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Court of Appeals  
Division II  
State of Washington  
1/3/2019 1:22 PM

COURT OF APPEALS II No.: 52006-1-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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TAMRA ARCHER LEIGH,

Petitioner/Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondents

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ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT

Case No. 17-2-13374-0

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AMENDED APPELLANT'S BRIEF

Tamra Archer Leigh  
Claimant  
20714 64<sup>th</sup> Avenue Ct. E.  
Spanaway, WA 98387-7564  
(253) 271-0169

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## I. INTRODUCTION

In a line of well-established cases dating from *Nafus v. Department of Labor & Industries* 142 Wash. 48, 251 P. 877 (1927) through the Supreme Court of the State of Washington decision in *Arriaga v. Dep 't of Labor & Indus.* \_ Wn. App. \_335 P.3d 977,978 (2014), the Courts have held that the Department of Labor & Industries <sup>1</sup> “communicates” an order to a party when the order “is received by the respective party.” In this instance, Ms. Leigh’s representative Nate D. Mannakee <sup>2</sup> at 1401 South Union Avenue, Tacoma, WA 98405, did not receive the order due to the breakdown in Department protocols after notification of address change. CP 28 The order was mailed to Ms. Leigh’s previous attorney Michael S. Lind CP 38 at 3124 E Valleyview Terrace, Tacoma, WA 98404. <sup>3</sup> In *Arriaga* the court held that actual delivery to the correct address constitutes “communication” under *RCW 51.52.060*. CP 24-27 <sup>4</sup>

Once the Department has issued an order, its authority to take further action with respect to such order is limited by *RCW 51.52.050* and *RCW 51.52.060*. Absent the filing of a valid protest or request for reconsideration, the Department cannot simply issue a further order which only adheres or affirms to the provisions of the original order. In such case, the adherence order is a nullity. *In re Thomas Houlihan*, BIIA Dec., 67,414 (1985). ...*In re Richard Wagner*, BIIA Dec., 88 0962 (1988)

For that reason, the Board of Industrial Insurance Appeals <sup>5</sup> cannot acquire jurisdiction over an appeal as no appeal may be taken from an invalid order. ... *In re Valentin Lima*, BIIA

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<sup>1</sup> The Department of Labor & Industries will be referenced as “Department”

<sup>2</sup> **Nate D. Mannakee – 5268**; Resignation in Lieu of Discipline, Effective Date: 8/10/2015, The Statement of Alleged Misconduct reflects the following violations of the Rules of Professional Conduct: 1.5 (Fees), 1.8 (Conflict of Interest: Current Clients: Specific Rules), 1.15A (Safeguarding Property), 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation).

<sup>3</sup> *Kaiser Aluminum & Chern. Corp. v. Dep 't of Labor & Indus.* 57 Wn. App. 886,790 P.2d 1254; *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 952-53, 540 P.2d 1359 (1975).

<sup>4</sup> The designation of court clerk administration record is cited as “CP” followed by the page number(s).

<sup>5</sup> The Board of Industrial Insurance Appeals will be referenced as “Board”

Dec., 96 2958 (1998). The Court of Appeals has held that if an affected party does not receive a Department order, the order does not become final.<sup>6</sup>

Before a party can be precluded by principles of res judicata from litigating a specific issue at a later time, the party must have had clear and unequivocal notice of issues adjudicated by the prior order, so that the party has had an opportunity to challenge the specific finding. *King v. Department of Labor & Indus.*, 12 Wn App. 1 (1974). Indeed, we have held on several occasions that an order of the Department will not be held to have a res judicata effect unless it specifically apprises the parties of the determinations being made. See *In re Lyssa Smith*, BIIA Dec., 86 1152 (1988); *In re Gary Johnson*, BIIA Dec., 86 3681 (1987).

