

NO. 42703-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ERIKA HARDY,

Appellant,

v.

FRED MEYER STORES, INC.,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTER STATEMENT OF THE ISSUES2

III. STATEMENT OF THE CASE2

 A. History Of The Adjudication Of Hardy’s Claim2

 B. History Of The Board Appeal.....4

 C. History Of The Superior Court Appeal.....6

IV. SUMMARY OF THE ARGUMENT7

V. STANDARD OF REVIEW.....9

VI. ARGUMENT10

 A. Hardy Waived The Right To Argue That It Is Res
 Judicata That Her Right Shoulder Condition Is Covered
 Under Her Claim, Because She Failed To Raise Res
 Judicata As An Issue In Her Petition For Review10

 B. It Is Not Res Judicata That Hardy’s Right Shoulder
 Condition Is Covered Under Her Claim, Because The
 Department’s June 22, 2004 Order That Allowed Hardy’s
 Claim Did Not Accept Responsibility For Any Particular
 Medical Condition12

 C. Hardy’s Attempt At Supplementing The Record At
 Superior Court Is Not Supported By RCW 51.52.115
 Because The Evidence That Hardy Attempts To Offer
 Does Not Demonstrate An “Irregularity In Procedure Of
 The Board”26

 D. Even Assuming For The Sake Of Argument That This
 Court Can Properly Consider The Evidence That Hardy
 Offered For The First Time To The Superior Court, Her
 Argument That It Is Res Judicata That Both Her Right

And Left Shoulder Conditions Are Covered Under Her
Claim Would Still Fail30

E. There Is No Basis For A Remand To The Department40

F. Hardy’s Arguments Are Not Supported By The Doctrine
Of Liberal Construction42

VII. CONCLUSION44

TABLE OF AUTHORITIES

Cases

<i>Adams v. Great Am. Ins. Co.</i> , 87 Wn. App. 883, 942 P.2d 1087 (1997).....	10
<i>Bird-Johnson Corp. v. Dana Corp.</i> , 119 Wn.2d 423, 833 P.2d 375 (1992).....	42
<i>Cascade Valley Hosp. v. Stach</i> , 152 Wn. App. 502, 215 P.3d 1043 (2009).....	14
<i>Chavez v. Dep't of Labor & Indus.</i> , 129 Wn. App. 236, 118 P.3d 392 (2005).....	19
<i>City of Pasco v. Pub. Empl't Relations Comm'n</i> , 119 Wn.2d 504, 833 P.2d 381 (1992).....	10
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	21, 40
<i>Cramer v. PEMCO Ins. Co.</i> , 67 Wn. App. 563, 842 P.2d 479 (1992).....	24
<i>Dennis v. Dep't of Labor & Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987).....	43
<i>Dep't of Labor & Indus. v. Fields Corp.</i> , 112 Wn. App. 450, 45 P.3d 1121 (2002).....	13, 14
<i>Gilbertson v. Dep't of Labor & Indus.</i> , 22 Wn. App. 813, 592 P.2d 665 (1979).....	9, 27, 29
<i>Hanson v. City of Snohomish</i> , 121 Wn.2d 552, 852 P.2d 295 (1993).....	19
<i>Hill v. Dep't of Labor & Indus.</i> , 90 Wn.2d 276, 580 P.2d 636 (1978).....	11, 12

<i>In Re Carl Allison</i> , No. 05 20497, 2007 WL 4565277 (Wash. Bd. Indus. Ins. Appeals September 4, 2007).....	37, 38, 39, 40
<i>Ivey v. Dep't of Labor & Indus.</i> , 4 Wn.2d 162, 102 P.2d 683 (1940).....	42
<i>Janssen v. Dep't of Labor & Indus.</i> , 125 Wn. App. 461, 105 P.3d 431 (2005).....	38
<i>King v. Dep't of Labor & Indus.</i> , 12 Wn. App. 1, 528 P.2d 271 (1974).....	15, 16, 18, 44
<i>Lane v. Dep't of Labor & Indus.</i> , 21 Wn.2d 420, 151 P.2d 440 (1944).....	27
<i>Lee v. Jacobs</i> , 81 Wn. 2d 937, 506 P.2d 308 (1973).....	33, 34, 38
<i>Lewis v. Simpson Timber Co.</i> , 145 Wn. App. 302, 189 P.3d 178 (2008).....	18
<i>Littlejohn Const. Co. v. Dep't of Labor & Indus.</i> , 74 Wn. App. 420, 873 P.2d 583 (1994).....	10
<i>Loveridge v. Fred Meyer, Inc.</i> , 125 Wn.2d 759, 887 P.2d 898 (1995).....	11, 20
<i>Malang v. Dep't of Labor & Indus.</i> , 139 Wn. App. 677, 162 P.3d 450 (2007).....	41
<i>Marley v. Dep't of Labor & Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994).....	13, 16, 18, 34
<i>McDonald v. Dep't of Labor & Indus.</i> , 104 Wn. App. 617, 17 P.3d 1195 (2001).....	22, 33
<i>Miller v. City of Tacoma</i> , 138 Wn.2d 318, 979 P.2d 429 (1999).....	9

<i>Ruse v. Department of Labor and Industries,</i> 138 Wn.2d 1, 977 P.2d 570 (1999).....	9
<i>Salesky v. Dep't of Labor & Indus.,</i> 42 Wn.2d 483, 255 P.2d 896 (1953).....	42
<i>Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n,</i> 133 Wn.2d 229, 943 P.2d 1358 (1997).....	43
<i>Shafer v. Dep't of Labor & Indus.,</i> 166 Wn.2d 710, 213 P.3d 591 (2009).....	23
<i>Somsak v. Criton Tech./Heath Tecna, Inc.,</i> 113 Wn. App. 84, 92, 52 P.3d 43 (2002)....	14, 15, 16, 17, 18, 25, 38, 39
<i>Upjohn v. Russell,</i> 33 Wn. App. 777, 658 P.2d 27 (1983).....	11

Statutes

RCW 51	1
RCW 51.08.150	4
RCW 51.08.160	4
RCW 51.12.010	42
RCW 51.32.060	4, 17
RCW 51.32.080	5
RCW 51.32.090	17
RCW 51.52.050	28, 33, 34, 36
RCW 51.52.060	34, 36, 40
RCW 51.52.104	2, 5, 7, 8, 12
RCW 51.52.110	7, 26

RCW 51.52.115	2, 7, 8, 9, 26, 27, 28, 29, 30, 41, 43
RCW 51.52.140	41
RCW 51.52.160	37
WAC 296-15-405.....	31, 32
WAC 296-20-01002.....	24, 25

Other Authorities

WPI 155.07 (6th ed.).....	4
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Rules

CR 50	6, 7, 8
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I. INTRODUCTION

This is a workers' compensation case under Title 51, RCW, the Industrial Insurance Act. Erika Hardy filed an application for benefits that contended that she had a left shoulder condition for her work at Fred Meyer Stores, Inc. Hardy's attending physician filed a chart note that referenced a bilateral shoulder strain. The Department issued an order that allowed Hardy's claim, but the order did not comment on whether any particular medical conditions would be accepted under the claim. No party appealed that order. The Department later issued an order that closed Hardy's claim with no additional benefits, and Hardy appealed that order. The Department's decision to close her claim with no additional benefits was ultimately affirmed by both the Board of Industrial Insurance Appeals (Board) and the Pierce County Superior Court. Hardy argues that the Board and the superior court erred as a matter of law, because each of them determined that Hardy did not have a right shoulder condition that was related to her injury, and Hardy contends that such a ruling is contrary to the res judicata effect of the order that allowed her claim.

