

NO. 36567-1-III

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

JEREMY L. MATSON,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF APPELLANT, JEREMY L. MATSON

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I. INTRODUCTION

Jeremy L. Matson is an injured worker who brings this wage order appeal under the Industrial Insurance Act (“IIA” or “Act”). Mr. Matson challenges that a Department of Labor & Industries (“department”) order dated May 7, 2012 may still be reconsidered, while the department maintains that under the doctrine of res judicata, it cannot. The superior court for Spokane County ruled against Mr. Matson on summary judgment.

In deciding this appeal, the three most important judicial canons to observe are: 1) the Act is to be liberally-construed in order to advance the remedies provided therein; 2) the courts must apply the law based upon the spirit, not just the letter of the Act, and 3) the courts must resolve any doubts as to the application of the Act in favor of the injured worker. *Gaines v. Dep’t of Labor & Indus.*, 1 Wn. App. 547, 552, 463 P.2d 269 (1968).

Mr. Matson believes his medical providers timely protested the disputed wage order such that res judicata does not apply. In the alternative, Mr. Matson urges a finding that when applying the three key judicial canons stated above to the questions of law now before this Court, and giving due consideration to the rules for when res judicata does not apply, the department should reconsider its misleading, only partially-complete, punitive and chilling wage order of May 7, 2012. That order was issued in

derogation of democratic principles against a technological background which gives the department no excuse.

“The standard of review on appeal of a summary judgment order is de novo, with the reviewing court performing the same inquiry as the trial court.” *Romo v. Dep’t of Labor & Indus.*, 92 Wn.App. 348, 353, 962 P.2d 844 (1998); *Herron v. Tribune Pub’g Co.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987). Summary judgment may then be upheld if “there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law.” CR 56(c). In conducting this de novo review, the facts and the reasonable inferences available from them are to be considered in the light most favorable to the non-moving party. *O’Keefe v. Dep’t of Labor & Indus.*, 126 Wn.App. 760, 765, 109 P.3d 848 (2005).

II. STATEMENT OF THE ISSUES

1. Does the Department’s record contain a timely protest to the Department’s May 7, 2012 wage order?

Answer: Yes, the June 2012 treatment notes of multiple physicians, when considered either individually or together, should have alerted an experienced claims manager that the department’s May 7, 2012 wage order was likely incorrect.

2. Is the Department’s May 7, 2012 wage order entitled to res judicata effect?

Answer: No, the Department’s wage order doesn’t communicate a proper statutory or case law basis for a wage

order, nor explain that it is actually “wage earning capacity” that is being decided; and as such, it is impermissibly vague. In addition, the facts show that it would be fundamentally unfair to allow *res judicata* to apply to this particularly-inept order, which here effectively denies years of proper benefits.

3. Did superior court err in granting summary judgment to the Department of Labor & Industries?

Answer: Yes, the superior court erred by failing to consider all facts and reasonable inferences in the light most favorable to Mr. Matson as the non-moving party.

III. STATEMENT OF THE CASE

On May 5, 2011 Jeremy L. Matson sustain a workplace injury when he fell off a 20-foot ladder while working full-time for his employer, fracturing his pelvis, coccyx and patella. (CABR 87)¹. On May 18, 2011, the department allowed Mr. Matson’s claim as compensable. (CABR 63)².

On September 29, 2011 the department issued a non-interlocutory wage order finding Mr. Matson’s “wage for the job of injury is based on the monthly salary of \$955.15.” (CABR 63, 68-69)³. No hourly wage; number of hours per day; daily wage; or number of days worked per week was stated. *Id.* On October 19, 2011 Mr. Matson filed a timely protest to the

¹ Admitted at Exhibit F (CABR 86-91) by joint stipulation of the parties (CABR 63-66), number 18 (CABR 65).

² Joint stipulation of the parties, number 2 (CABR 63).