The Assistant Attorney General<sup>7</sup> arguments render the plain language of *RCW 51.52.050*; *RCW 51.52.060* and *Court Rule 60* meaningless. This interpretation violates well-established canons of statutory construction and is in conflict with case law. Under this interpretation, the argument does not give effect to *RCW 51.52.050*; *RCW 51.52.060* and *Court Rule 60* language. When the language of a statute is plain, there is no room for judicial construction because legislative intent is determined solely from the language used. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995). *CP 179-196*; *5/18/18 RP 10-12*<sup>8</sup>

## II. ASSIGNMENT OF ERRORS

### Department: Assignment of Error 1

On March 31, 2011, Nate D. Mannakee, faxed a retainer letter with “general protest” language to the Department for Ms. Leigh’s claim AE62982. This notification specifically states, “*If any orders have been entered in the “past 60-days” that adversely affect this claimant, including any vocational determinations, please construe this letter as a protest of the same.*”

The date and time stamps of the Department acknowledge receipt on March 31, 2011. *CP 28*

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<sup>6</sup> *Ochoa v. Dep't of Labor & Indus.*, 100 Wn. App. 878, 881-82, 999 P.2d 633 (2000), rev'd on other grounds, 143 Wn.2d 422, 20 P.3d 939 (2001).

<sup>7</sup> Assistant Attorney General will be referenced as “AG”

<sup>8</sup> Transcript of hearing held on May 18, 2018, is cited as “*5/18/18 RP*” followed by the page number.

There is no statutory directive within the Act that permits the Department or Claimant to apply a previously communicated “general protest” to any future orders, thus the April 01, 2011 Claim Suspension Order was not protested by the March 31, 2011 “general protest”. If this action is permissible, Claimants would be allowed to predate and apply a physician and/or attorney “communication” to any forthcoming Department order as a protest without further “communication”. This would allow a frivolous abuse of the appeal process. *CP 60, 82-83, 179, 223-225*

The Department failed to properly serve on Ms. Leigh’s attorney of record the order dated April 01, 2011. *CP 24-27, 137-140, 161-162*, The sixty-day time limit for filing appeals begins to run only after the order is “communicated”. An order is not properly “communicated” to a represented party unless a copy of the order is sent (i.e. mailed under separate cover) *RCW 51.52.050; RCW 51.52.060* and *Court Rule 60* to that party’s representative. Here, the undisputed evidence established that Nate D. Mannakee became Ms. Leigh’s representative for Department matters the day before the Department issued the order on appeal. *CP 28-29, 133-134*. The Department chose to ignore the numerous requests by Mr. Mannakee in regard to claim status.<sup>9</sup> *CP 33-35, 41-43*

Although the Department mailed an imaged copy of Ms. Leigh’s claim file on April 11, 2011, the fiche could have contained the order on appeal, this action falls short of establishing a presumption of mailing.<sup>10</sup> *CP 37, 51, 144-145*.

A cured or constructively “communicated” order does not eliminate the statutory requirements of presumption of mailing. Being shown the order does not constitute “communication” or receipt of the order. *In re Larry Lunyou*, BIIA Dec., 87 0638 (1988)

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<sup>9</sup> *In re David Herring*, BIIA Dec., 57,831 (1981) A Department order must be sent to the worker's last known address as shown by the records of the Department. When the worker has notified the Department of a change of address to that of his attorney, an order sent to the claimant at his home address rather than in care of his attorney has not been “communicated” within the meaning of RCW 51.52.050.

<sup>10</sup> *In re Pamela Miller*, BIIA Dec. 05 12252 (2006), citing, *In re Bell & Bell Builders (II)*, BIIA Dec., 90 5119 (1992); *In re David Herring*, BIIA Dec., 57 831 (1981); *In re Better Brashear*, Dckt. No. 96 3341 (August 08, 1997); and *In re Calvin Keller, Dec’d*, Dckt. No. 89456 (March 15, 1991).

Reference to an order in subsequent correspondence sent by the Department to the worker does not satisfy the requirement that a copy of the order must have been “communicated” to the worker. ...*In re Elmer Doney*, BIIA Dec., 86 2762 (1987)

Accordingly, the Department’s failure to “communicate” the order on appeal to Ms. Leigh’s attorney meant that the order has never become final and binding. The statute requires Ms. Leigh to be served with a copy of the Department order per *RCW 51.52.050*; *RCW 51.52.060*. The evidence is clear that Ms. Leigh or her representative of record were not served. The Department failed in its statutory duty, and since it failed to “communicate” the order, that order never achieved operable power over Ms. Leigh as it never became final and binding.<sup>11</sup>

All resulting orders fall outside the correctness of the legislative mandates, as evidenced in the claim record. This was a pivotal event which significantly obscures the chronology of the administration of this claim.

