

**FILED**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 322378

Superior Court No. 12-2-00584-4

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

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BRIEF OF APPELLANT

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### III. INTRODUCTION

This appeal concerns a worker's compensation issue, specifically, an application to reopen a prior claim pursuant to RCW 51.32.160(1)(d).<sup>1</sup> The facts of Mr. Shawn Robbins' industrial injury are not the focus of this appeal. Instead it concerns the issue of "notice" of an application to reopen a claim filed with the Department of Labor and Industries (Department) and whether the Department subsequently complied with statutory requirements related to processing of Mr. Robbins' claim.

### IV. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

(1) The trial court's finding of fact 1.3 is not supported by substantial evidence in the record. It states:

The Court modifies [the Board's] Finding of Fact No. 4 as follows: On November 3, 2008, the Department received *another* copy of the application to reopen claim form signed by Mr. Robbins on July 22, 2008 along with *supplementary* medical [sic] from R.

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<sup>1</sup> The statute states in relevant part: ". . . if an order denying an application to reopen . . . is not issued within ninety days of receipt of such application by the self-insured employer or the department, such application shall be deemed granted. However, for good cause, the department may extend the time for making the final determination on the application for an additional sixty days." (Emphasis added.)

Barber, PA-C, but no cover letter asking for reopening of the claim.

(CP 5) (Emphasis added.)

(2) The trial court's conclusion of law 2.2 relies on a Board conclusion of law that does not flow from the trial court's findings of fact, nor is it supported by the laws of this state.

It states:

The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 through 4 of the September 25, 2012 Proposed Decision and Order, adopted by the Board of Industrial Insurance appeals as its final order on November 7, 2012.

(CP 6) Of particular interest to this appeal is the Board's finding of fact # 2, which states:

The Application to Reopen Claim form received by the Department on November 3, 2008, *did not put the Department on notice* that Shawn L. Robbins was seeking reopening of his claim separate and distinct from the same application previously received on July 28, 2008. *Donati v. Dep't of Labor & Indus.*, 35 Wn.2d 151 (1949); *In re Wallace Hansen*, BIIA Dec. 90 1429 (1991).

(CP 37)

(3) The trial court's conclusion of law 2.3 does not flow from any finding of fact. It states: "The Board's November 7, 2012

final order that adopted the September 25, 2012 Proposed Decision and Order is correct and is affirmed.” (CP 6)

The sole issue presented on appeal is whether Mr. Robbins’ November 3, 2008 application to reopen his industrial injury claim should be “deemed granted” within the meaning of RCW 51.32.160(1)(d) after the Department failed to take any action on the application.

The answer to the issue presented must be analyzed through the precise comparison of the two different applications to reopen claims that were submitted on different dates with medical substantiation of the worsening condition provided by different medical professionals based on medical examinations that occurred several months apart. The November 3, 2008 application was legally sufficient and contained appropriate evidence to put the Department on notice that it was separate and distinct from the July 28, 2008 application. Because the Department took no action on the November 3, 2008 application, pursuant to RCW 51.32.160(1)(d) it must be “deemed granted.”

## V. STATEMENT OF THE CASE

The underlying facts are undisputed.

On September 27, 2002 Mr. Robbins suffered an injury to his right arm while working for Don Kruse Electric, Inc. as an HVAC technician. (CP 53, 146-147)<sup>2</sup> A worker's compensation claim was opened with the Department and benefits were paid. (CP 53) Mr. Robbins returned to work on December 1, 2002. (CP 53) On November 30, 2006 the Department received from Mr. Robbins an Application to Reopen Claim.<sup>3</sup> (CP 53, Jurisdictional History – page 2)<sup>4</sup> This claim was ultimately denied with the final order issued on April 24, 2008. (CP 54)

On July 28, 2008, the Department received from Mr. Robbins another application to reopen claim using the Department-

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<sup>2</sup> CP refers to the Clerk's Papers accompanying this appeal.

