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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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MARCIA M. MAGEE,

Appellant

v.

RITE AID, INC.,

Respondent

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APPELLANT'S REPLY BRIEF

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## ARGUMENT

### **A. The Department and the Board do not have identical subject matter jurisdiction.**

Even though the Department of Labor and Industries and the Board of Industrial Insurance Appeals are created by, and governed by, the Industrial Insurance Act, they are independent bodies with wholly different functions. *See e.g. Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 90, 233 P.3d 853 (2010) (describing the process of initiating a claim for workers' compensation and noting "...the Department and the Board are separate administrative bodies involved in different functions . . .") The Courts have long recognized their unique roles, noting that the Board's authority is strictly limited to deciding only those issues that have been appealed from a Department Order. *See e.g., Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) ("If aggrieved by the Department's decision, the parties appeal to the Board and later the courts, but the Act provides that both the Board and the superior court serve a purely appellate function. RCW 51.52.060 and .115. The Board's appellate authority is strictly limited to reviewing the specific Department action."); *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970) ("It is not disputed that the board's and the superior court's jurisdiction is appellate only, and for the board

and the trial court to consider matters not first determined by the department would usurp the prerogatives of the department, the agency vested by statute with original jurisdiction.”) The Department’s claim that both the Department and Board “have the power to decide an occupational disease claim,” is misleading and inaccurate. Br. of Dept. at 13. The Department *always* has the power to decide an occupational disease claim; the Board’s power to decide an occupational disease claim does not exist unless and until that issue is appealed from a Department order. *See Perry v. Dep’t of Labor & Indus.*, 48 Wn.2d 205, 210, 292 P.2d 366 (1956) (where no appeal was taken from an order of the Department awarding compensation to a worker, both the Board and the superior court lacked jurisdiction to hear appeals from that order). If the Department does not issue an order which can be appealed, then the Board cannot obtain or exercise its jurisdiction.

*Marley* holds that “[a] tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate.” *Marley v. Dep’t of Labor and Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). The Court goes on to state that “[a] lack of subject matter jurisdiction implies that an agency has no authority to decide the claim at all, let alone order a particular kind of relief.” *Id.* Again, the widow in *Marley* was not arguing that the

Department did not have the power to decide if the widow's statute applied to her; she was arguing that the Department did not correctly apply the statute. The *Marley* Court's discussion of subject matter jurisdiction was focused on distinguishing these two situations. The *Marley* Court noted:

The term "subject matter jurisdiction" is often confused with a court's "authority" to rule in a particular manner. This has led to improvident and inconsistent use of the term.

...

...Courts do not lose subject matter jurisdiction merely by interpreting the law erroneously. If the phrase is to maintain its rightfully sweeping definition, it must not be reduced to signifying that a court has acted without error.

*Id.* at 539 quoting *In re Major*, 71 Wn. App. 531, 534-35, 859 P.2d 1262 (1993).

Here, Ms. Magee is not arguing that the Board's error was in *how* it interpreted the statute in order to deny her claim for occupational disease. The Board's error was in applying the statute when the issue was not before the Board. The Board did not have the power to either allow or deny the claim. Deciding such a question would be an exercise of original jurisdiction, something the Board does not possess. "A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate." *Marley*, 125 Wn.2d at 593. Only the Department has original

jurisdiction and therefore only the Department has authority to decide whether Ms. Magee has a valid claim for occupational disease. Neither the Department nor Rite Aid has been able to find a single case which states that the Board possesses original jurisdiction. As a matter of law, the Board's finding is void.

Defendants' disingenuously attempt to recast the hearings in 2004 (referred to as "Round 1" by the Department) as dealing with "claim allowance," as opposed to timeliness of an application for an industrial injury. However, the record on appeal is clear that the 2004 hearings were not about "claim allowance." The Board's jurisdiction is defined by 1. the Department Order on appeal; 2. the Notice of Appeal; and 3. the Litigation Order produced from an RCW 51.52.095(1) mediation conference. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 985, 478 P.2d 761 (1970)("It is not disputed that the board cannot consider matters not included within the notice of appeal, and the notice cannot enlarge the scope of inquiry before the board beyond the matters considered and passed upon by the department, as indicated by the order appealed from.") The Department Order on appeal defines the boundary of the appeal, which can be further refined by the notice of appeal. RCW 51.52.070. The purpose of the mediation conference is to further refine the issues, as agreed upon by the parties, and amend the notice of appeal

if necessary. RCW 51.52.095. The litigation order “*shall* control the subsequent course of the proceedings . . . .” RCW 51.52.095 (emphasis added). The Board does not have the power to expand the jurisdictional boundaries beyond the order on appeal. *Lenk*, 3 Wn. App. At 985.

