NO. 98191-4

SUPREME COURT
STATE OF WASHINGTON

TAMRA A. LEIGH,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

Five years after a final settlement of her workers' compensation claim, Tamra Leigh sought to challenge the validity of an earlier order of the Department of Labor and Industries that suspended her benefits. But the order Leigh wishes to challenge was not the Department's final order about her benefits, and Leigh settled her appeal of the final order.

In June 2012, Leigh negotiated a settlement that paid her a disability award and closed her workers' compensation claim. As part of that settlement, she dismissed her appeal from a July 2011 order that affirmed an earlier April 2011 order that suspended her time-loss compensation benefits.

Leigh now seeks to undo the settlement she negotiated, arguing that the Department never communicated the April 2011 order to her and that her settlement therefore has no effect because the alleged failure to communicate the order is jurisdictional. She is wrong. Because she timely protested the April 2011 order, the settlement and the July 2011 order were properly before the Board. Because she failed to appeal the June 2012 orders dismissing her appeal and closing her claim, they became final orders. Res judicata bars this appeal. This Court should deny review.

II. STATEMENT OF THE ISSUE

Under RCW 51.52.110, a party has 30 days to appeal the Board's final order to superior court. Leigh never appealed the Board's 2012 order dismissing her appeal from the Department's July 2011 suspension order, nor the Board's 2012 order closing her claim with a disability award. Does res judicata bar her from challenging an earlier Department order suspending her benefits?

III. STATEMENT OF THE CASE

A. Leigh Appealed the Department's July 2011 Order Affirming Its April 2011 Order That Suspended Leigh's Time-Loss Benefits Because She Stopped Cooperating with the Department's Attempts to Retrain Her

In June 2007, Leigh filed a workers' compensation claim, which the Department allowed. CP 118. The Department referred Leigh for vocational retraining. CP 137, 139. She signed an accountability agreement stating that she would fully participate with her retraining plan. CP 137, 139.

Later, the Department learned from Leigh's vocational counselor and instructors that Leigh had not complied with the accountability agreement. CP 139. So, on April 1, 2011, the Department issued an order suspending Leigh's right to time-loss compensation, a form of wage replacement benefits. CP 137–38. The Department does not pay time-loss compensation to workers in retraining programs if the workers' actions interrupt their retraining plans. *See* RCW 51.32.099, .110.

The Department sent a copy of the April 1, 2011, suspension order to Michael Lind, the attorney who had been representing Leigh on her claim. CP 137–38. The day before, on March 31, 2011, the Department had received a notice of representation from a new attorney, Nathaniel Mannakee, stating that he represented Leigh. CP 133.

On April 12, 2011, the Department sent a letter to Mannakee, acknowledging that it had received his notice of representation. CP 144–45. The Department enclosed a microfiche copy of the entire claim file with the letter, and it informed Mannakee that he could view his client's claim file documents online. CP 144.

On April 25, 2011, Mannakee sent an electronic message to the Department, requesting that Leigh receive time-loss compensation and stating that the claim suspension "has been lifted":

> Based on the claim status, the suspension has been lifted. Due to this, and the corresponding worker verification form, we know our client should be issued back time loss, and all future time-loss that she is entitled to. How long will it take for the department to restart Ms. Leigh's time-loss as she is still unable to work?

CP 146.

On June 15, 2011, Mannakee's paralegal sent a letter to the Department, confirming that his office had protested the April 1, 2011,

order. CP 149–50 (noting Mannakee's "ensuing protest" to the April 1, 2011, order).

On July 25, 2011, the Department sent a letter to Mannakee acknowledging that he had protested the April 1, 2011, order and stating that suspension of the claim was correct. CP 153–54. On the same day, the Department issued an order affirming the April 1, 2011, suspension order. CP 155.

On July 27, 2011, the Department issued an order that closed Leigh's claim. CP 157. That order stated that Leigh had no permanent partial disability. CP 157.

Leigh timely appealed four Department actions to the Board: the July 25, 2011, order affirming the suspension; the July 25, 2011, letter stating the suspension was correct; a July 26, 2011, order segregating a medical condition; and the July 27, 2011, closing order. CP 122.

