NO. 45653-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DARLENE FLETCHER,

Appellant,

v.

GRAYS HARBOR COMMUNITY HOSPITAL

Respondent.

REPLY BRIEF OF APPELLANT

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The Respondent Hospital argues that the court need only concern itself with one jury finding and ignore the other. Both findings are before the court and must be reviewed. When both are reviewed, it is very clear there is no "substantial evidence" to support the jury's verdict that:

> On December 8, 2011, Darlene H. Fletcher had no objective findings proximately caused by the industrial injury.

In fact, there is no evidence at all to support this finding.

RCW 51.52.104 Does Not Deprive This Court Of Jurisdiction

The Hospital argues that Ms. Fletcher's Petition for Review to the Board of Industrial Insurance Appeals (hereinafter Board) was not sufficient to preserve the issue of *res judicata* for this court's resolution. RCW 51.52.104 does not require that result. Ms. Fletcher petitioned for review of both Findings of Fact 4 and 5 and the parallel Conclusion of Law No. 2. (CABR[1] 4)

The argument seems to be that Ms. Fletcher had to use the words *res judicata* or collateral estoppel before the Board or be prohibited from using them before this court.

[1] Certified Appeal Board Record

First, *res judicata* or issue preclusion is an equitable doctrine. Stevens County v. Futurewise, 146 Wn.App 493, 192 P.3d 1 (2008). An administrative agency has only those powers expressly granted or necessarily implied from its statutory grant of authority. Kauzlarich v. Washington State Department of Social and Health Services, 132 Wn.App 868, 134 P.3d 1183 (2006); In Re: Pers. Restraint of Smith, 130 Wn.App 897, 125 P.3d 233 (2005).

The Board has confirmed it does not have equitable power. In Re: Seth E. Jackson, BIIA Dec., Docket No. 61,088 (1982), this is a significant Decision published pursuant to RCW 51.52.160. There is one caveat which the Board expressed as follows:

> Title 51 RCW confers no equitable power to this Board. This Board may by stare decisis apply only those equitable principles previously determined by appellate courts, which inherently have such equitable powers, to fact situations compatible with cases such as Ames v. Department of Labor and Industries, 176 Wn. 609 (1934) and Rodriguez v. Department of Labor and Industries, 85 Wn.2d 949 (1975). Seth E. Jackson, supra.

In essence, this means that if an appellate court has ruled on exactly the same factual situation, the rule of that case may be applied by the Board. For example, the Board utilized *res judicata* in at least four decisions where the facts were identical to the issue

decided in Cockle v. Department of Labor and Industries, 142 Wn.2d 801, 16 P.3d 583 (2001). This was discussed in Lynn v. Department of Labor and Industries, 130 Wn.App 829, 835, 125 P.3d 202 (2005).

These were all cases where the Board gave *res judicata* effect to prior unappealed wage orders. The real question involved was a legal one. Did a change in the law after an Order became final constitute a "change of circumstances" within the meaning of RCW 51.28.040? That was a question of interpretation of a provision of Title 51 RCW, a matter clearly within the Board's jurisdiction. RCW 51.52.050.

However, there is no appellate case with facts identical to those presented by this case which would have allowed the Board to exercise equitable power. We do hope this case, if reported, will provide the Board, in the future, with the needed stare decisis.

In one non-significant decision, In Re: Mickey J. Schull, Docket No. 90 4390 (January 30, 1992), the Board approached the issue presented here.[2] This was a case where a claim was closed, and the injured worker applied to reopen the claim. The Department then entered an Order that the increase in medical

[2] Another non-significant case, In Re: James G. Loushin, Docket No. 91 6400 (April 30, 1993), uses similar reasoning.

findings of the claimant's cervical-dorsal spine which occurred between April 16, 1985 and May 15, 1986 were not causally related to her industrial injury of October 30, 1978. That Order became final and binding.

The claimant then applied again to reopen her claim, and attempted to establish that objective evidence of worsening of her industrial condition was shown by the continued degeneration of her cervical spine condition. Even though the Department had previously found that the increased medical and radiologic findings occurring between 1985 and 1986 were not related, the Board held that prior decision was not *res judicata* as to whether her increased degenerative condition between 1986 and 1990 was causally related to the industrial injury. The Board relied on Donati v. Department of Labor and Industries, 35 Wn.2d 151 (1949) for the proposition that a Department order from which no appeal is taken is *res judicata* as to any issue before the Department at the time it was entered, but is not *res judicata* as to any aggravation occurring subsequent to that date.

In short, the Board could not and would not have applied *res judicata* to the facts of this case. Ms. Fletcher was under no obligation to invoke this issue where it could not be decided.

Courts should refrain from requiring the performance of useless or vain acts. Neilson v. Vashon Island School District, 402, 87 Wn.2d 955, 960, 558 P.2d 167 (1976); University Properties Inc. v. Moss, 63 Wn.2d 619, 388 P.2d 543 (1964); Jenson v. Richens, 74 Wn.2d 41, 46, 442 P.2d 636 (1968).

It makes no sense to deny Ms. Fletcher the exercise of equitable powers this court clearly has because she did not request the Board to exercise powers it did not have.

Ms. Fletcher pointed out, to the Board and this court, that the testimony of Drs. Goler and Bauer should be rejected because they both believed she did not have an industrial injury. The fact of the injury was established. (CABR 6 and 7)

Whether *res judicata*, collateral estoppel, issue preclusion or substantial evidence applies is not critical. What is critical is the total lack of evidence to support the jury's finding that on December 8, 2011 Ms. Fletcher had no objective findings proximately caused by the industrial injury. That finding, in turn, compelled the jury's

finding that Ms. Fletcher's condition had not objectively worsened between August 28, 2008 and December 8, 2011.

The Trial Court Erred by Not Giving the Hamilton Instruction

If there had been evidence, which would support the jury's verdict, Ms. Fletcher's proposed instructions about attending physicians should have been given.

The Hospital argues Ms. Fletcher was not harmed by the trial court's failure to give proposed Instruction 14 and that it did not prevent Ms. Fletcher from arguing her case. The Supreme Court anticipated this argument when it described the instruction and said:

> It reflects binding precedent in this state and correctly states the law. Since this is a rule of law, it is appropriate that the jury be informed of this by the instructions of the court. To refuse to do so would convert the rule of law into no more than the opinion of the claimant's attorney. Hamilton v. Department of Labor and Industries, 111 Wn.2d 569, 572, 761 P.2d 618 (1988).

Failure to give the instruction converted the rule of law from law to mere argument. The jury should be given the law by the court, not by assertions of counsel.

Conclusion

All issues were before the trial court and are before this court. We urge you to reverse the trial court ruling and award fees and costs before this court and the trial court. Fred Meyer v. Shearer, 102 Wn.App 336, 8 P.3d 310 (2000).

DATED this 15th day of May, 2014.

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DECLARATION

I, Heather Wulf, hereby declare, under the penalties of perjury of the State of Washington, that a true and correct copy of Response Brief of Appellant was mailed on this 15th day of May, 2014, to each of the following.

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