

Case No. 46955-3-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KATHRYN A. LANDON,

Appellant,

v.

THE HOME DEPOT, INC.,

Respondent.

THE HOME DEPOT, INC.'S BRIEF

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I. INTRODUCTION

This appeal arises from a workers' compensation matter.

Ms. Kathryn A. Landon alleges the Board of Industrial Insurance Appeals (hereinafter, "the Board") and Superior Court for Cowlitz County erred by addressing the merits of her occupational disease claim because it was not passed upon by the Department of Labor and Industries (hereinafter, "the Department"). Ms. Landon failed to preserve an error of law issue at the Board, so attempts to characterize this as a jurisdictional issue. The Board, and hence the trial court, had subject matter jurisdiction over Ms. Landon's claim, and she failed to preserve what is accurately characterized as legal error.

II. ISSUE

Whether the Board and Superior Court for Cowlitz County had subject matter jurisdiction to hear Ms. Landon's workers' compensation appeal.

III. STATEMENT OF THE CASE

Ms. Landon sets out a lengthy factual recitation regarding the merits of her claim for benefits. The sole issue before the court is subject matter jurisdiction. Ms. Landon appealed only the Order Denying Motion to Vacate, not the Judgment on Verdict. As a result, her factual statement

is largely irrelevant. Employer does not adopt or agree with her statement of facts, and offers the following facts as relevant to this appeal.

Ms. Landon, 58 years of age, began working at The Home Depot, Inc., in October 2008. She filed a claim for Lyme disease she attributed to employment exposure. On March 9, 2012, the Department denied the claim as untimely. CP 50. On May 11, 2012, the Department affirmed the denial. CP 51. Ms. Landon filed a May 15, 2012 Notice of Appeal raising the sole issue of whether she had an occupational disease or infection proximately caused by her employment. CP 52.

During a mediation conference on or about July 30, 2012, the parties stipulated to the Board's jurisdiction. CP 58. The parties appeared for a scheduling conference September 10, 2012, clarified the issues, and discussed deadlines for the presentation of substantive evidence. CP 63. The parties subsequently convened a conference to hear a motion to extend discovery. CP 68. At no time in this process did Ms. Landon raise an issue regarding the Board's scope of review or its ability to address the merits of her occupational disease claim.

After the parties convened a hearing and presented all substantive evidence on the issues raised, an Industrial Appeals Judge issued a Proposed Decision and Order on April 16, 2013, concluding it had jurisdiction, the application for benefits for an occupational disease was

timely filed, and Ms. Landon's condition was not an occupational disease. CP 48. Ms. Landon filed a June 13, 2013 Petition for Review with the Board raising the sole issue of whether she had an occupational disease arising naturally and proximately from the distinctive conditions of her employment. CP 4. The Board issued a July 3, 2013 Order Denying Petition for Review, and adopted the Industrial Appeals Judge's order as its own Decision and Order. CP 3. Ms. Landon appealed to the Cowlitz County Superior Court.

The parties proceeded to a 12-person jury trial in Cowlitz County Superior Court on August 12, 2014 on the sole issue of whether the Board correctly concluded Ms. Landon's condition is not an occupational disease arising naturally and proximately out of the distinctive conditions of her employment. Ms. Landon raised no issue regarding the scope of review. The jury heard the evidence and determined the Board had correctly concluded Ms. Landon's condition is not an occupational disease arising naturally and proximately out of the distinctive conditions of her employment at The Home Depot. CP 401. The superior court entered a Judgment on Verdict on August 25, 2014, affirming the July 3, 2013 Decision and Order of the Board. CP 402.

On September 4, 2014, Ms. Landon filed a Motion to Vacate Judgment on Verdict and Remand to the Department of Labor and

Industries for Further Action, raising for the first time that the Board and court lacked subject matter jurisdiction over the occupational disease claim. CP 405. The superior court denied the Motion to Vacate.¹ CP 428. Ms. Landon filed the present Notice of Appeal of the Order Granting Motion to Strike and Denying Motion to Vacate entered October 30, 2014.

IV. SUMMARY OF ARGUMENT

Ms. Landon argues the Board and superior court lacked subject matter jurisdiction over her occupational disease claim because the Department denied the claim as untimely and did not address it on its merits. Subject matter jurisdiction is present *ab initio*. The arguments set forth by Ms. Landon are more properly construed as raising an error of law by the Board, not a jurisdictional issue. Ms. Landon failed to preserve any error of law issue at the Board or at the superior court. The superior court's Order should be affirmed.²

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¹ The Superior Court also granted defendant's motion to strike documents Ms. Landon had included with her motion that were not part of the Certified Appeal Board Record.

² Ms. Landon did not appeal the Judgment on Verdict to the appellate court.