B. As Part of a Settlement at the Board, Leigh Dismissed Her Appeal of the July 2011 Order, and She Agreed to Close Her Claim in Exchange for Disability Awards

At an administrative hearing in June 2012, Leigh and the Department settled the appeals. *See* CP 88. Leigh attended the hearing and was present when the parties settled. CP 88. At the hearing, Leigh, through her attorney, voluntarily dismissed the appeals of the July 25, 2011, suspension order; the July 25, 2011, letter; and the July 26, 2011, order

segregating the medical condition. CP 85, 88. The Board issued an order formally dismissing those three appeals on June 11, 2012. CP 85. In the settlement agreement, the parties stipulated to entry of an agreed order by the Board, issued on June 29, 2012, which (1) reversed the July 27, 2011, closing order and ordered the Department to pay permanent partial disability awards to Leigh for cervical and lumbar injuries; (2) affirmed the closing order in all other respects; and (3) closed the claim. CP 88.

Neither order was appealed, and so both orders became final and binding after 30 days. *See* RCW 51.52.110; *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537–38, 543, 886 P.2d 189 (1994).[1]

C. Five Years After the Settlement, Leigh Appealed the April 2011 Order, and the Board Denied Her Appeal

Five years later, in August 2017, Leigh filed a document called "Department's failure to communicate order" with the Board. CP 130–32. The document stated that she was appealing the original April 1, 2011, suspension order. CP 130. Leigh alleged that the Department had "failed to properly serve" the order on her "attorney of record (Nate D. Mannakee)." CP 130.

[1] In July 2012, the Department issued two ministerial orders to carry out the Board's two orders. CP 123. Leigh protested the July 2012 ministerial orders, and the Department affirmed the two orders in a September 2012 order. CP 123. No party protested or appealed the September 2012 ministerial order. *See* CP 123. Because there was no protest or appeal to the September 2012 ministerial order, it also became final and binding. RCW 51.52.060(1); *Marley*, 125 Wn.2d at 537–38, 543.

The Board denied Leigh's attempt to appeal the April 2011 order. CP 128. In its order, the Board explained that the April 2011 order was not the Department's final determination of the suspension issue because the Department later issued an order on July 25, 2011, which affirmed the April 2011 suspension order. CP 128.

In response, Leigh filed a brief, which the Board treated as a motion to vacate its order denying the appeal of the April 1, 2011, order. CP 88, 101–05. The Board denied the motion to vacate. CP 88–89.

Leigh appealed to superior court. CP 1–8. The superior court affirmed the Board decision, concluding that the April 1, 2011, order was not an appealable order and that Leigh's arguments about that order were moot because they were resolved when Leigh appealed the July 25 and 27, 2011, orders and later dismissed those appeals. *See* CP 224–25.

IV. ARGUMENT

A. Leigh Shows No Conflict with Appellate Case Law, Which Provides That a Party Must Appeal Agency Orders or They Become Final

Leigh shows no reason warranting review. Her primary argument is that the April 2011 order was not communicated to her, so none of the later orders should stand. Pet. 1–2, 4–5, 7, 9–10. She argues that, because the Department had not communicated the April 2011 order to her, the Department had no authority to issue the July 2011 order affirming the

April 2011 order and the Board had no authority to consider the appeal to the July 2011 order, or to dismiss her appeal and close her claim in June 2012. Pet. 1–2, 4–5, 7–10. She cites RCW 51.52.050, RCW 51.52.060, and several cases for the proposition that the Department needs to communicate its orders to the worker. Pet. 12, 16–17. But these cases hold only that the Department needs to communicate orders; they do not support Leigh's proposition that any subsequent order is void. Pet. 12–16.

Any argument that the Department failed to communicate the April 2011 order could have been raised in Leigh's appeal to the Department's July 2011 order that affirmed the April 2011 order; Leigh voluntarily dismissed that appeal, however, and her failure to appeal the Board's dismissal order renders it final and binding upon Leigh. *See Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 781–85, 271 P.3d 356 (2012). In *Singletary*, the Department did not communicate a closing order to the worker, but it issued a subsequent order reopening her claim and the worker did not appeal that order. *Id.* Even though the reopening order contained an error of law (that the claim had been closed earlier), it was final because there was no appeal. *Id.*

Likewise, here Leigh's failure to appeal the Board's June 2012 order dismissing her appeal renders it a final order, even if it had been legal error to consider and dismiss the appeal. And the June 29, 2012,

order on agreement of parties closing the claim would have resolved all outstanding issues with the claim. *Singletary*, 166 Wn. App. at 781–85; *Randy M. Jundul*, No. 98 21118, 1999 WL 1446257 (Wash. Bd. Indus. Ins. Appeals Dec. 28, 1999), *overruled in part by Ken D. Follet*, No. 13 16696, 2014 WL 3055483 (Wash. Bd. Indus. Ins. Appeals June 3, 2014) (closing order resolves any unanswered protests). Leigh did not timely appeal the order resulting from the agreement of the parties, and she cannot challenge it now.

