

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

No. 42240-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KIM L. LEE, Respondent,

v.

SAFEWAY STORES, INC., Appellant.

REPLY BRIEF

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I. ARGUMENT

A. The Issue of Whether the August 16, 2007, Closing Order was Properly Communicated to the Person Primarily Responsible for Treating Ms. Lee, Raised by Respondent Ms. Lee in her Brief, was not Cross-Appealed and is Therefore Precluded from Review on Appeal.

The Washington State Supreme Court has held that failure to cross-appeal an issue generally precludes its review on appeal. *Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 203 (2000) (citing *Tellevik v. Real Prop. Known As 31641 W. Rutherford St.*, 120 Wash.2d 68, 89 (1992)). The exception to this rule is that a successful litigant need not cross-appeal in order to urge any additional reasons in support of the judgment, even though rejected by the trial court. *Amalgamated*, 142 Wash.2d at 203; see also *Peterson v. Hagan*, 56 Wash.2d 48, 52 (1960); and *City of Tacoma v. Taxpayers of Tacoma*, 108 Wash.2d 679, 685 (1987). However, in no circumstance will additional relief will be granted on appeal in the absence of a cross-appeal. *Id.*

In her Respondent's Brief, Respondent Ms. Lee raises the argument there is a genuine issue of material fact as to whether the August 16, 2007, closing order was properly communicated to the person primarily responsible for treating her.

The August 16, 2007, closing order was communicated to Laura Kaufman, M.D. Respondent Ms. Lee claims the closing order should have been communicated to Lester B. Pittle, M.D., the person she claims was primarily responsible for treating her at the time of the August 16, 2007, closing order. Respondent's Brief at 12-13.

As Respondent Ms. Lee correctly explains in the procedural history section of her brief, on March 5, 2010, the Board of Industrial Insurance Appeals (Board) granted Safeway Stores', Inc. (Safeway) Motion for Summary Judgment and found Dr. Pittle was not Ms. Lee's attending physician as of August 16, 2007, and that the August 16, 2007, closing order was properly communicated to Dr. Kaufman, Ms. Lee's attending physician as of that date. Respondent's Brief at 6 and CABR at 20-26.

On May 20, 2011, Pierce County Superior Court Judge Katherine M. Stolz affirmed the Board's decision that Dr. Pittle was not Ms. Lee's attending physician for claim number SB41082 and held the Board's granting of summary judgment as to that issue was correct and is affirmed. Respondent's Brief at 7 and CP at 87.

As explained above, at the trial court Ms. Lee did not prevail on her argument the August 16, 2007, closing order was not properly communicated to the person primarily responsible for treating her at that time. Respondent Ms. Lee did not file a notice of appeal to the Court of Appeals, Division Two, seeking review of this portion of the trial court's decision. Respondent Ms. Lee also did not file a cross-appeal requesting this part of the trial court decision be reviewed by this Court. Accordingly, pursuant to the Washington State Supreme Court's ruling in *Amalgamated*, because Respondent Ms. Lee did not obtain a favorable judgment on the communication of the August 16, 2007, closing order to Dr. Pittle issue at the trial court, and she did not cross-appeal the trial court's ruling on this issue, she is barred from challenging the trial court's decision on this issue.

B. There are no Genuine Issues of Material Fact as to Whether the August 16, 2007, Closing Order was Properly Communicated to Ms. Lee or Ms. Lee's Counsel, and as a Matter of Law, Appellant Safeway was Entitled to Summary Judgment in its Favor.

Respondent Ms. Lee contends genuine issues of material fact exist as to whether the August 16, 2007, closing order was properly communicated to Law Offices of David B. Vail & Jennifer Cross-Euteneier and Associates, PLLC (Ms. Lee's Counsel) and therefore the trial court was correct to reverse summary judgment on this issue.

However, Respondent Ms. Lee's statement that genuine issues of material fact exist is entirely unsupported. In actual, the facts in this matter are undisputed, and based on the undisputed facts and as supported by the applicable Washington statutes and case law, Safeway was entitled to summary judgment of this issue in its favor.

1. It is undisputed Safeway did not communicate the August 16, 2007, closing order to Ms. Lee's Counsel, rather pursuant to RCW 51.52.050(1), it correctly communicated the order to Ms. Lee.

As discussed in Appellant's Brief, Appellant Safeway did not communicate the August 16, 2007, closing order to Ms. Lee's Counsel. Rather, Safeway communicated the August 16, 2007, closing order to Ms. Lee's 13802 6th Avenue East, Tacoma, Washington 98845, address, the address on Ms. Lee's SIF-2 and her last known address as shown by Safeway's records. Appellant's Brief at 9 and CABR at 148. It is undisputed that Safeway mailed the closing order to this address and it is undisputed Ms. Lee received the August 16, 2007, closing order at this address.