³ Joint stipulation of the parties, number 4 (CABR 63).

department's September 29, 2011 wage order, asserting that he did not understand the basis of the department's wage order method and requesting clarification. (CABR 64)⁴. In his protest, Mr. Matson asserted the rate of \$955.15 was "really low. You can make more almost anywhere." (CABR 73) He asked the department to "please send me something that describes exactly how my wage was figured out, days, hours, months, I would really appreciate it." *Id.* His specific requests were ignored.

On May 7, 2012, the department issued a further wage order, this time finding that Mr. Matson's wages "for the job of injury" is based upon commission of \$776.29 per month. (CABR 82-3)⁵. The order further specified that the "worker's total gross wage received from all employment at the time of injury is \$776.29 per month," plus it found Mr. Matson to be single with one child on his date of injury. *Id.*

The department's May 7, 2012 wage order did not state that he was working for "fixed" monthly wages, nor in an industry where wages are normally "fixed" by the month. *Id.* It did not state that Mr. Matson's wages were being set based on him being an exclusively seasonal, part-time or

⁴ Joint stipulation of the parties, numbers 6 and 7; see also, Exhibit C (CABR 72-80), admitted by joint stipulation of the parties, number 18 (CABR 65).

⁵ Admitted as Exhibit D by joint stipulation of the parties, number 18 (CABR 65).

intermittent worker, nor based upon a similar worker's payroll. *Id.* It did not state that the true purpose of the order was to establish his "wage earning capacity." *Id.* It did not state that the department was computing his wage pursuant to RCW 51.08.178. *Id.* It did not state an hourly wage; number of hours per day; daily wage; or number of days worked per week. *Id.* It did state that Mr. Matson had 60 days to protest in writing. *Id.*

Meanwhile, RCW 51.08.178(1) expressly requires that if an injured worker's wages are not "fixed by the month," then they "shall be" set by multiplying the worker's daily wage by one of various available multipliers, depending upon how many days per week the worker normally worked. This statute also specifies that the "daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed." This statute commands the department that "[t]he number of hours the worker is normally employed shall be determined... in a fair and reasonable manner, which may include averaging the number of hours worked per day."

It is undeniable that the department's May 7, 2012 wage order is in derogation of legislative intent because it did not follow the statutory commands of RCW 51.08.178(1), the default statutory provision under which an injured worker's wages are normally calculated, and neither did it utilize any other legal method available under RCW 51.08.178. Sales "commissions" are nowhere directly mentioned within RCW 51.08.178, are

not generally “fixed” in the labor market like monthly wages might be, and again, at no time did the department’s wage order communicate that the proper legal standard for determining an injured worker’s wages entails consideration of a fair “wage earning capacity.” Nothing within the department’s statutorily-deficient order of May 7, 2012 gives any real clarity with comparison to its prior wage order of September 29, 2011, an order the department already knew Mr. Matson could not understand.

So, not only had Mr. Matson’s prior protest been futile, but after he spoke up, his next wage order set his wage at an even more draconian level. Predictably, he did not personally protest. Then, on July 19, 2013 the department closed Mr. Matson’s claim with an award for permanent partial disability equal to 20 percent of the amputation value of his right arm. (CABR 65)⁶. On August 3, 2015 Mr. Matson filed an application to reopen his claim. (CABR 65)⁷. On August 7, 2015 the department ordered the claim reopened as of June 19, 2015. (CABR 65)⁸. Finally, on December 20, 2016 the department issued an order asserting that it could not review the May 7, 2012 wage order because it had not received a protest within 60 days from May 7, 2012. (CABR 65)⁹. In doing so, the department implicitly

⁶ Joint stipulation of the parties, number 13 (CABR 65).

⁷ Joint stipulation of the parties, number 14 (CABR 65).

⁸ Joint stipulation of the parties, number 15 (CABR 65).

⁹ Joint stipulation of the parties, number 16 (CABR 65).

disclaimed that it had the authority to review the written filings timely made by Dr. John F. Long, DO, and Dr. Terrance Rempel, MD, MPH.

