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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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NO. 48306-8-II

COURT OF APPEALS,  
DIVISION II

IN THE STATE OF WASHINGTON

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MONTE D. MOORE,  
*APPELLANT/PLAINTIFF*

v.

GORDON TRUCKING, INC.,  
*RESPONDENT/DEFENDANT.*

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SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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## ARGUMENT

The majority of Respondent's argument is premised on the non-existence of the December 18, 2014, document that was received by the Department of Labor and Industries on December 18, 2014. If this document did not exist, then Respondent's argument would have merit and this appeal would not exist.

Respondents make no argument or citation to case law regarding the definition of a protest and request for reconsideration. Respondents simply assume, and ask this Court to make the same assumption, the December 18, 2014, document has no legal effect whatsoever on the Department's November 17, 2014, Order. Respondent's silence on this central question is telling.

It should tell the Court that Appellant's interpretation of the Board's decisions on what constitutes a protest is accurate. A protest is any written document, submitted to the Department, which reasonably places the Department on notice that a party is requesting action inconsistent with an order. *In re Mike Lambert*, BIIA Dec. 91 0107 (1991). There is nothing magical about this document: it does not need any specific language, phrases, or formulations. All that is required is an answer to this question: would a reasonable person reading the document conclude that a party is requesting action inconsistent with a prior Department order?

Respondents do not provide any argument to Appellant's assertion that the November 17, 2014, order is functionally identical to the Department's October 23, 2014, order. These two orders take the exact same legal and factual positions: any aggravation of Mr. Moore's shoulder had resolved, Mr. Moore did not require further treatment, Mr. Moore was capable of working, and Mr. Moore's claim should be closed.

The December 18, 2014, document expresses Mr. Moore's clear and explicit disagreement with the Department's determinations made by its November 17, 2014, order. The fact the December 18, 2014, document is entitled "Notice of Appeal" and refers to the October 23, 2014, order is immaterial. It is immaterial because any focus on the term "Appeal" risks the Court engaging in a prohibited magical words analysis. *Weatherspoon v. Dep't of Labor & Indus.*, 55 Wn. App. 439, 442 (1989).

It is immaterial because to disagree with the October 23, 2014, order is to disagree with the November 17, 2014, order. These are functionally identical orders. Their only distinction are dates they were communicated to the parties. No reasonable person could read the October 23, 2014, order, then the November 17, 2014, order, and then the December 18, 2014, document and conclude Mr. Moore was not expressing disagreement with

the November 17, 2014, order (in addition to the October 23, 2014, order). This is the essence of the protest.

This Court should affirm and adopt the Board of Industrial Insurance Appeals' long line of decisions defining the term "protest and request for reconsideration" found in RCW 51.52.050 and RCW 51.52.060. This Court should affirm and adopt the Board's long line of decisions applying what constitutes a protest to various common situations in worker compensation claims (e.g. reopening applications protesting closing orders, medical provider notes protesting treatment denials, etc.). The situation presented in this appeal is not fundamentally different: Mr. Moore put the Department on written notice one month after the November 17, 2014, order that he wanted further treatment for his shoulder and did not believe he could work due to that same condition.

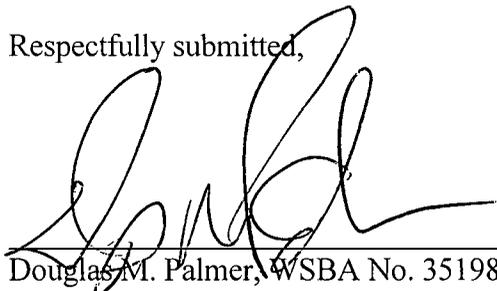
Finally, Respondents made no argument that if the December 18, 2014, document is a protest, that Mr. Moore's January 22, 2015, appeal was still untimely. Stated differently, Respondents do not appear to disagree the January 22, 2015, appeal was timely if the Court finds the December 18, 2014, document was a protest of the November 17, 2014, order. If the January 22, 2015, appeal was timely, then the Board and the Superior Court erred when it dismissed that appeal as untimely.

## CONCLUSION

The Court should reverse the Decision of the Superior Court and remand this matter back to the Board of Industrial Insurance Appeals for further hearings. The December 18, 2014, document was a protest of any order that closed Mr. Moore's claim, denying further treatment for his shoulder, and denying him further time loss benefits. This is exactly what the Department did in its November 17, 2014, order. Therefore, the November 17, 2014, order did not go final 60 days later and Mr. Moore's January 22, 2015, appeal to the Board was timely. To reach an opposite conclusion requires application of the prohibited magic words doctrine.

Dated: November 14, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Palmer', written over a horizontal line.

Douglas M. Palmer, WSBA No. 35198  
Attorney for Monte Moore  
Appellant/Plaintiff



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

3 Dated: November 14, 2016.

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8 Attorney for Monte Moore,  
9 Appellant/Plaintiff  
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