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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *or*
DEPUTY

No. 40808-2-II

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

GLEND A SINGLETARY,

Appellant,

v.

MANOR HEALTHCARE CORP., ET AL.,

Respondent.

RESPONDENT'S BRIEF

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I. MOTION TO DISMISS APPEAL

A. SUMMARY OF FACTS

Appellant Glenda J. Singletary (Claimant) does not have standing to file an appeal from the Order of the Superior Court for the County of Pierce dated May 5, 2010.

This Motion to Dismiss is filed pursuant to RAP 10.4(2)(d), RAP 17.1 and RAP 3.1. RAP 3.1 provides, as follows: "Only an aggrieved party may seek review by the Appellate Court." Simply, in this appeal, Claimant is not the aggrieved party. The pertinent procedural history is as follows:

Claimant appealed a December 29, 2005 Order in which the Department of Labor & Industries (Department) affirmed its July 29, 2005 Order in which it closed her claim, with time loss compensation as paid to January 23, 2004. The relief requested included the acceptance of several new conditions; time loss compensation from January 24, 2004 through December 29, 2005; and treatment or, in the alternative, permanent partial or total disability. Hearings were scheduled on December 6 and 7, 2006, for presentation of Claimant's evidence supporting her requested relief.

On October 15, 2006, Claimant filed a Motion to Dismiss her appeal for lack of jurisdiction. She alleged that a June 26, 2002 Order in which the Department initially closed her claim had not been communicated to her prior to her filing a June 20, 2003 Application to Reopen her claim. She asked that the claim be remanded to the Department with direction to consider the June 20, 2003 Application to Reopen as a protest to the Closing Order, and to issue a further order in which the Department responded to the protest.

A preliminary hearing was scheduled for November 9, 2006 to hear evidence on the jurisdictional issue. On October 24, 2006, Claimant filed a Motion to Strike the December 6 and 7, 2006 hearing dates scheduled for presentation of her case for additional benefits, pending the outcome of the November 29, 2006 jurisdictional hearing. On October 30, 2006, a hearing was held on the Motion to Strike the December hearing dates. The Motion was denied, as was Claimant's request for interlocutory review.

On November 16, 2006, an Industrial Appeals Judge issued an Interlocutory Order addressing the jurisdictional question. In this Order, he concluded that it was likely that Claimant received the June 26, 2002 Order closing her claim, despite the fact that it was

mailed to the wrong address. He based this decision on the fact that the mail was not returned, the correct zip code was used, and that Claimant filed a Reopening Application indicating a date that approximated the date her claim had been closed. In the Order, the Industrial Appeals Judge concluded that, taken as a whole, the record indicated that the Board of Industrial Insurance Appeals had jurisdiction over Claimant's appeal of the December 29, 2005 Order.

On December 5, 2006, Claimant filed a Notice of Intent to Rest on Jurisdiction and not present evidence on the merits of the claim before the Board on the scheduled trial date. She was given the opportunity to litigate entitlement to further benefits. She was provided with a reasonable period of time to schedule necessary witnesses supporting her claim for relief, but she made no effort to do so. Instead, Claimant chose to rest her case rather than present evidence of entitlement to benefits when due on December 6, 2006. Pursuant to RCW 51.52.012 and WAC 296-12-115(8), Claimant's appeal to the Board was dismissed. (App 1-2).

Claimant appealed the Order of Dismissal by Petition for Review to the Board filed January 22, 2007. Subsequently, on March 23, 2007, the Board issued a Decision and Order whereby it

affirmed dismissal of Claimant's appeal. (App 3-10). Claimant filed a Motion for Reconsideration which was denied on June 28, 2007. (App 11-12). She then appealed the matter to the Superior Court for the County of Pierce.

Trial on Claimant's appeal to Pierce County Superior Court was scheduled for May 22, 2008. On December 3, 2007, Respondent (Employer) filed its Motion for Summary Judgment and Memorandum of Law. (CP 29-30; 14-28). Argument on the Motion was scheduled for February 1, 2008. Three days before scheduled argument, Claimant filed a Cross-Motion for Summary Judgment. (CP 34-49).

After oral argument, Pierce County Superior Court Judge D. Gary Steiner issued a letter Order that remanded the matter to the Department so that a Closing Order could be "communicated" to Claimant. (CP 50). Reconsideration of the letter Order was requested by Employer on February 22, 2008. (App 13-14). Reconsideration was denied and, on November 14, 2008, an Order was entered that remanded the matter to the Department pursuant to Judge Steiner's letter Order. (CP 57-59). Employer filed a Motion for Reconsideration and Abatement on November 21, 2008. (CP 62-72). Argument was scheduled for January 23, 2009. After

argument, Judge Steiner issued another letter Order on or about February 7, 2009 reversing the Board's Decision and Order of March 23, 2007. (CP 83-84). Judge Steiner requested a Proposed Order for signature.

On February 10, 2010, Employer filed a Motion for Dismissal based on lack of prosecution, pursuant to CR 41. (CP 87-89). After hearing, Judge Steiner approved a Proposed Order drafted and submitted by Claimant. (CP 99-101). The Order was approved on May 5, 2010. Subsequently, on May 28, 2010, Claimant appealed her own Order to the Court of Appeals. (CP 103-108).