<sup>3</sup> This is the formal name of the Department-issued form whereby a claimant asks the Department to reopen their claim due to objective worsening or aggravation of the original injury. RCW 51.32.160 A formal application for reopening a claim occurs when the worker and doctor complete and file an application for reopening provided by the Department. WAC 296-14-400 The application is then reviewed by the Department who takes appropriate action by granting or denying the application. WAC 296-14-420; *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 432-433, 858 P.2d 503 (1993).

<sup>4</sup> Pages 2 and 4 in the Jurisdictional History generated by the Department (CP 53-55) inadvertently did not receive a Bates stamp so will be referred to as Jurisdictional History page 2 or 4.

issued form.<sup>5</sup> (CP 54, 157-159) The second page of the application form requests "Doctor's Information," which is to be completed "in FULL." (Emphasis added.) (CP 159) While page 2 of the application form was left blank, Mr. Robbins contemporaneously supplied with his application a medical report from Dr. Thomas Gritzka, an orthopedist. (CP 162-174) The medical examination took place on June 17, 2008. (CP 162-174) The Department denied the July 28, 2008 application on August 21, 2008 and closed the claim. (CP 160-618) Mr. Robbins appealed the decision and the Board of Industrial Insurance Appeals (Board) granted the appeal on October 28, 2008. (CP 54) The appeal was ultimately resolved by agreement of the parties on July 6, 2009. (CP 75-79) The agreed order reversed and remanded the Department's August 21, 2008 order and directed the Department to pay Mr. Robbins additional permanent partial disability benefits. At this point the July 28, 2008 application to reopen was permanently closed.

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<sup>5</sup> As long as the first aggravation claim is made within seven years from the date the first closing order becomes final, a claimant may apply to the Department for readjustment in the rate of compensation due to the original injury if the facts warrant such. RCW 51.32.160(1)(a).

On November 3, 2008, during the pendency of the appeal of the Department's August 21, 2008 order, Mr. Robbins filed another application to reopen his claim. (CP 72-73) The first page of the application was identical to the first page of the July 28, 2008 application. (Compare CP 72-73, 158-159) However, the *second page* of the November 3, 2008 application contained the required medical information in support of the application, which was properly signed by a physician's assistant, Robert Barber, PA-C on October 28, 2008. (CP 72-73, 135-136, 158-159) The medical information provided was different in scope and substance when compared to the medical information that accompanied the July 28, 2008 application to reopen claim that had been completed and signed by Dr. Gritzka on June 17, 2008. (CP 162-174)

The Department did not take any action on the November 3, 2008 application even after receiving the July 6, 2009 final order on the Department's denial and claim closure of the July 28, 2008 application to reopen as required by RCW 51.32.160(1)(d) and WAC 296-14-400.<sup>6</sup> When Mr. Robbins informed the Department of

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<sup>6</sup> The relevant portion of WAC 296-14-400 states:  
Applications for reopenings filed on or after July 1, 2008, must be acted upon by the department within ninety days of receipt of the application by the department or self-insurer. *The ninety-day limitation shall not apply if*

the error, it determined the November 3, 2008 application to reopen did not put it on notice that he had filed a separate and distinct claim from the July 28, 2008 claim, thus it was not required to address the November 3, 2008 application. Mr. Robbins argued the Department did have notice and because it did not issue a decision either granting or denying the claim, pursuant to RCW 51.32.160(1)(d), the November 3, 2008 application to reopen the claim should be deemed granted.

Mr. Robbins appealed the Department decision, which was ultimately heard by Board. Its Proposed Decision and Order upheld the Department decision. (CP 37) The Board found the November 3, 2008 claim was the same claim as was filed on July 28, 2008. (CP 36-37) As a result it determined that the Department was not required to act on the November 3, 2008 application. (CP 30-38) This decision later became the Board's Final Decision and Order when Mr. Robbins' Petition for Review was denied on November 7, 2012. (CP 24, 25-27)

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*the worker files an appeal or request for reconsideration of the department's denial of the reopening application.*