This Court should affirm the trial court's decision. Hardy did not raise the issue of res judicata at the Board and was, therefore, precluded from doing so at superior court. Moreover, while it is res judicata that Hardy has an allowable worker's compensation claim, it is not res judicata

that her right shoulder condition is accepted under that claim. The superior court also properly declined to accept the new evidence that Hardy offered to it because she had not offered that evidence to the Board.

II. COUNTER STATEMENT OF THE ISSUES

1. Under RCW 51.52.104, did Hardy waive the right to argue that it is res judicata that she has a right shoulder condition covered under her claim when she failed to raise that as an issue in the petition for review she filed with the Board?
2. Does a Department order that allowed Hardy's claim render it res judicata that her right shoulder condition is covered under her claim when the Department order did not comment on whether the right shoulder condition was accepted under the claim?
3. Under RCW 51.52.115, may Hardy supplement the record at superior court by offering additional evidence regarding the procedural history of the management of her claim that she did not offer to the Board when RCW 51.52.115 only allows a party to present new evidence regarding an irregularity in the Board's proceedings and when the evidence offered by Hardy does not show any such irregularity?

III. STATEMENT OF THE CASE

A. History Of The Adjudication Of Hardy's Claim

Hardy filed an application for benefits with Fred Meyer, a self-insured employer, that alleged a left shoulder injury. *See* CABR 18, 88.¹

¹ The Certified Appeal Board Record contains numerous documents that are consecutively numbered with a machine-stamped number, as well as the transcripts of hearings and depositions that do not have such numbers. Citations to the documents containing machine-stamped numbers will be listed with CABR followed by the appropriate page number. Citations to the hearing and deposition transcripts will be listed with CABR, followed by the name of the witness and the page number of the transcript.

See also CABR Gritzka 52. Hardy was employed with Fred Meyer from July of 1985 through October of 2004. CABR Hardy 45.

On June 22, 2004, the Department issued an order that allowed Hardy's claim under the claim number W970668. *See* CABR 18, 88. A copy of the June 22, 2004 order was not offered into evidence when the case was at the Board. However, at the Board, the parties stipulated to procedural facts in order to establish the Board's authority to hear the appeal. CABR 88-90. The jurisdictional fact stipulation indicates that the June 22, 2004 order directed that Hardy's claim be allowed and that that order observed that Fred Meyer had reported that it had paid time loss compensation to Hardy. CABR 88. There is no indication that the June 22, 2004 order mentioned, or addressed, a right shoulder condition.

Hardy saw Dr. Louis Enkema in connection with this claim on May 1, 2004. CABR Enkema 11. Dr. Enkema mentioned a bilateral shoulder strain in his May 1, 2004 chart note. CABR Enkema 39. He testified that, at the initial exam, he did not see much in the way of objective findings regarding either shoulder. CABR Enkema 14-15.

The Department subsequently closed Hardy's claim in August 2007, finding that, at that time, she had no permanent disability, and ending her time loss compensation as paid to March 2006. CABR 89. Hardy appealed that decision (CABR 98-90), and the Department affirmed

it on December 2007. CABR 89-90. Hardy appealed the December 2007 order to the Board. CABR 90.²

B. History Of The Board Appeal

Hardy and Fred Meyer presented the testimony of several medical experts, and each party presented the testimony of a vocational expert. CABR 4. Hardy presented evidence through her expert witnesses that was designed to show that (1) she had right and left shoulder conditions as a proximate result of her occupational exposure with Fred Meyer, (2) she had psychological conditions as a proximate result of her occupational exposure, and (3) she was totally and permanently disabled³ as a result of her right and left shoulder conditions, her psychological conditions, and her other, pre-existing, medical conditions. *See* CABR 4-18 (summarizing the evidence presented by the parties).⁴ In response, Fred Meyer

² Hardy also filed another claim, W971354, which the Department rejected. CABR 2. Hardy appealed the rejection of that claim to the Board, and the appeal was essentially consolidated with her appeal from the order that closed claim W970668. *See* CABR 2-18. However, Hardy did not raise any issue with regard to the rejection of claim W971354 before the superior court, and, if anything, suggested in briefing that she filed with the superior court that she did not challenge that aspect of the Board's decision. *See* CP 4 (noting that claim W971453 was "superfluous"). Furthermore, Hardy has not raised any issue with regard to the rejection of claim W971453 before this Court.

³ A worker is totally and permanently disabled if he or she is rendered unable to obtain or perform work on a gainful basis as a proximate result of an industrial injury. WPI 155.07 (6th ed.); *see also* RCW 51.08.160 (defining total and permanent disability); RCW 51.32.060 (providing for total and permanent disability awards).

⁴ Hardy also contended, in the alternative, that she was permanently and partially disabled as a result of her injury. *See* CABR 14-15 (summarizing testimony of doctors who opined, among other things, that Hardy was permanently and partially disabled as a result of her injury); *see also* RCW 51.08.150 (defining permanent and

presented expert evidence establishing that (1) she did not have a right shoulder condition related to her occupational exposure, (2) she did not have a psychological condition related to her occupational exposure, and (3) she did not have any disability that was proximately caused by her occupational exposure. *See* CABR 4-18.

The industrial appeals judge issued a proposed decision and order that determined – based upon a consideration of all of the evidence in the record – that Hardy did not have a right shoulder condition or a psychological condition that arose naturally and proximately out of her employment and that she was not entitled to any disability benefits beyond what had already been provided. *See* CABR 43-65.

Hardy challenged the industrial appeal judge’s decision to the full three-member Board by filing a petition for review as allowed by RCW 51.52.104. CABR 25-38. She contended that the preponderance of the evidence showed that her right shoulder and psychological conditions were related to her employment and contended that she was entitled to an award of permanent and total disability under her occupational disease claim. *See* CABR 25-38. She did not, in her petition for review, contend

partial disability); RCW 51.32.080 (providing for permanent and partial disability awards).

that it was res judicata that the right shoulder condition was covered under her claim. CABR 25-38.

The Board granted review, but it ultimately issued a decision and order that, like the proposed decision and order, affirmed the Department order under appeal. CABR 2-23. Hardy appealed to Pierce County Superior Court. CP 1-25.

C. History Of The Superior Court Appeal

At superior court, Hardy filed a motion for judgment as a matter of law under CR 50, contending, for the first time, that it was res judicata that her right shoulder condition was covered under her claim. CP 29-44. Hardy attached a declaration from her attorney to support that motion. CP 45-59. She offered several documents to the superior court that she had not offered to the Board as exhibits, including (1) a copy of the Department's June 22, 2004 order that allowed her claim (CP 50), (2) a copy of a "physician's initial report" dated May 1, 2004, (CP 49), and (3) a letter written by the Department on October 21, 2004, that indicates that a newly filed claim is a duplicate of the current claim because the current claim is for a bilateral shoulder condition. CP 54.

Fred Meyer responded, contending that Hardy's motion should be denied. CP 60-82. Fred Meyer noted that Hardy had failed to raise an issue with regard to the alleged res judicata effect of the Department's

decision to allow her claim while her case was pending at the Board. CP 63. Fred Meyer also asserted that the court could not properly consider the evidence that she had failed to present to the Board under RCW 51.52.115, and that the evidence that was in the record did not support Hardy's res judicata argument. CP 67-82.