B. ARGUMENT

As pointed out above, RAP 3.1 allows only an aggrieved party to seek review by the Appellate Court. "Aggrieved" has been defined to mean "a denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation." State v. G.A.H., 133 Wn. App. 567, 574, 137 P.3d 66 (2006); State v. A.M.R., 147 Wn.2d 91, 95, 51 P.3d 790 (2002).

In this case, Judge Steiner's Order, an Order drafted and submitted by Claimant, without agreement by Employer's counsel, reverses a Decision and Order by the Board of Industrial Insurance

Appeals that affirmed dismissal of Claimant's appeal of a Department Order that closed her claim. If any party was aggrieved by Judge Steiner's Order, it was Employer. Claimant, quite simply, has no standing to seek review. It is Employer upon which a burden or obligation has been imposed by Judge Steiner's Order. Seeking to move this claim forward, Employer opted to forego appeal of the Order denying its Motion for Summary Judgment.

Claimant's appeal should be dismissed.

II. STATEMENT OF CASE

This appeal arises out of an Order of the Superior Court issued in response to Employer's Motion for Summary Judgment. Claimant's Cross-Motion for Summary Judgment was submitted in violation of CR 56 and did not address Employer's Motion. Nevertheless, the Court denied Employer's Motion and granted Claimant's Cross-Motion.

In an initial letter Order, the Court remanded the Board's Decision and Order of March 23, 2007 to the Department for proper "communication" of a claim closing order dated June 26, 2002. On November 14, 2008, the Court signed and entered the Order remanding the matter to the Department.

After a Request for Reconsideration, the Court issued a second letter Order that purported to reverse the Board's Decision and Order of March 23, 2007 to allow Claimant to present additional evidence. (This is something Claimant failed to do, first time around).

Over one year went by and Claimant did not submit an Order for Judge Steiner's signature. On February 10, 2010, Employer filed its Motion for Dismissal pursuant to CR 41. The Motion was denied and Claimant finally submitted an Order for signature and entry. The Order reiterated points set out in the letter Order of February 2009.

An Appellate Court reviews a Summary Judgment by engaging in the same inquiry as the trial court. Review is conducted by applying the standard of CR 56(c) to the facts of the case and the reasonable inferences therefrom as viewed most favorable toward the non-moving party. See Solven v. Dept. of Labor & Indus., 101 Wn. App. 189, 193, 2 P.3d 492, rev. den., 142 Wn.2d 1012 (2000); Romo v. Dept of Labor & Indus., 92 Wn. App. 348, 353, 962 P.2d 844 (1998), RAP 9.12. The Appellate Court conducts a de novo review "based solely on the evidence and testimony presented to the Board." RCW 51.52.115. The Board's

findings are prima facie correct. Summary judgment is appropriate 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 this workers’ compensation case, Claimant appealed an Order closing her claim a second time. It had previously been closed on June 26, 2002, and had been reopened for further medical care and benefits effective June 12, 2003. After reclosure, on July 29, 2005, Claimant alleged that she never received the first Closing Order of June 26, 2002 and that, therefore, the Board had no jurisdiction over issues arising out of reclosure on July 29, 2005.

Trial on all issues was scheduled for December 6, 2006. Claimant notified the Board, prior to trial, that she would not be presenting evidence on the merits and would rest, solely, on her jurisdictional argument. Pursuant to RCW 51.52.102 and WAC 296-12-115(8), and upon Employer’s Motion, Claimant’s appeal was dismissed. This disposition was affirmed by Decision and Order dated March 23, 2007, and further affirmed by Order Denying Claimant’s Motion for Reconsideration dated June 28, 2007.

After Claimant filed an appeal to Pierce County Superior Court, Employer filed its Motion for Summary Judgment. The sole issue was whether the Board correctly dismissed Claimant’s appeal

due to her failure to present a prima facie case on the scheduled date of hearing. This Motion was filed on December 3, 2007, more than 28 calendar days before the hearing on February 1, 2008.

Claimant filed a Cross-Motion for Summary Judgment on January 28, 2008, in violation of CR 56(c) and Pierce County Local Rule 7(a)(4). Nevertheless, Claimant's arguments were heard and her Motion was granted.

On review of the parties respective motions in this case, this Court should deny Claimant's Cross-Motion on the following bases: (1) it did not respond to the issues raised by Employer's Motion; (2) it did not address the basis for the Board's dismissal of her appeal; and (3) it was filed untimely under CR 56(c) and PCLR 7(a)(4) and should not have been considered by the Court.

III. RESPONSES TO ASSIGNMENTS OF ERROR

A. Claimant has misinterpreted and mischaracterized the Order she drafted and submitted to Superior Court. She has no standing to challenge her own Order.

ARGUMENT

Judge Steiner's letter Order of February 2009 states, in part, "Plaintiff should have been allowed to present evidence from June 26, 2002 to June 12, 2003; realistically, she was not." This was

based on an earlier observation by Judge Steiner: "Plaintiff made such a reopening application here but evidently she did not seek benefits in the application for the time post-closing order to June 2003." (CP 84; emphasis original).

In Claimant's Order, approved on May 5, 2010, she wrote, "ORDERED, ADJUDGED AND DECREED that since plaintiff did not previously seek benefits for the time post-closing order to June 2003 and since the closing order was not properly communicated to her, plaintiff would still be entitled to seek benefits from that time until the time when the claim was reopened." (CP 100; emphasis added). Claimant has admitted Judge Steiner's Finding and has memorialized that admission in the Order approved by Judge Steiner on May 5, 2010.

