defect by submitting an expert declaration eight months after the summary judgment hearing, this declaration was directly contradicted by the expert's sworn deposition testimony. As a result, Judge Jaffe found that the Department could not raise a genuine issue of material fact on these four claims. CP 552-53.
- In two separate willful Citation items, the Department alleged that Tesoro violated WAC 296-67-037(2) by failing to implement its mechanical integrity procedures. In particular, the Department claimed that a procedure known as ACAMP was a mechanical

integrity procedure and that Tesoro had suspended implementation of ACAMP. However, the Department had previously issued a citation to Tesoro concerning ACAMP, and on appeal, the Board had found that ACAMP was not a mechanical integrity procedure subject to WAC 296-67-037. As a result, Judge Jaffe found that these two Citation items were barred by the doctrine of collateral estoppel. CP 507-08.

- In two separate willful Citation items, the Department alleged that Tesoro violated WAC 296-67-037(2) by failing to implement a high temperature hydrogen attack inspection procedure for two heat exchangers. Tesoro argued that the Department improperly alleged two separate claims for a single violation. Judge Jaffe agreed and reduced the claims to a single Citation item. CP 517.
- In four separate willful Citation items, the Department alleged that Tesoro violated WAC 296-67-037(4)(c) by failing to conduct a specific test on four heat exchangers in accordance with good engineering practices. Tesoro argued that the regulation did not apply to the facts alleged by the Department, but Judge Jaffe denied Tesoro's motion on these claims. However, Judge Jaffe found that the Department had improperly asserted four separate

claims for a single alleged violation, and therefore reduced the four claims to a single Citation item. CP 517.

- In three willful Citation items, the Department alleged that Tesoro violated WAC 296-67-037(5) by failing to correct equipment deficiencies in a timely manner. Judge Jaffe found that one of the three claims did not allege an equipment deficiency, as defined by the regulation. Although finding that the remaining two items did allege an equipment deficiency, Judge Jaffe held that the Department had improperly alleged two separate claims for a single violation, and therefore reduced the remaining two claims to a single Citation item. CP 517.
- In seven separate willful Citation items, the Department alleged that Tesoro violated WAC 296-67-045(1) by failing to implement its procedure for management of changes (“MOC”). Tesoro argued that the Department had improperly alleged seven separate claims for a single violation and that therefore six of the seven claims should be dismissed. Judge Jaffe denied Tesoro’s motion on these claims, leaving all seven Citation items for trial. CP 517.
- In one willful Citation item, the Department alleged that Tesoro violated WAC 296-67-017(6) by failing to consider a change to a

specific temperature limit during a process hazard analysis (“PHA”) revalidation conducted in December 2005. However, the undisputed evidence showed that the temperature limit change occurred in January 2006 and therefore could not have been considered during the PHA revalidation conducted in December 2005. As a result, Judge Jaffe held that the Department had failed to raise a genuine issue of material fact on this claim. CP 513-14.

- In one willful Citation item, the Department alleged that Tesoro violated WAC 296-67-045(4) by failing to include certain heat exchanger operating temperatures in its process safety information (“PSI”). Judge Jaffe found that, as a matter of law, the regulations did not define PSI to include heat exchanger operating temperatures. As a result, Judge Jaffe found that the Department could not raise a genuine issue of material fact on this claim. CP 512-13.
- In one willful Citation item, the Department alleged that Tesoro had violated WAC 296-67-049(1) by failing to conduct an incident investigation of heat exchanger leaks occurring in Spring 2009. However, the undisputed evidence established that Tesoro did in fact investigate these leaks. Judge Jaffe therefore found that the

Department had failed to raise a genuine issue of material fact on this claim. CP 514.

- Tesoro also moved for summary judgment on two of five serious Citation items on grounds that the facts alleged by the Department did not constitute a violation of the cited regulations. Judge Jaffe denied the motion as to one claim and granted it as to the other claim. CP 507-518.