V. STANDARD OF REVIEW

The superior courts review Board decisions *de novo* on the certified appeal board record (designated as the CABR at trial). RCW 51.52.115; *Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 445, 213 P.3d 44 (2009). On review, the Board's decision is prima facie correct. The party challenging the decision bears the burden of proof. *McClelland v. FIT Rayanier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). A superior court may substitute its own findings and decision if it determines, from a preponderance of the evidence, the Board's findings and decision are incorrect. *Id.*

The Washington Court of Appeals reviews the superior court's decision in a workers' compensation case under the ordinary standard of civil review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases.") It reviews for substantial evidence and errors of law. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). The application of an incorrect legal standard is an error of law this Court reviews *de novo*. *Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012) (citing *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001)).

VI. ARGUMENT

Ms. Landon contends the Board and the court lacked subject matter jurisdiction over her occupational disease claim because the Department's order addressed only timeliness of the claim, not the merits. This is not an issue of jurisdiction, but one of scope of review. Ms. Landon never challenged the Board's scope of review or the superior court's scope of review through hearing, Board appeal, or jury trial. Having received an unfavorable verdict, and having failed to raise a scope of review error, she now seeks to avoid the judgment by asserting subject matter jurisdiction.

A. Subject Matter Jurisdiction vs. Scope of Review

Subject matter jurisdiction refers to the category or type of controversy that an agency has authority to decide. *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 782, 271 P.3d 356, review denied, 175 Wn.2d 1008 (2012). In assessing subject matter jurisdiction, the appropriate focus of the inquiry is whether the "type of controversy" is within the agency's given subject matter jurisdiction. All other errors "go to something other than subject matter jurisdiction." *Singletary*, 166 Wn. App. at 783 (quoting *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 316, 76 P.3d 1183 (2003)). The type of category means "the general category without regard to the facts of the particular case." It refers to a

general power to adjudicate a particular nature of controversy, not a specific case. *Dougherty*, 150 Wn.2d 310.

Under the Industrial Insurance Act, Title 51 RCW, the Board and the courts serve an appellate function in workers' compensation cases. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997). The Department enjoys broad subject matter jurisdiction to adjudicate all claims for workers' compensation benefits. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539–40, 886 P.2d 189 (1994). The Board also enjoys broad subject matter jurisdiction, including express statutory authorization, to review Department actions. RCW 51.52.050(2)(a); *Shafer v. Dep't of Labor & Indus.*, 140 Wn. App. 1, 7, 159 P.3d 473 (2007), *aff'd*, 166 Wn.2d 710, 213 P.3d 591 (2009). In turn, the superior courts have subject matter jurisdiction and express statutory authorization to review appeals from Board decisions. RCW 51.52.050(2)(b), (c). A superior court's authority to determine an issue in a workers' compensation case "depends upon whether or not the Board properly addressed that issue." *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 663–64, 879 P.2d 326 (1994), *review denied*, 125 Wn.2d 1019, 890 P.2d 20 (1995).

The Board has appellate subject matter jurisdiction in all matters relating to industrial insurance as well as other select controversies as may

be specified by the legislature. *Marley*, 125 Wn.2d at 539-40. The Board's subject matter jurisdiction differs from its scope of review. Scope of review limits the issues the Board has authority to consider to those matters already passed upon by the Department. However, the concept is not jurisdictional, per se. *In re Lai Ping-Bazzell*, Dckt. No. 08 10572, 1 (Jan. 20, 2009). If the Board exceeds the scope of review by resolving issues not properly before it, it commits an error of law; such error, however, is not jurisdictional and does not deprive the Board of subject matter jurisdiction. *Matthews v. State Dept. of Labor and Industries*, 171 Wn. App. 477, 288 P.3d 630 (2012), *review denied*, 176 Wn.2d 1026, 301 P.3d 1047 (2013).

In *Matthews*, the Department found the worker willfully misrepresented her ability to work and ordered her to reimburse time loss. A hearing judge ordered an overpayment on a different basis, and the worker challenged the judge's jurisdiction on the grounds that the Department limited its order to willful misrepresentation. The Court of Appeals disagreed with the worker that the Board lacked subject matter jurisdiction, citing the Board's broad authority to review actions by the Department. *Id.* at 490-91. It then proceeded to address if the Board exceeded its scope of review, and found it did not because the worker

submitted a very general notice of appeal and did not limit the issue to that of willful misrepresentation. *Id.* at 492.

The cases cited by Ms. Landon do not support her argument. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970) and *Hanquet* addressed scope of review. In both, the parties had properly raised and challenged the Board's ability to address issues not already passed on by the Department. Neither case addressed subject matter jurisdiction.

Ms. Landon urges the Court to blur the line between scope of review and subject matter jurisdiction. The Board unquestionably had jurisdiction over the Department's order denying her claim for benefits.

B. The Board Has Subject Matter Jurisdiction Over This Occupational Disease Claim.

This occupational disease claim falls squarely within the Board's subject matter jurisdiction. The Department's order denied Ms. Landon's claim based on an untimely filing. CP 50-51. In her Notice of Appeal, Ms. Landon raised the merits of her claim for "occupational disease or infection proximately caused by her employment." CP 52. The parties' stipulation that the issues included timeliness of filing and occurrence of an occupational disease is memorialized in the Proposed Decision and Order. CP 48. The Industrial Appeals Judge (IAJ) found the claim timely,

but concluded on the merits Ms. Landon had not proven her claim for benefits. CP 35. Ms. Landon appealed to the Board, outlining the issues for review as limited to the compensability of an occupational disease. CP 4. She did not allege the IAJ exceeded the permissible scope of review or challenge the conclusion that the Board had jurisdiction over the issues.