The obvious problem with Claimant's first assignment of error is that she could have presented evidence on December 6, 2006, and potentially circumvented all that has happened since, but she chose not to. Claimant did not previously seek benefits for the period June 26, 2002 to June 12, 2003 and, if she did, she did not present any evidence when she had the opportunity. Her arguments, on this late date, should not be considered.

Furthermore, she has no standing to raise issues arising out of her own Order

B. Claimant has misinterpreted and mischaracterized the Order she drafted and submitted to Superior Court. She has no standing to challenge her own Order.

ARGUMENT

Claimant argues against the very remedy she sought by her Cross-Motion for Summary Judgment and submitted Order. The Order signed by Judge Steiner effectively gives Claimant a second opportunity to present evidence on her alleged entitlement to benefits from June 26, 2002 to June 12, 2003. In her Opening Brief, Claimant now seems to argue that she should not be given that opportunity. If that is so, Employer has no quarrel with the position. As discussed above, however, Claimant has no standing to dispute an Order issued in her favor.

C. Economic expense and judicial economy could have been preserved had Claimant presented evidence on the merits as required by the Board's Interlocutory Order Establishing Litigation Schedule. Employer's Motion for Summary Judgment should have been granted.

ARGUMENT

Claimant argues that economic expense and judicial economy could have been preserved if the Board had simply done what she wanted it to do. She, however, did not preserve her rights or exhaust her administrative remedies when she opted to forego the presentation of evidence on the date of trial. If she had availed herself of the opportunity to present the merits of her case, the economy of this Court would not have been wasted.

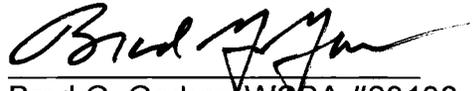
The sole issue raised by Employer's Motion for Summary Judgment is whether the Board erred in dismissing Claimant's appeal for lack of prosecution. This issue was not addressed by Judge Steiner. The Motion, however, should have been granted.

IV. CONCLUSION

For the reasons discussed above, this appeal should be dismissed because Claimant is not an "aggrieved party" under RAP 3.1. If it is dismissed, Claimant should be sanctioned under RAP 18.9(a) for frivolous appeal. If the matter is not dismissed, this Court, on de novo review, should deny Claimant's Cross-Motion for Summary Judgment and should grant Employer's Motion for Summary Judgment.

Respectfully submitted this 9th day of December 2010.

Wallace, Klor & Mann, PC

A handwritten signature in black ink, appearing to read "Brad G. Garber", written over a horizontal line.

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

DEC 13 2006

WKM

1 IN RE: GLENDA J. SINGLETARY) DOCKET NO. 06 12195
2 CLAIM NO. W-280241) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Greg J. Duras
4

5 APPEARANCES:

6 Claimant, Glenda J. Singletary, by
7 David B. Vail & Jennifer Cross-Euteneier & Associates, per
8 Tara J. Reck

9 Self-Insured Employer, Manor Healthcare Corp., by
10 Wallace, Klor & Mann, P.C., per
11 Brad G. Garber

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 Kathryn Balzer, Paralegal

15 The claimant, Glenda J. Singletary, filed an appeal with the Board of Industrial Insurance
16 Appeals on February 24, 2006, from an order of the Department of Labor and Industries dated
17 December 29, 2005. In this order, the Department affirmed its order issued on July 29, 2005. The
18 July 29, 2005 order indicated that time loss compensation is ended as paid to January 23, 2004;
19 the claim is closed without further award for time loss compensation or permanent partial disability;
20 self-insured employer cannot pay for medical services or treatment rendered after date of closure.
21 The appeal is **DISMISSED**.

22 DECISION

23 The Board record shows that a conference, which the claimant's attorney attended, was held
24 pursuant to due and proper notice on August 22, 2006. At this conference, a hearing was
25 scheduled for December 6, 2006 for the presentation of the evidence in support of the claimant's
26 appeal. On December 5, 2006, the claimant filed a Notice of Intent to Rest on Jurisdiction and Not
27 to Present Evidence on the Merits of the Claim Before the Board. The claimant had previously
28 made a motion to strike the hearing date and that motion was denied. The hearing was held
29 pursuant to due and proper notice on December 6, 2006, and the claimant presented no evidence
30 at that time. The self-insured employer made a motion to dismiss the claimant's appeal. Under
31 the circumstances, no order can be issued except an order dismissing the appeal pursuant to
32 RCW 51.52.102 and WAC 263-12-115(8).

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It is ORDERED that the claimant's appeal filed with the Board of Industrial Insurance Appeals on February 24, 2006 is dismissed for failure to present evidence when due.

At the hearing held on December 6, 2006, counsel for the self-insured employer requested a ruling on employer's motion to compel discovery filed on December 4, 2006, and requested costs. In light of the ruling above there is no need to rule on that motion which is moot and, accordingly, costs are denied.