The Department was without legal authority to issue orders on July 25, 2011 Affirming the April 01, 2011 Claim Suspension Until Claim Closure and July 27, 2011 Claim Closure with operative effect other than one consistent with the specific grant of authority in the final proviso of *RCW 51.52.060* regarding the non-communicated / non-protested April 01, 2011 Claim Suspension Order. When it attempts to do so; its attempt should be regarded as a nullity.<sup>12</sup>

#### **Board: Assignment of Error 2**

Ms. Leigh brought this matter to the attention of the Department on several occasions from the time of discovery at a Board hearing when *CP 11, 161* was introduced as Exhibit 1 (Departments Certification of Notice of Change of Address on March 31, 2011) by AG Pat L. Demarco into evidence, from October 2016 to July 2017 to no avail, thus Ms. Leigh filed an appeal to the Department order dated April 01, 2011 on August 04, 2017. *CP 10-12* Ms. Leigh referenced Board Docket No. 16 13973 in regard to Order Finding Appeal Timely, because it

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<sup>11</sup> *In re Elmer P. Doney*, BIIA Dec., 86 2762 (1987); *In re Mollie L. McMillon*, BIIA Dec., 22,173 (1966).

<sup>12</sup> *In re Richard Wagner*, BIIA Dec., 88 0962 (1988).

adjudicated the same issue under the same circumstances (same date, claim manager, Ms. Leigh, attorney, Departments failure to “communicate” an order) in a different claim. *CP 49-51*

The Board failed <sup>13</sup> to address the issue of “Department’s failure to “legally communicate” a determinative order - *RCW 51.52.050*” prior to addressing the significant jurisdictional questions in the August 24, 2017 Board “Order Denying Appeal”. *RCW 51.52.080. Court Rule 60. CP 60*

Ms. Leigh was not afforded the opportunity to challenge the incorrect jurisdictional history *CP 20, 114, 121* or submit evidence to the facts. *CP 60*

Ms. Leigh filed a Petition for Review with supporting documentation *CP 62-66, 101-105, 133-134, 137-140, 143* on September 02, 2017. The Board elected to consider it as a Motion for Reconsideration. *CP 69*

Once again, the Board failed to address the issue of “Department’s failure to “legally communicate” a determinative order - *RCW 51.52.050; RCW 51.52.060* and *Court Rule 60*” in the November 13, 2017 Order Denying Motion to Vacate Order Denying Appeal. Once again, the consequences outweighed the law. *CP 82-83*

The Department’s failure to legally “communicate” an order warrants the review authority of the Board. Ms. Leigh is aggrieved by the failure of the Department to abide by the statute which requires it to “communicate” the order to her. Black's Law Dictionary, 4th Ed., p. 60; *Department of Labor & Indus. v. Cook*, 44 Wn.2d 671, 269 P.2d 962 (1954); *Yamada v. Hall*, 145 Wash. 365, 260 Pac. 243 (1927). Ms. Leigh is aggrieved by the Boards failure to perform its due diligence. <sup>14</sup>

Where the worker had no actual knowledge of the contents of a Department order since it had never been “communicated”, the worker could not pursue an appeal from the contents of the

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<sup>13</sup> *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965) The Board may review and take notice of the contents of the Department file, sua sponte, at any stage of the proceedings, in order to determine whether it has jurisdiction over the appeal.

<sup>14</sup> *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965)

order. Instead, the Board remanded the matter to the Department to either “communicate” the order to the worker or to issue a further determinative order.<sup>15</sup>

A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate. To declare an order void, a reviewing court must find the issuing tribunal lacked either personal jurisdiction over the parties or subject matter jurisdiction over the claim. Subject matter jurisdiction is the authority to adjudicate the type of controversy at issue. *Marley v. Dep 't of Labor & Indus.* 125 Wn.2d 533,886 P.2d 189 (1994). *CP 85*

*Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975) (“a judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved”). *Court Rule 60*<sup>16</sup>

Neither res judicata nor collateral estoppel will be accorded to a finding of fact from a prior Board decision when the subject matter of the prior and present appeal is dissimilar, or the earlier determination is ambiguous due to an internal inconsistency. ....*In re Keith Browne*, BIIA Dec., 06 13972 (2007).

