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COURT OF APPEALS
DIVISION ONE

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NO. 71101-6-I

COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON

CITY OF BELLEVUE,

Appellant,

v.

WILFRED A. LARSON AND DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

SUPPLEMENTAL BRIEF
DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

The Department of Labor & Industries is a party in workers' compensation appeals and may file briefs advocating its position. The Court has asked the Department to address "its authority to file a brief in this case." In all cases arising under the Industrial Insurance Act there are at least three parties: an employer, the Department, and a workers' compensation claimant. Employers may be either "state fund" employers or self-insured employers. The Department is responsible for payment of workers' compensation benefits for state fund employers, although a state fund employer may challenge the Department's payment decision.¹ Self-insurers are responsible for paying their employees benefits, but the Department is responsible for approving those payments. RAP 10.1(g) permits a party in cases involving multiple parties to file a separate brief.

The Legislature, in RCW 51.52.110, limited the Department's appeal rights from the Board of Industrial Insurance Appeals to "questions of law or mandatory administrative actions of the director" but made sure the Department would continue to be a party by decreeing that whenever there is a superior court appeal the Department "may appear and take part in *any* proceeding." The Legislature recognized that although it limited

¹ Per RCW 51.52.050(2) "Whenever the department has . . . made any decision . . . the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board." "Other person" may be a health care provider. RCW 51.52.050(1). Cf. RCW 51.52.060(1)

the Department's ability to appeal, it should not limit the Department's right to appear and participate in cases in which another party files a further appeal. Because of this limited appeal right the Department is most often nominally a "respondent" bound by the decision below unless or until it is set aside by a higher tribunal. Given the issues in any particular case, however, the Department may be "aligned" with an appellant, as is the case here. But even though the Department may not be an appellant, or a respondent, in the normal sense, our Supreme Court has held that it need not be an appealing party to be a party to a further appeal. This Court should accept the brief of respondent filed by the Department in this case because it presents an important issue regarding how the firefighter presumption is applied.

II. STATEMENT OF CASE

Wilfred Larson, a firefighter employed by self-insurer the City of Bellevue, applied for workers' compensation benefits. CP 26-35. In Larson's claim for workers' compensation benefits, he claimed that his melanoma was an occupational disease. CP 26-35. The Department issued an order allowing the claim and applied the RCW 51.32.185 evidentiary presumption that Larson's melanoma was an occupational

disease.² CP 31-32. The City appealed to the Board of Industrial Insurance Appeals. CP 40-42. The Department did not participate in the Board proceedings.

At the Board, the City successfully rebutted the evidentiary presumption. CP 31-33. The Board then determined that Larson's melanoma was not an occupational disease as defined by RCW 51.08.140, i.e., it did not arise naturally and proximately out of distinctive conditions of Larson's employment. CP 33-35. Larson appealed to superior court. CP 1-2. The Department filed a notice of appearance in superior court and monitored the case.

The City asked the trial judge to affirm the Board's ruling that the RCW 51.32.185 presumption had been rebutted, and to only submit to the jury the question of whether the Board's decision that Larson's melanoma did not arise naturally and proximately out of distinctive conditions of his employment as a firefighter for the City was correct. RP 753-54. The trial judge, however, submitted the question of whether the City had successfully rebutted the RCW 51.32.185 presumption to the jury, as a question of fact. CP 71. The jury found that the presumption had not been rebutted. CP 1775-76.

² Per RCW 51.32.185(3) malignant melanoma is specifically identified as a disease to which the evidentiary presumption applies.

The City appealed the jury's verdict. The City filed a brief of appellant. Larson filed a brief of respondent. The Department filed its brief of respondent to clarify the operation of RCW 51.32.185. Neither Larson nor the City objected to the Department's filing of a separate brief.

III. ARGUMENT

A. The Department is a Party in All Workers' Compensation Appeals

Our State's Industrial Insurance Act is a comprehensive scheme regulating the compensation of work place injuries. The Legislature entrusted the Department with administration of the Industrial Insurance Act. *See* RCW 43.22.030 (the Department shall exercise "all the powers and perform all the duties prescribed by law with respect to the administration of workers' compensation and medical aid in this state."); RCW 51.04.020. The Department serves as a fiduciary over funds held in trust for workers' compensation purposes. *VanHess v. Dep't of Labor & Indus.*, 132 Wn. App. 304, 311, 130 P.3d 902 (2006). "The Department's primary responsibility is to administer a social insurance system" *Mills v. Dep't of Labor & Indus.*, 72 Wn. App. 575, 578, 865 P.2d 41 (1994).

To effectuate this "primary responsibility," RCW 51.52.100 and RCW 51.52.110 authorize the Department to appear in appeals to the

Board and to superior court. RCW 51.52.100 provides “The department shall be entitled to appear in all proceedings before the board and introduce testimony in support of its order. RCW 51.52.110 allows the Department to participate in “any proceeding.” The word “any” means “every” and “all.” *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). “Any proceeding” would include any further appeal. Because rights of appeal are derivative of the rights at the superior court, if the Department was a party at superior court necessarily it may appear as a party at the appellate court.