The superior court denied Hardy's CR 50 motion. CP 127-29. The superior court expressly noted that Hardy's attempt at supplementing the record was not supported by RCW 51.52.110. CP 127-29. The superior court also expressly noted that Hardy's failure to raise an issue with regard to res judicata in her petition for review resulted in a waiver of that issue under RCW 51.52.104. CP 128-29.

The parties then submitted trial briefs that addressed the merits of the issues raised by the appeal. CP 116-26 (Hardy's trial brief); CP 86-115 (Fred Meyer's trial brief). The superior court ultimately concluded that the Board's decision (which affirmed the Department's decision to close Hardy's claim) was correct. CP 138-42.

Hardy appeals to this Court. CP 143-49.

IV. SUMMARY OF THE ARGUMENT

The Department issued an order that allowed Hardy's industrial insurance claim, but that order did not identify any particular medical conditions that would be covered under the claim. Hardy nonetheless

argues that res judicata precluded the Board and the superior court from finding that her right shoulder condition was not proximately caused by her work activities. However, as the trial court found when it denied her CR 50 motion, Hardy waived any argument with regard to res judicata by failing to raise res judicata as an issue when her case was at the Board. CP 128-29. *See* RCW 51.52.104.

Furthermore, even assuming she did not waive her argument with regard to res judicata, it is well settled that a Department order is not entitled to res judicata effect unless that order clearly advised the parties of the nature of the action that was taken through that order. Here, the Department's order unambiguously allowed her claim, but it took no action beyond that, and it did not imply, let alone determine, that she had a bilateral shoulder condition as a proximate result of her work activities. As the order did not "clearly advise" the parties that it had the effect of accepting Hardy's alleged bilateral shoulder condition under the claim, it cannot be given such res judicata effect.

Finally, under RCW 51.52.115, a court generally cannot consider any evidence that was not offered at the Board, subject only to a very narrow exception that allows a court to consider newly offered evidence if that evidence reveals that there was a procedural irregularity during the Board's proceedings that is not revealed by the Board's administrative

record. Here, the evidence that Hardy wishes to have considered does not suggest that the Board committed any sort of irregularity in its procedures. Therefore, the superior court properly declined to take notice of the evidence that Hardy attempted to offer to it.

V. STANDARD OF REVIEW

As the Supreme Court explained in *Ruse v. Department of Labor and Industries*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999), an appellate court's role is limited to reviewing the Board's administrative record to determine whether the trial court's findings are supported by substantial evidence and to determine whether the superior court's conclusions of law follow from its findings of fact. This Court must uphold the trial court's findings so long as they are supported by substantial evidence. *See Miller v. City of Tacoma*, 138 Wn.2d 318, 322-23, 979 P.2d 429 (1999).

Furthermore, like the trial court, this Court may not consider any evidence that was not presented to the Board, except under the very limited exception carved out in RCW 51.52.115, which allows a party to present testimony to a superior court regarding "alleged irregularities in procedure before the board, not shown in said [board's] record." *See Gilbertson v. Dep't of Labor & Indus.*, 22 Wn. App. 813, 816-17, 592 P.2d 665 (1979).

This Court reviews a superior court's legal conclusions de novo. *Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997). However, when an administrative agency is charged with application of a statute, the agency's interpretation of an ambiguous statute is accorded great weight. *City of Pasco v. Pub. Empl't Relations Comm'n*, 119 Wn.2d 504, 507-08, 833 P.2d 381 (1992). The Department's interpretations of the Industrial Insurance Act are entitled to great deference, and the courts "must accord substantial weight to the agenc[ies'] interpretation of the law". *Littlejohn Const. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994).

VI. ARGUMENT

A. **Hardy Waived The Right To Argue That It Is Res Judicata That Her Right Shoulder Condition Is Covered Under Her Claim, Because She Failed To Raise Res Judicata As An Issue In Her Petition For Review**

Hardy appears to claim that she raised the res judicata issue in her petition for review. *See* AB 19-20.⁵ She did not. The petition for review contains no argument that res judicata established that her right shoulder condition was covered under her occupational disease claim. CABR 25-39. It is well settled that in industrial insurance cases a party must raise an issue in a petition for review that was filed with the Board in

⁵ The Department will cite to the Appellant's Brief as AB.

order to preserve the right to raise that as an issue in a court appeal. RCW 51.52.104 (providing that a party who fails to raise an issue in a petition for review waives any argument with regard to that issue); *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978); *Upjohn v. Russell*, 33 Wn. App. 777, 778, 658 P.2d 27 (1983). Thus, as the superior court properly concluded, Hardy's failure to raise that argument in her petition for review prevents her from raising that argument here, and, for that reason, her res judicata argument should be rejected. CP 128-29. *See Hill*, 90 Wn.2d at 279.

Hardy also contends that it was not necessary for her to raise an issue with regard to res judicata in her petition for review because the case did not present an issue with regard to res judicata until the Board determined that her right shoulder condition was *not* related to her work activities. AB 19-20. However, the issue regarding acceptance of her shoulder conditions was squarely before the industrial appeals judge, and was, therefore, an issue before the Board.

A case presents an issue with regard to res judicata when a party is attempting, in a pending case, to relitigate issues that have already been fully resolved through a final and legally binding decision. *E.g.*, *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Hardy's essential contention in this case is that the Department's decision

to allow her claim rendered it res judicata that her right and left shoulder conditions were covered under that claim. To the extent that this argument has merit (it does not), it was the issuance of the Department's order allowing her claim, not the issuance of the Board decision that found that the right shoulder was *not* covered under that claim, that raised a potential issue with regard to res judicata. If Hardy wished to argue, as she attempts to argue here, that the Department's decision to allow her claim rendered it res judicata that her right shoulder condition was covered under that claim, then it was incumbent upon her to raise this as an issue in her petition for review. RCW 51.52.104; *Hill*, 90 Wn.2d at 279.

B. It Is Not Res Judicata That Hardy's Right Shoulder Condition Is Covered Under Her Claim, Because The Department's June 22, 2004 Order That Allowed Hardy's Claim Did Not Accept Responsibility For Any Particular Medical Condition

Hardy contends that the fact that her claim has been allowed through a final order renders it res judicata that she has a right shoulder condition related to that claim, even though the order that allowed her claim did not purport to accept responsibility for either of her shoulder conditions.⁶ See AB 14-15. Hardy relies on *Marley v. Department of*

⁶ A copy of the order that allowed Hardy's claim is not part of the Board's administrative record. However, as Fred Meyer noted, to the extent that the Board's record sheds any light on the contents of the Department order that allowed Hardy's claim, the Board's record indicates that that order simply found that Hardy either had suffered an industrial injury or that she had suffered an occupational disease and that her

Labor and Industries, 125 Wn.2d 533, 886 P.2d 189 (1994), in support of her argument. AB 14-15. However, her reliance on *Marley* is misplaced, as *Marley* does not support the idea that a decision of the Department can have res judicata effect with regard to issues that go beyond the scope of the issues decided in that Department order. *See id.* at 543 (determining that the worker's failure to appeal a Department order transforms the order into a final adjudication, but not, therein, suggesting that the order could be given preclusive effect that goes beyond the terms of the unappealed order). Rather, what *Marley* held is that an order of the Department that is not timely appealed by any party is entitled to the same res judicata effect as would be given to an unappealed superior court judgment. *Id.* at 537.