As a result of the September 2013 and November 2013 orders, Judge Jaffe granted Tesoro summary judgment on 28 willful Citation items and one serious Citation item, leaving 11 willful and four serious Citation items remaining for the February 2015 trial. *See* CP 502-21; CP 552-56. The Department requested interlocutory review of the summary judgment rulings, and the Board denied these requests by orders dated September 27, 2013 and December 17, 2013. CP 549, 568.

C. The Department's Request to Present Evidence in Colloquy on Issues Resolved by Summary Judgment.

Several months later, the Department requested leave to introduce at trial evidence on the claims that Judge Jaffe resolved through summary judgment. CP 580-83. The Department estimated presentation of this evidence would take one month of trial. In support of this request, the Department argued that it had an absolute right to present such evidence

through the “colloquy” procedure in WAC 263-12-115(9), which provides:

Offers of proof in colloquy. When an objection to a question is sustained an offer of proof in question and answer form shall be permitted *unless the question is clearly objectionable on any theory of the case.*

On March 27, 2014, after briefing by the parties, Judge Jaffe issued an interlocutory order denying the Department’s request. CP 585-86. Judge Jaffe found that doing so would not be appropriate under WAC 263-12-115(9), that the record was currently complete for a reviewer to determine if the summary judgment rulings were correct, and that presenting further evidence on the vacated citations would pose a danger of confusing the record to be reviewed by the Board and, subsequently, the courts. CP 585-86.

The Department requested interlocutory review of Judge Jaffe’s March 27 order. CP 590-95. Pursuant to WAC 263-12-115(6), Chief Industrial Appeals Judge Janet Whitney designated Senior Assistant Chief Industrial Appeals Judge Charles McCullough to decide the matter. *See* CP 597. On April 10, 2014, Judge McCullough denied the request for interlocutory review of Judge Jaffe’s March 27, 2014 order, finding that “[o]ffers of testimony in colloquy, in an attempt to litigate issues that have

been previously decided on a partial summary judgment, [have] never been the purpose of WAC 263-12-115(9).” CP 597.

Judge McCullough noted that it was the hearing judge’s duty under WAC 263-12-115(1) to “conduct the hearing in an orderly manner” and agreed with Judge Jaffe that “any attempt to present testimony in colloquy on matters that are already decided on partial summary judgment would only serve to muddle a technically complex case.” CP 597. The Department’s request, Judge McCullough determined, “would only serve to add disorder” and would be “a frivolous waste of the opposing parties resources.” CP 597.

D. The Department’s Application For a Writ of Review.

On July 28, 2014, the Department commenced an action in Skagit Superior Court for a writ of review challenging the Board’s interlocutory orders on colloquy (the “Writ Action”). CP 1-21. In particular, the Department requested that the Superior Court reverse Judge McCullough’s April 14, 2014 interlocutory order and direct the Board to allow the Department to present evidence in colloquy on issues resolved by summary judgment. CP 1, 18. Tesoro and the United Steel Workers Union (“USW”) were granted leave to intervene in the Writ Action. CP 621-24.

Tesoro filed a motion to dismiss the Writ Action on three separate grounds. CP 778-87. First, by its express terms, RCW 7.16.040 only applies where no appeal is otherwise available, and it is undisputed that the Department has a right to appeal the decisions at issue in this action both to the full Board and to the superior court. *See* CP 780-81. Second, on its face, there is no legal merit to the Department's position that the Board is required to allow introduction of evidence in colloquy on claims that have already been resolved. *See* CP 781-82. Third, the Department filed the Writ Action in the wrong venue, because the official acts giving rise to this action occurred in Thurston and King Counties, not in Skagit County. *See* CP 782-783. The Department and USW opposed Tesoro's motion, while the Board supported the request for dismissal. CP 641-46, 651-69.

The Department separately filed a "Motion to Grant Writ of Review," in which it requested that the Superior Court grant final relief on the merits of the Department's writ of review. CP 670-74. In addition to the grounds asserted in its motion to dismiss, Tesoro opposed the Department's motion as procedurally improper, because it sought judgment on the merits prior to return of the writ of review, certification of the record, and an opportunity for the parties to be heard on the merits, as required by RCW 7.16.110. CP 712-15.