As explained in Appellant Safeway's Brief, RCW 51.52.050(1) states whenever the Department (or implicitly the self-insured employer) has made any order, decision, or award, it shall promptly serve the worker with a copy thereof by mail, which shall be addressed to such person at his or her last known address as shown by the records of the Department (or the self-insured employer in the cases where the self-insurer is issuing the order). Appellant's Brief at 9. Accordingly, as a matter of law, Appellant Safeway properly communicated the August 16, 2007, closing order to Ms. Lee at 13802 6th Avenue East, Tacoma, Washington 98845, her last known address as shown by Safeway's records, and thus was entitled to summary judgment of this issue in its favor.

2. It is undisputed Safeway did not receive a notice of representation directly from Ms. Lee's Counsel for claim SB41082 prior to Safeway's issuance of the August 16, 2007, closing order.

Respondent Ms. Lee states that on February 6, 2007, Tonja Holcomb, paralegal for Ms. Lee's Counsel, submitted a notice of representation for claim SB41082 to Ms. Michelle Morrison, claims examiner for Safeway for claim SB41082. Respondent's Brief at 14. This statement is misleading because although Ms. Lee's Counsel may have *attempted* to communicate a notice of representation to Safeway on February 6, 2007, Safeway did not receive the notice.

As explained in Appellant Safeway's Brief and as clearly evidenced in Respondent Ms. Lee's Certified Appeal Board Record citation in her brief, the February 6, 2007, notice of representation from Ms. Lee's Counsel was addressed to Michelle Morrison at the following address: Zenith Administrators, P.O. Box 21505, Seattle, WA 98111. Appellant's Brief at 12, Respondent's Brief at 14, and CABR at 240. There is no evidence that Michelle Morrison or any other person at Safeway received any mail at the Zenith Administrators address. Respondent Ms. Lee does not dispute Safeway did not receive the February 6, 2007, notice of representation or that any other notice of representation was sent directly to Safeway by Ms. Lee's Counsel prior to the issuance of the August 16, 2007, closing order.

Respondent Ms. Lee asserts on February 12, 2007, Ms. Tonja Holcomb completed an opening memo, added claim number SB41077 to the notice of representation and resubmitted it. Respondent's Brief at 14. Once again, this statement is misleading and requires clarification. The notice of representation that had claim SB41077 added to it was submitted to the Department of Labor and Industries (Department). It was not submitted directly to Safeway. CABR at 244.

Additionally, the notice of representation sent to the Department containing the additional claim number SB41077 was submitted on February 6, 2007, as shown by the Certified Appeal Board Record, a date that comes before February 12, 2007. CABR at 244. There is no evidence a notice of representation from Ms. Lee's Counsel was sent to the Department on February 12, 2007. However, even if the February 6, 2007, notice of representation was resubmitted to the Department on February 12, 2007, it is factually immaterial and of no legal significance. In order to avoid confusion, the notice of representation from Ms. Lee's counsel for claims SB41082 and SB41077 sent to the department will be referred to as the February 6, 2007, notice of representation, as shown by the Certified Appeal Board Record. CABR at 244.

3. It is undisputed the Department received the February 6, 2007, notice of representation from Ms. Lee's Counsel for claims SB41082 and SB41077.

Respondent Ms. Lee states on February 6, 2007, Ms. Lee's Counsel communicated to the Department a notice of representation that listed both claim SB41082 and claim SB41077. Respondent's Brief at 14. It is undisputed Ms. Lee's Counsel communicated this notice of representation to the Department and it is undisputed the Department received this notice. CABR at 244.

4. It is undisputed Safeway was informed Ms. Lee's Counsel represented Ms. Lee on claim SB41077.

Respondent Ms. Lee states in her brief, "Safeway received the notice of representation for that claim number and mailed a copy of the May 11, 2007, closing order on that claim number to Kim Lee's attorney." Respondent's Brief at 14. Once again this is a misleading statement, and appears to be an attempt by Respondent Ms. Lee to demonstrate a genuine issue of material fact when one does not exist. To clarify, "the notice of representation for that claim number" Respondent Ms. Lee is referring to is the February 6, 2007, notice of representation sent to the Department for claims SB41082 and SB41077. As discussed above, it is undisputed the Department received this notice.

As discussed in Appellant's Brief, Safeway was not forwarded a copy of the actual February 6, 2007, notice of representation sent to the Department by Ms. Lee's Counsel. Appellant's Brief at 18. This fact is not disputed by Respondent Ms. Lee. However, Safeway does not dispute it was informed by the Department that the Department had received a February 6, 2007, notice of representation from Ms. Lee's Counsel for *claim SB41077*.

5. **The reason Safeway was on notice of Ms. Lee's Counsel's representation of Ms. Lee on claim SB41077, but was not on notice of Ms. Lee's Counsel's representation of Ms. Lee on claim SB41082, is not a question of fact, rather a matter of law, and therefore does not preclude summary judgment.**

Despite clearly demonstrating the material facts presented by Appellant Safeway and Respondent Ms. Lee are not in dispute, Respondent Ms. Lee still contends there is a genuine question of material fact as to why, when the same notice of representation form was sent to the employer listing both claim numbers, the employer was on notice of representation on one claim, but not the other. Respondent's Brief at 14-15.

