

NO. 38588-1-II

APPELLANT'S REPLY BRIEF
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CLERK OF COURT
MICHAEL W. ALDRIDGE

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Michael W. Aldridge

Appellant,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES – STATE OF
WASHINGTON

Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
ACTING IN ITS APPELLATE CAPACITY

APPELLANT'S REPLY BRIEF

MICHAEL W. ALDRIDGE
By Michael W. Aldridge, Pro se

MICHAEL W. ALDRIDGE
P.O. Box 237
DuPont, WA. 98327-0237
Telephone: (360) 493-0069
Facsimile: (360) 486-0259

ORIGINAL

I. REPLY

I-1. Despite the department's argument to the contrary, the Board violated the law and its own administrative code when it refused on four separate occasions to accept Mr. Aldridge's appeal thereby causing it to lose jurisdiction one an appeal was filed in Superior Court regarding the inaction of the Board.

The department goes to great lengths to justify the Board's violation of the law and its own administrative code when it failed on four separate occasions involving the same appeal, to comply with the mandates of RCW 51.52.090 and WAC 263-12-060(7). However, nowhere in its six and a half pages of argument does it ever deny that on four separate occasions involving the same appeal the Board received Mr. Aldridge's Notice of Appeal nor does the department deny that the Board failed to comply with WAC 263-12-060(7) when it refused to "forthwith" acknowledge receipt of the appeals. In fact, in its six and a half pages of argument, the department never mentions WAC 263-12-060(7); rather, it purposely ignores the WAC because there was no excuse for the Board's violation of the WAC and accordingly RCW 51.52.090. Mr. Aldridge agrees that RCW 51.52.090 establishes the circumstances under which an appeal before the Board is deemed granted however, neither RCW 51.52.090 nor WAC 263-12-060 or any RCW or WAC for that matter, establishes what an appellant is to do when the Board violates the law and its own administrative code. The only solution available to an aggrieved appellant occurs when the matter is advanced to the Superior Court. The

department argues, “On March 8, 2007, Mr. Aldridge filed an appeal from the January 9, 2007 letter to the Board. While his appeal at the Board from that letter was still pending, and before the Board had issued any orders regarding that particular appeal, Mr. Aldridge filed a Notice of Appeal with the Thurston County Superior Court that indicated that he was challenging the Board’s “violation” of RCW 51.52.090 with regard to that Board appeal.” RB 43-44 What is not addressed in the department’s brief is what an injured worker is supposed to do after he has complied with the law believing he will receive a fair and impartial review of his appeal but the agency charged with this responsibility blatantly ignores the appellant. After filing his appeal on four separate occasions and the Board’s refusal to comply with the law, Mr. Aldridge certainly could have waited three, six, nine months or even a year to allow the Board time to decide when it might finally comply with the law and acknowledge receipt of the appeal and issue an order accordingly however, that is not the law and by doing so the department might successfully argue legal theory akin to abandonment, waiver, laches or due diligence once Mr. Aldridge did finally advance his appeal to the Superior Court after waiting so long. In this case, Mr. Aldridge did not wait any longer than what any reasonable person would have waited before realizing that the Board had no intention of complying with the law. Mr. Aldridge advanced his concerns to the Superior Court thereby requiring that the Board finally explain its failure to comply with the law and administrative codes. As Mr. Aldridge states in previous pleadings before the courts, this is not the first time the Board

has failed to respond appeals filed by Mr. Aldridge and without this matter being brought forth from the secluded venue of the Board and into the public eye, who knows how many other injured workers have or may suffer the same bias fate.

In its response, the department expresses its confusion where Mr. Aldridge cites and relies upon *Giles v. Department of Social & Health Services*, 90 Wn.2d 457, 583, P.2d 1213 (1978) and insists Giles does Mr. Aldridge more harm than good. As indicated by the department, Giles is nearly identical to the circumstances of Mr. Aldridge's case with exceptions. The judicial authorities established to review appeals in Giles and the supporting case *State Liquor Control Bd. V. State Personnel Bd.*, 88 Wn.2d 368, 561 P.2d 195 (1977) did comply with the law where acceptance and processing of the appeals was concerned thereby assuring Giles of his right to an appeal. Such compliance was not afforded Mr. Aldridge in his case. Additionally, Giles appeal was subsequently heard outside of the period required by statute. Prior to his appeal being heard, Giles did not advance his appeal to Superior Court to contest the delay; rather, Giles waited until his appeal was heard and a decision rendered before bringing his challenge of jurisdiction. Because Giles appeal was properly received and processed albeit not heard pursuant to statute, nonetheless properly accepted by the appellate jurisdiction, Giles had no final order advance and accordingly was not prejudiced. Where Mr. Aldridge's appeal is distinguishable is that the Board refused to acknowledge Mr. Aldridge's appeal whatsoever until it was forced to