Mr. Robbins appealed the Board decision to the Okanogan County Superior Court. (CP 188-190; RP 3)<sup>7</sup> He argued the resolution of the appeal turned on the comparison of the two applications to reopen: the July 28, 2008 claim and the November 3, 2008 claim. (RP 5) He reasoned the July 28, 2008 application was separate and distinct from the subsequent application filed on November 3, 2008 based on the medical reports, that were based on separate medical examinations conducted by different medical providers on different dates that accompanied each of the two applications. (RP 7-8, 10-11, 21) He reasoned this new medical evidence could and should have put the Department on notice that the November 3, 2008 application was a new application that should have been acted upon within 90 days after the conclusion of the appeal of the denial and claim closure of the July 28, 2008 application. As noted above, that final order was filed on July 6, 2009. (RP 7-8, 11, 21) Because the Department took no action within 90 days, Mr. Robbins argued the November 3, 2008 application should have been deemed granted pursuant to RCW 51.32.160(1)(d).

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<sup>7</sup> RP in this context refers to the Verbatim Report of Proceedings, which was held on November 13, 2013 before the Honorable Christopher E. Culp. (RP 1)

The Department made the opposite argument claiming, with no explanation or citation to authority, that the new medical information accompanying the November 3, 2008 application was merely “additional information based upon the same application to reopen . . .” which did not “adequately put the Department on notice” that it was a reopening application requiring the Department to take action in either granting or denying it. (RP 15-16)

The trial court took the matter under consideration, later issuing a 4-page memorandum decision. (CP 13-16) Findings of fact and conclusions of law were later entered which essentially adopted the Board’s findings and conclusions. (CP 8-11) The trial court decision was properly appealed to this court. (CP 1-3)

## **VI. ARGUMENT**

### **A. Standard of Review**

Review by the Court of Appeals is limited to examination of the record to see whether substantial evidence supports the superior court’s findings of fact and whether the superior court’s conclusions of law flow from its findings. *Ruse v. Dep’t of Labor and Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999)(citation

omitted). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the matter asserted. *Ruse*, 138 Wn.2d at 5 (citing *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987)).

## **B. Discussion**

### *(1) Court's Findings and Conclusions*

The trial court issued a 4-page memorandum decision, which included two pages of analysis. Yet it only wrote three findings of fact. (CP 5) Finding # 1.1 is a short history of the case. Finding # 1.2 adopts 7 of the 8 *Board* findings of fact all of which are supported in the record but have no relevance to Mr. Robbins' current appeal. Accordingly, the third finding (# 1.3) is the only finding with which Mr. Robbins can take issue although he maintains more specific findings should have been included based on the trial court's memorandum decision. The trial court findings and conclusions predominantly rely on the Board's findings and conclusions that scarcely address the focus of Mr. Robbins' appeal. For these reasons he requests this court remand the case for more complete findings of fact and conclusions of law. If this court

disagrees the following arguments apply under the specific facts of this case.

*(2) Duplicate Applications*

In its memorandum decision the trial court determined: “. . . the record reflects that the plaintiff submitted *2 of the same* Application to Reopen Claim forms he signed on July 22, 2008 – one received by the department on July 28, 2008 and the other as noted on November 3, 2008.” (CP 14) (Emphasis added.) This determination was reflected in the trial court’s finding of fact # 1.3, which found:

On November 3, 2008, the Department received *another* copy of the July 28, 2008 application to reopen claim form signed by Mr. Robbins on July 22, 2008 along with *supplementary* medical [sic] from R. Barber, PA-C, but no cover letter asking for reopening of the claim.

(CP 5) (Emphasis added.)

This finding is the crux of Mr. Robbins’ appeal. He agrees the *first* page of the November 3, 2008 application is identical to the first page of the July 28, 2008 application to reopen claim form. However, that is where the similarity ends. The Washington

Administrative Code governs the reopening application claim process. It states:

. . . An *informal written request* [to reopen a claim] filed *without accompanying medical substantiation of worsening of the condition* will constitute a request to reopen, but the time for taking action on the request shall not commence until a formal application is filed with the department or self-insurer as the case may be.

A *formal application* occurs when the *worker and doctor* complete and file the application for reopening provided by the department. Upon receipt of an *informal request without accompanying medical substantiation* of worsening of the worker's condition, the department or self-insurer shall promptly provide the necessary application to the worker for completion. . . . WAC 296-14-400 (Emphasis added.)