Tesoro's motion to dismiss and the Department's motion to grant writ of review were both heard on September 11, 2014 before the Honorable Michael E. Rickert. In announcing his decision to deny Tesoro's motion to dismiss and grant the Department's motion, Judge Rickert acknowledged that the Department had a right to two separate appeals. RP (9/11/14) at 21-22. Nonetheless, because the March 27, 2014 and April 10, 2014 evidentiary orders were not themselves appealable orders, Judge Rickert found they were subject to a writ of review. RP (9/11/14) at 21-22. Judge Rickert also noted that his law clerk had done a broad search for other cases involving colloquy, but could not find any in which the procedure had been used for presenting evidence on issues resolved through summary judgment. RP (9/11/14) at 21. Judge Rickert made no comment on the procedural irregularities of the Department's request or Tesoro's argument that the Superior Court lacked venue.

Judge Rickert signed the order prepared by the Department, which (1) reversed the Board's interlocutory orders of March 27, 2014 and April 14, 2014; and (2) ordered the Board to permit the Department to use colloquy to present evidence on all claims alleged in the Citation at the trial, regardless of whether they had already been resolved by summary judgment. CP 752-54. Judge Rickert's September 11 order therefore granted the ultimate relief requested by the Department, prior to issuance

and return of a preliminary writ, certification of the record, or an opportunity for the parties to be heard on the merits. *See* CP 752-54. Tesoro filed its notice of appeal from Judge Rickert's orders on September 12, 2014. CP 755-61.

III. STANDARD OF REVIEW

This Court reviews the decision to grant a writ of review de novo. *Nichols v. Seattle Hous. Auth.*, 171 Wn. App. 897, 902-03, 288 P.3d 403 (2012) (citing *City of Seattle v. Holifield*, 170 Wn.2d 230, 240, 240 P.3d 1162 (2010)).

On appeal of a writ of review, Washington courts review the challenged administrative decision on the record of the administrative tribunal, reviewing the decision of the body that makes the findings and conclusions relevant to the decision. *Nichols*, 171 Wn. App. at 904 (citing *Hilltop Terrace Homeowner's Ass'n v. Island Cnty.*, 126 Wn.2d 22, 29-30, 891 P.2d 29 (1995)). Determining whether the administrative decision below was contrary to law is an issue of law subject to de novo review. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995); RCW 7.16.120(3).

While a superior court is a court of general jurisdiction, "when it acts in an appellate capacity in a statutory writ proceeding it has only such jurisdiction as is conferred by law." *Crosby v. Cnty. of Spokane*, 137

Wn.2d 296, 300-01, 971 P.2d 32 (1999) (citations omitted). “Thus, statutory procedural requirements must be satisfied before a superior court’s appellate jurisdiction is invoked.” *Id.* at 301, citing *City of Seattle v. Pub. Emp’t Relations Comm’n*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991). “The issue whether a court has jurisdiction is a question of law subject to de novo review.” *Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 141, 231 P.3d 840 (2010) (quoting *Crosby*, 137 Wn.2d at 301).

IV. ARGUMENT

A. A Writ of Review Is Not Available as a Matter of Law, Because the Department Had a Right to Appeal the Interlocutory Orders.

As the Supreme Court has held, “[a] writ of review is an extraordinary remedy granted by statute” that “should be granted sparingly.” *Holifield*, 170 Wn.2d at 239-40 (citations omitted). A statutory writ of review “shall issue when an inferior tribunal has (1) exceeded its authority *or* acted illegally, and (2) no appeal nor any plain, speedy, and adequate remedy at law exists.” *Id.* at 240. “Unless both elements are present, the superior court has no jurisdiction for review.” *Id.* (quoting *Commanda v. Cary*, 143 Wn.2d 651, 655, 23 P.3d 1086 (2001)); *see* RCW 7.16.040.