DATED: DEC 11 2006



GREG J. DURAS
Industrial Appeals Judge
Board of Industrial Insurance Appeals

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: GLENDA J. SINGLETARY) DOCKET NO. 06 12195
2)
3 CLAIM NO. W-280241) DECISION AND ORDER
4

5 APPEARANCES:
6

7 Claimant, Glenda J. Singletary, by
8 David B. Vail & Jennifer Cross-Euteneier & Associates, per
9 David B. Vail

11 Self-Insured Employer, Manor Healthcare Corp., by
12 Wallace, Klor & Mann, P.C., per
13 Lawrence E. Mann

MAR 26 2007

WKM

15 Department of Labor and Industries, by
16 The Office of the Attorney General, per
17 Kathryn S. Balzer, Paralegal
18

19 The claimant, Glenda J. Singletary, filed an appeal with the Board of Industrial Insurance
20 Appeals on February 24, 2006, from an order of the Department of Labor and Industries dated
21 December 29, 2005. In this order, the Department affirmed its order issued on July 29, 2005. In
22 the July 29, 2005 order, the Department ended time loss compensation as paid to January 23,
23 2004; closed the claim without further award for time loss compensation or permanent partial
24 disability; and determined that the self-insured employer cannot pay for medical services or
25 treatment rendered after date of closure. The appeal is **DISMISSED**.
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30 DECISION

31 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
32 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
33 issued on December 11, 2006, in which the industrial appeals judge dismissed the claimant's
34 appeal from the order of the Department dated December 29, 2005.
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37 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
38 no prejudicial error was committed. The rulings are affirmed. We also affirm the rulings regarding
39 the parties' discovery dispute, finding no abuse of discretion.
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42 Glenda Singletary, the claimant, appealed a December 29, 2005 order in which the
43 Department affirmed its July 29, 2005 order in which it closed her claim with time loss
44 compensation as paid to January 23, 2004. The relief requested included the acceptance of
45 several new conditions; time loss compensation from January 24, 2004 through December 29,
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1 2005; and treatment or, in the alternative, permanent partial or total disability. Hearings were
2 scheduled on December 6 and 7, 2006, for presentation of Ms. Singletary's evidence supporting
3 her requested relief. 8/22/06 Interlocutory Order.
4

5 On October 16, 2006, Ms. Singletary filed a motion to dismiss this appeal for lack of
6 jurisdiction. She alleged that a June 26, 2002 order in which the Department initially closed her
7 claim had not been communicated to her prior to her filing a June 20, 2003 application to reopen
8 the claim. Ms. Singletary asked that the claim be remanded to the Department with directions to
9 consider the June 20, 2003 application to reopen as a protest to the closing order and to issue a
10 further order in which the Department responds to the protest.
11

12 A preliminary hearing was scheduled for November 9, 2006, to hear evidence on the
13 jurisdictional issue. On October 24, 2006, Ms. Singletary filed a motion to strike the December 6
14 and 7, 2006 hearing dates scheduled for presentation of her case for additional benefits, pending
15 the outcome of the November 9, 2006 jurisdictional hearing. On October 30, 2006, a hearing was
16 held on the motion to strike the December hearing dates. The motion was denied, as was
17 Ms. Singletary's request for interlocutory review.
18

19 At the jurisdictional hearing on November 9, 2006, Ms. Singletary testified that she was
20 injured at work on June 16, 2001, and her claim was accepted under Claim No. W-280241. Until
21 July 2002, she resided at 11302 18th Avenue South, Apartment I-102, Tacoma, Washington. In
22 July 2002, she moved to 10610 17th Avenue South, Apartment 610-D, Tacoma, Washington.
23

24 Ms. Singletary was handed Exhibit No. 1, a copy of the June 26, 2002 order closing her
25 claim. She testified that the first time she had seen the order was at a September 25, 2006
26 discovery deposition conducted by the self-insured employer. When she closely reviewed the
27 order, Ms. Singletary noticed that her address was listed as 11302 118th Avenue South.
28 Ms. Singletary has never resided at this address or used it for receipt of mail. Her records
29 confirmed that she had not received that order, or any other order, on or around June 26, 2002.
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31 Ms. Singletary testified that she sought treatment for her industrial injury on June 20, 2003,
32 due to pain she was experiencing. When she made the appointment, she believed that her claim
33 was still open. At the doctor's office, she learned that the claim had been closed and was asked to
34 complete the paperwork necessary to reopen the claim. On the application, Ms. Singletary wrote
35 that her claim had been closed on June 27, 2002. Subsequently, the Department reopened her
36 claim by order of September 9, 2003, effective June 12, 2003. Time loss compensation was paid to
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1 January 23, 2004, and the claim remained open until it was closed by order of July 29, 2005. In its
2 order presently on appeal, the Department affirmed the July 29, 2005 order.
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4 Lorrie Sheehan testified that she is a workers' compensation claim adjuster for Crawford and
5 Co., the self-insured employer's third-party adjudicator. She assumed responsibility for
6 Ms. Singletary's file in April 2006, and did not personally send the June 26, 2002 closure notice.
7 She certified Exhibit No. 1 as a true and correct copy of that order. It is standard procedure for a
8 Crawford claim adjuster to send mail to the address on file for a particular claimant. Ms. Sheehan
9 agreed that the June 26, 2002 closing order was sent to the **118th** Avenue South address, rather
10 than to the address on file for Ms. Singletary on **18th** Avenue South.
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12 On November 16, 2006, our industrial appeals judge issued an interlocutory order
13 addressing the jurisdictional question. In this order, he concluded that it was likely that
14 Ms. Singletary received the June 26, 2002 order closing her claim, despite the fact that it was
15 mailed to the wrong address. He based this decision on the fact that the mail was not returned; the
16 correct zip code was used; and that Ms. Singletary filed a reopening application indicating a date
17 that approximated the date her claim had been closed. In the order the industrial appeals judge
18 concluded that, taken as a whole, the record indicates that the Board had jurisdiction over the
19 claimant's appeal of the December 29, 2005 order.
20