It is clear that in order to commence the *formal* process of applying to reopen a claim a worker needs to submit a reopening application provided by the Department. That application must include information from both the worker and the "doctor"<sup>8</sup> for the Department to commence action on the reopening claim. There is a section on the Department-issued form labeled "DOCTOR'S INFORMATION," which is found on the *back* side of the two-sided

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<sup>8</sup> The definition of "doctor" as used in this section is found in WAC 296-20-01002. This includes physician's assistants such as R. Barber, PA-C who signed the November 3, 2008 "DOCTOR'S INFORMATION" portion of the Department's formal application to reopen form.

Department-issued form.<sup>9</sup> (CP 146-147, 158-159; RP 18-19) In his November 3, 2008 application to reopen Mr. Robbins properly initiated the formal process by filing with the Department his formal application, completed on both the front and back. His personal information, which was the same information as was included in the July 28, 2008 application, was on the front of the application and his “doctor” (certified physician’s assistant) filled out the “DOCTOR’S INFORMATION” portion found on the back side of the Department-issued form. As noted above, both were necessary to commence the formal application to reopen claim.

The sufficiency of an application to reopen has been addressed by our supreme court. Pursuant to *Donati v. Dep’t of Labor & Indus.*, 35 Wn.2d 151, 211 P.2d 503 (1949), the court set forth the test that determines whether a submitted document is sufficient to constitute an application to reopen an industrial insurance claim. The *Donati* court determined the application must be: (a) in writing; (b) individualized in nature; and (c) provide the

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<sup>9</sup> The CP included in this appeal is printed on only one side so the record does not accurately reflect the fact that the Department-issued form is in actuality two-sided rather than on two separate pages as presented in the CP. (RP 18-19)

Department with *some* information regarding the reason for the application. *Donati*, 35 Wn.2d at 154 (1949).

Mr. Robbins' November 3, 2008, application satisfies all three criteria. First, the application was submitted in writing on a Department-issued form. Although the court discussed it in finding # 1.3, (CP 5) pursuant to WAC 296-14-400 there is no requirement that a cover letter accompany the application form. Next, Mr. Robbins' November 3, 2008 application is individualized in nature as it contains his personal information including his name, address, claim number and social security number. Additionally, it lists his employer, the type and date of the injury. It is signed and dated. Third, the *reason* for Mr. Robbins' submission of the application was to reopen his claim due to the aggravation of his initial industrial injury. This information is found in the medical information contained on page two of the application.

There are several reasons that substantial evidence does not support the trial court's finding # 1.3. First, Mr. Robbins utilized the same Department-issued form when he submitted both the July 28, 2008 and the November 3, 2008 claim reopening applications, which were properly filled out and filed with the Department. The

Department accepted the July 28, 2008 application yet, with no explanation, chose not to respond to the November 3, 2008 application. Next, Mr. Robbins' personal information requested on the front page of the Department-issued application had not changed from the time of the July 28, 2008 application to the time of the November 3, 2008 application. For this reason it was not a fatal error for Mr. Robbins to submit on November 3, 2008 the same front page of the application as he had on July 28, 2008 merely because it had been signed and dated on "7/22/08." (CP 146) The date an application is signed does not determine the accurateness of the information contained in the application. The personal information is just that, information that is personal to the claimant, which also addresses the circumstances of the industrial injury. Third, Mr. Robbins properly filled out both pages of the November 2008 application pursuant to *Donati*. Fourth, the medical information contained in the November 3, 2008 application was different in scope and substance than the medical information submitted with the July 28, 2008 application based on examinations by different medical professionals on different dates.

Substantial evidence in this record does not support the trial court's finding of fact # 1.3. It incorrectly determined the November

3, 2008 application was “another copy” of the July 28, 2008 application based solely on the first page of the formal application. It completely ignored the second page even though the information found on both pages is required to commence the formal action to reopen a claim. If the Department had merely looked on the back page of the November 3, 2008 application to reopen it would have been clear that the July 28, 2008 application was substantially different. The Department received separate and distinct applications based on the medical information found on page 2 of the applications to reopen.