A writ of review therefore is only available if “there is no appeal.” Where a party may appeal from a final judgment, RCW 7.16.040 does not apply. *See Commanda*, 143 Wn.2d at 656. This point is not in dispute, as the Department concedes that “[t]he parties agree that a writ should not issue if the party has a statutory right to appeal.” CP 666.

Here, it is undisputed—and the Superior Court expressly found—that the Department has a right to multiple appeals of the interlocutory orders. First, after Judge Jaffe issues a proposed decision, the Department may appeal the proposed decision to the full Board under RCW 51.52.104, which provides as follows:

After all evidence has been presented at hearings conducted by an industrial appeals judge, . . . 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. . . . Within twenty days, . . . ***any party may file with the board a written petition for review of the same.*** . . . 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.

(emphasis added). Critically, under WAC 263-12-145(3), a petition for review to the Board may challenge all evidentiary rulings of the IAJ.

If the Board upholds the interlocutory orders on colloquy in its final judgment, the Department may further appeal to the superior court under RCW 49.17.150(1):

Any person aggrieved by an order of the board of industrial insurance appeals issued under RCW 49.17.140(3) ***may obtain a review of such order in the superior court for the county in which the violation is alleged to have occurred***, by filing in such court within thirty days following the communication of the board's order or denial of any petition or petitions for review, a written notice of appeal praying that the order be modified or set aside.

(emphasis added).

The Department concedes the existence of these appeal rights in its writ application. *See* CP 2 (“all evidentiary decision an IAJ makes are subject to review by the Board”); CP 3 (“When the Board, or a later reviewing court, concludes that the IAJs’ decision to deny colloquy was wrong . . .”). The Superior Court likewise found that the Department has a right to at least two appeals:

I understand, of course, that there is an appeal process that the Industrial Appeals Judge Jaffe, I believe it was, his decision to dismiss I think twenty-nine (29) out of thirty-nine (39), that could be appealed to the full board and then the board makes its ruling and that board’s ruling I understand is appealable in superior court, so there is an avenue for appeal for the judges [sic] principle decision, which was the granting of the summary judgment, the twenty-nine (29) counts.”

RP (9/11/14) at 21-22.

Nonetheless, the Department argued, and the Superior Court held, that a writ of review was appropriate, because the interlocutory orders themselves are not directly appealable, but instead could only be reviewed following entry of a final order. *See* CP 3 (“The Board cannot review that

interlocutory order until the IAJ issues his proposed decision and order at the end of the case.”). By this reasoning, every interlocutory order issued by a court or administrative tribunal is subject to direct and immediate review by a writ of review. Not only is such a rule contrary to the well-established final judgments rule, but it has been directly rejected by the Supreme Court.

In *Commanda v. Cary*, defendants in a DUI case sought a writ of review to challenge the constitutionality of penalties for drunk driving prior to their conviction or sentencing. The Court of Appeals granted the writ, but was reversed by the Supreme Court. Because the defendants had the right to raise the constitutional issue on appeal of a final judgment of conviction, the Supreme Court found that the defendants had failed to establish the statutory prerequisites for a writ of review. 143 Wn.2d at 656-57.

As the Supreme Court held: “A writ is proper only when there is not any ‘plain, speedy and adequate remedy in the ordinary course of law. . . . The fact that an appeal will not lie directly from an interlocutory order is not a sufficient basis for a writ of review if there is an adequate remedy by appeal from the final judgment.’” *Id.* at 656. Here, it is undisputed that the Department may appeal the interlocutory orders concerning colloquy to the Board and, if unsuccessful, to the Superior Court. A writ

of review therefore was not available under RCW 7.16.040, and the Superior Court should have granted Tesoro's motion to dismiss and denied the Department's motion to grant writ of review.

B. The Board Did Not Act Illegally in Denying the Department's Request to Use the Colloquy Procedure to Introduce at Trial Evidence on Claims Resolved by Summary Judgment.

The Superior Court also erred in holding that the Board acted illegally in denying the Department's request to submit evidence in colloquy on claims that were resolved by summary judgment. The Supreme Court recently set forth the standard for satisfying the "acting illegally" prong of the writ statute:

We hold that, for purposes of RCW 7.16.040, an inferior tribunal, board or officer, exercising judicial functions, acts illegally when that tribunal, board, or officer (1) has committed an obvious error that would render further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an appellate court.