The application of the doctrine(s) of res judicata or collateral estoppel must not work an injustice on the party against whom it is to be applied. *Winchell's Donuts v. Quintana*, 65 Wn. App. 525, 529-30 (1992). In this situation, if the doctrine(s) res judicata or collateral estoppel were to be applied against Ms. Leigh, in light of the undeniable failure to “communicate” a previous order, would continue to work an injustice upon Ms. Leigh. *CP 223-225*

When the Department failed to “communicate” the suspension order to Ms. Leigh or her representative, as evidenced within the Department record, Ms. Leigh’s right to due process was

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<sup>15</sup> *In re Daniel Bazan*, BIIA Dec., 92 5953 (1994)

<sup>16</sup> The Board considers all of its opinions, whether significant or not. See, e.g., *In re Jornada Roofing I, Inc.*, No. 08 W1050, 2010 WL 1170616 (Wash. Bd. Ind. Ins. Appeals Jan. 27, 2010) (*In re Dianne DeRidder*, No. 98 22312, 2000 WL 1011049 (Wash. Bd. Ind. Ins. Appeals May 30, 2000) (the Board was bound by a “duty of consistency” to follow prior decisions, whether designated significant or not, unless articulable reasons existed for not doing so).

denied, and the resulting adjudication history of Ms. Leigh's claim has been indefensibly altered, and significantly outside the extensive statutory and regulatory framework through which the Legislature created the Industrial Insurance Act.

### **Superior Court: Assignment of Error 3**

In Superior Court, Ms. Leigh has the burden of proving the Board's findings and decision were not prima facie correct.<sup>17</sup>

Courts apply the doctrine of res judicata "to prevent repetitive litigation of claims or causes of action arising out of the same facts and to 'avoid repetitive litigation, conserve judicial resources, and prevent the moral force of court judgments from being undermined.'" *Hyatt v. Department of Labor & Indus.*, 132 Wn. App. 387, 394 (2006); *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 410 (2002), aff'd, 151 Wn. 2d 853, 93 P.3d 108 (2004). The doctrine generally applies to final adjudications of administrative agencies such as the Department of Labor and Industries. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994); Restatement (Second) of Judgments, § 83. There are three basic requirements that must be met before a judgment can be entitled to res judicata effect against a party to a subsequent action. (1) The judgment must be valid; that is, it must have been entered by a forum, judicial or administrative, that had jurisdiction over the subject matter of the action; the parties to the action must have submitted to the jurisdiction of the court or agency; and adequate notice and opportunity to be heard must have been afforded to the party in the earlier litigation. *Marley*; Restatement (Second) of Judgments, §§ 1, et seq. When a Department order does not meet the requisites for validity, it is void and no appeal is necessary. *Marley*. In such a case the Board or the courts, on their own motion or by application of a party, may declare the order void. (2) The judgment on the merits must be final. The applicable statutory protest and/or appeal period must have run without a protest or appeal being filed by any party. *Marley*; Restatement (Second) of

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<sup>17</sup> *R&G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413, review denied, 152 Wn.2d 1034 (2004) "Evidence is substantial if "sufficient to persuade a fair-minded, rational person of the truth of the matter."

Judgments, §§ 13, et seq. Failure to “communicate” to a party a copy of an order that contains the protest and appeals language set forth in *RCW 51.52.050* will prevent a Department order from becoming final.<sup>18</sup> A statute may prevent a Department order from becoming final, in which case the same issues may be adjudicated in a later proceeding.<sup>19</sup> An interlocutory Department order or adjudication can be valid and appealable in certain circumstances, for example, *In re Robert Uerling*, BIIA Dec., 99 17584 (1999), and *In re Louise Favaloro*, BIIA Dec., 90 5892 (1990), but will not be given res judicata effect because it is only temporary—further, determinative action by the Department is required to make that order final. An order in which the Department places an earlier order in abeyance also is not a final Department order.<sup>20</sup> (3) The prior and present actions must have involved: (a) the same subject matter; (b) the same cause of action; (c) the same persons and parties; and (d) the same quality of persons for or against whom the claim is made. *Hyatt, Hisle*. Failure to conform to this latter requirement does not render the judgment void; it restricts or prevents the use of that judgment as a defense against a party in later litigation. For instance, the extent to which res judicata can be used to prevent litigation of particular issues will be restricted if the judgment is ambiguous.<sup>21</sup>