21 On December 5, 2006, Ms. Singletary filed a Notice of Intent to Rest on Jurisdiction and Not
22 to Present Evidence on the Merits of the Claim Before the Board. In her motion, Ms. Singletary
23 expressed distress
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31 over the prospect of having to expend funds to present evidence at a
32 hearing on the merits of the claim before the Board because said
33 expenditure may become needless and regrettable depending on whether
34 the Board, in fact, lacks jurisdiction.
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36 Claimant's Notice of Intent to Rest, Affidavit of Tara Jane Reck at 4. She contended that our
37 decision, *In re Santos Alonzo*, BIIA Dec., 56,833 (1981), established a Board policy that claimants
38 should not have to incur the expense of litigation at the Board of the substantive merits of their
39 claims until Board jurisdiction has been finally resolved. In *Santos Alonzo*, we did express regret
40 that the parties had expended time and money litigating the merits of the appeals prior to our
41 ultimate conclusion that the Board lacked jurisdiction to render a decision on the merits. However,
42 *Santos Alonzo* does not stand for the proposition that an appellant may rest on the jurisdictional
43 issue at the Board, without presenting evidence on the merits of the appeal, where an industrial
44 appeals judge has conducted a jurisdictional hearing and determined that the Board has jurisdiction
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1 to decide the appeal. A claimant's anticipation that an industrial appeals judge's finding of Board
2 jurisdiction will ultimately be overturned upon review at the Board, in superior court, or in appellate
3 court, does not excuse her from making her case for further benefits at Board level. This practice
4 encourages piecemeal litigation, which is neither expedient nor economical. Also, as noted in
5 *Santos Alonzo*, in those cases where evidence supporting entitlement is presented at the Board and
6 it is ultimately determined that a remand to the Department is required, the record created at the
7 Board remains useful to the Department in adjudicating entitlement to the additional benefits. We
8 hold that, upon a finding of Board jurisdiction by the industrial appeals judge, the appealing party is
9 required to go forward with a prima facie case for the relief ultimately sought, or risk dismissal for
10 failure to present evidence when due.

11 We now address Ms. Singletary's contention that this appeal should be dismissed on
12 grounds that the Board lacked jurisdiction to decide the appeal. She also assigns error to the
13 omission of findings and conclusions by the judge in his order dismissing the appeal. We agree
14 that our industrial appeals judge should have entered findings and conclusions regarding
15 jurisdiction in his dismissal order. An industrial appeals judge is required to include in a proposed
16 decision, "findings and conclusions as to each contested issue of fact and law." RCW 51.52.104.
17 Here, jurisdiction was a contested issue and appropriate findings and conclusions were required.
18 Further, findings and conclusions establishing jurisdiction are a necessary prerequisite to any
19 decision issued by this Board. Accordingly, we include appropriate findings and conclusions
20 addressing jurisdiction in this decision and order.

21 We do not agree with Ms. Singletary's contention that this Board lacks jurisdiction to decide
22 the merits of her appeal. We base our determination on *In re Thomas E. Hansen*, Dckt.
23 No. 94 1283 (July 9, 1996), a Board decision that is factually indistinguishable from Ms. Singletary's
24 case. Although *Hansen* has not been designated as "significant" pursuant to RCW 51.52.160, we
25 have recognized that we are bound as a quasi-judicial agency by the "duty of consistency" to follow
26 our prior decisions, unless there are "articulable reasons" for not doing so. *In re Diane K. Deridder*,
27 Dckt. No. 98 22312 (May 30, 2000). We find no basis for disregarding the *Hansen* decision.

28 In *Hansen*, the claimant appealed from a May 25, 1994 Department order closing the claim.
29 In a preliminary jurisdictional hearing, the industrial appeals judge determined that an earlier closing
30 order of July 28, 1986 was properly communicated to Mr. Hansen. The Board disagreed, finding
31 that Mr. Hansen had proven that the July 28, 1986 order had not been communicated to him.

1 To establish proof of mailing and a presumption of receipt of a document, it is necessary to
2 establish that the document was deposited in the United States mail, "properly addressed,
3 stamped, and sealed." *In re Elmer Doney*, BIIA Dec., 86 2762 (1987). This can be proven by
4 actual evidence of the addressing, stamping, sealing, and mailing or through testimony setting forth
5 the mailing custom within a large organization and compliance with the custom in a particular
6 instance. *Farrow v. Department of Labor & Indus.*, 179 Wash. 453, 455 (1934). In Ms. Singletary's
7 case, it is uncontroverted that the address to which the closing order was sent contained a
8 significant typographical error in the street number. As Ms. Sheehan acknowledged, it was not
9 Crawford's office custom to mail orders to addresses that were incorrectly typed. Ms. Singletary
10 has proven that the June 26, 2002 closing order was not communicated to her.