Mr. Matson has maintained throughout this appeal that the treatment record of Dr. Long dated June 4, 2012 and received by the department on June 5, 2012 contains information sufficient to constitute a protest to the May 7, 2012 order. (CABR 64)¹⁰. Similarly, Mr. Matson urges that the treatment record of Dr. Rempel dated June 7, 2012 and received by the department on June 8, 2012 is also a proper protest. (CABR 64-5)¹¹. Dr. Long's treatment note was admitted as Exhibit F in the board's record (CABR 64-5)¹² while Dr. Rempel's treatment note was admitted as Exhibit G (CABR 64-5)¹³. Exhibit F is located at CABR 86 through 91 while Exhibit G is located at CABR 92 through 94.

Dr. Long's June 4, 2012 treatment note indicates that Mr. Matson was working "full time doing carpet cleaning and running a carpet business and he also[,] I believe, has another job," although Mr. Matson was hurting with various work activities and also by the end of the day (CABR 87). In the patient history section of this treatment record, Dr. Long indicated Mr. Matson's "background" was working "40+" hours per week (CABR 88).

¹⁰ Joint stipulation of the parties, number 11 (CABR 64).

¹¹ Joint stipulation of the parties, number 12 (CABR 64-65).

¹² Joint stipulation of the parties, numbers 11 and 18 (CABR 64, 65).

¹³ Joint stipulation of the parties, numbers 12 and 18 (CABR 64-65).

Dr. Rempel's June 7, 2012 treatment note lists Mr. Matson's "OCCUPATIONAL HISTORY:" as being "self-employed with a carpet cleaning service. Job of injury: carpet cleaning and window cleaning. Prior work: Carpet cleaning, supervisor, manager"(CABR 93) Dr. Rempel noted that the "PLAN" was for Mr. Matson to "return" to work on a full-time, unrestricted basis (CABR 94).

Mr. Matson appealed the department's December 20, 2016 order to the board, contending that either and/or both of the two above-stated medical provider reports were legally-operative as protests; and as well that the May 7, 2012 order was so vague he could not understand it, so in fairness, he should not be bound by it. (CABR 103-105). Without properly analyzing the core concept that department wage orders must accurately reflect an injured worker's "wage earning capacity" (which may differ from their wage at the time of injury), the board found that the medical records of Drs. Long and Rempel did not constitute protests and that the May 7, 2012 wage order was otherwise final and binding (CABR 4 and 33-43).

Mr. Matson appealed to Spokane County Superior Court. Superior Court received briefings, heard oral arguments and then granted a department motion for summary judgment, therefore denying a jury trial.

Mr. Matson hereby assigns error to the Superior Court's findings and conclusions as indicated by his following arguments:

IV. ARGUMENT

The board and superior court each failed to apply the holding of *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wash.App. 84, 52 P.3d 43 (2002) (res judicata does not apply to a department wage order where the wage order fails to clearly detail the basis of the department's findings [according to statutory requirements]), but neither did they at least distinguish Mr. Matson's claim facts from those in *Somsak*. Mr. Matson believes his case facts are entirely consistent with those in *Somsak*, so the same result should also obtain: direct remand for the department to determine a proper and fair wage order pursuant to RCW 51.08.178.

A. The Department's May 7, 2012 Wage Order is Not Entitled to Res Judicata.

Res judicata, or claim preclusion, is an affirmative defense that bars relitigation of claims and issues that were litigated, or could have been, in a prior action. This doctrine normally applies to the issues encompassed within department orders. *Marley v. Dep't of Labor & Indus.*, 125 Wash.2d 533, 537 886 P.2d 189 (1994); *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997). However, "[f]undamental fairness requires that a claimant must be clearly advised of the issue" being decided before reconsideration is barred by res judicata. *Somsak*, 113 Wash.App. at 92 (citing *King v. Dep't of Labor & Indus.*, 12 Wash. App. 1, 4, 528 P.2d

271 (1974)). Fundamental fairness requires that the application of res judicata “does not work an injustice on the party against whom it is to be applied.” *Winchell’s Donuts v. Quintana*, 65 Wn.App. 525, 529-30, 828 P.2d 1166 (1992); *Malland v. Dep’t of Retirement Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985) (additional citation omitted)). Whether res judicata bars a party pursuing an action is to be decided as a matter of law. *Kuhlman v. Thomas*, 78 Wash.App. 115, 119-20, 897 P.2d 365 (1995).