The statutory time-frames contained in *RCW 51.52.060* limit the time within which the Department must enter a further order in response to a valid protest, “if” the Department had legally “communicated” the order, the time for further consideration allowed to the Department had long since passed, the record demonstrates it did not legally extend the time-frame with written notification for issuing a further order before the initial 60-day time-frame had elapsed. The Department issued the adherence or affirming order 115-days after the non-communicated non-protested order. Where a valid timely protest has been filed in response to an order containing language which invites the filing of a protest, the Department must enter a further

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<sup>18</sup> *Lee v. Jacobs*, 81 Wn.2d. 937 (1973)

<sup>19</sup> *Rhodes v. Department of Labor & Indus.*, 103 Wn.2d 895 (1985); *In re Ruth Logan*, BIIA Dec., 89 0189 (1989).

<sup>20</sup> *In re Coni Oakes*, BIIA Dec., 90 1968 (1990).

<sup>21</sup> *In re Rick Yost*, BIIA Dec., 01 24199 (2003).

order within the time limited by the fifth proviso to RCW 51.52.060 (i.e., within 90-days or up to an additional 90-days for good cause stated in writing). Further, the time within which the Department must enter the further order commences on the date the Department receives the protest. In the instant case the Department did not enter a further order within 90-days of receipt of the claimant's "predated" protest on March 31, 2011, nor did it extend the time for issuing a further order before the initial 90-day time period had elapsed,<sup>22</sup> thus leaving the AG arguments moot. *CP 179-196*

A party can be relieved from the effect of a judgment procured by fraud, duress, or corruption. *Abraham v. Department of Labor & Indus.*, 178 Wash. 160, 163 (1934). *LeBire v. Department of Labor & Indus.*, 14 Wn.2d 407 (1942); Restatement (Second) of Judgments, § 70. A party can be relieved from the effect of a judgment on the ground of mistake of law or fact. Restatement (Second) of Judgments, § 71. Such relief is granted under only very limited circumstances, such as an error that is obvious to all the parties. *Callihan v. Department of Labor & Indus.* 10 Wn. App. 153 (1973). *Court Rule 60*.

Ms. Leigh is aggrieved by the May 18, 2018 *CP 210; 5/18/18 RP 2-9, 14-20* and July 20, 2018 *CP 223-225; 7/20/18 RP 4-5*<sup>23</sup> decisions of the Superior Court in the County of Pierce, for the reason that deference was applied to the Department and Board orders without regard to the legislative mandates of the Act, in addition to "applying common law standards" without giving weight to the legislative intent provided in the Act.<sup>24</sup> The totality of credible evidence, circumstance and intent, when assessed in chronological sequence and judiciously put into perspective, creates an unmistakable appearance of predetermination. Such a result cannot be tolerated as it is inconsistent with public interest and the "sure and certain relief" mandated by the Industrial Insurance Act.

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<sup>22</sup> *In re Clarence Haugen*, BIIA Dec., 91 1687 (1991)

<sup>23</sup> Transcript of hearing held on July 20, 2018, is cited as "7/20/18 RP" followed by the page number.

<sup>24</sup> *Rhoad v. McLean Trucking Co.*, 102 Wash.2d 422, 426, 686 P.2d 483 (1984) (citing *King County v. Seattle*, 70 Wash.2d 988, 991, 425 P.2d 887 (1967)).

### III. STATEMENT OF CASE

The issue before the Court is the Department's failure to legally "communicate" under separate cover the April 01, 2011 Claim Suspension Order to Ms. Leigh or her legal representative as of March 31, 2011 per *RCW 51.52.050* Service of Departmental Action and *RCW 51.52.060* Notice of Appeal. Including the absence of entry of a valid protest or request for reconsideration to said order within the Department record or the Certified Board Record from April 01, 2011 through July 25, 2011. *CP 107-127* Although, Ms. Leigh had representation at the time, and Ms. Leigh's representative had knowledge of said order, per online access and microfiche (the presumption of receipt arises once proper mailing of an order is established), these facts do not relieve the Department of its obligation to legally "communicate" under separate cover notices and orders, per strict adherence to the statutory mandates in nearly 91 years of well-established precedent within the Court(s) opinions and the Board significant decisions.

