

FILED
COURT OF APPEALS
DIVISION II

2012 MAY 30 PM 2:44

STATE OF WASHINGTON

BY 
DEPUTY

No. 42703-6-II

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

ERIKA HARDY,

Appellant,

v.

FRED MEYER STORES, INC.,

Respondant,

APPELLANT'S REPLY BRIEF

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I. ADDITIONAL ARGUMENTS

A. THE UNAPPEALED DEPARTMENT ORDER DATED JUNE 22, 2004 ALLOWING MS. HARDY'S CLAIM FOR WORKERS' COMPENSATION BENEFITS IS FINAL AND BINDING AND SUBJECT TO THE DOCTRINE OF RES JUDICATA

An order of the Department of Labor and Industries (Department) becomes a final and complete adjudication, binding upon both the department and the claimant unless such action...is set aside upon appeal or is vacated for fraud or something of like nature. *Lebire v. Department of Labor and Industries*, 14 Wn.2d 407, 415, 128 P.2d 308 (1942). As final and binding, an unappealed Department order precludes the parties from rearguing the same claim. *Marley v. Department of Labor and Industries*, 125 Wn.2d 533, 537, 866 P.2d 189 (1994).

In respondent's brief, the self-insured employer (Fred Meyer) argues that the Department allowance order dated June 22, 2004 was silent as to what conditions were accepted or allowed, specifically as to the causal relationship of Ms. Hardy's right shoulder condition, and thus does not constitute a legally binding determination that is subject to the doctrine of res judicata. Respondent's Brief (RB) at pg. 10 *et seq.* However, there is evidence indicating that the Department's allowance order accepted Ms. Hardy's bilateral shoulder conditions and, as such, was a final determination. When this order went unprotested and unappealed the

doctrine of res judicata precludes reargument or readjudication of what conditions were allowed and accepted under the claim.

1. MS. HARDY CONTENDED HER BILATERAL SHOULDER CONDITIONS WHEN SHE FILED HER CLAIM FOR BENEFITS

Fred Meyer claims that “there is simply no evidence in the CABR to establish that [Ms. Hardy] filed her claim for a bilateral occupational disease,” based on the stipulated jurisdictional history. RB at 11. However, this history is simply a summary of relevant Department actions in the appeal, which does not include every action taken, and is merely for the purposes of establishing the Board of Industrial Insurance Appeal’s (Board) jurisdiction to hear the matter and determine the issues to be resolved. CABR at 88.

While the jurisdictional history notes that an application for benefits has been filed for a left shoulder condition resulting from a date of injury of May 1, 2004, *Id.*, the testimony of Dr. Louis Enkema illustrates that Ms. Hardy’s condition involved both shoulders and was not the result of an acute injury, but was the result of an ongoing process. Dr. Enkema testified that his impression, both initially on May 1, 2004 and roughly a week later, of Ms. Hardy’s condition was a *bilateral* shoulder strain. Enkema Dep. at 39 (emphasis added). He further testified that it is

common for him to help injured worker's file applications for benefits and that he did in fact help Ms. Hardy file one of her applications. *Id.* at 46-7. Dr. Enkema diagnosed Ms. Hardy with a *bilateral* shoulder strain, left side more than right, and testified that her complaints were not the result of a specific incident, but were probably associated with the heavy lifting, turning, and twisting associated with her job. *Id.* at 12-3, 20 (emphasis added). This is indicative of a bilateral shoulder condition with a manifestation date of May 1, 2004, rather than a left shoulder condition resulting from an injury sustained on May 1, 2004.

Moreover, Dr. Enkema's initial physician's report of May 1, 2004, lists the diagnoses of strained bilateral shoulder and bilateral A-C joint tendonitis with a manifestation date of May 1, 2004. CP at 49. The Board even noted in its Decision and Order that at the outset Dr. Enkema's impression was that both shoulders were involved. CP at 8. The Board further noted that if the right shoulder condition was to be considered a part of this claim, it would have to be because the claim was filed for both shoulders and this is indicated by Dr. Enkema. *Id.* Clearly, Ms. Hardy was contending that both of her shoulders were involved when she filed her application for benefits. The Board and the Superior Court below explicitly determined in their respective findings of fact that "the medical records of Louis Enkema, M.D., placed the self-insured employer on

notice that Erika Hardy was contending she had bilateral conditions arising out of her employment with Fred Meyer Stores, Inc., that became manifest on May 1, 2004.” CABR at 19, CP at 141.