Holifield, 170 Wn.2d at 244-45. As the Supreme Court explained, "[w]e borrowed this formula from our rule governing interlocutory review, *see* RAP 13.5(b), and that governing discretionary review of a trial court decision. *See* RAP 2.3(b)." *Id.* at 245.

In granting the Department's writ of review, the Superior Court expressly held that Judge McCullough committed "probable error in

entering [his] Order Denying Review of Interlocutory Appeal dated April 10, 2014,” and that this order “substantially altered the Plaintiff’s status quo and limited the Plaintiff’s freedom to act.” CP 753. The Superior Court’s finding is contrary to law, because (1) the Board properly denied the Department’s request to present evidence in colloquy; and (2) the Board’s orders did not have any impact beyond the pending litigation and therefore did not alter the status quo or limit the Department’s freedom to act.

1. The Board Did Not Commit Error in Denying the Department’s Request to Present Evidence in Colloquy.

Under the Board’s colloquy regulation, “[w]hen an objection to a question is sustained an offer of proof in question and answer form shall be permitted unless the question is clearly objectionable on any theory of the case.” WAC 263-12-115(9). As a matter of law, evidence on claims resolved by summary judgment is irrelevant and therefore “objectionable on any theory of the case.”

Colloquy, as used by the Board, is similar to an “offer of proof” under Washington Evidence Rule 103(a) and (b). *In re: Herman L. Goddard*, Dkt. No. 95 1468, 1997 WL 316445, at *1 n.1 (BIIA Apr. 24, 1997). If a party wishes to challenge the exclusion of evidence at the hearing, an offer of proof is required where the substance of the excluded

evidence is not already clear from the record. *State v. Ray*, 116 Wn.2d 531, 538-39, 806 P.2d 1220 (1991). That is, an offer of proof provides the trial judge and appellate court information necessary to determine the admissibility of evidence. See ER 103; *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 26, 864 P.2d 921 (1993) (offer of proof serves three purposes: “[I]t informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.”) (quoting *Ray*, 116 Wn.2d at 538).

An offer of proof with respect to issues resolved by summary judgment would serve no purpose, because the evidence necessary for review is already in the record. Appellate review of summary judgment orders is limited to the record before the trial court when it decided the summary judgment motion. RAP 9.12; *Milligan v. Thompson*, 110 Wn. App. 628, 633, 42 P.3d 418 (2002). The Department and Tesoro already submitted voluminous evidence along with their summary judgment briefs. See CP 131-35, 225-32. To the extent the Department wishes to introduce the same evidence in colloquy, it is entirely unnecessary, because the evidence is already in the summary judgment record. To the extent the Department wishes to introduce different evidence, it is entirely

irrelevant, because such evidence cannot be considered on review of Judge Jaffe's summary judgment rulings.¹

Moreover, a grant of partial summary judgment is intended to "limit . . . 'the issues for trial . . .'" *Grill v. Meydenbauer Bay Yacht Club*, 57 Wn.2d 800, 803, 359 P.2d 1040 (1961). It is "a *pre-trial adjudication that certain issues in the case shall be deemed established for the trial of the case.*" *Id.* at 804-05 (emphasis added); *see also* CR 56(d). Any evidence on such issues is inadmissible as a matter of law. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 814, 828 P.2d 549 (1992) (testimony related to issue previously resolved on summary judgment is inadmissible).

The Department's attempt to re-litigate issues previously decided on summary judgment therefore "is clearly objectionable on any theory of the case," and WAC 263-12-115(9) does not authorize use of colloquy for such purposes. As Judge McCullough held, "[o]ffers of testimony in colloquy, in an attempt to litigate issues that have been previously decided on a partial summary judgment, [have] never been the purpose of WAC 263-12-115(9)." CP 597. The Superior Court itself confirmed Judge

¹ Nor may the Department use colloquy in an effort to seek reconsideration of the summary judgment orders based on new evidence. Any such request must comply with CR 59, including the requirement that any new evidence "could not with reasonable diligence have been discovered and produced," at the time of the summary judgment briefing. CR 59(a)(4).