Although, Ms. Leigh's representative appealed to the Board the invalid Affirming Order of July 25, 2011 Board Dckt. No. 11 19779 and moved to dismiss the invalid appeal, these facts do not relieve the Department of its obligation to legally "communicate" under separate cover the April 01, 2011 Claim Suspension a discretionary determinative order, per *RCW 51.52.050* Service of Departmental Action and *RCW 51.52.060* Notice of Appeal. *Court Rule 60*.

The AG argues that the June 15, 2011 request for "communication" received by the Department 75-days after the April 01, 2011 Claim Suspension Order was issued, is a protest. This is invalid due to the facts: 1) The June 15, 2011 request for "communication" is outside the time limited for protest and/or appeal, the initial 60-day time-frame had elapsed 2) The Department record does not establish this "communication" as a protest or request for consideration for the order of April 01, 2011. *CP 107-127, 181; 5/18/18 RP 10-12*

The Board has erroneously interpreted, applied or completely dismissed precedent within its own significant decisions and within the Courts decisions in denying appeal Docket No. 17 19680 in regard to "communication" of Department orders to Ms. Leigh and/or attorney of record

at the time. *RCW 51.04.080* Appeal to Board denied. The Board considers all of its opinions, whether significant or not. See, e.g., *In re Jornada Roofing I, Inc.*, No. 08 W1050, 2010 WL 1170616 (Wash. Bd. Ind. Ins. Appeals Jan. 27, 2010) (*In re Dianne DeRidder*, No. 98 22312, 2000 WL 1011049 (Wash. Bd. Ind. Ins. Appeals May 30, 2000) (the Board was bound by a “duty of consistency” to follow prior decisions, whether designated significant or not, unless articulable reasons existed for not doing so). *CP 88-90*

The Superior Court of Washington for Pierce County order entered on May 18, 2018, *CP 215; 5/18/18 RP 17-18* and July 20, 2018 *CP 223-225; 7/20/18 RP 5* did not take into account the germane statutes regarding the Departments obligation to legally “communicate” under separate cover a discretionary determinative order per the carefully crafted mandates of the Act *RCW 51.52.050* Service of Departmental Action and *RCW 51.52.060* Notice of Appeal. Industrial insurance claims are governed by statute, not common law. *CP 215, 223-225* Courts will neither read matters into a statute that are not there nor modify a statute by construction. *Rhoad v. McLean Trucking Co.*, 102 Wash.2d 422, 426, 686 P.2d 483 (1984) (citing *King County v. Seattle*, 70 Wash.2d 988, 991, 425 P.2d 887 (1967)). The issue of failure to legally “communicate” under separate cover a discretionary determinative order, including the absent entry of a valid protest or request for reconsideration in the Department record or the Certified Board Record from April 01, 2011 through July 25, 2011, to said order was not addressed by the Superior Court of Washington for Pierce County in the order(s) entered on May 18, 2018, and July 20, 2018 per respective statutes and well-established statutory construction within the plain language of *RCW 51.52.050* Service of Departmental Action and *RCW 51.52.060* Notice of Appeal.

The court reads statutes in order to give effect to all statutory language and to achieve a harmonious statutory scheme that maintains the integrity of the respective statutes. See *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001); *Mason v. Georgia-Pac. Corp.*, 166 Wn. App. 859, 864, 271 P.3d 381, review denied, 174 Wn.2d 1015 (2012).

#### IV. ARGUMENT

The Department Record, the Certified Board Record and other documents with corroborating Department date and time stamp markings, support the allegations in Ms. Leigh's Board and Court briefs. *CP 1-8, 10-12, 62-66, 164-178, 179-209* The AG's Court brief and testimony clearly states, that the Department has not "communicated" the April 01, 2011 Claim Suspension Order to Ms. Leigh or her representative at any time. *CP 181; 5/18/18 RP 10-12* The AG's arguments present a conflict with case law and disregard the well-reasoned Court decisions applying *Arriaga, Shafer, Rodriguez, and Nafus* to the facts.