1. *The Department’s May 7, 2012 Wage Order was Timely Protested.*

“[T]he purpose behind RCW Title 51 is to insure against the effective loss of wage-earning capacity.” *Adams v. Dep’t of Labor & Indus.*, 128 Wn.2d 224, 233, 905 P.2d 1220 (1995) (citing *Kuhnle v. Dep’t of Labor & Indus.*, 12 Wn.2d 191, 197, 120 P.2d 1003 (1942)). “Wage-earning capacity means sustainable wage-earning capacity.” *Adams*, 128 Wn.2d at 233. It follows from the purpose of the Act that the proper focus of the department’s wage order calculations is to be upon lost wage-earning capacity. *Dep’t of Labor & Indus. v. Avundes*, 140 Wash.2d 282, 287 996 P.2d 593, 596 (Wash. 2000) (“This statute should be construed liberally in a way that is most likely to reflect a worker’s lost earning capacity, with doubts resolved in favor of the worker”) (citing *Double D. Hop Ranch v. Sanchez*, 133 Wash.2d 793, 798, 947 P.2d 727, 952 P.2d 590 (1997)). This non-debatable, foundational concept was nowhere

properly recognized within the department's May 7, 2012 wage order, nor analyzed properly by either the board or superior court rulings below.

But it wasn't just all these prior courts that recognized the core concept of wage earning capacity that breathes life into the spirit of a proper wage order determination. It was also Mr. Matson's treating occupational medical providers, Drs. John F. Long and Terrance Rempel, whose writings may also constitute valid protests. *Shafer v. Dep't of Labor & Indus.*, 140 Wn.App. 1, 11, 159 P.3d 473 (2007), *aff'd*, 166 Wn.2d 710, 213 P.3d 591 (2009) (treating medical provider's note is sufficient to constitute a protest).

Dr. Long's treatment note of June 4, 2012 was received by the Department on June 5, 2012. Dr. Rempel's June 7, 2012 treatment note was received by the Department on June 8, 2012. Either or both are valid as protests if the information contained therein was of such a nature as would have objectively informed an experienced department claims manager that its May 7, 2012 wage order was potentially incorrect. *In Re: Mike Lambert*, 91 0107, 1991 WL 11008451, at *1 (Wash. Bd. Of Indus. Ins. Appeals Jan. 29, 1991) (a protest requires no use of "magical" statutory words, special formatting or observation of other formalities such as specifically requesting reconsideration); *Boyd v. City of Olympia*, 1 Wash. App. 2d, 17, 33, 403 P.3d 956 (Div. 1, 2017) (proper test to determine if writing was "calculated to put the department on notice" is an objective one).

Notably, there is little comprehensible medical purpose for why a treating physician would ever need to record in standard medical treatment notes that a patient previously worked in full-time work; “40+” hours per week; as a supervisor; or had started his own business, etc.. However, in occupational medicine records, this information is used specifically to notify the department of key “background” or “OCCUPATIONAL HISTORY” facts which bear on the injured worker’s current and previous wage-earning capacity so that the department can then make payment and vocational determinations thereupon. Here, Drs. Long and Rempel documented exactly these critical facts regarding Mr. Matson’s specific wage-earning capacity, so their timely-filed treatment records are legally-cognizable as protests to the May 7, 2012 wage order. No other conclusion on these facts is reasonable or upholds the spirit and purposes of the Act. The board and superior court erred by not so finding.