11 Mr. Hansen filed a reopening application on October 28, 1988, and the Department
12 reopened the claim, provided benefits, and closed the claim by order of May 25, 1994 (the order on
13 appeal). We found that these facts distinguished Mr. Hansen's case from the decision *In re Ronald*
14 *Liebfried*, BIIA Dec., 88 2274 (1990), which is cited by Ms. Singletary. In *Liebfried*, the initial closing
15 order was not communicated to the claimant but an aggravation application had been submitted
16 and denied by the Department. Mr. Liebfried appealed the denial of the reopening application. The
17 Board in *Liebfried* determined that since the initial closing order had not been communicated, it had
18 not become final and therefore the aggravation issue was not before the Board. Instead, the
19 aggravation application was considered a timely protest to the closing order because it notified the
20 Department of the claimant's continuing need for treatment. Mr. Liebfried's appeal was dismissed
21 and the claim remanded to the Department to act on the protest.

22 The Board determined that Mr. Hansen's aggravation application was a protest from the
23 July 28, 1986 order because the appeal period had not run, due to non-receipt of the order. But the
24 fact that the Department had reopened Mr. Hansen's claim and provided additional benefits
25 required a different result than in *Liebfried*. In Mr. Hansen's case, there was no need to remand to
26 the Department to act on the protest because the Department had already litigated entitlement to
27 further benefits, "at least from the date it reopened the claim forward." Therefore, the Board could
28 consider whether Mr. Hansen was entitled to seek further benefits "for the entire period from before
29 the closure of his claim in 1986 and through May 25, 2004, without any need to establish
30 aggravation of his condition." In Ms. Singletary's case, as in *Hansen*, her application to reopen was
31 granted and benefits were provided. A dismissal on jurisdictional grounds with remand to the
32

1 Department is not required because Ms. Singletary's entitlement to benefits post-reopening have
2 been addressed by the Department.
3

4 We note that, following the industrial appeals judge's determination of Board jurisdiction, the
5 parties in *Hansen* proceeded to a hearing on the merits and litigated Mr. Hansen's entitlement to
6 benefits. Ms. Singletary was given the opportunity to litigate entitlement to further benefits
7 subsequent to the industrial appeals judge's determination of Board jurisdiction. She was provided
8 with a reasonable period of time to schedule necessary witnesses supporting her claim for relief but
9 made no effort to do so. Instead, Ms. Singletary chose to rest her case rather than present
10 evidence of entitlement to benefits when due on December 6, 2002. Pursuant to RCW 51.52.102
11 and WAC 296-12-115(8), this appeal is properly dismissed.
12
13
14
15

16 FINDINGS OF FACT

- 17
- 18 1. On July 23, 2001, the claimant, Glenda J. Singletary, filed an application
19 for benefits with the Department of Labor and Industries in which she
20 alleged that she sustained a right shoulder injury on June 16, 2001,
21 while in the course of her employment with Manor Healthcare
22 Corporation, a self-insured employer. The claim was allowed and
23 benefits paid. On June 26, 2002, the self-insured employer issued an
24 order in which it ended time loss compensation as paid to August 3,
25 2002, and closed the claim effective June 26, 2002, without further
26 award for time loss compensation or permanent partial disability.

27
28 On June 20, 2003, an application to reopen the claim for aggravation of
29 condition was received by the Department. By order of September 9,
30 2003, the Department reopened the claim effective June 12, 2003, for
31 authorized treatment and action as indicated. On July 29, 2005, the
32 Department issued an order in which it closed the claim with time loss
33 compensation as paid to January 23, 2004, and without further award
34 for time loss compensation or permanent partial disability. On
35 September 22, 2005, the claimant filed a Protest and Request for
36 Reconsideration of the July 29, 2005 Department order. On
37 December 29, 2005, the Department issued an order in which it affirmed
38 its July 29, 2005 order.

39
40 On February 24, 2006, the claimant filed a Notice of Appeal with the
41 Board of Industrial Insurance Appeals to the December 29, 2005
42 Department order. On April 3, 2006, the Board issued an order in which
43 it granted the appeal, assigned Docket No. 06 12195, and directed that
44 proceedings be held.

- 45
- 46 2. The order of the Department dated June 26, 2002, in which the
47 employer closed Ms. Singletary's claim, was addressed to the claimant
at 11302 118th Avenue South, Apartment I-102, Tacoma, Washington
98444. Ms. Singletary has never lived at this address or received mail

1 at this address. She resided at 11302 18th Avenue South, Apartment
2 I-102, Tacoma, Washington 98444 until sometime in July 2002, when
3 she moved to 10610 17th Avenue South, Apartment 610-D, Tacoma,
4 Washington.

- 5
6 3. At the time the June 20, 2003 application to reopen Ms. Singletary's
7 claim was filed on her behalf, the Department order of June 26, 2002
8 had not yet been communicated to her. The application to reopen put
9 the Department on notice that the claimant was seeking additional
10 benefits for her industrial injury and that she did not want her claim to be
11 closed.
- 12
13 4. On September 9, 2003, Ms. Singletary's claim was reopened effective
14 June 12, 2003. Time loss compensation benefits were paid to
15 January 23, 2004. The claim was closed by the Department in its order
16 of July 29, 2005, which was affirmed by the Department in its order of
17 December 29, 2005.
- 18
19 5. A conference, which the claimant's attorney attended, was held pursuant
20 to due and proper notice on August 22, 2006. At this conference,
21 hearings were scheduled for December 6 and 7, 2006, for the
22 presentation of the evidence in support of the claimant's appeal. Relief
23 requested included acceptance of conditions as proximately caused by
24 the industrial injury of June 16, 2001, time loss compensation from
25 January 24, 2004 through December 29, 2005, and treatment or, in the
26 alternative, permanent partial or total disability.
- 27
28 6. On October 25, 2006, the claimant moved to strike the hearing dates
29 pending the outcome of the jurisdictional hearing scheduled for
30 November 9, 2006. Following a hearing on the motion, the motion was
31 denied. On December 5, 2006, the claimant filed a Notice of Intent to
32 Rest on Jurisdiction and Not to Present Evidence on the Merits of the
33 Claim Before the Board. A hearing for presentation of Ms. Singletary's
34 evidence was held pursuant to due and proper notice on December 6,
35 2006, and the claimant presented no evidence at that time.