*(3) Supplemental Information*

Similarly, it is not known on which facts or law the trial court relied when it determined (apparently based on Board finding # 4)<sup>10</sup> in finding # 1.3 that the medical information contained on page two of the November 3, 2008 application to reopen was “supplemental” to the medical information accompanying the July 28, 2008

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<sup>10</sup> Board finding of fact # 4 states:

On November 3, 2008, the Department received *another* copy of the application to reopen claim form signed by Mr. Robbins on July 22, 2008, along with *additional* medical [sic] from R. Barber, PA-C, but no cover letter asking for reopening of the claim.

(CP 36) (Emphasis added.)

application. However, the finding is disingenuous and not supported by substantial evidence.

The Department could not have considered any “supplemental” evidence after August 21, 2008 since that is the date the July 28, 2008 application to reopen was denied and the Department *closed the claim*. In light of the claimant’s granted appeal to the Board of Industrial Insurance Appeals, the Department lacked the authority to adjudicate “supplemental evidence” until the claimant’s appeal to the denial of the prior application to reopen was resolved. *In re Betty Wilson*, BIIA Dec., 02 21517 (2004). For this reason the new medical evidence contained in the November 3, 2008 application cannot be considered “supplemental.” The trial court’s finding to the contrary is incorrect. Substantial evidence in this record does not support the trial court’s finding of fact # 1.3 in regard to supplemental medical information.

#### *(4) Notice*

Resolution of this issue begins with a review of the court’s memorandum decision. In it the trial court asserts: “The November application is redundant on its face and offers no reasonable notice

to the department of the need to take additional action.” (CP 15) It then declares: “. . . the record presented does not provide a basis upon which to conclude there was adequate notice of a new request to open a claim.” (CP 16) There is no written finding of fact on this issue to which Mr. Robbins can apply the substantial evidence standard, making appeal of this issue difficult. The court’s assertion was only included in its conclusion of law # 2.2, (CP 6) which adopted and incorporated by reference Board conclusion of law # 2. (CP 37) Board conclusion of law # 2, merely determined the November 3, 2008 application to reopen did not put the Department on notice that Mr. Robbins was seeking a different reopening claim than the one submitted on July 28, 2008. (CP 37) However, the Board, in its conclusion of law # 2 did cite to legal authority. While neither case addresses the precise “notice” issue currently before this court, they are instructive. Relying on these citations Mr. Robbins contends the record *does* provide a basis on which to conclude the Department received notice that the November 3, 2008 application was separate and distinct from the July 28, 2008 application.

The court first cites the *Donati* case. Mr. Donati’s attorney forwarded a letter to the Department listing 18 claimants along with

their claim numbers in an attempt to reopen all the claims due to aggravation of industrial injuries. However, the letter failed to give any information regarding the basis of a claim for aggravation. The supreme court held, in part, that the attorney letter sent to the Department was insufficient to constitute an application to reopen Mr. Donati's individual claim. The court determined that an application to reopen must be individualized, in writing and give the Department some information related to the reason for the application. *Donati*, 35 Wn.2d 151, 153-154 (1949).

The facts of the *Donati* case are distinguishable from those in this record. Unlike Mr. Donati, Mr. Robbins' November 3, 2008 application contained personal information as well as medical information that outlined the reason for and date of his industrial injury, his current symptoms, objective medical findings proving the existing signs of his worsening condition as well as the curative treatment plan. (CP 146-147) As found in the discussion found in section VI.(B)(2) above and contrary to the Board conclusion and trial court memorandum decision, the information in the November 3, 2008 application is not redundant or the same as that found in the July 28, 2008 application. Additionally, although not necessary, Mr. Robbins used the formal Department-issued form for reopening

a claim. He put his application in writing and supplied personal, individualized information related to his claim. Mr. Robbins' November 3, 2008 application to reopen complies with the *Donati* factors, which, according to the supreme court equate to a legally sufficient application to reopen a claim. Although different in substance and scope, the November 3, 2008 application contained the same *type* of information as was contained in the July 28, 2008 application. The Department properly considered the July 28, 2008 application, apparently determining that it had proper notice of the claim and began to work on it immediately. The Department made a harmful mistake when it failed to extend the same diligence to Mr. Robbins' legally sufficient November 3, 2008 application, which could and should have provided to the Department notice that it was a new and different application to reopen.

