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SUPREME COURT OF THE STATE OF WASHINGTON

KATHRYN A. LANDON,

Petitioner,

v.

THE HOME DEPOT AND THE DEPARTMENT OF LABOR &
INDUSTRIES,

Respondents.

**DEPARTMENT OF LABOR & INDUSTRIES'
ANSWER TO PETITION FOR REVIEW**

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 ORIGINAL

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I. INTRODUCTION

The courts have already considered the issue in this case and it is well-settled that the issue of what the Board of Industrial Insurance Appeals may consider—its “scope of review”—is not an issue of subject matter jurisdiction. *Magee v. Rite Aid*, 167 Wn. App. 60, 75-76, 277 P.3d 1 (2012). The case Kathryn Landon relies upon to show conflict does not rest on jurisdictional grounds, and does not conflict with the decision in this case. *See Hanquet v. Dep’t of Labor & Indus.*, 75 Wn. App. 657, 661-64, 879 P.2d 326 (1994).

What Landon is actually raising is a question about whether the Board can raise an issue that the Department of Labor & Industries has not considered, which is an issue of law, not jurisdiction. To hold otherwise would enable parties to reverse final orders of the Board years later on a theory that the Board’s decision was void because it made a jurisdictional misstep regarding its scope of review. Such a result cannot be tolerated as it is inconsistent with the “sure and certain relief” mandated by the Industrial Insurance Act. Landon shows no basis for review and this Court should deny review.

II. ISSUE

Review should not be granted, but if were, the following issue would be presented:

Is the Board's scope of review a matter of jurisdiction when it is uncontested that the Board has the authority to decide the "type of controversy" of an appeal from a Department order?

III. STATEMENT OF THE CASE

In her petition for review to this Court, Landon claims that the Board exceeded its scope of review in considering whether she had an occupational disease because the Department's order only mentioned consideration of an alleged industrial injury. Pet. at 3-5. She claims this is a jurisdictional flaw. *Id.* She raised this argument for the first time in a post-verdict motion. CP 405.

A. **At the Board, Landon Agreed That the Issue Before the Board Was Whether She Had an Occupational Disease**

Landon was bitten by a bug in June 2010 at work. CP 85, 87. She was later treated for Lyme disease, but it was disputed whether she actually had it. CP 44-47, 98. In March 2012, she filed a claim for industrial insurance benefits, which the Department rejected because it was not filed within one year of the bug bite as required by the statute of limitations. CP 50; RCW 51.28.050. Landon appealed to the Board, claiming she had an occupational disease, which has a different statute of limitations. CP 52.

At the Board, she stipulated that the issue on appeal was whether she had an occupational disease related to the bug bite. CP 35, 73. After a

hearing, the industrial appeals judge determined she did not have an occupational disease. CP 48. Landon petitioned the Board for review and did not contest that the issue before the Board was whether she had an occupational disease. CP 4-24. The Board adopted the industrial appeals judge's decision. CP 3.

B. The Superior Court Rejected Landon's Argument Raised for the First Time in Her Post-Verdict Motion That the Scope of Review Was Jurisdictional, and the Court of Appeals Affirmed

At superior court the issue was whether Landon had an occupational disease and Landon did not object to jury instructions to that effect. CP 391-92, 394, 401; RP 343. It was not until after a verdict was entered against her that she raised an issue that the Board exceeded its scope of review and that this was a jurisdictional issue. CP 405. Upon the trial court's denial of her motion she appealed to the Court of Appeals.

The Court of Appeals, Division II, rejected her argument, holding the Board's scope of review is not jurisdictional because the Board had the power to decide the type of controversy of a workers' compensation case. *Landon v. The Home Depot*, No. 46955-3-II, slip op. at 6. (Wash. Ct. Appeals Dec. 29, 2015). She now petitions for review.

IV. REASONS WHY REVIEW SHOULD NOT BE GRANTED

It is well-settled that the Board's scope of review is not jurisdictional. *Magee*, 167 Wn. App. at 75-76. There is no conflict

between the Court of Appeals' decision here and Division I's decision in *Hanquet*. That case did not rest on jurisdictional grounds. 75 Wn. App. at 661-64.

To hold that the issue of the Board's scope of review is jurisdictional would benefit Landon in this individual case, but would be harmful to workers, employers, and the Department in many other cases because it would render Board decisions vulnerable to claims they lacked finality. This Court should deny review.

A. No Conflict Is Demonstrated With Court of Appeals Cases Because It Is Well-Settled That the Board's Scope of Review Is Not a Jurisdictional Requirement

Under well-settled principles, the issue the Board may consider in an appeal of a Department order is not a jurisdictional question. It is true that under its "scope of review," the Board may only decide questions that are first considered by the Department. *Hanquet*, 75 Wn. App. at 661-63. Perhaps there was an error here when the Board considered the issue of occupational disease, when the Department's order only discussed an industrial injury. *See Hanquet*, 75 Wn. App. 661-64. But *Hanquet* did not rest on jurisdictional grounds. *Hanquet*, 75 Wn. App. 661-64. Indeed in *Magee*, the court held that the scope of review of the Board is not jurisdictional. *See Magee*, 167 Wn. App. at 75-76.