2. *The Department’s Wage Order is Impermissibly Vague with Respect to Statutory Requirements, So Did Not Clearly Advise Mr. Matson.*

The department’s wage orders of September 29, 2011 and May 7, 2012 are very comparable in their contents and legal deficiencies, but they are not identical. Both omit or otherwise defy the injured worker to guess at the department’s statutorily-mandatory considerations. The undisputed facts show that Mr. Matson could not understand the first of these two

similarly-vague wage orders. The most reasonable inferences are that he therefore could not and did not understand the second wage order either.

But, the May 7, 2012 order doesn't follow any known statutory or case law formula, so it is both subjectively and objectively vague. It fails to state that wages were earned according to "fixed" monthly earnings. It fails to express Mr. Matson's hourly wage; the number of hours he worked; his daily wage or the number of days per month which he worked; all of which must be included in a proper wage order decided pursuant to RCW 51.08.178(1), the default wage calculation provision. In the alternative, the department's May 7, 2012 wage order does not indicate that it is being decided in reference to the wage earning capacity of a similarly-situated worker pursuant to RCW 51.08.178(4). Nor does it clearly advise Mr. Matson that the issue being decided, in any event, is his specific "wage earning capacity," a concept that can easily differ from actual earnings.

The objective deficiencies here are sufficiently-similar to the deficiencies found by Division One in *Somsak*. In that case, the injured worker had an open industrial insurance act claim for a period of years in the 1980's. *Somsak*, 113 Wn. App. at 89. Her claim closed by unprotested order dated March 8, 1989. *Id.* at 92. There was then a subsequent opening and additional orders were issued in 1996, reflecting "adjustments made to her prior monthly benefits," neither of which orders were protested. *Id.*

However, neither the closing order nor the two wage benefit adjustment orders detailed the underlying factual basis for Somsak's time loss compensation rate. *Id.* Then, on February 5, 1998, the department finally issued a detailed wage order discussing Somsak's hourly wage rate, hours per day worked, and days per week worked. *Id.* at 89. Somsak protested because overtime hours and healthcare benefits were not included. *Id.* at 89-90. Somsak's complaints were litigated up through the board to a superior court jury which found Somsak entitled to have 48 hours per month in overtime and healthcare benefits added to her wage order. *Id.* at 91. Somsak's self-insured employer, Criton, appealed, arguing that her protest and subsequent appeals were time-barred under the doctrine of res judicata, based upon the closing order in 1989 and the two time loss adjustment orders of 1996. *Id.* Division One disagreed and held that "fundamental fairness requires that a claimant must be clearly advised of the issue before it will be barred by the doctrine of res judicata." *Id.* at 92 (internal citations omitted). Further, because the orders Somsak failed to protest did not state the hours she worked, the rate of her pay, or mention her health care benefits, Division One easily found that the factual basis for Somsak's time loss benefits were "not encompassed within the terms" of the department's previous orders. *Id.* at 92-93. Accordingly, fundamental fairness prevented res judicata from attaching to those orders. *Id.* at 93.

Just exactly like the three prior orders discussed in *Somsak*, the department's wage order of May 7, 2012 here fails to discuss Mr. Matson's wages of injury in the mandatory statutory terms found within RCW 51.08.178, and alternatively, in terms of his "wage-earning capacity," as was discussed by our Supreme Court in *Avundes*. Because the May 7, 2012 order fails to discuss those statutory and case law considerations, it does not "clearly advise" Mr. Matson (or his medical providers) that those bases were being either included or rejected by the department as part of its consideration. Because these mandatory statutory and case law considerations were not "clearly encompassed" in the department's May 7, 2012 partial wage order¹⁴, res judicata should not apply.