*Donati v. Department of Labor & Indus.*, 36 Wn.2d 151 (1949); *In re Wallace Hansen*, BIIA Dec., 90 1429 (1991). Because the Department did not consider ... never properly answered them, we must find that orders issued by the Department thereafter are not valid because the Department lacked jurisdiction to issue them.

Because a series of Board significant decisions place the Department on notice of the likely outcome in a similar fact pattern, and the Department has not sought review when it had the opportunity, it is frivolous for the Department to proceed in the defense of its order when there is no debatable issue based on the Board's significant decisions. ... *In re Michael Burke*, BIIA Dec., 99 14178 (2001)

An error by the Department is in its control, the worker is not.<sup>25</sup> The Department made an error in judgment with the information it had. When the Department issues an order suspending a claim until the claim is closed, as a matter of law the claimant has a statutory, regulatory, and constitutional right to administratively challenge the Department's discretionary

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<sup>25</sup> *In re Richard Wagner*, BIIA Dec., 88 0962 (1988); then it should correct the error within the usual 60-day period or live with the consequences.

decision under *WAC 296-14-410(4)(a)(b)*<sup>26</sup> and the Board has the authority to review the Department's discretionary decision to suspend the claim.<sup>27</sup>

When the Department failed to "communicate" the suspension order to Ms. Leigh or her representative, as evidenced within the Department's record, due process was denied, and the resulting adjudication history of Ms. Leigh's claim has been indefensibly altered, and significantly outside the extensive statutory and regulatory framework through which the Legislature created the Act.

It has been held for many years that the Courts and the Board are committed to the rule that the Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. The Washington Supreme Court in *Clauson v. Department of Labor and Industries*, 130 Wn. 2d 580 (1996) "it is mandated that any doubt as to the meaning of the workers' compensation law be resolved in favor of the worker." /d, at 586. We have previously noted that this provision means "this court is required to interpret ambiguities in the Industrial Insurance Act in favor of the injured worker." And "Moreover, our holding that a claim cannot be final until the attending physician receives a copy of the closure order will motivate the Department to fulfill its statutory obligation to "communicate" its orders to all persons affected by the orders."<sup>28</sup>

The superior court may substitute its own findings and decision if it finds from a "fair preponderance of credible evidence" *CP 24-27, 37-38* that the Board findings and decision were incorrect.<sup>29</sup>

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<sup>26</sup> *WAC 296-14-410* Reduction, suspension, or denial of compensation as a result of noncooperation

<sup>27</sup> *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965) The Board may review and take notice of the contents of the Department file, sua sponte, at any stage of the proceedings, in order to determine whether it has jurisdiction over the appeal.

<sup>28</sup> *Shafer v. Dep 't of Labor & Indus.*, 166 Wn.2d 710, 721, 213 P.3d 591 (2009)

<sup>29</sup> *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992).

## V. CONCLUSION

Considering the Department is tasked with adjudicating legally complicated workers compensation claims and is well versed in the legislative mandates of the Act, the error in not “communicating” an order and opting to issue an invalid adherence or affirming order is injudicious.<sup>30</sup> The aforementioned facts along with the corroborating evidence, and the admission of fault in the AG court brief, in conjunction with the AG testimony, leaves the AG argument without merit and frivolous. Due to the above circumstances and the evidence presented, the Board has clearly lacked jurisdiction over the parties and subject matter of appeals from April 01, 2011 forward.<sup>31</sup>

This should not be allowed for it unjustly denies Ms. Leigh specific guarantees within Title 51 RCW Industrial Insurance and due process. The above outlined actions are not in the best interest of the public, in fact one could construe the above actions may very well erode public confidence.

Ms. Leigh respectfully request this Court render the April 01, 2011 Claim Suspension Order on claim AE62982 null and void based on its lack of finality and determine the status of resulting adjudication of claim within the jurisdictions of the Department and Board.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of January, 2019



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<sup>30</sup> *In re Clarence Haugen*, BIIA Dec., 91 1687 (1991)

<sup>31</sup> *Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975) “It is well-established that when a tribunal issues an order when it did not have jurisdiction the order is void.”

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**Appellate Court Case Number:** 52006-1  
**Appellate Court Case Title:** Tamra A. Leigh, Appellant v. Department of Labor and Industries, Respondent  
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