At trial, Ms. Landon again characterized the issue as one for an occupational disease. She did not object to the jury instructions or Special Verdict Form which asked the jury if the Board correctly found her “condition is not an occupational disease arising naturally and proximately out of the distinctive conditions of her employment...” CP 384 - 401. RP 343. In fact, she requested and agreed with posing that question. RP 328 - 341.

Although the Department’s order denied the claim for benefits on the basis of timeliness, that order vested the Board with broad jurisdiction to review the Department’s action. Just as in *Matthews*, the fact the Department issued an order on one basis does not deprive the Board of its ability to determine if the action would otherwise be proper on another basis. It is the Board’s power generally to adjudicate the orders of the Department for a claim for benefits that defines its jurisdiction, and it clearly acted within its jurisdiction when it examined the Department’s denial of Ms. Landon’s claim.

The Board has broad power to review actions by the Department. An agency does not lack subject matter jurisdiction even if it “may lack authority to enter a given order.” *Marley* at 539. “The power to decide [a type of controversy] includes the power to decide wrong****”. *Id.* at 543; *see e.g. Singletary*, 166 Wn. App. 774, 783-84. Ms. Landon contends the Board made the wrong decision because the Department had not first addressed the merits of the occupational disease claim. Even were this true, this is an issue of scope of review and not one of jurisdiction.

C. Any Issue Regarding Scope of Review Has Been Waived.

Because she failed to raise the issue regarding the Board’s authority to review the merits of the occupational disease claim in her June 13, 2013 Petition for Review to the Board, she cannot now raise the issue on appeal. RCW 51.52.104 provides, in part:

After all evidence has been presented at hearings conducted by an industrial appeals judge, who shall be an active or judicial member of the Washington state bar association, the industrial appeals judge shall enter a proposed or recommended decision and order which shall be in writing and shall contain findings and conclusions as to each contested issue of fact and law, as well as the order based thereon. * * * * Within twenty days, or such further time as the board may allow on written application of a party, filed within said twenty days from the date of communication of the proposed decision and order to the parties or their attorneys or representatives of record, any party may file with the board a written petition for review of the same. Filing of a petition for review is perfected by mailing or personally delivering the petition to the board’s

offices in Olympia. Such petition for review shall set forth in detail the grounds therefore and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.

Similarly, the Court of Appeals generally does not reach issues that were not presented first to the trial court. RAP 2.5. The reason for these preservation rules is to protect efficient and fair adjudication. It is not efficient to allow a party to go through hearing, Board appeal, and a jury trial without raising an error of law, and then allow that party to escape a jury verdict by raising an error, even if it may be a legitimate error, after the fact. Employer does not agree that the merits of the occupational disease claim were outside the Board's scope of review, particularly as Ms. Landon herself identified the issue in the Notice of Appeal. But that issue is moot. Having failed to raise any concerns over the Board's scope of review, she waived any such irregularities, and presents no valid issue for appellate judicial review.

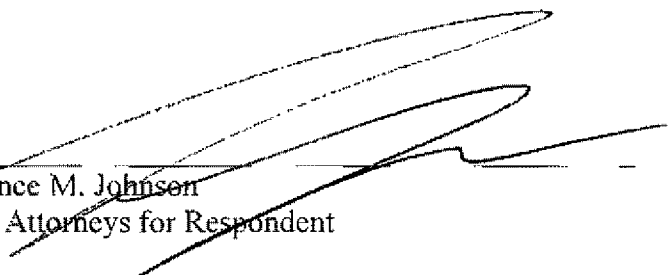
VII. CONCLUSION

Ms. Landon attempts to raise a scope of review issue, inaccurately characterized as subject matter jurisdiction, for the first time after judgment on a jury verdict. There is no valid subject matter jurisdiction issue before the Court. Ms. Landon waived any scope of review issues below. She failed to enumerate sufficient facts and authority to support an

order disturbing the judgment on jury verdict. Respondent respectfully requests this court deny Ms. Landon's requests for relief.

Dated: June 9, 2015

Respectfully submitted,



Lance M. Johnson
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed a copy of
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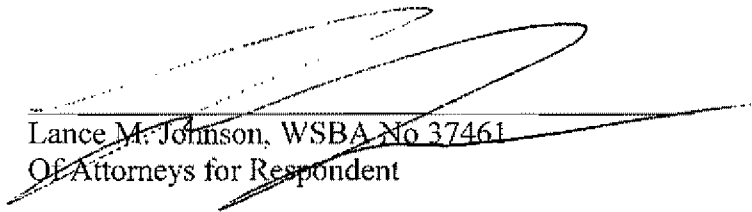
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