36 CONCLUSIONS OF LAW

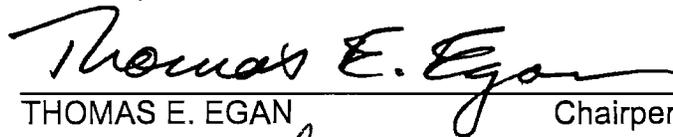
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38
39 1. The Board of Industrial Insurance Appeals has jurisdiction over the
40 parties to and the subject matter of this appeal.
- 41
42 2. The June 20, 2003 application to reopen the claim constituted a timely
43 protest to the Department order of June 26, 2002. The Department's
44 subsequent action in reopening the claim and providing additional
45 benefits constituted action by the Department on this protest.
- 46
47

1
2 3. The claimant's appeal is dismissed pursuant to RCW 51.52.102 and
3 WAC 263-12-115(8), for failure to present evidence when due.
4

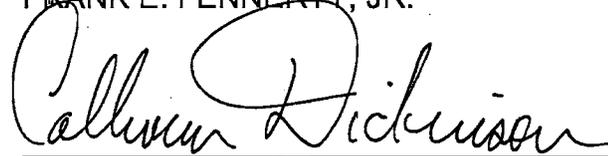
5 It is so **ORDERED**.

6 Dated this 23rd day of March, 2007.
7

8 BOARD OF INDUSTRIAL INSURANCE APPEALS
9

10 
11 THOMAS E. EGAN Chairperson
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13 
14 FRANK E. FENNERTY, JR. Member
15

16 
17 CALHOUN DICKINSON Member
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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

JUL 01 2007

WKM

1 IN RE: GLENDA J. SINGLETARY) DOCKET NO. 06 12195
2 CLAIM NO. W-280241) ORDER DENYING CLAIMANT'S MOTION FOR
3) RECONSIDERATION

4 The claimant, Glenda J. Singletary, filed an appeal with the Board of industrial insurance
5 appeals on February 24, 2006, from an order of the Department of Labor and Industries dated
6 December 29, 2005. In this order, the Department affirmed an order dated July 29, 2005, in which
7 the Department ended time-loss compensation as paid to January 23, 2004; closed the claim
8 without an award for time-loss compensation or permanent partial disability; and determined that
9 the self-insured employer cannot pay for medical services or treatment rendered after the date of
10 closure. On March 23, 2007, we issued a Decision and Order that dismissed the appeal due to the
11 claimant's failure to present evidence when due. On April 2, 2007, we received the claimant's
12 motion to reconsider our Decision and Order. After consideration of the claimant's motion, the
13 response of the self-insured employer, and the record of this appeal, we determine that the motion
14 should be denied.

15 In support of her motion, the claimant contends that there has been accident or surprise
16 which ordinary prudence could not have guarded against and substantial justice has not been done.
17 Ms. Singletary claims surprise due to our reliance on *In re Thomas E. Hansen*, Dckt. No. 94 1283
18 (July 9, 1996). She asserts that the *Hansen* decision was not contrary to the significant decisions
19 relied upon by her and that because the ruling was unknown to her that she did not know that she
20 could have presented evidence consistent with *Hansen*.

21 We agree with Ms. Singletary in that the ruling in *Hansen* is not inconsistent with prior
22 significant decisions of *In re Ronald Leibfried*, BIIA Dec., 88 2274 (1990); *In re Daniel Bazan*, BIIA
23 Dec., 92 5953 (1994); or *In re Charles Weighall*, BIIA Dec., 29,863 (1970). For reasons explained
24 in our Decision and Order, the facts presented by Ms. Singletary's circumstances were not the
25 same as presented in those significant decisions. This required a different resolution of her appeal
26 without being contrary to the significant decisions.

27 We are unconvinced by arguments that because the *Hansen* decision is not significant, we
28 could not rely on its holding. The holding articulated in *Hansen* should be followed because the
29 rationale applied to the facts of that case also applies to this case. That the decision has not been
30 made significant does not detract from the sound logic on which it is based. We should note that
31 we are equally unconvinced by arguments that the non-significant decisions are unavailable to
32 workers, particularly because the same law firm representing Mr. Hansen is now representing
Ms. Singletary.

With regard to the surprise to the scope and character of the evidence she could have
presented, we agree that there may have been slight expansion in the scope of evidence that could
have been presented had the industrial appeals judge determined that the closing order had not
been communicated to her. Instead of being limited to benefits related to the reopening of her
claim, she could have presented evidence regarding any benefits she thought she may have been
entitled to since the closing order was issued. What is not acknowledged by Ms. Singletary is that
this issue is moot because she did not present any evidence. Her arguments may have been
persuasive if she had presented evidence supporting receipt of benefits and was now claiming that
she could have established a claim for additional benefits based on the expanded jurisdiction of the
Board caused by the determination that the closing order was not communicated to her.