McCullough's holding by noting that an extensive search for legal authority on colloquy revealed no other case involving use of colloquy in similar circumstances. RP (9/11/14) at 21.

And while the Department has no right to present evidence in colloquy on matters resolved by summary judgment, the Board and the parties have a significant interest in avoiding the disruption and expense that such a use of colloquy would entail. Judge McCullough noted that it was the hearing officer's duty under WAC 263-12-115(1) to "conduct the hearing in an orderly manner" and agreed with Judge Jaffe that "any attempt to present testimony in colloquy on matters that are already decided on partial summary judgment would only serve to muddle a technically complex case." CP 597. The Department's request, Judge McCullough determined, "would only serve to add disorder" and would be "a frivolous waste of the opposing parties resources." CP 597.

The Board therefore acted well within its authority to deny the Department's request, and the Superior Court erred in finding that the interlocutory orders concerning colloquy constituted "probable error."

2. The Board's Orders Did Not Alter the Status Quo or Limit the Department's Freedom to Act.

Even if the Board had committed probable error, any such error would not satisfy the requirements for a writ of review. As noted above,

in construing the “acted illegally” requirement, the Supreme Court has relied upon the standard for discretionary review under RAP 2.3(b). *Holifield*, 170 Wn.2d at 244-45. This Court’s recent decision in *State v. Howland*, 180 Wn. App. 196, 321 P.3d 303 (2014), clarifies that where a challenged order has no effect beyond the immediate litigation, it neither changes the status quo nor limits a party’s freedom to act for purposes of RAP 2.3(b).

Relying on former Supreme Court Commissioner Geoffrey Crooks’s oft-cited analysis of discretionary review, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 WASH. L. REV. 1541 (1986), this Court explained:

Crooks suggests that keeping the drafter’s intentions in mind when considering whether discretionary review is appropriate is helpful. He contends that discretionary review should be accepted only when a trial court’s order has, as with an injunction, an immediate effect outside the courtroom. For example, when a party is compelled by court order to remove a structure, the order, if given effect, quite literally alters the status quo. Or if a court restrains a party from disposing of his or her private property, the party’s freedom to act to conduct his or her affairs, is at least arguably, substantially limited. In each example, the court’s action has effects beyond the parties’ ability to conduct the immediate litigation. When this occurs in combination with the trial court’s probable error, discretionary review is appropriate. ***But where a trial court’s action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court’s action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2).*** Errors such as these are properly reviewed, if necessary, at the conclusion of

the case where they may be considered in the context of the entire hearing or trial.

Howland, 180 Wn. App. at 207 (emphasis added).

At issue in *Howland* was the trial court's rejection of a petition for conditional release from a state mental hospital on grounds that the petitioner failed to submit any expert testimony supporting her request. This Court denied discretionary review of the trial court's decision, finding *inter alia* that the ruling did not affect the status quo or limit the petitioner's freedom to act, because it had no impact beyond the pending action. As the Court explained, "[w]hile the decision arguably limited the manner in which Howland can conduct the litigation regarding her conditional release, it has no effect beyond the immediate litigation." *Id.* at 207.

Howland is fatal to the Superior Court's finding that the Board's orders altered the status quo and limited the Department's freedom to act. As in *Howland*, the Board's orders denying the Department's request to present evidence in colloquy "ha[ve] no effect beyond the immediate litigation." Accordingly, even if this Court were to conclude that the Board committed probable error, such error could not provide any basis for finding that the Board acted "illegally" for purposes of RCW 7.16.040.

Because the Department cannot establish that the Board acted illegally, the Superior Court's grant of the writ should be reversed.

C. The Superior Court Erred by Granting the Department Final Relief Prior to Satisfying the Requisite Procedural Requirements for a Writ of Review.

