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COURT OF APPEALS

DIVISION I

OF THE STATE OF WASHINGTON

Don Herron, Appellant
v.
Community Transit, Respondent

Case No. 62516-1-I

RESPONSE BRIEF OF APPELLANT

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I. INTRODUCTION

This is the Appellant's reply to the brief filed with this Court on February 26, 2010, by Respondent, in answer to the Appellant's brief filed on July 24, 2009, and will address only issues related thereto.

II. REPLY TO RESPONDENT'S SUPPLEMENTAL STATEMENT OF THE CASE

A. Supplemental Procedural History

As to Respondent's lengthy recitation of the series of events regarding the procedural issues occurring since the filing of the Notice of Appeal with this Court on October 20, 2008, Appellant will address only the issues relating directly to Appellant's opening Brief, rather than the irrelevant issues proposed by Respondent.

B. Supplemental Summary of Facts

The record that Appellant is relying on is indeed the 130 pages of clerk's papers received by this Court on February 2, 2009. Specifically the Respondent's Superior Court trial brief and the exhibits and/or attachments thereto.

III. RESPONSE TO THE ARGUMENTS PROPOSED BY RESPONDENT

A. Petition For Board Review

The employer included in their Superior Court trial brief the following documents, upon which Appellant asserts lack of jurisdiction of the Superior Court to hear the Appeal:

- March 7, 2007: Order of the Board of Industrial Insurance Appeals denying the employer's Petition for Review;
- February 21, 2007: Employer's Petition for Review; and
- January 11, 2007: Proposed Decision and Order of the Board of Industrial Insurance Appeals.

Appellant proposes that these three documents represent that portion of the procedural record submitted to the Superior Court, and the lack of an Order granting the employer an extension in which to file their Petition for Review does therefore support Appellant's assertion that no such Order was issued. Had an Order granting an extension been issued, it would have been a relevant and pertinent document of which ought to be included by the employer in their showing of Superior Court jurisdiction

Because the employer bares the burden of proving Trial Court jurisdiction, and no such proof exists, Appellant

proposes no such jurisdiction existed. Based on the foregoing, Appellant proposes that this Court make a finding that the Superior Court lacked jurisdiction to hear the Appeal, and that the March 7, 2007, Order of the Board become the final Order in this Appeal.

B. Notice of Appeal to Superior Court

Claimant again relies on the record, or lack thereof, provided to the Superior Court. It is the employer's own exhibits upon which Respondent relies, in showing the procedure undertaken in perfecting service of their Notice of Appeal. Because that record does not reflect a showing that the employer timely served the Board with a copy of the Notice of appeal as stated in the RCW's and case law cited by Appellant in their Opening Brief.

Because the employer bares the burden of proving Trial Court jurisdiction, and no such proof exists, Appellant proposes no such jurisdiction existed and therefore, the decision of Judge Bowden dated September 18, 2008 should be stricken and the March 7, 2007 Order of the Board becomes the final Order in this Appeal.

C. Substantial Evidence

Respondent recites specific statements included in the Board Appeal transcripts which support their position, however, when taken as a whole, and viewed as proscribed by the applicable RCW's and case law set out in Appellant's Opening Brief, the record reflects a finding that the Department's September 15, 2005 should be affirmed, thereby allowing benefits to Mr. Herron under the Industrial Insurance laws of the State of Washington.

D. Legal Error

Claimant's live testimony at the Board, coupled with the medical testimony provided in this case, and reviewed under the applicable case law and statutes, does hereby meet the requisite standard for proving Mr. Herron suffered an industrial injury or occupational disease while in the employ of Community Transit, and should therefore be granted any and all relevant benefits from such.

IV. CONCLUSION

In light of the foregoing clarifications, Appellant once again respectfully requests this Court to decide whether the trial court had

jurisdiction to hear this appeal, and if this Court finds that the trial Court did not have jurisdiction, we respectfully request that you issue an Order which would VACATE the September 18, 2008, Superior Court Decision which reversed the March 7, 2007, Decision of the Board. This would allow the claim for an injury only pursuant to the final Order of the Board.

In the alternative, we ask this Court to REVERSE the Decision of the trial Court which reversed the March 7, 2007 Decision of the Board which ALLOWED this claim for an injury, or REVERSE the portion of the Board's Decision which denied the claim for an occupational disease, so that the September 15, 2005 Decision of the Department of Labor and Industries, which ALLOWED this claim for an injury or occupational disease become the final determination of allowance.

Dated this 29th day of March, 2010.

Respectfully submitted,

Fiona A.C. Kennedy
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WSBA No. 32385

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the forgoing APPELLANT'S REPLY TO RESPONSE to the following via United State Postal Service as follows:

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Dated this 29th day of March 2010.

FIONA A.C. KENNEDY