Hardy cites *Department of Labor and Industries v. Fields Corporation*, 112 Wn. App. 450, 455, 45 P.3d 1121 (2002), for the proposition that "an unappealed Department order is res judicata as to the issues encompassed within its terms." AB 15. The Department does not quarrel with this statement. However, the logical corollary to this rule is that an unappealed Department order is not res judicata as to issues that are not "encompassed within its terms". Here, the Department issued a final and unappealed order that determined that Hardy had either an

claim should be allowed as either one or the other. Fred Meyer Respondent's Br. at 7. *See also* CABR 88.

industrial injury or an occupational disease and that her claim for benefits should be allowed. *See* CABR 88. However, the issue of what medical conditions, in particular, were related to that injury or disease was not “encompassed” within the terms of the order. *See* CABR 88. Therefore, while the order that allowed Hardy’s claim is indeed a final and binding order, it did not have any preclusive effect as to whether the right shoulder was or was not covered under her claim. *See Fields Corp.*, 112 Wn. App. at 455.

Furthermore, the courts have rejected attempts by litigants to give final decisions of the Department *res judicata* effect with regard to issues that the orders themselves did not purport to resolve. *See Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502, 507, 215 P.3d 1043 (2009) (concluding that a decision of the Department that declined to provide disability benefits to a worker whose claim had been closed more than seven years before it was reopened did not preclude the Department from subsequently providing disability benefits to the worker based on a further aggravation of the worker’s condition); *Somsak v. Criton Tech./Heath Tecna, Inc.*, 113 Wn. App. 84, 92, 52 P.3d 43 (2002) (concluding that a final and unappealed order of the Department that paid the worker time loss compensation at a specific dollar amount, but which did not explain the basis of the time loss payment’s calculation, did not have preclusive effect

regarding the proper calculation of the worker's time loss compensation); *King v. Dep't of Labor & Indus.*, 12 Wn. App. 1, 4-5, 528 P.2d 271 (1974) (concluding that a final and unappealed superior court order that found that a worker did not have any psychiatric permanent partial disability as of a specific date did not render it res judicata that the worker had no psychiatric condition related to the worker's industrial injury).

A Department order must "clearly advise" the recipients of that order of the nature of the Department's decision before the decision will be given res judicata effect as to a given issue. *See Somsak*, 113 Wn. App. at 92-93 (citing *King*, 12 Wn. App. at 4).

In *King*, there was a final and unappealed superior court determination that concluded that the worker had no permanent partial disability of a psychiatric nature as a proximate result of the worker's injury. *King*, 12 Wn. App. at 2. *King* concluded that the superior court's judgment did not have the legal effect of establishing that the worker did not have a psychiatric condition related to the worker's injury, because the prior judgment merely established that the worker had no permanent partial disability of a psychiatric nature and it did not establish that the worker had no psychiatric condition of any kind related to his injury. *Id.* at 4-5. The Court of Appeals explained that "fundamental fairness requires" that a worker be "clearly advised" that a final decision has been

made with regard to whether a given condition is related to his or her injury or not before such an issue can be given res judicata effect. *Id.* at 4.

In *King*, there was a final and unappealed order that at least indirectly referenced the issue of whether a worker had a disabling condition of a given kind as a proximate result of an industrial injury, and the superior court's order, nonetheless, was not given res judicata effect on the issue of whether that alleged condition was related to the worker's injury. *See id.* at 2, 4-5. Here, the unappealed order that Hardy attempts to rely upon for res judicata effect did not even mention a right shoulder condition, let alone purport to make any determination with regard to her right shoulder. *See CABR 88*. If a final order that at least indirectly commented on whether a worker had a condition related to an injury does not have res judicata effect with regard to whether the worker has such a medical condition as a result of an injury, then an order that did not comment on an alleged medical condition in any way cannot be properly given preclusive effect with regard to that issue.

While *King* involved an unappealed superior court judgment rather than an unappealed decision of the Department, the logic of *King* has been extended to unappealed decisions of the Department as well. *See Somsak*, 113 Wn. App. at 92-93 (applying the holding in *King*, 12 Wn. App. at 4, to unappealed Department orders); *see also Marley*, 125 Wn.2d at 537

(holding that an unappealed decision of the Department is given the same res judicata effect as an unappealed superior court judgment).

In *Somsak*, a worker had received three orders that paid her various amounts of time loss compensation, and she did not appeal any of those orders. *Somsak*, 113 Wn. App. at 92-93. Under RCW 51.32.060 and RCW 51.32.090, a worker's time loss compensation is calculated based on the worker's wages at the time of injury, as well as the worker's marital status and the number of dependents. None of the orders that paid the worker time loss explained how those payment amounts were determined, and the payment orders did not comment on the worker's wages at the time of injury, marital status, or number of dependents. *Id.* at 92-93. The employer argued, nonetheless, that the finality of those time loss compensation payment orders precluded the worker from arguing that her wages should be calculated in a way that would result in a higher calculation of her time loss compensation. *Id.* at 92-93. The Court of Appeals disagreed, citing *King's* ruling that a decision must "clearly advise" the recipients of that order of the nature of the decision that was made, and it concluded that the finality of those time loss payment orders did not have any preclusive effect with regard to the proper calculation of the worker's wages at the time of her injury because none of those payment orders "clearly advised" the worker of any finding with regard to

her wages at the time of her injury. *See id.* at 92-93 (citing *King*, 12 Wn. App. at 4).

In this case, the order that allowed Hardy's claim did not identify any specific medical conditions that the Department had determined to be proximately related to her occupational disease.⁷ CABR 88. Indeed, the order did not, on its face, in any way suggest that the Department had decided to accept a right shoulder condition as being causally related to Hardy's claim, and it did not advise the parties – clearly or otherwise – that a decision regarding that issue had been made. CABR 88. Since the order that allowed Hardy's claim was not appealed, it is, indeed, res judicata that Hardy suffered either an injury or an occupational disease that is covered under the Industrial Insurance Act. *See, e.g., Marley*, 125 Wn.2d at 543. However, that is the only issue that was decided through that order, and that is the full res judicata effect that results from the fact that that order was not appealed. *See Marley*, 125 Wn.2d at 543; *Somsak*, 113 Wn. App. at 92-93 (citing *King*, 12 Wn. App. at 4).

⁷ In cases involving self-insured claimants, the Department will, on occasion, allow a claim as either an injury or an occupational disease. *See, e.g., Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 312, 189 P.3d 178 (2008). Allowing a claim on such a basis allows the Department to ensure that the worker begins receiving benefits promptly. If the Department delayed making a decision as to whether to allow a claim or not until it could determine the precise nature of the worker's claim and the full extent of the worker's industrially-related medical conditions, a worker's receipt of benefits might be needlessly delayed. The Department agrees with Fred Meyer that the fact that the order allowed Hardy's claim as either an injury or an occupational underscores the fact that the Department had not made a final decision as to the precise nature of Hardy's claim. *See Fred Meyer Respondent's Br.* at 17.