2. THE JUNE 22, 2004 DEPARTMENT ALLOWANCE ORDER ACCEPTED MS. HARDY’S BILATERAL SHOULDER CONDITIONS UNDER THE CLAIM

It is established that Ms. Hardy and Dr. Enkema filed a claim for bilateral shoulder conditions with a date of manifestation on May 1, 2004. Ms. Hardy’s claim for benefits was allowed by the Department order dated June 22, 2004. CABR at 88. This order constituted a determination by the Department that allowed Ms. Hardy’s bilateral shoulder claim as an injury or occupational disease which was causally related to her employment. *See, e.g. In Re Kerry G. Kemery*, BIIA dec., 62,634, 1983 WL 470517 at *2 (1983)¹. As stated conspicuously on the order and RCW § 51.52.060(1)(a), there is a sixty day window in order to protest or appeal an order to prevent the order from becoming final. CP at 50. Therefore, if Fred Meyer failed to appeal that order, it is deemed final and binding, subject to the doctrine of res judicata, and “turned into a final adjudication, precluding any reargument.” *Pearson v. Department of Labor and Industries*, 164 Wn. App. 426, 433, 262 P.3d 837 (2011). Here, there is no

¹ The Board is required to publish and index its significant decisions under RCW § 51.52.160. These decisions are persuasive authority, although not binding upon the courts. *O’ Keefe v. Department of Labor and Industries*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005).

disputing that Fred Meyer failed to appeal this allowance order of Ms. Hardy's bilateral shoulder conditions. Therefore, the doctrine of res judicata applies and there can be no relitigation or rearguing of what conditions were initially allowed and accepted under the claim with the Department order dated June 22, 2004.

Even though particular, specific conditions were not identified in this order, it has been established that Fred Meyer had notice of the conditions being contested under the claim, namely the bilateral shoulder conditions diagnosed by Dr. Enkema on May 1, 2004. As noted by the Board, Fred Meyer is entitled to basic notice of what conditions were being contended, and subsequently accepted and allowed by the Department, through the application and the medical records. CP at 8. The records of Dr. Enkema clearly put Fred Meyer on notice that Ms. Hardy's claim was an occupational disease claim for bilateral shoulder conditions, notwithstanding what is noted on the jurisdictional history regarding Ms. Hardy's application for benefits. Fred Meyer had notice of what conditions were being contended on the date of manifestation, May 1, 2004, with this claim and thus, what conditions were initially allowed by the Department with the acceptance of the claim.

Fred Meyer asserts that "the fact that Dr. Enkema noted 'bilateral shoulder strain' in his initial chart note is not proof of a definitive

diagnosis.” and does not give it actual notice of what conditions were accepted under the claim. RB at 23. However, Dr. Enkema testified that he diagnosed Ms. Hardy with a bilateral shoulder strain and his physician’s initial report listed under ICDM-9 code and diagnosis: 840.8 bilateral shoulder strain and 726.10 bilateral A-C joint tendonitis. Enkema Dep. at 20, CP at 49. The Washington Administrative Code defines “acceptance” or “an accepted condition” as a determination that reimbursement for the diagnosis and curative or rehabilitative treatment of a claimant’s medical condition is the responsibility of the department or the self-insurer. WAC § 296-20-01002. It also notes that the condition being accepted must be specified by one or more diagnosis codes from the International Classification of Diseases, Clinically Modified. *Id.* Here, the Department’s allowance order accepts responsibility for Ms. Hardy’s two diagnosed bilateral shoulder conditions which were properly coded in Dr. Enkema’s physician’s initial report. CP at 49. Fred Meyer had notice of these properly coded diagnoses and its failure to appeal the Department’s allowance order accepting Ms. Hardy’s bilateral shoulder conditions at any time precludes the relitigation or rearguing of what conditions were accepted initially under the claim per the doctrine of res judicata.