3. *The Department's Wage Order is Fundamentally Unfair.*

An executive branch agency may only exercise those powers granted to it by the Legislature. *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 519, 852 P.2d 288 (1993) (citing *Anderson, Leech & Morse, Inc. v. State Liquor Control Bd.*, 89 Wn.2d 688, 694, 575 P.2d 221 (1978)). Thus, the Court of Appeals here should begin its fundamental fairness analysis by determining if the May 7, 2012 order was decided

¹⁴ The most reasonable inference may be that the May 7, 2012 wage order was simply incomplete and inadvertently published before it was ready.

according to the mandatory methods prescribed by the Legislature, and also whether it fairly incorporated in clear language to Mr. Matson the court-described “wage-earning capacity” concept. It did neither.

In terms of fundamental fairness, if Mr. Matson was working (or even capable of working) as a full-time worker at the time of injury, then it follows that his wage order should likely reflect at least the minimum legal wage for full-time employment in this state. Here, the Court of Appeals will please judicially note that as of May 5, 2011, Washington’s minimum wage was \$8.67 per hour¹⁵. A full-time wage earning capacity (8 hours per day, five days per week) for Mr. Matson would therefore equal at least \$69.36 in daily wages and \$1,525.92 in monthly wages at the time of his injury under RCW 51.08.178(1); whereas the department’s May 7, 2012 wage order assigns less than 51% of the then-available minimum wage rate mandated by law. These differential calculations show obvious injustice.

Mr. Matson’s record shows that he was able to work in full-time employment, sometimes even as a supervisor, as well as in non-exclusively sales positions both before and after his industrial injury. He was working on a ladder at the time of his injury, from which it can be understood that

¹⁵ The Department of Labor & Industries published this information online: <https://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/History/default.asp> (last accessed on July 27, 2019).

he was not working in an exclusively sales-based capacity. Why then does the department insist he can be given a minimalist, exclusively sales-commission-based wage rate? RCW 51.08.178(4) provides that if the default subsection (1) method cannot “fairly” be used, and the worker is not specifically found to be a seasonal, part-time or intermittent worker under subsection (2)¹⁶, then the worker’s “monthly wage *shall be* computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.” Here, the Department made no finding that full-time workers like Mr. Matson are usually only paid exclusively via minimal commissions. So, what was the sufficient statutory basis that justifies Mr. Matson’s wage order? Answer: there was none.

In making its fundamental fairness evaluation, this Court must again reflect upon the three key judicial canons which drive all Industrial Insurance Act adjudications: 1) the Act is to be liberally-construed in order to advance the remedies provided therein; 2) the courts must apply the law based upon the spirit, not just the letter of the Act, and 3) the courts must resolve any doubts as to the application of the Act in favor of the injured worker. *Gaines v. Dep’t of Labor & Indus.*, 1 Wn. App. 547, 552, 463 P.2d

¹⁶ Neither party has ever asserted in this litigation that Mr. Matson was either a seasonal or intermittent worker (CABR 63-66) and the department never so found, either expressly or tacitly (CABR 68-69; CABR 82-83).

269 (1968). Applying these canons in Mr. Matson's case, he both subjectively and objectively did not understand the department's May 7, 2012 wage order. The order didn't fairly encompass the statutory and case law requirements, and it results in a calculation demonstrably and significantly below what was then the state's minimum legal wage. The May 7, 2012 order was also potentially punitive and chilling in character, on top of which Mr. Matson's prior protest had already proved generally futile. Reviewing all of these factors in this de novo review, this court should find that the department's May 7, 2012 wage order was fundamentally unfair, so it is not entitled to res judicata protection.

But a further judicial policy determination is now also requested. Mr. Matson is either the exceptionally-rare injured worker whose rights have been abused in extra-statutory fashion, or his case is more emblematic. In either event, there is no excuse. The Court of Appeals should now judicially notice that it should be quite simple, programmatically, to ensure that every wage order published by the department contains fields describing the mandatory considerations set forth in RCW 51.08.178(1); or alternatively, requires the department to either set forth a statement that the injured worker's wage is being computed expressly "under RCW 51.08.178(2) for "exclusively seasonal, essentially part-time or intermittent workers;" or "under RCW 51.08.178(4) based on similar workers' wages

due to the fact that the wage of injury cannot be fairly computed utilizing the other methods in RCW 51.08.178.” All department wage orders should also state their purpose, which is to “fairly determine wage-earning capacity, which may in some cases even be different than wages actually earned.” This strict construction against the department is appropriate under the judicial canons stated supra. If this Court of Appeals declares that it will no longer consider claims of res judicata from the department in the absence of the department correcting its wage publication methods, but will instead presume fundamental unfairness where statutory mandates have been abridged, the purposes of the Act will be thereby advanced.