The trial court also cited the *Hansen* case. *In re Wallace Hansen*, BIIA Dec., 90 1429 (1991) This is a significant decision written by the Board. Significant decisions are considered persuasive but not binding authority. RCW 51.52.160; *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991). Courts may substitute their own view of the law for that of the Board although great weight is given to the Board's interpretation of the

Industrial Insurance Act. *VanHess v. Dep't of Labor & Indus.*, 132 Wn. App. 304, 315, 130 P.3d 902 (2006).

*Hansen* actually supports Mr. Robbins' position on appeal regarding the legal sufficiency of his November 3, 2008 application. In attempting to file an application to reopen with the Department, Mr. Hansen's doctor only sent in one page of office progress notes but the information was not included with a formal Department-issued claim form. However, the notes included the Department's claim number for Mr. Hansen's case and contained a description of recent findings made by the doctor. The Board determined the doctor's notes satisfied the *Donati* factors, thus, provided legally sufficient information to constitute a legally sufficient application to reopen Mr. Hansen's claim within the meaning of RCW 51.32.160 such that the Department should have acted on the claim.

Mr. Robbins' November 3, 2008 formal claim form contained even more personal and medical information than did the doctor's chart notes. Additionally, the medical evidence provided on page two of Mr. Robbins' November 3, 2008 application coupled with the personal, individualized information on page one was legally sufficient information, pursuant to RCW 51.32.160, *Donati* and

*Hansen*, to constitute a proper application to reopen his claim. As set forth above, the legally sufficient application could and should have placed the Department on notice that the information contained in the November 3, 2008 application to reopen was separate and distinct from the information contained in the July 28, 2008 application, which it found provided proper notice.

If the Department had thoughtfully and carefully reviewed its own form (front and back) it could and should have been on notice that Mr. Robbins' November 3, 2008 application was not "another copy" of the July 28, 2008 application as found by the trial court in finding of fact 1.3. Rather, the legally sufficient November 3, 2008 application provided the Department reasonable notice that a new and independent application for reopening had been filed. The trial court's conclusion of law # 2.2 does not flow from finding of fact # 1.3.

Because the trial court's finding of fact # 1.3 is not supported by substantial evidence and conclusion of law # 2.2 does not flow from that finding, the trial court's conclusion of law # 2.3, which determined the Board orders below were correct and should be affirmed, is incorrect and does not flow from the findings. The trial

court's reliance on the Board orders entered September 25, 2012 (CP 30-37) and November 7, 2012 (CP 24) was improper.

*(5) Deemed Granted*

When a Department order closing a claim or denying a prior claim reopening is not yet final due to an appeal, the Department must only act upon an intervening reopening application within 90 days of receipt of a *final order* adjudicating the claim or prior claim reopening; if no decision is issued within 90 days of the receipt of the final order the application will be "deemed granted." RCW 51.32.160(1)(d); WAC 296-14-400. (Emphasis added.)

The purpose of RCW 51.32.160(1)(d) is to protect injured workers from arbitrary and unpredictable administrative delay. That purpose was accomplished by establishing a statutory remedy, which is the automatic granting of an application to reopen, whenever the Department fails to act within the prescribed time period. *Tollycraft Yachts Corp.* 122 Wn.2d 426, 434 (1993). Due to administrative procedures that are not relevant here on appeal, Mr. Robbins was forced to file yet another application to reopen (approximately 14 months after the November 3, 2008 application) in order to appeal the Department's inaction on his November 3,

2008 application to reopen his claim. (CP 53-55, Jurisdictional History – page 4) This inaction is an arbitrary and unpredictable Department delay in violation of the purpose of RCW 51.32.160(1)(d).