Furthermore, like any other litigant who is making an argument based on res judicata, a party who argues that an unappealed decision of the Department should be given res judicata effect must prove (1) the parties in the two successive proceedings are the same, (2) the prior proceeding ended in a final judgment, (3) a party in the second proceeding is attempting to litigate for the first time a matter that should have been raised in the earlier proceeding, and (4) application of the doctrine must not work an injustice. *See Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 240, 118 P.3d 392 (2005) (citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 562, 852 P.2d 295 (1993)). Here, while Hardy can satisfy the first two elements, she cannot meet the third or fourth element.

Hardy's argument that Fred Meyer is attempting, in this case, to "relitigate" an issue that had been previously decided through the order that allowed her claim lacks merit because that order did not decide anything other than the fact that Hardy had a valid claim under the Industrial Insurance Act. Since the Department's decision to allow Hardy's claim did not purport to decide that she had a right and left shoulder condition covered under that claim (CABR 88), Fred Meyer had no reason to appeal that order unless it believed that she had not suffered either an injury or an occupational disease of any kind. Since the Department did not decide that the right shoulder condition was covered

under her claim at the time that it allowed her claim, Fred Meyer's argument that the right shoulder condition is not covered under her claim is not an attempt by Fred Meyer to relitigate an issue that has previously been decided.

It would work an injustice if this Court were to give the Department order that allowed Hardy's claims a res judicata effect regarding an issue that the order itself did not purport to decide. Since the order that allowed Hardy's claim did not purport to accept responsibility for a right or left shoulder condition, Fred Meyer had no reason to believe that it should appeal the order that allowed Hardy's claim if it agreed that she had suffered an injury or an occupational disease but it wished to preserve the right to argue that her right shoulder condition was not related to that claim. Therefore, it would be unjust for this Court to rule that Fred Meyer is precluded from being able to argue that it is not responsible for her alleged right shoulder condition, and, for that reason, res judicata should not be applied in that fashion. *See Loveridge*, 125 Wn.2d at 759, 763.

Hardy appears to argue that the Department's order allowing her claim rendered it res judicata that her bilateral shoulder condition was accepted under that claim based on the fact that her attending physician mentioned bilateral shoulder complaints in chart notes that were generated

in conjunction with her industrial insurance claim. AB 16; Reply 2-9. However, Hardy cites to no legal authority supporting the idea that a decision of the Department can be given res judicata effect with regard to issues that the order itself did not address but that were addressed (in some fashion) by various documents that were generated before it made that decision. See AB 16. For this reason alone, her argument should be rejected. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Furthermore, her argument is particularly unreasonable here. First, the record does not reveal whether the Department had received Dr. Enkema's chart notes at the time that it issued the order that allowed Hardy's claim. Therefore, one cannot reasonably view its decision to allow her claim as an implicit determination that every diagnosis listed by Dr. Enkema in that document should be covered under that claim.

Moreover, Hardy's proposition that any condition listed in the physician's chart notes at the time of claim filing automatically become covered under the claim simply because an order allowing the claim has been issued is unsupportable. In addition to having failed to point to any legal authority supporting this apparent contention, Hardy's argument is also defective because the mere fact that a medical condition is listed in a medical provider's chart note does not necessarily establish that the

provider believed that that condition was proximately caused by the worker's injury. It is well-settled that only the conditions that are proximately caused by an industrial injury or an occupational disease are properly covered under a worker's claim. *See McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623-25, 17 P.3d 1195 (2001) (approving of a jury instruction stating that a worker may only recover benefits under the Act for conditions that were that were proximately caused by the worker's injury).

Second, the record in this case reveals that Hardy's application for benefits mentioned only a *left* shoulder condition. *See* CABR 18, 88. *See also* CABR Gritzka 52. To the extent that either Hardy or Fred Meyer could make any sort of assumption about what medical conditions the Department had decided to accept when it decided to allow her claim, the most sensible assumption for them to make would be that the Department agreed that the condition listed on Hardy's application for benefits should be covered under her claim, but that it had made no decision with regard to any other medical conditions that had not yet been formally contended.

Hardy attempts to bolster her argument by noting that the Board found that Fred Meyer was provided with "notice" that she was

contending that she had suffered a bilateral shoulder condition.⁸ AB 20; Reply 2-9. However, while it is true that the Board found that Fred Meyer had received such notice (CABR 19), Hardy conflates the issue of whether Fred Meyer received notice that the Department's order allowing her claim was a determination that she had a bilateral shoulder condition that was proximately caused by her occupational disease with the issue of whether Fred Meyer received notice that Hardy was contending that she had suffered such a condition as a result of her occupational disease claim. In order for Hardy to have a valid argument based on res judicata, she must show that Fred Meyer received notice that the Department had made a decision with regard to that issue through a formal order. *See Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 719, 213 P.3d 591 (2009) (holding that a decision of the Department is not res judicata unless that decision was communicated to every necessary party). There is no legal authority supporting the idea that if a self-insured employer has been given notice that a worker is (or might be) contending something that this somehow renders it res judicata that the worker's contentions are correct,

⁸ The Board's decision suggests that it found that Fred Meyer had been provided with notice that a bilateral shoulder condition was being contended in support of its conclusion that the issue of whether Hardy had a bilateral shoulder condition (or not) was properly before it on appeal. CABR 6. The Board's decision does not mention any issue with regard to res judicata, let alone suggest that any res judicata effect could be given to the fact that Fred Meyer received such notice. *See* CABR 6.

even if no decision with regard to that issue has been made by an entity with the authority to make such a decision.

In her reply brief, Hardy also argues, for the first time in this appeal,⁹ that WAC 296-20-01002 somehow supports her argument that the Department's decision to allow her claim on June 22, 2004, had the effect of establishing that her right shoulder condition was covered under her claim even though the order itself did not comment upon an alleged right shoulder condition. Reply 6. Hardy's precise reasoning is unclear, but the idea seems to be that WAC 296-20-01002 shows that the Department will not accept a medical condition unless (1) the Department determines that that medical condition was proximately caused by the worker's injury or disease and (2) a physician has diagnosed the condition using a code from the International Classification of Diseases, Clinically Modified. Reply 6. Here, as Dr. Enkema listed a bilateral shoulder diagnosis and used a code from the proper source, Hardy suggests that it follows that the Department must have determined that the right shoulder condition was proximately caused by her workplace activities when it allowed her claim. See Reply 6.

⁹ Appellate courts typically decline to consider novel legal arguments that are raised for the first time in a party's reply brief. *Cramer v. PEMCO Ins. Co.*, 67 Wn. App. 563, 567, 842 P.2d 479 (1992). This Court should not do so here.

If this is her argument, it fails. First, WAC 296-20-01002 defines what the terms “acceptance” and “accepted condition” mean for the purposes of the Medical Aid Rules, and it sets forth the criteria that the Department uses when making decisions regarding the acceptance of a medical condition. However, WAC 296-20-01002 does not purport to expand the res judicata effect that may be given to a decision of the Department that allows a worker’s claim but that does not make any determination regarding acceptance of any particular medical condition.

Second, Hardy offers no legal authority that suggests that a regulation like WAC 296-20-01002 could possibly be given such legal effect even if the regulation purported to change the law with regard to the res judicata effect that would be given to an allowance order. *See* Reply 6.

Third, the case law establishes that a Department order cannot be given res judicata effect with regard to a given issue unless the Department order clearly advised the recipients of it of the nature of the decision made. *See Somsak*, 113 Wn. App. at 92-93. Here, the Department’s June 22, 2004 order simply allowed Hardy’s claim, and it did not advise the parties, clearly or otherwise, that any decision had been made regarding whether Hardy had a right shoulder condition or whether such a condition would be covered under her claim. CABR 88. Neither WAC 296-20-01002 nor any other legal authority allows an order of the

Department to be given res judicata effect with regard to issues that the order itself did not purport to decide.