admit receipt of the appeal when Mr. Aldridge advanced the Board's refusal to comply with the law to Superior Court. The record is tangible and lucid, the Board had no intention of accepting Mr. Aldridge's appeal until Mr. Aldridge advanced the matter to Superior Court; as a result, Mr. Aldridge was prejudiced by having to undertake the actions and costs he was forced to endure to compel the Board to comply with the law. The mandates of RCW 51.52.090 and WAC 263-12-060(7) are clear and are purposely in place to avoid eventualities such as this. The Board is not above the law and its failure to abide by the law should not be excused just because it finally agreed to follow the law once its bias conduct was brought to light. The holdings in Giles assures an appellant of the right of appeal through the normal and lawful course of our legal/administrative system of process not just when the bias conduct of an entity that is charged with responsibility to conduct fair and un-bias judicial reviews decides to do so once their bias conduct is brought publicized.

I-2. The department's argument that providing the complete claim file of an injured worker complies with the mandates of RCW 51.52.070 is without merit.

The department argues that its decision to provide the Board with the complete claim file of an injured worker complies with the mandates of RCW 51.52.070 and it argues that to send anything less would itself violate the mandate of the statute. RCW 51.52.070 requires in relevant part, that the department "promptly transmit its original record, or a legible copy thereof . . . [i]n such matter to the board." The phrase "in

such matter” specifically restricts the information to be provided to the Board to that specifically related to the subject matter of the appeal not all matters related to that particular claim file that are otherwise pending, resolved or otherwise adjudicated and that are not inextricably tied to the subject matter of the appeal before the Board. The plain language contained within the statute further establishes this restriction of the information contained within a claim file to be provided by the department to the Board. RCW 51.52.070 states,

The **notice of appeal** to the board shall set forth in full detail the **grounds** upon which the person appealing considers **such** order, decision, or award **is** unjust or unlawful, and shall include **every issue to be considered by the board**, and it must contain a detailed statement of facts upon which such worker, beneficiary, employer, or other person relies in support thereof. The worker, beneficiary, employer, or other person shall be deemed to have **waived** all objections or irregularities concerning the **matter** on which **such** appeal is taken other than those **specifically** set forth in such notice of appeal or appearing in the records of the department. The department shall promptly transmit its original record, or a legible copy thereof produced by mechanical, photographic, or electronic means, in such matter to the board. [Emphasis added]

The plain language in this statute establishes that matters strictly related to the order, decision or award being appealed are the only matters for which the department must forward records; however, even if the Court finds that the language contained within RCW 51.52.070 mandates

that the department forward the entire case file of an injured worker to the Board where an appeal is filed, the decision of the Board to sanitize the case the information contained within the file to the extent that only the action taking by the department during facilitation of the claim flies in the face of the theory set forth by the department in its response brief and establishes the prejudice asserted by Mr. Aldridge.

In its responsive brief, the department asserts inter alia that picking through the claim file and “only send a portion of the record” would not be sending the original record; rather, it would be sending “a new, abridged, version of its file” and by doing so, would likely result in “differences of opinion between the Department, the Board, and the other parties to the appeal as to which of the documents in the Department’s file were “relevant” to the appeal.” RB 34 When the Board receives the “original” record of the claim file from the department, it does exactly what the department asserts in its responsive brief should not occur; however, not only are any response, challenge or letter indicating good cause for alleged non-cooperation with a claim removed from the document that becomes the jurisdictional history from which the Board asserts it derives jurisdiction to hear an appeal, but the appellant is required to stipulate to the “abridged”/sanitized history of the claim file or risk losing the appeal altogether as a result of a Board denial. This conduct is prejudicial to the appellant and is contrary to the holdings in *Brundridge v. Fluor Federal Service, Inc*, 164 Wn.2d 432, 445-48, 191 P.3d 879 with regard to admissible evidence, the probative value of bad act evidence and character

evidence as well as the harmlessness of such evidence; the case the department relies upon to support its argument.