Under *Marley v. Department of Labor & Industries*, a court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order. 125 Wn.2d 533, 539, 886 P.2d 189 (1994). Instead, subject matter jurisdiction is the power to decide the “type of controversy,” and the “type” means “the general category without regard to the facts of the particular case.” *Dougherty v. Dep’t of Labor & Indus.*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003) (citation omitted). Here, the Board has the power to decide appeals in workers’ compensation cases and the superior court has the power to decide appeals of Board cases. *Matthews v. Dep’t of Labor & Indus.*, 171 Wn. App. 477, 490-91, 288 P.3d 630 (2012).

That the Department has original jurisdiction in workers’ compensation cases does not change the result here. Landon points to RCW 51.04.010 and case law that provides that the Department has original and exclusive jurisdiction to decide whether there is a compensable injury or occupational disease, and notes that it follows from this that the Board and superior court have appellate jurisdiction regarding Department decisions, which she then concludes means that the Board’s scope of review is a jurisdictional question. Pet. at 3-4. It is correct that the Department has original jurisdiction in workers’ compensation claims, and the Board and superior court serve in an appellate capacity. But this does

not mean that every issue that flows from a Department order is jurisdictional. To the contrary, *Marley*, which recognized the original jurisdiction of the Department, provided that the test is to look to see whether the tribunal has the authority to consider the controversy. 125 Wn.2d at 539-40. If such authority exists, any remaining issue is not jurisdictional. *Id.* Applying *Marley*, the Board's scope of review is not jurisdictional because it has the power to hear appeals of Department decisions.

B. Waiting Until After a Jury Trial To Raise an Issue Is Too Late and a Holding That Permits That Would Also Threaten Finality In Other Cases

Because Landon did not raise the scope of review issue in her petition for review at the Board, she could not raise the issue at the superior court, even assuming she could raise it when she did not challenge the jury instructions. Washington courts have held on numerous occasions that under RCW 51.52.104, a party waives legal arguments that are not presented to the Board in his or her petition for review. *E.g., Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279-80, 580 P.2d 636 (1978) (claimant waived argument of Board chairman's potential disqualification

by failing to present argument to Board).¹

The reasons for the requirement to exhaust administrative remedies are to allow the agency tribunal to consider the matter in the first instance and apply its expertise. *See Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). This requirement allows development of a factual record, facilitates the exercise of administrative expertise, allows an agency to correct its own errors, and prevents the circumvention of administrative procedures through resort to the courts. *Id.* Landon's arguments frustrate these important goals.

But even more significantly, Landon's arguments threaten the finality of Board decisions. It is well-established that when a tribunal issues an order when it did not have jurisdiction the order is void. *See Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975). But applying this rule to make scope of review issues jurisdictional would mean that someone could later challenge a Board decision on jurisdictional grounds. This would not provide "sure and certain relief" to workers, employers,

¹ *See also Leuluai v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012) (claimant waived argument that closing order was not final because she failed to raise it in her appeal to the Board or petition for review of the Board's decision); *Merlino Constr. Co. v. City of Seattle*, 167 Wn. App. 609, 616 n.3, 273 P.3d 1049 (2012) (party waived argument that a police officer was an independent contractor by failing to present argument to the Board or trial court); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (claimant waived objection on grounds of insufficient notice because it was not set out in her petition for review to the Board).

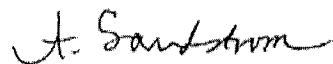
and the Department as mandated by the Industrial Insurance Act. RCW 51.04.010. The Court should reject Landon's arguments and deny review.

V. CONCLUSION

Consistent with well-established principles, the Court of Appeals held that the Board's scope of review is not a question of jurisdiction. This ruling conflicts with no Court of Appeals' decision and this Court should not grant review.

RESPECTFULLY SUBMITTED this 11th day of February, 2016.

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SUPREME COURT OF THE STATE OF WASHINGTON

KATHRYN LANDON,

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THE HOME DEPOT and THE
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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 of Labor & Industries' Answer to Petition for Review and this Certificate of Service in the below described manner:

Via Email filing to:

Ronald R. Carpenter
Supreme Court Clerk
Supreme Court
Supreme@courts.wa.gov

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Via First Class United States Mail, Postage Prepaid to:

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DATED this 11th day of February, 2016.



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Legal Assistant

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Case No. 92730-8
RE: Kathryn Landon v. The Home Depot

Dear Mr. Carpenter:

Attached for filing is the Department's Answer to Petition for Review and Certificate of Service in the above referenced matter.

Thank you,
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