The Department Order on appeal in 2004 clearly states that the claim was rejected because “no claim has been filed by said worker within one year after the day upon which the alleged injury occurred.” Sub. 18 (CABR I at 131). Although the Notice of Appeal stated the relief sought was “claim allowance,” the Notice also made clear that it was the Department’s Order of 7/9/04 that was being appealed. A Notice of Appeal can not expand the scope of appeal beyond the order on appeal. RCW 51.52.070. Finally, the parties conferred with the Industrial Appeals Judge and agreed what issues were being appealed. Those issues are stated in the Litigation Order (titled “Interlocutory Order Establishing Litigation Schedule”) as “Did the claimant file the application for benefits within one year of the date of injury? Did the self-insured employer fail to file the claim and/or report an on-the-job injury? If so, what penalties should be assessed?” Sub. 18 (CABR I at 143-146.) There is no mention of “claim allowance,” or “occupational disease.”

Finally, the Parties' Agreement/Stipulation Regarding the Scope of the Board's Review makes it undeniably clear that the only thing actually litigated during the 2004 hearings was whether Ms. Magee timely filed an application for benefits. Ms. Magee is not asserting that the Stipulation is retrospectively binding on the Board (as falsely stated by the defendants' in their briefing); rather, the Stipulation is conclusive and irrefutable evidence that the parties, as well as the Industrial Appeals Judge, understood and agreed that the hearings involved the issue of timeliness and did **not** include any issues of whether Ms. Magee actually suffered an industrial injury and/or an occupational disease.<sup>1</sup> Thus, for the defendants' to now assert that the parties submitted evidence on the merits of an occupational disease is false. The evidence plainly shows that the issue of occupational disease was never litigated. Rite Aid stated explicitly in the Stipulation that "[t]he parties and Judge Bradley agreed that the Board did not have *jurisdiction* to address the issue of whether an industrial injury or occupational disease had occurred. That is why no medical evidence was presented, no employer witness regarding the nature of the relationship, etc. [sic]" Sub. 18 (CABR I at 44/17-

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<sup>1</sup> Again, several Industrial Appeals Judges were assigned to this case throughout the course of the 2004 hearings. Judge Laura Bradley participated in the RCW 51.52.095 conference and issued the Litigation Schedule. The Judge who issued the ultimate Proposed Decision and Order did not have the opportunity to participate in the preliminary matters which set the jurisdictional boundaries of the appeal.

23)(emphasis added). Again, while the Stipulation was drafted after the PD&O was issued, it explains the intentions and actions of the parties and the judge *before* litigation began.

The Department erroneously asserts that the Notice of Appeal requesting “claim allowance,” Ms. Magee’s testimony of being sexually assaulted by her supervisor, and Ms. Magee’s counsel’s response to an objection somehow constitutes “evidence” on the merits of an occupational disease claim. Br. of Dep’t at 31-32. Such an assertion is untenable. As noted above, the Notice of Appeal is not, by itself, dispositive of the issues being litigated. The Litigation Schedule, issued after the parties and the judge confer about the order on appeal, is a more accurate document that reflects the issues on appeal. Further, the testimony about the sexual assaults was necessary to determine if Ms. Magee filed her application for benefits within 1 year of the last assault, as required by statute. Notably, neither party called medical witnesses to testify about diagnoses or causal connections. Such testimony is generally required for industrial injury and/or occupational disease claims. Moreover, a response by counsel to an objection by opposing counsel is simply not “evidence.” See WPI 155.01, 1.02 (5<sup>th</sup> Ed. Supp. 2009). This argument fails. In fact, arguing these items are “evidence” on the merits of an occupational disease claim only highlights that in fact

*no* evidence was ever presented on the merits of an occupational disease claim during the 2004 hearings.

**B. Defendants are unable to meet their burden of showing that the requirements of res judicata (claim preclusion) or collateral estoppel (issue preclusion) apply.**

The defendants' assert that this is an issue of claim preclusion, not issue preclusion. See Br. of Dep't at 29. Even if the defendants' are correct, they still have not, and cannot, meet their burden of showing that res judicata applies here.