Character evidence is not admissible to prove conformity therewith, ER 404(a), but evidence of prior bad acts may be admissible for other purposes, such as proof of motive, intent, plan, knowledge, etc., ER 404(b). When a trial court admits bad acts evidence, it must first identify the purpose for which the evidence is to be admitted. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). The court must then, on the record, balance the probative value of the evidence against its potential for prejudice. *Id.* Without such a record, effective appellate review is precluded [T]he error is harmless unless it was reasonably probable that it changed the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). *Id.*

I-3. The department's argument does not accurately reflect the decision of the department reflected in its letter of November 9, 2006.

The department argues that its letter issued November 9, 2006, takes no action whereby Mr. Aldridge was aggrieved however, the argument in the department's responsive brief uses words such as "if, in the future, would, either and may," while these words are not part of the decision rendered in the department's November 9, 2006 letter. RB 40 – 42 Contrary to the department's argument, the November 9, 2006 letter states unequivocally that, based upon unfounded allegations by a vocational counselor that was not a part of the original negotiations of the

vocational rehabilitation contract that Mr. Aldridge was forced to enter into under duress and that the assigned vocational counselor violated as well as attempted to coheres members of the college Mr. Aldridge attended to violate federal and state law; that Mr. Aldridge had not supplied;

[y]our grade report for August through October term to your vocational counselor. I have received information that you have sent an e-mail to Kaplan University requesting that they not provide your vocational counselor with any information regarding your schooling [P]lease send a letter explaining your reason for non-cooperation with vocational services. Your written response is due by 12/11/06. If good cause is shown, continued vocational and time-loss benefits will be considered.

The plain language contained in the department's letter of November 6, 2006, offers no "if, would, either or may;" rather, it establishes that Mr. Aldridge is non-cooperative and if good cause for his non-cooperation is provided, continuing vocational services and time-loss benefit would be considered however, until then, they are discontinued. Vocational services should never have been provided under the circumstances Mr. Aldridge was required to participate however; Mr. Aldridge was threatened with non-cooperation if he did not participate. Additionally, despite the department's assertion to the contrary, time-lose benefits were discontinued and have not been restarted.

RCW 51.28.040 is applicable in Mr. Aldridge's claim.

In its argument, the department appears to rely singularly upon the employer's contribution to health care as the only circumstance that would allow a change in circumstance under RCW 51.28.040; the department's reliance upon this legal theory and its assertions to support the theory are without merit.

The February 15, 2002 order that the department issued set Mr. Aldridge's time-loss compensation benefits. The wages determined by this order included Mr. Aldridge's contribution to his employer's group insurance program.

Malang v. Dep't of Labor & Indus., 139 Wn.

App. 677; 162 P.3d 450; (2007) this Court held;

When possible, courts define statutory terms by their ordinary meaning. See *Cockle*, 142 Wn.2d at 807-08; *In re Testamentary Trusts Created for Benefit of Barovic*, 128 Wn. App. 196, 200, 114 P.3d 1230 (2005). The plain meaning of "wages" is remuneration from the employer in exchange for work performed. Webster's Third New International Dictionary 2568 (2002); Black's Law Dictionary 1610 (8th ed. 1999); see also *Doty*, 155 Wn.2d at 542 ("'[W]ages,' simply stated, refer to the **monetary remuneration for services performed.**"); *Rose*, 57 Wn. App. at 758 ("**We construe the term 'wage,' therefore, to include any and all forms of consideration received by the employee from the employer in exchange for work performed.**"). This definition is consistent

with RCW 51.08.178(1), which describes **“wages” as including “the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer.”** [Emphasis added]

See Doty v. The Town of South Prairie, 155 Wn.2d 527; 120 P.3d 941; (2005) [A]ccording to RCW 51.08.178, "wages" refer to the "hourly," "daily," or "monthly" "wage" that the employee "receive[s] from the employer as part of the contract of hire." RCW 51.08.178(1). Whether salaried or paid hourly, "wages," simply stated, refer to the monetary remuneration for services performed.