The situation here is somewhat analogous to the situation in the Board decision, *In re: Carl W. Allison, Jr.*, Dekt. No. 05 20497, 2007 WL

4565277 (2007), where the employer sought to have the condition of Hepatitis C segregated from the claim about a year after the claim was allowed. In that case, the claimant filed a claim for benefits and the Department issued an order allowing the claim, but the order did not specify which conditions were allowed under the claim. *Id.* at *3-4. However, the Board found that the employer had been appraised that hepatitis C was an allowed condition based on extraneous things like a Department letter, phone conversations with the Department, and the application for benefits. Because the employer, who had notice of the conditions being contended, did not protest or appeal the allowance order, it was final and binding as to the allowance and causal relationship of Hepatitis C even though it was not specifically identified as an accepted condition under the claim. *Id.* Similarly, as repeatedly pointed out in respondent's brief, the Department order allowing Ms. Hardy's claim is silent as to what conditions were accepted under the claim. However, this is not fatal to the res judicata argument as extraneous things such as Dr. Enkema's records, including the physician's initial report, and testimony clearly indicate that Ms. Hardy's bilateral shoulder conditions were accepted under the claim.

This is further evidenced by the Department letter dated October 21, 2004. That letter explicitly states that claim number W970668 was

filed for the bilateral shoulder injury/occupational disease of May 1, 2004, and a subsequent accident report is duplicative and will be consolidated with claim number W970668. CP at 54. Fred Meyer is correct in its assertion that Ms. Hardy is not claiming that this letter is a final and binding department determination. RB at 28. However, it mischaracterizes Ms. Hardy's argument regarding this letter. This letter does not establish Fred Meyer's notice of what conditions were accepted under the claim; this notice is satisfied with Dr. Enkema's initial physician's report and records. What this letter does is buttress the fact that the Department's initial allowance of the claim on June 22, 2004 accepted Ms. Hardy's bilateral shoulder conditions, not just simply a left shoulder condition.

In its response, Fred Meyer contends that Ms. Hardy's argument is similar to an argument that failed in the board case *In Re Kerry G. Kemery*, IIA dec., 62, 634, 1983 WL 470517 (1983). However, this case is distinguishable from *Kemery*. Here, like in *Kemery*, Ms. Hardy's claim was allowed in an order which did not specifically identify what conditions were accepted under the claim, but, unlike *Kemery*, the employer had notice of what conditions were contended under the claim since the manifestation date via Dr. Enkema's records. Further distinguishable from *Kemery*, the Department letter in this case is not

what is putting Fred Meyer on actual notice of what conditions were accepted under the claim. Fred Meyer had actual notice from Dr. Enkema and an opportunity to protest or appeal the allowance order. Not having done so, results in a final and binding Department order which allowed Ms. Hardy's bilateral shoulder occupational disease claim resulting from her employment with Fred Meyer. The situation here is more analogous to *Allison* rather than *Kemery*. Thus, under res judicata, there can be no relitigating this issue.

II. CONCLUSION

Ms. Hardy has contended her conditions were bilateral shoulder conditions and not just a left shoulder condition which became manifest on May 1, 2004, as evidenced by the testimony and records of Dr. Enkema. Furthermore, the Department's allowance order accepted Ms. Hardy's claim for bilateral shoulder conditions. This is clearly evidenced by Dr. Enkema's records, testimony, and the Department letter consolidating duplicative claims. It is undisputed that the June 22, 2004 Department allowance order was not protested or appealed.

Thus, Ms. Hardy respectfully requests that this Court find the Department Order dated June 22, 2004 as res judicata on the issue of what conditions were allowed initially under the claim, namely Ms. Hardy's

bilateral shoulder conditions, preventing the Board from having the authority to readjudicate the final and conclusive determination that Ms. Hardy's right shoulder condition was involved. The Superior Court's judgment should be reversed and this matter should be remanded back to the Department of Labor and Industries to make a decision on final claim benefits fully considering all of Ms. Hardy's allowed conditions.

DATED this 30th day of May, 2012.

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CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 30th day of May, 2012, the document to which this certificate is attached, Appellant's Reply Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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DATED this 30th day of May, 2012.


LYNN M. VENEGAS, Secretary