Under res judicata, a prior judgment will bar litigation of "a subsequent claim if 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 persons for or against whom the claim is made.'" *City of Arlington v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 791, 193 P.3d 1077 (2008) quoting *In re Election Contest Filed by Coday*, 156 Wn.2d 485, 500-01, 130 P.3d 809 (2006).

Here, the subject matter of the two appeals is vastly different. The board hearings in 2004 involved whether or not there was a timely application of benefits. Evidence of a timely application would include evidence of when the alleged injury occurred and when the application

for benefits was filed. The current appeal involves whether or not Ms. Magee can bring a claim for an occupational disease. Evidence for an occupational disease claim requires medical testimony as to the conditions diagnosed, testimony of the environment of the workplace, and testimony about the causal connection of that environment to the diagnosed conditions. These are wholly separate and distinct questions requiring wholly different types of evidence. Calling these appeals “round 1” and “round 2” is not enough to overcome the fact that the issues appealed in each situation were vastly different.

Even if the Department is correct in asserting that res judicata, and not collateral estoppel, applies to this analysis, the defendants cannot show meet their burden to show that the requirements for res judicata have been met. Notably, res judicata precludes litigation of an issue which might have been raised and determined in prior cases (as opposed to actually litigated and necessarily determined). *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987). As explained in prior briefing and above, the issue of whether Ms. Magee suffered an occupational disease could not have been raised and determined in the 2004 hearings because the issue of occupational disease was clearly outside the jurisdiction of the Board. The Board was only empowered to hear the issue of timeliness. To find that Ms. Magee could have litigated

the issue of occupational disease despite appealing a decision limited to timeliness and despite an agreement among the parties and the judge that occupational disease was beyond the jurisdiction of the board would create an impossible position for injured workers. A finding that the occupational disease issue could have been litigated would require injured workers to put on evidence of every conceivable issue that may come up during the lifetime of the claim, even if the judge hearing the appeals agrees that those issues are not being litigated in the hearing.

**C. Ms. Magee did not abandon her appeal.**

Ms. Magee did appeal the Board's Decision and Order, in its entirety to Superior Court. Because the issue of timelines was dispositive (that is, if her "application" was considered timely, the matter would be remanded to the Department for further action and there would be no need for a trial or further review by the Superior Court), Ms. Magee made a motion for Summary Judgment. However, Ms. Magee also maintained that if her application was not timely, then a trial would be necessary. Rite Aid also filed a Motion for Summary Judgment arguing that if the application was not timely, there were no other issues to consider and the Board's Decision should be affirmed. However, in what can only be described as a procedural anomaly, the Superior Court did not grant either party's motion for summary

judgment (meaning nothing could be determined as a matter of law.) Then, without holding the trial requested by Ms. Magee, the court simply affirmed the Board's decision. Sub. 20 (CABR II at 200.) The Superior Court did not, as Rite Aid suggests, "implicitly grant[]" its Summary Judgment Motion. Br. of Rite Aid at 10. Rite Aid submitted a proposed order which the court could have granted had it wanted to.

Ms. Magee was not allowed to have a trial after the Superior Court declined to grant either party's Motions. Ms. Magee argued this to the Court of Appeals and the Supreme Court in her briefing and requested the matter be remanded to Superior Court for the purpose of trial. Sub. 20 (CABR II at 329-330; 399). However, this issue was not addressed by the Courts. Ms. Magee did not abandon her appeal, as alleged by the Defendants.

**D. The Department's claim that Ms. Magee does not have an occupational disease as a matter of law is improper.**

As shown in appellant's briefing, the record does not contain any evidence which goes to merits of an occupational disease claim. The briefing from the Superior Court appeal from the 2004 hearings, however, reveals that the underlying facts, including whether Ms. Magee was violently raped versus engaging in a consensual sexual relationship with her boss, were hotly contested by the parties. Sub. 20 (CABR II

252-288). Rite Aid conceded that “The Board ruled that Magee ‘characterized the contacts as assaults. Woolford characterized the contact as consensual.’ An ultimate determination as to whose characterization was correct was neither necessary nor within the Board’s jurisdiction. This appeal dealt simply with whether her application for benefits was timely filed, not whether the incidents alleged constituted industrial injuries.” Sub 20 (CABR II at 266, fn 1)(internal citations omitted).