Accordingly, Mr. Matson proposes a clarifying rule that those department wage orders that ostensibly conform to the statutory requirements are sufficiently within the authority of the state agency to decide, *Erection Co.*, 121 Wn.2d at 519, and will normally therefore be given res judicata effect even if decided incorrectly, either as a matter of fact or law, *Marley*, 125 Wash.2d at 537; but those wage orders that do not at least ostensibly conform to statutory mandates are not entitled to the slightest res judicata protections on later protest or appeal by the injured worker. *Somsak*, 113 Wash.App. at 92. Such a rule, applicable at either the department or board, would prevent needless delays, injustice, and waste of judicial resources in future cases. This proposed rule would further the

remedial purposes of the Act; engage the spirit, not just the letter of the Act; and at least partially resolve the legal question of what constitutes fundamental unfairness toward injured workers. *Gaines*, 1 Wn. App. at 552.

B. The Superior Court Committed Multiple Reversible Errors.

1. Superior Court failed to analyze and apply controlling case law.

Mr. Matson vociferously argued to superior court that *Somsak* is controlling law based on the facts of Mr. Matson’s case, but the superior court failed to acknowledge and analyze this key argument. That failure abrogates the rule and intent of *Groff v. Dep’t of Labor & Indus.*, 65 Wn.2d 35, 395 P.2d 633 (1964). In *Groff*, it was recognized that in order to create a proper record for appellate court review, the trial court should “show an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact that penetrates beneath the generality of ultimate conclusions, together with a knowledge of the standards applicable to the determination of those facts.” *Groff*, 65 Wn.2d at 40 (emphasis added) (footnote omitted), quoting *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 419, 63 S. Ct. 1141, 87 L. Ed. 1485 (1943). Here, the Court of Appeals should waste no time finding that if a petitioner argues in written briefs that a given case contains controlling or binding analysis, then the least duty incumbent on superior court is to provide in its decision a reasoned assessment of why the “controlling law” claim is or is not true.

2. *Superior Court misapplied dicta from a non-precedential Board of Industrial Insurance Appeals case while ignoring controlling case law from the Washington State Court of Appeals.*

The board's Significant Decisions are considered nonbinding, yet persuasive legal authority for the higher courts. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991); *O'Keefe*, 126 Wn. App. at 766. Non-Significant (unpublished) board decisions are considered neither precedential nor persuasive. Here, superior court erred when it relied on the non-Significant decision of *Joanne K. Tolonen*, No. 02 18722¹⁷, 2003 WL 23201546 for a logically-unsound legal proposition. Superior Court relied upon *Tolonen* to incorrectly find that a department wage order "contains all the statutory elements if it contains the monthly wage, the marital status, and the dependent status." *Somsak*, the judicial canons of *Gaines*, and the plain statutory text of RCW 51.08.178 provide otherwise.

3. *Superior Court announced and applied an incorrect legal standard that a "clear and unmistakable final finding" within a Department wage order cannot also be fundamentally unfair to the injured worker.*

The superior court's finding that a "clear and unmistakable final finding" means a wage order "cannot be fundamentally unfair" is a non

¹⁷ Please judicially note that this is ***not*** one of the board's Significant Decisions, a fact that is easily verified by reviewing the board's Significant Decisions index online: <http://www.biia.wa.gov/SDNameIndex.html> (last viewed on July 26, 2019).

sequitur fallacy which also presumes a factually-inaccurate premise in this record. For example, here the injured worker had every reason to believe if he dared to speak up again, that might simply be futile, or he might also have his monthly wage arbitrarily lowered further. These facts illustrate that an abusive final finding, taken in derogation of statutory mandates and democratic expectations, may be fundamentally unfair under a given set of circumstances to a particular worker, no matter how “clear and unmistakable” specific order language might appear to others at first blush.