B. The Department Is a Party In All Self-Insured Cases, and Monitors or Participates in Some Self-Insured Cases

The Department, per RCW 51.14.010(2), .020 and .030, has certified the City of Bellevue as a self-insured employer authorized, with Department approval, to provide industrial insurance benefits to its employees. RCW 51.08.173; *see also Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 745, 630 P.2d 441 (1981) (statutory safeguards are provided for the employee should an employer elect to become self-insured).

There are three parties to a self-insured appeal: the Department, the self-insured employer, and the worker. RCW 51.52.100 (proceedings before Board), .110 (proceedings in superior court). RCW 51.52.110, in

addition to providing that the Department, in its discretion, “may appear and take part in any proceeding” also requires a self-insurer to notify the Department of an appeal to superior court.

If the case is one involving a self-insurer, such self-insurer *shall*, within twenty days after receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed to be at issue. In such cases *the department may appear and take part in any proceedings.*

(Emphasis added). And, per WAC 296-15-490(3), “When any party appeals a claim to superior or appellate court, the self-insurer must promptly send to the department copies of the notice of appeal, judgment, and all other relevant information.” This further underscores the Department’s responsibility for overseeing self-insured appeals as mandated by RCW 51.14.030 and .090, and WAC 296-15-221, whether it is an appealing party or not.

Here, the Department appeared at superior court and monitored the case. It would make no sense, given the Department’s statutory duty to administer the Industrial Insurance Act, to prevent the Department from continuing to appear, and to participate to the extent, in its discretion, it deemed necessary, should a further appeal be taken from superior court. When this case was appealed to the Court of Appeals, the Department

participated because the case presents important issues regarding the evidentiary presumption in RCW 51.32.185.

C. The Supreme Court Has Recognized that the Department Need Not Have Appealed to Participate Under RCW 51.52.110

The Court has asked the Department to provide authority for it to file a brief in this matter. As discussed above, this self-insured workers' compensation case has three parties: the Department, the employer, and the worker. In cases involving multiple parties, RAP 10.1(g) allows the parties to file separate briefs. Application of this rule turns on whether the Department is a "party" on appeal.

The Department need not appeal in a workers' compensation matter to be to be a party. *Aloha Lumber Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 775-76, 466 P.2d 151 (1970); *see also Blue Chelan, Inc. v. Dep't of Labor & Indus.*, 101 Wn.2d 512, 516, 681 P.2d 233 (1984) (Department necessary party though it may be unable to initiate a superior court appeal). The *Aloha* Court considered whether the Department needed to separately appeal to participate at superior court. The Court held the Department was a "necessary party" that did not need to appeal. *Id.* Underpinning its analysis was the Court's recognition of the central role the Department serves under the Industrial Insurance Act:

The Department is made a necessary party by RCW 51.52.110. Having given the Attorney General the duty of

advising and representing the Department, the legislature could have hardly intended that he should abandon the Department on an appeal . . . The Attorney General must, of course, be guided by the interests of his client in determining the extent of his participation in the appeal. We merely rule that the Department remains his client, even though it is neither the appellant nor the prevailing party

Similarly, in *Pybus Steel Co. v. Dep't of Labor & Indus.*, 12 Wn. App. 436, 440-41, 530 P.2d 350 (1975), the court considered whether the Department could participate in an employer appeal of a case where the Department did not have the right to appeal due to the RCW 51.52.110 statutory limitation. The court held that RCW 51.52.110 is an expression of legislative policy to allow the Department to defend its position on appeal even though not authorized to institute an appeal. *Pybus Steel*, 12 Wn. App. at 441.

Finally, in *Ackley-Bell v. Seattle School Dist. No. 1*, 87 Wn. App. 158, 169, 940 P. 2d 685 (1997), the self-insured school district moved to strike the Department's brief and argument at superior court. *Id.* at 163. The worker had appealed the Board order and the Department was aligned with the worker, but had not separately appealed. *Id.* at 161. The Court of Appeals held that although the Department did not appeal, the Department is entitled to appear and take part in the proceedings. *Ackley-Bell*, 87 Wn. App. at 161, 169 (quoting RCW 51.52.110).

Under *Aloha Lumber*, *Blue Chelan*, *Pybus Steel*, and *Ackley-Bell*, the Department may participate in a judicial proceeding. The reason for this is apparent: the Department, as administrator of the Industrial Insurance Act, is always concerned with the proper application of workers' compensation law as manifested in numerous self-insured cases where the Department has filed briefs. It is the long-standing practice of the Department to file an appellate brief in self-insured cases when the issue is one the resolution of which may affect all employers and workers because it implicates either the administration of the Act, or the interpretation of it. *See* Appendix A. Holding that the Department cannot file a brief here would be contrary to the weight of authority that has allowed the Department to participate since the Legislature first allowed self-insured employers in 1971. No reason exists to distinguish participating in superior court from participating in the appellate court.