The statute and code apply directly to the facts of this case. The parties agree and the record establishes the Department did not ever respond to Mr. Robbins' November 3, 2008 application to reopen his claim. It is this inaction as it relates to RCW 51.32.160(1)(d) and WAC 296-14-400 that forms the basis of Mr. Robbins' contention that his November 3, 2008 application must now be "deemed granted" and the claim reopened due to the Department's error in failing to either grant or deny the application within 90 days of receiving the Department's final order on July 6, 2009 regarding the appeal of the August 21, 2008 claim closure of the July 28, 2008 application to reopen. This result is mandated by statute and code.

Because the trial court's conclusion # 2.3 determined the Board decision from November 7, 2012 was correct it does not flow from the findings of fact. For this reason trial court decision should be reversed.

*(6) Trial Court's Memorandum Decision*

The trial court's memorandum decision contains several factual errors. They will be addressed individually as they are relevant to the court's thought process as it made its ultimate decision. This is important because, as noted above, many of the facts contained in the memorandum decision did not make it into findings of fact in the trial court's final order, which somewhat impedes meaningful argument on appeal

Initially the court states: "The record is not clear; however, it appears plaintiff filed the November 3, 2008 application on his own behalf, counsel was not involved in the latter filing." (CP 14) Factually, this is not a true statement and no evidence in the record supports such.

Next, the court makes the statement that "[i]t is clear that the department was still dealing with the first application received in July of 2008 when Mr. Robbins filed the second one [on November 3, 2008]." (CP 14) Again, this is a true fact but, as noted above, the "dealing" had now taken the form of an *appeal* of the August 21, 2008 *claim closure*. (CP 54) Consequently, the court's statement has no relevance to Mr. Robbins' current appeal because both

parties agree the Department was without jurisdiction to decide the November 3, 2008 aggravation claim until the August 21, 2008 Department decision had reached final resolution. That final resolution did not occur until on July 6, 2009. (CP 152) By its statement the court implies that the Department can never address the November 3, 2008 application because the July 28, 2008 application was still open. This state of mind is reiterated below.

Likewise, the court made another mistake, which affected its final resolution of the appeal. It declares: "Parenthetically, as noted in the Order Denying Review of Interlocutory Appeal, the . . . Industrial Appeals Judge ruled that since there was already an *open claim* at the time of the November 8, [sic] 2008 filing, the department was not required to respond." (CP 15) This sentence as pointed out above, does not apply to the specific facts of this case. As already noted, there was *not* an "open claim" when the November 3, 2008 application to reopen was filed. The July 28, 2008 application to reopen had been closed on August 21, 2008. (CP 54) The only thing that was *open* on November 3, 2008 was the *appeal* of the August 21, 2008 denial of the July 28, 2008 application to reopen claim. The trial court statement is absolute: because of the allegedly open claim "the department was not

required to respond.” This is contrary to law. Under the specific facts of this case, the Department was not required to *immediately* respond to the November 3, 2008 application to reopen due to the appeal of the August 21, 2008 claim *closure*. However, by law the Department *was* required to respond within 90 days to the November 3, 2008 application to reopen once there was a final decision on the claim closure appeal of the July 28, 2008 application to reopen claim.

The court next spends an entire paragraph discussing the “application form submitted by plaintiff and received November 3, 2008.” (CP 15) In explaining why it was improper for Mr. Robbins to use it the court says: “The language of these sections is important because it tells a claimant and the department what to use the form for and when to use it.” (CP 15) The court’s memorandum decision then reasons: “Plaintiff’s use of the form for the application received November 3, 2008 was improper because he was not (and could not have been) reopening a claim. That was already in progress, through counsel, with the July 2008 letter and application form.” (CP 15) The trial court also decided: “there is no basis to require the department to act anew on what is already an open claim.” (CP 16) As has been shown above, neither of the last

two quotes is accurate under the specific facts of this case. First, pursuant to *Donati* and *Hansen*, quoted by the Board and adopted and incorporated by reference by the trial court, Mr. Robbins' November 3, 2008 use of the Department-issued form was appropriate and lawful as he was properly and legally attempting to reopen his claim after his July 28, 2008 application had been denied, closing the case. Next, Mr. Robbins' November 3, 2008 application was different in scope and substance from the July 28, 2008 application. Finally, the Department did not have to act anew on the July 28, 2008 claim because it had already been denied and that decision was being appealed. The trial court misinterpreted the facts and law when discussing the proper use of the application to reopen claim form.