C. Hardy's Attempt At Supplementing The Record At Superior Court Is Not Supported By RCW 51.52.115 Because The Evidence That Hardy Attempts To Offer Does Not Demonstrate An "Irregularity In Procedure Of The Board"

Hardy contends that she had the right to offer new evidence to the superior court regarding the issue of whether it is res judicata that her right shoulder condition is covered under her claim. AB 19. However, Hardy's argument that this Court should consider her newly-offered evidence fails, because the plain language of RCW 51.52.115 shows that a superior court cannot consider new evidence of the type that she attempted to offer.

RCW 51.52.115 states, in pertinent part:

Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court.

Thus, under the plain language of RCW 51.52.110, a superior court cannot consider evidence that was not offered to the Board unless the evidence is offered to show that the Board committed a procedural

irregularity, and the fact that the Board followed improper procedures is not demonstrated by the Board's record. Where the meaning of a statute is plain on its face, a court need not interpret the statute, and merely needs to apply it to the facts in a given case. *Lane v. Dep't of Labor & Indus.*, 21 Wn.2d 420, 423-24, 151 P.2d 440 (1944).

The case law confirms that the exception in RCW 51.52.115 allows a party to present evidence only to show irregularities in the procedures used by the Board when it decided a case. For example, *Gilbertson* held that a superior court properly refused to consider evidence that had not been offered to the Board and that would have related to the issue of whether the worker filed a timely application for benefits, because such evidence would not have established that the Board committed an irregularity of procedure. *Gilbertson*, 22 Wn. App. at 816-17.

Here, none of the materials that Hardy offered to the superior court provide information that sheds any light on whether the procedures *used by the Board* when it adjudicated her appeal were proper. Rather, the materials, at most, shed light on the procedures followed *by the Department* while it was managing her claim. RCW 51.52.115 allows litigants to offer evidence to a superior court for the first time only when the evidence relates to irregularities in the *Board* procedures. The statute

does not authorize a party to offer evidence regarding any other issue, including, but not limited to, the Department's management of the claim.

The reason why RCW 51.52.115 allows a party to present evidence to a superior court regarding alleged procedural irregularities of the Board, while not allowing the party to present the superior court with other types of new evidence (including, among other things, evidence regarding the Department's management of the claim), seems self-evident: if a Board employee committed a procedural irregularity, and he or she did so "off the record", then a litigant must be allowed to present evidence regarding the Board's use of improper procedures to a superior court, or the Board's use of improper procedure would forever be shielded from meaningful judicial review.

Conversely, if a party believes that the Department followed improper procedures while adjudicating the claim, then it is incumbent upon the party to present evidence regarding that issue to the Board, just as it is incumbent upon a party to present the Board with any other type of evidence that the party believes to be relevant and supportive of its position on appeal. *See* RCW 51.52.050(2)(a) (providing that a party who appeals a decision of the Department has the burden of proceeding to present a prima facie case supporting the party's request for relief). A litigant who could have, but did not, offer evidence to the Board regarding

the Department's management of a worker's claim can hardly be heard to complain about the fact that such evidence is not contained in the Board's record. *See, e.g., Gilbertson*, 22 Wn. App. at 816-17 (noting that the time to present evidence as to whether or not a timely application was filed had passed, since such evidence was not offered to the Board).

As none of the materials offered by Hardy can be construed as revealing irregularities in the procedures used by the Board, consideration of those materials is barred by the plain language of RCW 51.52.115. Hardy could have offered any and all of those documents as exhibits to the Board, and, if she had done so, one or more of them might have been admitted.¹⁰ However, Hardy did not offer any of those materials to the Board. Her failure to offer them to the Board precludes them from being considered by this Court. *See* RCW 51.52.115.

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¹⁰ Fred Meyer asserts that the various materials offered by Hardy are "inadmissible hearsay" in addition to being inadmissible under RCW 51.52.115. Respondent's Br. at 22. The Department agrees with Fred Meyer that all of the materials offered by Hardy are barred by RCW 51.52.115, but it is not clear to the Department that all of the documents offered by Hardy are "inadmissible hearsay", since it does not appear that Hardy necessarily offered those materials to prove the truth of the matter asserted in those documents. In any event, as RCW 51.52.115 plainly bans consideration of the materials, whether they are also inadmissible on the grounds that they are hearsay is irrelevant.

D. Even Assuming For The Sake Of Argument That This Court Can Properly Consider The Evidence That Hardy Offered For The First Time To The Superior Court, Her Argument That It Is Res Judicata That Both Her Right And Left Shoulder Conditions Are Covered Under Her Claim Would Still Fail

As the Department explained above, this Court cannot properly consider the evidence that Hardy offered for the first time to the superior court because none of the evidence that she attempted to offer at that time fits within the narrow exception contained within RCW 51.52.115. However, even assuming for the sake of argument that this Court considers that evidence as properly being before it in this case (it should not do so), that evidence would not support Hardy's argument that it is res judicata that both her right and left shoulder conditions are covered under her occupational disease claim.

As noted previously, the three key documents that Hardy offered to the superior court include (1) a copy of the Department's June 22, 2004 order that allowed her claim (CP 50); (2) a copy of a "physician's initial report" dated May 1, 2004, (CP 49); and (3) a letter written by the Department on October 21, 2004, in which the Department indicates that a newly filed claim is a duplicate of the current claim because the current claim is for a bilateral shoulder condition. CP 54.

With regard to the Department's June 22, 2004 order, a review of that document simply confirms what the evidence in the Board's record

already indicates: namely, that that order allowed Hardy's claim as either an injury or an occupational disease but it did not comment in any way on whether Hardy had a right shoulder condition that was covered under the claim. *See* CP 50. Therefore, for the reasons noted above, the Department's allowance order did not have the res judicata effect of establishing that Hardy's right shoulder condition was covered under her claim.

The "physician's initial report" of May 1, 2004, also fails to establish that the Department's allowance order had the res judicata effect of establishing that the right shoulder condition was covered under the claim. A review of the document reveals three things that are noteworthy. First, much of the document is either illegible or difficult to read. CP 49. This underscores the inappropriateness of relying on that document to establish that any issue is foreclosed by res judicata.

Second, at the right hand bottom corner of the document it states, in all capital letters, "DO NOT SEND THIS FORM TO LABOR & INDUSTRIES". CP 49.¹¹ That the document contains this statement underscores the fact that it is unclear in this case if this particular

¹¹ A self-insured employer's worker files an accident report with the self-insured employer. WAC 296-15-405. In such a case, the worker's physician files a physician's initial report with the employer. WAC 296-15-405. The employer is then required to notify the Department of the injury. *Id.*

document had been provided *to the Department* at the time that it issued the order that allowed Hardy's claim. The Department does not mean to suggest that it never received this document based on the fact that the document itself states that it should not be delivered to the Department. Presumably, the chart note was provided to Fred Meyer (at some point) and Fred Meyer, presumably, provided the document to the Department (at some time after that). *See* WAC 296-15-405. But it is impossible to determine, on the current record, if the Department was aware of this particular document at the time that it allowed Hardy's claim.