D. Participation by the Department in Self-Insured Appeals Allows the Department to Weigh in on Important Matters of Law That Effect Not Just One Case But Many

The Department is entitled, although not required, to participate in *any* Board *or* superior court proceedings below and, by logical extension, any further appeal. The Department has not waived this right by not filing a separate appeal. When the City chose to appeal, the Department was obligated to determine whether its responsibility for the administration of

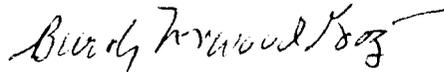
the Industrial Insurance Act required it to fully participate in an appeal, the outcome of which would likely affect the application of RCW 51.32.185 in the future. The Department weighs in on self-insured cases that have important issues of law. Because the Department's concern is the correct application of RCW 51.32.185, and not just the outcome of a dispute between an employer and a workers' compensation claimant, it chose to file a separate brief to clarify this unique provision of the Act, as authorized by RAP 10.1(g). The Department was a party at the superior court and remains one at the Court of Appeals.³

IV. CONCLUSION

This case involves three parties, the Department, the City of Bellevue, and Larson. All parties are entitled to file briefs in this matter. RAP 10.1(g). The Court should consider the Department's brief.

RESPECTFULLY SUBMITTED this 20th day of February, 2015.

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³ Should the Department's "respondent" role in any given case result in it providing briefing that other respondents did not have the opportunity to respond to a supplemental brief under RAP 10.1(h) would be appropriate.

Appendix A

APPENDIX A

Gorre v. City of Tacoma, 180 Wn. App. 729, 324 P.3d 716 (2014), review granted __ Wn. 2d __ (January 9, 2015)

Jones v. City of Olympia, 171 Wn. App. 614, 287 P.3d 687 (2012)

Magee v. Rite Aid, 167 Wn. App. 60, 277 P.3d 1 (2012)

Leuluaiialii v. Dep't of Labor & Indus., 169 Wn. App. 672, 279 P.3d 515 (2012)

Singletary v. Manor Healthcare Corp., 166 Wn. App. 774, 271 P.3d 356 (2012)

Hudson v. United Parcel Service, Inc., 163 Wn. App. 254, 258 P.3d 87 (2011)

Cascade Valley Hosp. v. Stach, 152 Wn. App. 502, 215 P.3d 1043 (2009)

Harry v. Buse Timber & Sales, Inc., 166 Wn.2d 1, 201 P.3d 1011 (2009)

Glacier Northwest, Inc. v. Walker, 151 Wn. App. 389, 212 P.3d 587(2009)

Ball-Foster Glass Container Co. v. Giovanelli, 163 Wn.2d. 133, 177 P.3d 692 (2008)

Magee v. Rite Aid, 144 Wn. App. 1, 182 P.3d 429 (2008); *In re Purdy*, 146 Wn. App. 226, 189 P.3d 826 (2008)

Jenkins v. Weyerhaeuser Co., 143 Wn. App. 246, 177 P.3d 180 (2008)

Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 141 P.3d 1(2006)

Gallo v. Dep't of Labor & Indus., 155 Wn.2d 470 120 P.3d 564 (2005)

Gersema v. Allstate Ins. Co., 127 Wn. App. 684, 112 P.3d 552 (2005)

Fria v. Dep't of Labor & Indus., 125 Wn. App. 531, 105 P.3d 33 (2004)

Taylor v. Nalley's Fine Foods, 119 Wn. App. 919, 83 P.3d 1018 (2004)

Pollard v. Weyerhaeuser Co., 123 Wn. App. 506, 98 P.3d 545 (2004)

Anderson v. Weyerhaeuser Co., 116 Wn. App. 149, 64 P.3d 669 (2003)

Puget Sound Energy, Inc. v. Adamo, 113 Wn. App. 166, 52 P.3d 560 (2002)

Boeing Co. v. Heidy, 147 Wash.2d 78, 51 P.3d 793 (2002)

Corona v. Boeing Co., 111 Wn. App. 1, 46 P.3d 253 (2002)

Boeing Co. v. Lee, 102 Wn. App. 552, 8 P.3d 1064 (2000)

Boeing Co. v. Rooney, 102 Wn. App. 414, 10 P.3d 423 (2000)

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CITY OF BELLEVUE AND
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Appellants.

CERTIFICATE OF
SERVICE

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on the below date, I caused to be served the Supplemental Brief Department of Labor and Industries and this Certificate of Service in the below described manner:

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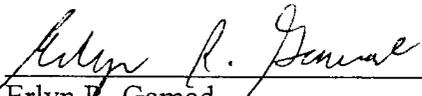
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