## **VII. CONCLUSION**

The court must liberally construe the Industrial Insurance Act “for the purpose of reducing to a minimum the suffering and economic loss arising from injuries . . . occurring in the course of employment.” RCW 51.12.010 Doubts are resolved in favor of the injured worker. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 598, 257 P.3d 532 (2011).

This appeal relies heavily on the specific facts of this case as they relate to case law, WAC 296-14-400, WAC 296-14-420 and RCW 51.32.160(1)(d). Resolving all doubt in Mr. Robbins' favor he has presented substantial evidence based on the facts in this record that: (1) his November 3, 2008 application to reopen the claim was not "another copy" of the July 28, 2008 application; (2) the medical information included in the November 3, 2008 application was not "supplementary medical" information to the July 28, 2008 application nor was it redundant; (3) the trial court's conclusion of law # 2.2 does not properly flow from finding of fact # 1.3 nor does it properly apply the laws of this state; and (4) the Department had adequate and reasonable notice that the November 3, 2008 application was a separate and distinct application to reopen from the July 28, 2008 application, which was at the time of the November 3, 2008 application, closed. Accordingly, pursuant to RCW 51.32.160(1)(d), the Department was required to take action on the November 3, 2008 application within 90 days of the final decision on the appeal of the August 21, 2008 claim closure of the July 28, 2008 application to reopen Mr. Robbins' claim. Because the Department took no action within 90 days or otherwise, the application must be deemed granted. For

these reasons, the trial court's conclusion of law # 2.3, which affirmed the Board's decision that the Department was not required to act on the November 3, 2008 application, is incorrect and does not flow from the findings of fact. Based on the facts, case law, the relevant statute, administrative code and arguments set forth above, Mr. Robbins respectfully requests this court reverse the superior court decision and determine the November 3, 2008 application is deemed granted pursuant to RCW 51.32.160(1)(d).

#### **VIII. ATTORNEY FEES**

If successful in his appeal, Mr. Robbins requests an award of attorney fees pursuant to RAP 18.1, RCW 51.52.130<sup>11</sup> and *Brand v. Dep't of Labor and Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999). In deciding an attorney fee request this court is to look to both the statutory scheme and the historically liberal interpretation of the Industrial Insurance Act in favor of the injured worker. Additionally, it is vital to recognize that the purpose of the award of attorney fees allowed in RCW 51.52.130 is to ensure adequate representation for

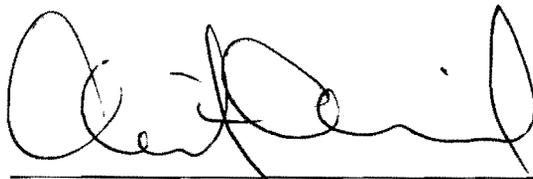
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<sup>11</sup> The relevant portion of RCW 51.52.130(1) provides: "If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary ... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court."

the injured worker who is forced to appeal from the ruling of the Board and trial court in order to obtain all compensation due on the claim. *Id.* at 667-70.

Here, Mr. Robbins has set forth good faith arguments that prove the Board and then the trial court erred in determining the Department complied with statutory requirements regarding Mr. Robbins' November 3, 2008 aggravation claim application. As a result of the error he was forced to file this appeal. For these reasons, Mr. Robbins asks this court to award him attorney fees.

Respectfully submitted this 16<sup>th</sup> day of July, 2014



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CERTIFICATE OF SERVICE

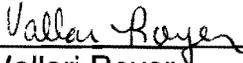
I HEREBY CERTIFY that on the 16<sup>th</sup> day of July, 2014, I sent for delivery a true and correct copy of the Brief of Appellant by the method indicated below, and addressed to the following:

**U.S. Mail (Original and one (1) copy)**

Renee S. Townsley, Clerk Administrator  
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**U.S. Mail (One (1) copy)**

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Vallari Royer