Third, the document has a portion that asks the doctor to indicate whether the medical diagnoses listed upon it were proximately caused by the injury or work exposure on a more probable than not basis, and it appears that the doctor did not check either a "yes" or a "no" in response to that question. CP 49. Since the Department cannot properly accept a condition under a claim unless the medical evidence establishes that it is more probable than not that that condition was proximately caused by the injury or exposure, the fact that the document does not indicate whether the bilateral shoulder strain was related to the worker's injury or exposure highlights the inappropriateness of assuming that the Department determined that Hardy had a bilateral shoulder condition that was related

to her occupational exposure when it issued the order that allowed her claim. *See McDonald*, 104 Wn. App. at 623-25.

Finally, with regard to the October 2004 letter that mentioned a bilateral shoulder condition, this letter did not provide the appeal notice required by RCW 51.52.050. CP 54. Namely, it did not inform the recipients of that letter that they had the right to file a request for reconsideration or an appeal from that decision in the event that they disagreed with it. CP 54. An informal letter that contains an administrative decision, but that does not provide the notice required by RCW 51.52.050, does not “rise to the dignity of an appealable order.” *Lee v. Jacobs*, 81 Wn. 2d 937, 941, 506 P.2d 308 (1973).

The issue before the *Lee* Court was whether the worker’s failure to appeal an informal letter of the Department to the Board prevented the worker from challenging the letter through a superior court proceeding. The *Lee* Court concluded that the worker had no duty to appeal the Department’s letter to the Board before challenging it in superior court because the letter did not provide the notice required by the statute and, therefore, it was not an appealable order.

While the *Lee* Court did not address the precise issue of whether a party’s failure to appeal an informal letter of the Department would result in the statements made in the letter becoming final and binding, it

logically follows, from what the *Lee* Court did hold, that such letters are not entitled to res judicata effect. *Lee*, 81 Wn.2d 940-41. This is because *Marley*'s holding that final and unappealed Department orders are entitled to res judicata effect is premised on its understanding that a party who disagrees with a decision of the Department has the burden of appealing that order to the Board if he or she wishes to have it overturned. *Marley*, 125 Wn.2d at 537-38; *see also* RCW 51.52.060 (stating that a party who wishes to challenge an order of the Department must file an appeal from the decision with the Board within sixty days). If, as *Lee* held, an informal letter that failed to provide the notice required by RCW 51.52.050 is not an "appealable order", and if, as *Lee* also stated, a party has no burden to appeal such a letter even if the party disagrees with it, then it would be nonsensical to conclude that an informal Department letter is, nonetheless, entitled to res judicata if it is not appealed. *See Lee*, 81 Wn.2d 940-41.

Furthermore, as *Lee* notes, it would be "nonsense" to treat every informal letter that has been issued by the Department as a formal determination of a worker's rights that must be appealed to the Board if a party wishes to have the letter overturned. *Id.* at 941. Indulging in such a fiction would place a needless burden on both workers and employers to file appeals from every piece of paper that arrives on an attorney's desk and which references a worker's benefits in some fashion. *Id.* It would

serve no useful function for the Board and the courts to be flooded with such appeals, but injured workers, employers, and their respective advocates would have little choice but to file appeals from such letters in order to ensure that those informal decisions were not later given preclusive effect by a court.

Hardy appears to suggest that even if the Department's October 2004 letter is not, itself, entitled to res judicata effect, the letter should be considered when deciding what res judicata effect should be given to the Department's June 22, 2004 order allowing her claim. *See* AB 17; Reply 7-8. Such an argument is untenable for at least two reasons.

First, the June 22, 2004 order does not, in any way, suggest that the Department had made any decision of any kind as to whether to accept a right shoulder condition as being covered under that claim. CP 50. Thus, it cannot be sensibly argued that the October 2004 letter simply clarified the scope of the decision made in the June 22, 2004 order. *See* CP 50, 54. Rather, the October 2004 letter made statements regarding issues that the June 22, 2004 order itself had not even hinted at in any way. *Compare* CP 50 *with* CP 54. If one purports to use the October 2004 letter to "construe" the effect of the June 22, 2004 order, what one is doing, in reality, is retroactively changing the scope of the June 22, 2004 order by

grafting a determination upon it that the order itself did not make. *See* CP 50, 54.

Second, the October 2004 letter was written almost four months after the Department had issued the June 22, 2004 order. CP 54. Under RCW 51.52.050 and RCW 51.52.060, aggrieved parties only have sixty days to file requests for reconsideration or appeals from a formal decision of the Department. Thus, by the time the Department wrote the October 2004 letter, the deadline to appeal the June 22, 2004 order had long since elapsed. CP 50, 54. It would be manifestly unreasonable to retroactively change the scope of a Department order after the deadline to appeal that order has elapsed, yet that is precisely what one would be doing if the October 2004 letter is used to construe the June 22, 2004 order as constituting a decision to allow a bilateral shoulder condition. CP 50, 54. Since the June 22, 2004 order itself did not purport to address the issue of whether the right shoulder condition was related to Hardy's occupational exposure, using the October 2004 letter to give the order that effect, after the deadline to appeal that order had elapsed, would be unjust, as it would deprive Fred Meyer of a meaningful opportunity to be heard regarding the issue of whether the right shoulder condition should be covered under that claim. CP 50, 54.

Finally, Hardy contends in her reply brief that her case is analogous to the case in the Board case, *In Re Carl Allison*, No. 05 20497, 2007 WL 4565277 (Wash. Bd. Indus. Ins. Appeals September 4, 2007). This argument fails, both because *Allison* is incorrect and its legal analysis should not be adopted by this Court, and because Hardy's case is readily distinguishable from *Allison*. *Allison*, 2007 WL 4565277 at *4.

In *Allison*, a case that the Board did not designate as one of its significant decisions¹², the Department issued a letter on November 21, 2003, that stated that the Department had decided to accept the worker's claim for hepatitis C as an industrial injury and that if any party disagreed with that decision they should file an appeal from an order allowing the worker's claim (that, presumably, would be issued in the near future) within 60 days. *Id.* On November 24, 2003, the Department issued an order that allowed the claim but that did not specify any particular medical conditions. *Id.*

The Board noted that it typically would not give any res judicata effect to an informal letter of the Department, but that it would do so here based on the highly unusual combination of facts present in that case. *Id.* The Board noted that the November 21, 2003 letter was essentially a cover

¹² Under RCW 51.52.160, the Board is required to designate, and publish, its "significant decisions".

letter that clarified the meaning of the November 24, 2003 letter. *Id.* The Board emphasized that the November 21, 2003 letter gave the parties some notice of their appeals rights (albeit imperfect notice), and, in fact, the letter expressly directed the parties to appeal the order allowing the worker's claim if any of them disagreed with the decision to allow the claim for hepatitis C. *Allison*, 2007 WL 4565277 at *4-*5.

This Court should not accept the *Allison* decision as a correct statement of the law, as decisions of the Board are not binding on appellate courts, and as *Allison* is contrary to the rule of law set by *Somsak* and *Lee*. See *Somsak*, 113 Wn. App. at 92-93; *Lee*, 81 Wn.2d at 940-41; *Janssen v. Dep't of Labor & Indus.*, 125 Wn. App. 461, 466, 105 P.3d 431 (2005) (decisions of the Board are not binding on the courts).