The Superior Court also improperly granted the Department final relief on the merits of its writ prior to satisfying the statutory procedural requirements. A writ of review “command[s] the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings . . . that the same may be reviewed by the court.” RCW 7.16.070. The court that issues a writ conducts a hearing on the merits *only after* “the return of the writ.” RCW 7.16.110. “When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, *and may thereupon give judgment*, either affirming or annulling or modifying the proceedings below.” *Id.* (emphasis added); *see Bennett v. Bd. of Adjustment of Benton Cnty.*, 23 Wn. App. 698, 699, 597 P.2d 939 (1979) (holding that “the record of a proceeding from which a writ of review is taken to a court of record must be in writing to effect a proper review”).

As a matter of law, judgment on a writ may only be entered after return of the writ, certification of the record, and an opportunity for the parties to be heard. Because none of these predicate events had occurred,

the Superior Court granted the Department final relief without the benefit of a full record or the parties' briefing on the merits. The Superior Court therefore acted prematurely in entering final judgment.

Accordingly, the Superior Court's orders should be reversed and the matter remanded for further proceedings.

D. The Superior Court Lacked Venue, Because the Official Actions at Issue Occurred Outside of Skagit County.

The Superior Court also committed error by failing to dismiss the Department's action for lack of venue. RCW 4.12.020 provides that actions "[a]gainst a public officer . . . for an act done by him or her in virtue of his or her office" shall be tried "in the county where the cause . . . arose." Courts uniformly hold that a cause of action against a state agency or employee acting in an official capacity arises in the county where the employee carried out his or her duties. *Roy v. Everett*, 48 Wn. App. 369, 371-72, 738 P.2d 1090 (1987).

In the present action, the Department challenged interlocutory orders issued by two IAJs: Judge Jaffe in King County and Judge McCullough located in Thurston County. The Board confirmed that the IAJ's actions occurred in King and Thurston Counties, and the Department has offered no evidence to the contrary. *See* CP 645 ("The challenged order was decided and entered in either King County, where

the IAJ presides, or Thurston County, where the Board is located, but not in Skagit County, where [the Department] filed its Application for Writ of Review.”). Because the official actions at issue in this case occurred in counties other than Skagit, the Superior Court lacked venue.

In briefing below, the Department sought to rely on venue provisions other than RCW 4.12.020. CP 667-68. First, the Department referred to RCW 51.52.100, which establishes the venue for proceedings *before* the Board. The Writ Action plainly was not a proceeding *before* the Board, but instead a proceeding in Superior Court *against* the Board.

Similarly unavailing is the Department’s reliance on RCW 49.17.150(1), which applies to appeals of “an order of the board of industrial appeals issued under RCW 49.17.140(3)” RCW 49.17.140(3) in turn authorizes the Board to issue final judgments on appeals of citations issued by the Department. The venue provision of RCW 49.17.150(1) therefore applies only to the Department’s appeal of the Board’s final judgment. Of course, the Writ Action did not challenge any such final judgment, but instead seeks review of interlocutory orders entered prior to issuance of the Board’s final judgment.

Accordingly, the Superior Court’s orders should be reversed and the Superior Court should be instructed to enter an order granting Tesoro’s motion to dismiss.

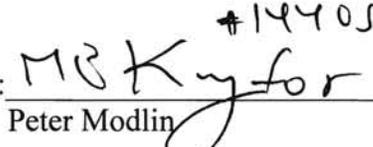
VI. CONCLUSION

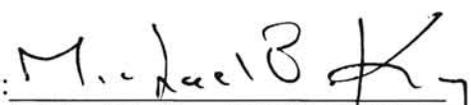
Because the Superior Court committed clear legal error on four independent grounds, this Court should reverse the Superior Court's order granting the Department's motion for writ of review. Additionally, because three of those grounds justify dismissing the Writ Action in its entirety, the Superior Court's order denying Tesoro's motion to dismiss should be reversed and the Superior Court should be instructed to enter an order granting Tesoro's motion to dismiss.

RESPECTFULLY SUBMITTED this 25th day of September, 2014.

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