When Mr. Aldridge’s employer increased the amount of co-contribution Mr. Aldridge was required to pay to remain a member of his employer’s group insurance program, as a condition of employment, Mr. Aldridge was required to contribute his portion of the cost to maintain the health care insurance or lose the coverage and face termination. As the cost of Mr. Aldridge’s co-contribution increased, the amount of wages determined by the department’s February 15, 2002 order changed in violation of the holdings in Marley v. Department of Labor and Indus., 125 Wn.2d 533, 548, 886 P.2d 189 (1994) which establishes that where an order establishing a claimants wages at the time of injury is not protested or appealed, the order becomes final and binding on all parties not just Mr. Aldridge. In contemplation of an eventuality such as that in Mr. Aldridge’s case, RCW 51.28.040 authorizes the department to overcome the holding in Marley to allow it to amend or supplement a previous order

where legal restraints such as case law and time bars might otherwise prohibit such amendment or supplementation. Such is the situation in Mr. Aldridge's case. With each increase in the amount of co-contribution Mr. Aldridge was required to pay to retain health care coverage, the amount of wages established in the department's February 15, 2002 order decreased. The department argues that the cost of living increases injured workers receive serve to fill the gap left by an increase in health care co-contributions such as those in Mr. Aldridge's case; the department's assertion is flawed and nonsensical. The cost of living increases injured workers receive are designed to address the cost of living increases established by the economy not the increase in the co-contribution the injured worker makes. If Mr. Aldridge's employer were required to comply with the holdings of Marley and the department's February 15, 2002 order that set Mr. Aldridge's wages, Mr. Aldridge would not have been required to contribute any more money toward maintaining the same level of health care coverage he was receiving at the time of his industrial injury. The cost of living increases Mr. Aldridge would have received would have been added to the time-loss benefit he was already receiving thereby allowing Mr. Aldridge to at least maintain some parity in income with that of the economy. Under the department's theory of the nature of the cost of living increases, the only benefit Mr. Aldridge would receive from the cost of living increases would be to maintain the same level of benefits he was receiving when he suffered his industrial injury in 2002. The department's assertion flies in the face of logic, is inconsistent with

the true purpose of cost of living increases and undermines the legislative intent of the Industrial Insurance Act.

Cockle v. Dep't of Labor & Indus., 142
Wn.2d 801, 16 P.3d 583 (2001)

The 1971 Legislature also codified a principle already long recognized by our courts: **"This Title shall 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. In other words, where reasonable minds can differ over what Title 51 RCW provisions mean, **in keeping with the legislation's fundamental purpose**, the benefit of the doubt belongs to the **injured worker**: [T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987) (citing cases both predating and postdating the 1971 codification of this principle); see also *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727 (1997), 952 P.2d 590 (1998). [Emphasis added]

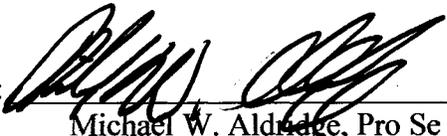
II. CONCLUSION

The department erred when it denied Mr. Aldridge's application for change in circumstance and it abused its authority throughout its facilitation of Mr. Aldridge's claim. Adding insult to Mr. Aldridge's

suffering, is the Board of Industrial Insurance Appeals blatant violation of the law by which Mr. Aldridge was additionally deprived of fair and unbiased treatment.

RESPECTFULLY SUBMITTED this 6th day of July 2009.

MICHAEL W. ALDRIDGE, PRO SE

By: 
Michael W. Aldridge, Pro Se

CO. JUD. - 1-10-09
STATE OF WASHINGTON
BY: *[Signature]*
DEPUTY

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

Michael W. Aldridge,
Appellant,
vs.
Department of Labor and Industries, State of
Washington,
Respondent,

Court of Appeals No. 38588-1-II
DECLARATION OF SERVICE/MAILING

I, Michael W. Aldridge, being first duly sworn on oath, depose and say:

On the 6 day of July, 2009, I personally served

Attorney General of Washington
Labor and Industries Division
Attention: Steve Vinyard
1019 Pacific Avenue
Tacoma, WA. 98402

AND via facsimile:
Washington State Patrol
P.O. Box 42620
Olympia, WA. 98504-2620

containing the following:

- 1. Appellant's Reply Brief;
- 2. Declaration of Service/Mailing.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6 day of July, 2009.

[Signature]
Michael W. Aldridge

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