Additionally, Ms. Magee takes exception to the Department’s suggestion that she is making a claim for an occupational disease based on mental conditions caused by “stress.” Br. of Dep’t at 32-33. Sexual assault is not “stress.”

Regardless, the merits of an occupational disease claim have not been determined by the Department, appealed by either party and/or litigated by the Board. This Court cannot pass upon the Department’s attempt to have the occupational disease claim rejected as a matter of law here. *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994).

**E. Ms. Magee’s appeal is not frivolous.**

RAP 18.9(a) states in relevant part:

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. . . .

The rule permits an appellate court to award attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action. *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd.*, 170 Wn.2d 577, 580 (2010). An appeal is frivolous if, considering the entire record, the court is convinced that: 1) the appeal presents no debatable issues upon which reasonable minds might differ, and 2) the appeal is so devoid of merit that there is no possibility of reversal. *Id.* Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous. *Id.* citing *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 443, 730 P.2d 653 (1986). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *Id.*

Whether the Board had subject matter jurisdiction to decide an issue that has not first been decided by the Department is not a frivolous claim. The Washington Court of Appeals has decided in at least one

unpublished<sup>2</sup> opinion that the Board lacks *subject matter jurisdiction* to decide an issue that was not included in the appealed Department decision. *Jones v. Dep't of Labor & Indus.*, 2007 Wash. App. LEXIS 553 (Wash. Ct. App., Mar. 22, 2007), *amended by Jones v. Dep't of Labor & Indus.*, 2007 Wash. App. LEXIS 1614 (Wash. Ct. App., June 14, 2007).

Further, Ms. Magee vehemently disagrees with the Defendants' attempts to recast the 2004 hearings as involving substantive evidence on the issue of whether or not she suffered an occupational disease. Particularly in light of Rite Aid's briefings to the Board and the Stipulation which state that the issue of occupational disease was not before the Board and therefore neither party submitted evidence on this point.

Clearly, reasonable minds can differ on this issue. Rite Aid has failed to meet its burden of showing that Ms. Magee's request to remand this matter to the Department so that she may finally have her occupational disease claim adjudicated is in any way "frivolous."

**D. Marcia Magee is entitled to reasonable attorney fees under RCW 51.52.130**

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<sup>2</sup> Ms. Magee is aware of RAP 10.4 (h) and GR 14.1 which prohibits citing an unpublished opinion as authority. Ms. Magee is not relying on *Jones* as authority to support her arguments in this appeal. *Jones* is being cited solely for the purpose of rebutting Rite Aid's assertion that this appeal is frivolous and so devoid of merit that there is no possibility of reversal.

RCW 51.52.130 provides that when a Decision and Order from the Board is reversed or modified on appeal and additional relief is granted to a worker or a beneficiary, then a reasonable fee for the services of the worker's attorney shall be fixed by the court. Here, Ms. Marcia Magee seeks to reverse a Decision and Order of the Superior Court and the Board of Industrial Insurance Appeals. Because Ms. Magee has shown that the Board lacked authority to make any findings of fact or conclusions of law regarding an occupational disease claim during the 2004 litigation, the Decision and Order of the Board must be reversed and remanded. Ms. Magee, therefore, is entitled to an award of reasonable attorney fees and expenses for the work on the matter before this Court and the Superior Court.

### **CONCLUSION**

The Department of Labor and Industries and the Board of Industrial Insurance Appeals do not have the same subject matter jurisdiction. They are separate and distinct agencies with separate and distinct functions. The issue of occupational disease could not have been litigated before the Board of Industrial Insurance Appeals because 1) the Board did not have jurisdiction; and 2) the parties and the Industrial Appeals Judge agreed that the issue of occupational disease

was outside of the Board's jurisdiction on appeal. The Defendants, thus, are unable to meet their burden of showing that Ms. Magee's claim is barred by the principles of res judicata.

Further, Ms. Magee did not abandon her appeal. She appealed the entire decision of the Board to Superior Court. After submitting a Motion for Summary Judgment which was not granted, Ms. Magee repeatedly requested a trial be held at the Superior Court level for purposes of entering Findings of Fact and Conclusions of Law.

Ms. Magee's claims are not frivolous and sanctions under CR 18.9(a) are not warranted. If she prevails, Ms. Magee is entitled to attorney fees.

Dated this 21<sup>st</sup> day of January, 2011.



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