First, *Lee* shows that an informal letter of the Department is not an appealable order and it is not entitled to the legal status of such an order. *Lee*, 81 Wn.2d at 940-41. While the letter in the *Allison* case was an unusual one, in that it expressly referenced a formal order and expressly directed the parties to appeal the formal order within sixty days if they disagreed with it, it was, nonetheless, an informal letter and not an appealable order, and, as such, it was not entitled to any res judicata effect. See *Lee*, 81 Wn.2d at 940-41; *Allison*, 2007 WL 4565277 at *4.

Second, *Somsak* held that an order of the Department cannot be given res judicata effect unless it clearly advised the parties that a decision had been made regarding a given issue. *Somsak*, 113 Wn. App. at 92-93. The order in the *Allison* case did not advise the parties that a decision had been made regarding hepatitis C. *Allison*, 2007 WL 4565277 at *4. The order in the *Allison* case could only be so construed by grafting the September 21, 2003 letter on to the September 24, 2003 order, something unauthorized by any legal authority. *Id.* Furthermore, a person who received the September 24, 2003 order could reasonably take note of the fact that that order did not mention hepatitis C, and could reasonably assume that the further order promised by the September 21, 2003 letter would be an order which expressly mentioned hepatitis C. *Id.* at *4. Thus, even under the unusual circumstances present in *Allison*, it was improper to give an informal letter of the Department res judicata effect.

In any event, Hardy's reliance on *Allison* is misplaced, as the cases are readily distinguishable. Reply 6-7; *Allison*, 2007 WL 4565277 at *4. In Hardy's case, as noted, the Department's letter mentioning a bilateral shoulder condition was mailed four months after the order that allowed her claim had been issued. CP 50, 54. Furthermore, the letter did not give the parties any notice of their appeal rights. CP 54. Moreover, if the letter had advised the parties to appeal the order allowing Hardy's claim if they

disagreed with the decision to accept a bilateral shoulder condition, it would have been advising them to complete a useless task, as the deadline to appeal the order had already elapsed by the time the letter was issued. RCW 51.52.060; CP 50, 54. Since none of the unusual circumstances that the Board relied upon in *Allison* are present in her case, *Allison* lends no aid to Hardy. *See Allison*, 2007 WL 4565277 at *4.

E. There Is No Basis For A Remand To The Department

Hardy has failed to support her argument that it is res judicata that her right shoulder condition is covered under claim. However, even assuming for the sake of argument that this Court concludes that res judicata applies to that issue (this Court should not do so), Hardy's request (at AB 19) to have her claim remanded to the Department should, nonetheless, be denied.

Hardy fails to cite to any legal authority that supports the notion that if the Board or a superior court makes an erroneous ruling as to whether res judicata applies in a given case, then the proper remedy is to remand the case to the Department for further action. *See* AB 19-20. For this reason alone, her request should be denied. *Bosley*, 118 Wn.2d at 809.

Furthermore, as Fred Meyer notes, such an argument does not make sense. Fred Meyer Respondent's Br. 29. The parties were allowed to, and did, present considerable evidence to the Board on the issue of

whether she has right or left shoulder conditions (among others) that were proximately caused by her occupational disease. *See* CABR 4-18. The parties also presented considerable evidence regarding the issue of whether any or all of those alleged conditions resulted in any disability. CABR 4-18. Therefore, even assuming for the sake of argument that res judicata precluded the trial court from finding that the right shoulder condition was not proximately caused by the injury, the remedy Hardy seeks – a remand of her claim to the Department for further action – would serve no useful purpose, and it should, therefore, be rejected.

Rather, the appropriate remedy would be to remand the case to the superior court for a further decision regarding Hardy's eligibility for benefits consistent with this Court's res judicata determination. Such a remedy is consistent with the well-settled rule that an appellate court, in a worker's compensation case, applies the ordinary civil standard of review, and with the well-settled rule that superior courts conduct *de novo* reviews of decisions of the Department. RCW 51.52.115 (providing that superior courts conduct *de novo* reviews); RCW 51.52.140 (providing that the ordinary civil rules apply to worker's compensation cases except where otherwise provided in the Industrial Insurance Act); *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). *Cf.* *Salesky v. Dep't of Labor & Indus.*, 42 Wn.2d 483, 484-85, 255 P.2d 896

(1953) (holding that the trial court could not remand a case to the Department to incorporate the Department file into the Board record); *Ivey v. Dep't of Labor & Indus.*, 4 Wn.2d 162, 163-64, 102 P.2d 683 (1940) (holding that a trial court could not remand a case to the Department with directions that it gather new medical evidence even if the trial court concluded that the evidence in the record before it was so conflicting that it was impossible to determine if the Department's decision was correct or incorrect).

F. Hardy's Arguments Are Not Supported By The Doctrine Of Liberal Construction

Hardy attempts to bolster her various arguments in this case by emphasizing that the Industrial Insurance Act is subject to liberal construction. AB 10-14. While it is true that the provisions of the Industrial Insurance Act are "liberally construed," this rule of construction does not authorize an interpretation of a statute that produces strained or absurd results that defeat the plain meaning and intent of the legislature. See RCW 51.12.010 (providing that the Industrial Insurance Act is subject to liberal construction); see *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992) (explaining that liberal construction does not authorize a court to construe a statute in a way resulting in a strained or absurd result); *Senate Republican Campaign*

Comm. v. Pub. Disclosure Comm'n, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997) (same).

Here, no provision of the Industrial Insurance Act supports Hardy's argument that the Department's decision to allow her claim rendered it res judicata that her right shoulder condition was covered under that claim. Nor does any provision of the Industrial Insurance Act support the notion that a worker can offer new evidence to a superior court that falls outside the narrow exception recognized by RCW 51.52.115 for evidence regarding irregularities in the procedures of the Board that are not revealed by the Board's record. Because the doctrine of liberal construction does not authorize an unrealistic interpretation of a statute that would produce strained or unrealistic results, and since there is no statute that can be reasonably construed as being supportive of any of Hardy's arguments in this case, the liberal construction doctrine is of no aid to her. See *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

The doctrine of liberal construction is also inapplicable because the rule of law that Hardy seeks would not work to the advantage of injured workers as a whole. A rule of law that allows a decision of the Department to be treated as a final and binding determination with regard to issues that the Department order itself did not address would not

necessarily be favorable to injured workers as a class. All of the parties to a decision of the Department, including the injured worker, have the right to be clearly advised that a decision has been made with regard to a specific issue or else res judicata cannot be properly applied to that issue. *King*, 12 Wn. App. at 4. Treating an unappealed order of the Department as a final resolution of an issue that the order itself did not comment upon could just as easily work to the disadvantage of a worker as it could to the disadvantage of an employer, and, therefore, the liberal construction doctrine does not support adopting Hardy's proposed rule of law.

VII. CONCLUSION

For the reasons discussed above, the Department respectfully requests that this Court affirm the decision of the superior court, which affirmed the decisions of the Board and of the Department.

RESPECTFULLY SUBMITTED this 1 day of June, 2012.

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NO. 42703-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ERIKA HARDY,

Appellant,

v.

FRED MEYERS STORES, INC. AND
DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondents.

**DECLARATION OF
SERVICE**

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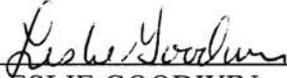
The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Respondent's Brief of the Department of Labor and Industries and this Declaration of Service to all parties on record by depositing postage prepaid envelopes in the U.S. mail addressed as follows and by facsimile:

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DATED this 4th day of June, 2012.



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