A worker's "failure to appeal an adverse ruling to the next level transforms the ruling into a final adjudication by the Department." *Marley*, 125 Wn.2d at 537 n 2. This is true even if the Department's order was issued because of a clear error of law. *See id*. at 538, 542. Leigh is simply incorrect in her assertion that *Marley* holds that "[w]hen a Department Order does not meet the requisites for validity, it is void and no appeal is necessary." Pet. 14. *Marley* stands for the opposite proposition—recognizing that "the power to decide includes the power to decide wrong, and an erroneous decision is as binding as one that is correct until set aside or corrected in a manner provided by law." *Id.* at 543 (quoting *Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490 (1968)).

Leigh claims a jurisdictional flaw in issuing the Department's July 2011 order and argues that all later orders are void, including the Board's

June 11, 2012, order dismissing her appeals and June 29, 2012, order on agreement of parties closing the claim. Pet. 3, 8, 14, 16. But this Court in *Marley* held that a final order is not void even if it contains a mistake, as long as there is personal and subject matter jurisdiction. *See Marley*, 125 Wn.2d at 53842; *Singletary*, 166 Wn. App. at 782.

Leigh does not challenge the Board's subject matter jurisdiction—i.e., she does not claim the Board lacks authority to hear the type of controversy in the appeal of the July 2011 order. Nor can she show an absence of personal jurisdiction when her attorney appealed the July 2011 order on her behalf and she personally attended the hearing. Thus, when the Board dismissed her appeal—on her request—in June 2012, it had personal jurisdiction over her and subject matter jurisdiction over her appeal. Even if the July 25, 2011, order was issued in error, Leigh had to timely appeal it and secure its reversal on appeal to avoid being bound by it.

B. Leigh Shows No Issue of Substantial Public Interest in Her Failure to Appeal an Order Eight Years Ago

Leigh argues (rhetorically and without supporting evidence) that the Department's alleged failure to communicate the April 2011 order to her was part of a "pattern" that requires review. Pet. 18–19. But she had the opportunity in both July 2011 and June 2012 to argue that the

Department should have never issued the July 2011 order because the April 2011 order had not been communicated to her. Neither her unsubstantiated suggestion of a "pattern" nor her failure to exercise her appeal right create an issue of substantial public interest.

Because Leigh never appealed the Board's orders to superior court, they are final. Contrary to her argument, res judicata does apply to preclude her claim. *See* Pet. 2, 10–11, 13–14. Res judicata, or claim preclusion, prevents a party from "[r]esurrecting the same claim in a subsequent action" so long as "the prior judgment has a concurrence of identity with the subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made." *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737, 222 P.3d 791 (2009) (internal citations, quotations, and alterations omitted).

Each of the elements of res judicata is met here. The Board's June 2012 orders involved the same subject matter and cause of action (suspension of time-loss benefits) as the April 2011 order that Leigh purports to challenge here. The Board's orders involved the same parties (Department, Leigh, and her employer) acting in their same capacities. Leigh did not timely appeal the Board's orders, so she is bound by them. *Marley*, 125 Wn.2d at 537–38, 543.

Contrary to her argument, it is not an injustice to apply her own settlement agreement to her. Pet. 11. Leigh should not be permitted to undo what has already been resolved through a final settlement eight years ago.

V. CONCLUSION

This Court should deny review.

RESPECTFULLY SUBMITTED this 16 day of April, 2020.

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NO. 98191-4

SUPREME COURT OF THE STATE OF WASHINGTON

TAMRA A. LEIGH, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the DEPARTMENT'S ANSWER TO PETITION FOR REVIEW and this CERTIFICATE OF SERVICE in the below described manner:

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Susan L. Carlson
Supreme Court Clerk
Supreme Court

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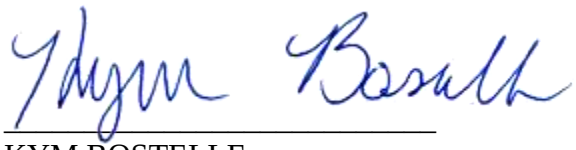
Via First Class United States Mail, Postage Prepaid to:

Tamra A. Leigh
20714 64th Avenue CT E
Spanaway, WA 98387

RESPECTFULLY SUBMITTED this 16 day of April, 2020.



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