To begin, as explained above, the February 6, 2007, notice of representation listing both claim numbers Respondent Ms. Lee is referring to is the notice that was sent to the Department, not to Safeway. As also previously discussed, Safeway did not receive this February 6, 2007, notice of representation from the Department, and Respondent Ms. Lee has offered no evidence to dispute this fact. However, the Department did *inform* Safeway that Ms. Lee's Counsel represented Ms. Lee on claim SB41077.

Therefore the correct question is, why did the Department inform Safeway it had received a February 6, 2007 notice of representation from Ms. Lee's Counsel for claim SB41077, but did not inform Safeway that it had received a notice of representation from Ms. Lee's Counsel for claim SB41082. This is not a factual question precluding summary judgment; rather as explained in Appellant's Brief, this is a legal question.

As explained in Appellant's Brief, as a matter of law, pursuant to RCW 51.28.050, *Wheaton v. Dep't of Labor & Indus.*, 40 Wash.2d 56, 58 (1952), and *Nelson v. Dep't of Labor and Indus.*, 9 Wash.2d 621, 629 (1941), a claim does not exist until an application for benefits (SIF-2) has been received by the Department. Appellant's Brief at 19-20. As of February 6, 2007, claim SB41082 did not exist. Claim SB41082 did not exist until the application of benefits was received by the Department on March 6, 2007, and thus it would be illogical for the Department to recognize, or inform Safeway of, a February 6, 2007, notice of representation from Ms. Lee's Counsel on claim SB41082.

The Department's non-recognition of the February 6, 2007, notice of representation for claim SB41082 is also why Ms. Teja Cronk did not have access to the claim file on-line until she resubmitted the notices in October and November 2008, after the application for benefits had been received by the Department on March 6, 2007, and after claim SB41082 was recognized as a claim. Respondent's Brief at 15 and 16.

Claim SB41077 did exist as of February 6, 2007, because the application for benefits was received by the Department for this claim on December 4, 2006. Thus, it was proper for the Department to recognize, and to inform Safeway that it had received, a February 6, 2007, notice of representation from Ms. Lee's counsel on claim SB41077.

C. Although Respondent Ms. Lee Seeks Liberal Interpretation of the Industrial Insurance Act, There is no Statute in Dispute or in Need of Interpretation.

As is often the case when a worker is attempting to persuade a court to rule in his or her favor, Respondent Ms. Lee's opening assertion in her brief is the often inapplicable and abused argument that this Court should afford a liberal interpretation to the law under the Industrial Insurance Act. *Clausen v. Department of Labor & Industries*, 130 Wn.2d 580 (1996).

First, this only applies in cases where the law is not clear. The Washington State Supreme Court has held that “If a statute is clear on its face, its meaning is to be derived from the language of the statute alone.” *Kilian v. Atkinson*, 147 Wn.2d 16, 20 (2002) (citing *State v. Keller*, 143 Wn.2d 267, 276 (2001), *cert. denied*, 534 U.S. 1130, (2002)). The *Kilian* court went on to state, “This court has repeatedly held that an unambiguous statute is not subject to judicial construction and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it.” *Id.*

Thus, while a general assertion is made that this Court shall afford Ms. Lee liberal interpretation, there is no reference to what statute is in dispute and in need of interpretation.

Further, in cases of liberal interpretation of the law, the Court has long held that, “...while the act should be liberally construed in favor of those who come within its terms, persons who claim rights thereunder should be held to strict proof of their right to receive the benefits provided by the act.” *Olympia Brewing Co. v. Department of Labor & Industries*, 34 Wn.2d 498, 505 (1949).

Thus, the opening assertion of seeking a liberal interpretation has no bearing in this matter involving material facts. Respondent Ms. Lee's correctly cited standard of summary judgment is all that is relevant. Respondent's Brief at 10.

Clearly, even when viewing the facts in a light most favorable to the non-moving party, Respondent Ms. Lee, there is no material fact offered in the record to dispute the finality of the August 16, 2007, closing order, and the untimely appeal by the Ms. Lee on December 1, 2008. Because that appeal was filed too late, per the requirements of RCW 51.52.050 and RCW 51.52.060, the Department lacked jurisdiction to set aside the closing order on March 12, 2009. CABR 29.

II. CONCLUSION

There are no material facts in dispute and even when looking at the evidence in light most favorable to the non-moving party, Respondent Ms. Lee, Ms. Lee has failed to demonstrate the August 16, 2007, closing order was not properly communicated to her and thus summary judgment should have been granted in favor of Appellant Safeway.

Because the August 16, 2007, closing order was properly communicated to Ms. Lee and the order was not timely appealed within the applicable sixty-day period per RCW 51.52.050(1), the Court should reverse, in part, the May 20, 2011, Superior Court Order that reversed and remanded in part, the Board's March 5, 2010, Decision and Order, which held there was no timely protest or request for reconsideration of the August 16, 2007, order and that the order became final and binding.

DATED this 21st day of November, 2011.

Respectfully submitted,



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Safeway Stores, Inc.

DATED this 21st day of November, 2011.

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