1 Ms. Singletary also maintains that substantial justice has not been done because she chose
2 not to litigate jurisdictional and substantive issues at the same time. Because a jurisdictional
3 question could be raised at any time in proceedings, this argument would apply to all Board
4 proceedings. We are unwilling to adopt a procedure where all substantive proceedings could be
5 delayed because a party raised a jurisdictional issue. Ms. Singletary chose to rely on her
6 jurisdictional theory to mistakenly decide not to present evidence of her entitlement to benefits. It
7 was her tactical decision, not the actions of this Board that brought on the result.

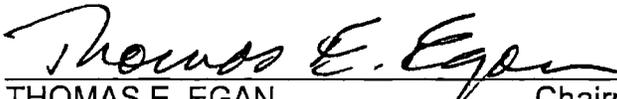
8 Finally, Ms. Singletary argues that the Board did not respond to her concern that the order
9 declining interlocutory review did not contain an explanation of the ruling. When the reviewer
10 declines review, this signifies agreement with the ruling and, by implication, adopts the rationale
11 contained in the interlocutory order. There is no necessity that the assistant chief reiterate the
12 rationale stated in the interlocutory order.

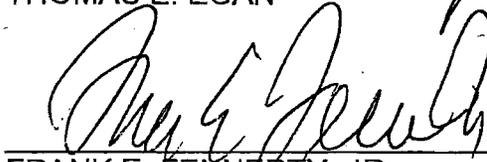
13 For the reasons state above, we determine that Ms. Singletary's motion for reconsideration
14 must be denied.

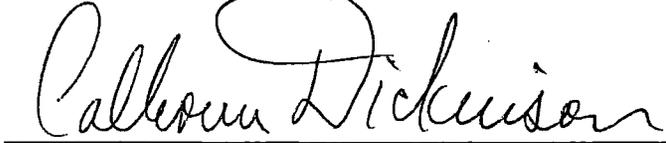
15 It is so ORDERED.

16 DATED: JUN 28 2007

17 BOARD OF INDUSTRIAL INSURANCE APPEALS

18 
19 THOMAS E. EGAN Chairperson

20 
21 FRANK E. FENNERTY, JR. Member

22 
23 CALHOUN DICKINSON Member

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February 22, 2008

Honorable D. Gary Steiner
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Tacoma, WA 98402-2177

RE: *GLEND A. SINGLETARY vs. MANOR HEALTHCARE CORP*
Cause No. 07-2-10345-2

Dear Judge Steiner:

The employer respectfully requests that you reconsider your letter order of February 15, 2008. The Board's Findings of Fact are presumed correct at the Superior Court level. With regard to the jurisdictional issue, the pertinent findings are as follows:

3. At the time the June 20, 2003 Application to Reopen Ms. Singletary's claim was filed on her behalf, the Department order of June 26, 2002 had not yet been communicated to her. The Application to Reopen put the Department on notice that the claimant was seeking additional benefits for her industrial injury and that she did not want her claim to be closed.

4. On September 9, 2003, Ms. Singletary's claim was reopened effective June 12, 2003. Time loss compensation benefits were paid to January 23, 2004. The claim was closed by the Department in its order of July 29, 2005, which was affirmed by the Department in its order of December 29, 2005.

Because claimant did not assign error to these facts, they are the established facts of this case. *Peter M. Black Real Estate Company v. Dep't of Labor & Indus.* Wn.App 482, 487, 854 P.2d 46 (1993). These facts show that, regardless of the fact that the closing order of June 26, 2002 may not have been "communicated" to her, claimant's claim was, in fact, reopened upon receipt of the June 20, 2003 Application to Reopen. If the claim had not been reopened, and claimant had appealed that decision

WALLACE, KLOR & MANN, P.C.

Honorable D. Gary Steiner
February 22, 2008
RE: Glenda Singletary
Page 2

to the Board, there might be some practical merit to claimant's jurisdiction argument. The fact is, however, that the Board had jurisdiction over matters arising out of the second closure order of July 29, 2005. There is no allegation that that order was not "communicated" to Ms. Singletary.

Defendant Manor Healthcare Corporation filed a Motion for Summary Judgment on December 3, 2007. Plaintiff filed nothing in opposition to that motion. The document that Plaintiff's counsel presented to the court on about January 28, 2008 was filed untimely under both CR56 and PCLR 7(a)(4), and any argument presented in that document should not be considered. On the face of the pleadings presented, there is no genuine issue with regard to the basis of the Board's dismissal of claimant's appeal. The closing order of July 29, 2005, and Summary Judgment should be granted.

Thank you for your reconsideration of this matter.

Very truly yours,

WALLACE, KLOR & MANN, P.C.



Brad G. Garber

BGG/nt

cc: David Threedy, Board of Industrial Insurance Appeals
Tary Jayne Reck, Attorney at Law/Claimant
Penny L. Allen, Assistant Attorney General
Judy Schurke, Office of the Director
Erik Samuelsen, Broadspire
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DATED: December 9, 2010

WALLACE, KLOR & MANN, PC


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Of Attorneys for MANOR HEALTHCARE
CORP., ET AL.