

FILED

OCT 15 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 322378

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

SHAWN ROBBINS, individually,

Appellant

v.

STATE OF WASHINGTON,
DEPARTMENT OF LABOR AND INDUSTRIES

Respondent

REPLY BRIEF

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I. TABLE OF CONTENTS

I. TABLE OF CONTENTS.....	i
II. TABLE OF AUTHORITIES	ii
III. ARGUMENT.....	1
A. INADEQUATE FINDINGS AND CONCLUSIONS	1
B. NOTICE.....	2
C. NEW MEDICAL INFORMATION	4
D. ATTORNEY FEES	6
IV. CONCLUSION.....	8

II. TABLE OF AUTHORITIES

Cases

<i>Brand v. Dep't of Labor and Indus.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999).....	7, 8
<i>Donati v. Dep't of Labor & Indus.</i> , 35 Wn.2d 151, 211 P.2d 503 (1949).....	3, 4
<i>In re Betty Wilson</i> , BIIA Dec., 02 21517 (2004).....	5
<i>In re Wallace Hansen</i> , BIIA Dec., 02 21517 (2004).....	3, 4
<i>Pearson v. Dep't of Labor & Indus.</i> , 164 Wn. App. 426, 262 P.3d 837 (2011).....	7
<i>Smith v. Dalton</i> , 58 Wn. App. 876, 795 P.2d 706 (1990).....	1

Statutes

RCW 51.32.160(1)(d)	8
RCW 51.52.130.....	6, 7

Regulations

WAC 296-14-400	8
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III. ARGUMENT

A. INADEQUATE FINDINGS AND CONCLUSIONS

In his Appellant's brief Mr. Robbins contends the trial court's findings and conclusions are inadequate. App. Br. 10 The Department, in one short paragraph at the end of its brief claims this argument has no merit. Resp. Br. at 23-24 It cites a Division I case, *Smith v. Dalton*, 58 Wn. App. 876, 795 P.2d 706 (1990) for the proposition that an appellate court may consider the entire record when assessing the adequacy of the trial court's written findings. The *Smith* case is distinguishable. It discusses the ability of the *reviewing court* to assess facts related to the written findings; it does not, however, discuss an *Appellant's* inability to assign error to a finding that does not exist, thus eliminating the capability of presenting meaningful arguments on appeal. See RAP 10.3(g) (A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.)

The trial court composed only four findings of fact. They were inadequate to allow Mr. Robbins' meaningful appellate review

of the lower court's decision. The trial court's memorandum decision contained several facts that were not included in the formal findings although they should have been. Because the following facts were mentioned in the memorandum decision, the court's findings should have included: (a) its belief that legal counsel was not involved in the filing of the November 2008 application to reopen (CP 14); (b) its decision that the Department was "still dealing with [Mr. Robbins'] first application" thus the information contained in the second application was supplemental medical information related solely to the first application (CP 14); and (c) its opinion that Mr. Robbins should not have used a Department-required reopening claim form "because he was not (and could not have been) reopening a claim." (CP 15) Mr. Robbins' inability to address these facts hindered his ability to analyze for this court, proper findings so that a thorough appellate brief could have been submitted.

B. NOTICE

The Department next argues the November 2008 application did not put it on notice that Mr. Robbins was requesting reopening of his claim. Repeating the argument it made at the trial court, the

Department claims Mr. Robbins' November 2008 application to reopen was a photocopy of his July 2008 reopening application that merely contained supplementary medical information. Resp. Br. 13-14 The Department fails to respond to Mr. Robbins' analysis of the *Donati*¹ factors instead citing a Board decision, *In re Wallace Hansen*, BIIA Dec., 02 21517 (2004)², which applied the *Donati* factors to the facts of the case. The *Hansen* Board's analysis wholly favors Mr. Robbins' argument on appeal. Explaining *Hansen*, the Department's brief states:

Applying *Donati*, the Board explained that a reopening application is sufficient where 'the document filed contains an individual's name and claim number, medical substantiation of apparent worsening of the industrially related condition, and a proposed course of treatment or other activity regarding that condition[.]' The Board determined that *such information 'adequately puts the Department on notice that the claimant is seeking reopening of his claim.'* *Id.* (Emphasis added.)

Mr. Robbins argues the facts of this case regarding the November 2008 application to reopen mirror the facts of the *Hansen* case, which applied the *Donati* factors. As noted by the Department, the November application contained Mr. Robbins' name and claim number on the front side of the application,

¹ *Donati v. Dep't of Labor & Indus.*, 35 Wn.2d 151, 211 P.2d 503 (1949).