4. *Superior Court announced and applied an incorrect legal standard that the Department need not consider the contents of a medical record as a protest to a wage order if the industrial insurance claim is allowed.*

This is a further logical fallacy, untethered to any precedential case law. There is no case law in existence that says a legally-sufficient protest may simply be disregarded by the department if it merely comes from the treating physician after a case has already been allowed.

5. *Superior Court failed to recognize and observe the liberal spirit of the Industrial Insurance Act, the required liberal interpretation of the Act and the rule of resolving conflicts of law in favor of injured workers.*

The Industrial Insurance Act, Title 51 RCW, was written to provide swift and certain relief to injured workers. *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987); *Cockle v. Dept. of Labor and Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001) (emphasis

added). The “overarching objective” of the Act is to reduce to a minimum “the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” *Cockle*, 142 Wn.2d at 822 (quoting RCW 51.12.010)(emphasis added). The Act is remedial in nature and is therefore to be construed liberally in order to achieve its purpose. RCW 51.12.010; *Sacred Heart Med. Ctr. V. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979). The Act is “grounded in such humanitarian impulse” (rephrased for grammatical conformity) as to allow findings “included within the reason, although outside the letter, of the statute.” *Ross v. Erickson Const. Co.*, 89 Wn. 634, 639-641, 155 P. 153 (1916) (consequences of medical malpractice are covered as consequential injuries under the IIA). When interpreting the Act, all doubts regarding the law are to be resolved in favor of the injured worker. *Dennis*, 109 Wn.2d at 470; *Sacred Heart*, 92 Wn.2d at 635.

The superior court here simply disregarded bedrock principles. It drew no appropriate inferences in the light most favorable to Mr. Matson’s claims. It didn’t recognize or discuss the legal reality that a department wage order is to reflect wage-earning capacity, so it therefore failed to recognize the reports of Drs. Long and Rempel as valid protests. For the same reason superior court failed to understand exactly why the language of the Department’s May 7, 2012 wage order was fundamentally unfair.

Superior court misapplied the law, and moreover, if it was not clear that judgment should have been granted to Mr. Matson, it should have at least empaneled a jury to provide the court with an advisory opinion from which to make its timely provider protest and fundamental fairness decisions. This case was never an automatic win in summary judgment for the department because the department's order failed to observe statutory mandates or provide reasoned analysis. To that extent, the holding of *Groff* might even be wisely extended expressly to future department wage orders. The wasteful *Somsak* litigation, repeated again here, justifies same.

C. Attorney Fees

Mr. Matson requests an award of reasonable attorney's fees on appeal pursuant to RCW 51.52.130(1), which 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, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

Should the Court of Appeals find that the department's May 7, 2012 wage order must be reversed, then Mr. Matson has successfully appealed to this appellate court and should be awarded attorney fees pursuant to RCW 51.52.130(1) as well as pursuant to RAP 18.1(b). If in the alternative, Mr.

Matson's case is remanded to superior court for an advisory jury trial, then he has not yet prevailed and his request for attorney fees is not yet ripe.

V. CONCLUSION

This Court of Appeals should hold that Mr. Matson timely appealed the department's May 7, 2012 wage order through Drs. Long and Rempel; that the department's wage order violates statutory mandates and results in a vague and incomplete adjudication of Mr. Matson's wage-earning capacity, and that it would be fundamentally unfair under the facts of this case to bar reconsideration of that order under the doctrine of res judicata.

Attorney Fees should then be awarded to Mr. Matson pursuant to 51.52.130(1) and RAP 18.1(b).

RESPECTFULLY SUBMITTED this 29th day of July, 2019.

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