² Resp. Br. 13

information that had not changed from July 2008 to November 2008. The date of the worsening of the condition, an argument on which the Department heavily depends, is not a required factor in either the *Donati* or *Hansen* cases.³ The reverse side of the November 2008 application to reopen contained new medical substantiation of the worsening of Mr. Robbins' injury, accompanied by a new proposed course of treatment. Accordingly, the November 2008 application to reopen necessarily put the Department on notice that a new application had been filed. As a result, both statutorily and administratively the November 2008 application to reopen must be deemed granted. The trial court's conclusion of law # 2.2 (CP 6), which incorporates by reference Board conclusion of law # 2 (CP 37) does not flow from any finding of fact because no finding on this issue exists.

C. NEW MEDICAL INFORMATION

The Department disregards Mr. Robbins' contention that the new medical information submitted with his November 2008 application to reopen could not have related to the July 2008 application. Resp. Br. at 20 Without citation to authority that either

³ Mr. Robbins admits the failure to change this date was an oversight on his part. It was not noted by the Board or the trial court. It is a new argument noted by the Department for the first time on appeal.

agreed with or approved such a practice, the Department makes the bold assertion that “workers can and do submit supplementary medical evidence to the Department even when the issues to which that evidence relates are on appeal.” It also admits that this medical evidence is utilized in settling claims. *Id.* This is in direct contradiction to a Board significant decision, *In re Betty Wilson*, BIIA Dec., 02 21517 (2004) (Department without authority to adjudicate “supplemental evidence” until appeal of denial of prior application resolved). Relying on the above improper assertions the Department claims because PAC Barber’s medical findings were attached to what it believes is a photocopy of the July 2008 application it must have been Barber’s intent to supplement the July 2008 application. Resp. Br 22 The record is silent as to any information regarding PAC Barber’s state of mind when he filled out the medical portion of the November 2008 application and the Department’s allegation to the contrary must be ignored.

The Department argues Mr. Robbins’ contention that the medical substantiation accompanying the November 2008 application was different in scope and substance making it inapplicable to the July 2008 application is meritless *because “the court’s critical finding was that this medical evidence related to*

Robbins's [sic] July 2008 application." Resp. Br. 21 However, a close reading of the Board findings⁴ (on which the court heavily relied) and trial court findings⁵ reveal the fallacy of Department's allegation. Although there was one inference, there was no Board or trial court finding regarding the November 2008 medical evidence relating solely to the July 2008 application. (CP 5, 36-37) It must be restated here that Mr. Robbins cannot properly present appellate argument when no finding of fact exists.

D. ATTORNEY FEES

Mr. Robbins requested attorney fees on appeal. At the end of its brief the Department claims this request is without merit, citing RCW 51.52.130 and a Division I case, *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011), which is not mandatory authority. Interestingly, the portion of the case on which the Department relies has not been cited by any other Division of this court or the Supreme Court of this state.

Mr. Robbins on the other hand, cites the same statute and a current state Supreme Court opinion, *Brand v. Dep't of Labor and*

⁴ CP 36-37

⁵ CP 5

Indus., 139 Wn.2d 659, 989 P.2d 1111 (1999), which cites RCW 51.52.130:

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 ... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

Brand, 139 Wn.2d at 665-666. Importantly, the *Brand* court also specifically noted that the purpose of an award of attorney fees is 'to ensure adequate representation for injured workers who were denied justice by the Department[.]' (Citations omitted.) *Id.* at 667.

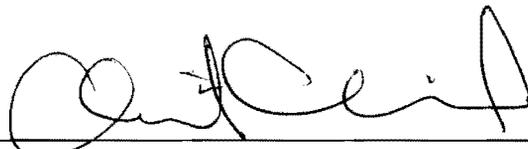
The Department maintains even if Mr. Robbins prevailed in his appeal he would not be entitled to attorney fees because his only remedy would be for the Department to be required to grant his November 2008 application to reopen his claim. Resp. Br. 24 fn 10 It is mistaken. The relevant statute declares that if the decision below is "*reversed or modified and additional relief is granted*" the worker then the court *shall* fix a reasonable fee for attorney services. RCW 51.52.130 Mr. Robbins incurred attorney fees in the preparation of this appeal. If Mr. Robbins prevails the trial court decision will necessarily be reversed as will the Department order that determined it did not have adequate notice of Mr. Robbins'

November 2008 application to reopen his claim. Mr. Robbins' request for attorney fees has merit and should be granted if he prevails on appeal.

IV. CONCLUSION

Based on his appellant's brief and the information set forth above, Mr. Robbins maintains the Department had proper notice the November 2008 application was a new application to reopen his claim separate and distinct from the July 2008 application. If, as posited here, the Department received notice of an application to reopen and failed to act on it by operation of law⁶ the application is deemed granted. The trial court's decision to the contrary is not supported by substantial evidence and should be reversed.

Respectfully submitted this 13th day of October 2014



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⁶ RCW 51.32.160(1)(d); WAC 296-14-400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of October, 2014, I sent for delivery a true and correct copy of Reply Brief by the method indicated below, and addressed to the following:

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