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

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TAMRA A. LEIGH,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR & INDUSTRIES**

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## I. INTRODUCTION

Five years after a final settlement of her workers' compensation claim, Tamra Leigh seeks to challenge the validity of an earlier order of the Department of Labor and Industries that suspended her benefits. However, the order Leigh wishes to challenge was not the Department's final order about her benefits, and Leigh dismissed her appeal of the Department's final order as part of the settlement. Res judicata now bars her claim.

In 2012, Tamra Leigh negotiated a settlement that paid her a disability award and closed her workers' compensation claim. As part of that settlement, she dismissed her appeal from a July 25, 2011 order that affirmed an earlier April 1, 2011 order that suspended her time loss compensation benefits.

Five years later, Leigh seeks to undo the settlement she negotiated, arguing that the Department never communicated the April 1, 2011 order to her and that her settlement therefore has no effect. She is wrong. The Department communicated the April 1, 2011 order to her attorney, who protested it. And, in any event, because she dismissed her appeal from the final order of July 25, 2011, which affirmed the April 1, 2011 order, res judicata bars her claim.

Leigh cannot undo the benefit of her bargain. This Court should affirm.

## II. STATEMENT OF THE ISSUE

Under RCW 51.52.110, a party has 30 days to appeal a Board's final order to superior court. Leigh never appealed the Board's order dismissing her appeal from the July 25, 2011 suspension order or the Board's order closing her claim with a disability award. Does res judicata bar her from challenging an earlier Department order suspending her benefits?

## III. STATEMENT OF THE CASE

### A. The Department Suspended Leigh's Time-Loss Benefits on April 1, 2011 When She Stopped Cooperating with the Department's Attempts to Retrain Her

In June 2007, Leigh filed a workers' compensation claim, which the Department allowed. CP 118.<sup>1</sup> The Department referred Leigh for vocational retraining. CP 137, 139.<sup>2</sup> She signed an accountability agreement stating that she would fully participate with her retraining plan. CP 137, 139.

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<sup>1</sup> The Board prepared a certified appeal record. *See* CP 86-163. The Board's record consists of the documents, pleadings, and decision from Leigh's 2017 appeal in docket no. 17 19680. It does not include the record from her 2012 appeal. Therefore, for the background facts related to her 2012 claim, this brief cites the jurisdictional history that the Board prepared in this appeal. *See* CP 118-126.

<sup>2</sup> The Department has discretion to provide vocational services when vocational services are both necessary and likely to enable the injured worker to become employable at gainful employment. RCW 51.32.095.

Later, the Department received information from Leigh's vocational counselor and instructors that Leigh had not complied with the accountability agreement. CP 139. So, on April 1, 2011, the Department issued an order suspending Leigh's right to time-loss compensation, a form of wage replacement benefits. CP 24. The Department does not pay time-loss compensation to workers in retraining programs if the workers' actions interrupt their retraining plans. *See* RCW 51.32.099, .110.<sup>3</sup>

**B. Leigh Timely Protested the April 1, 2011 Suspension Order and Timely Appealed the July 25, 2011 Order that Affirmed the April 1, 2011 Order**

The Department sent a copy of the April 1, 2011 suspension order to Michael Lind, the attorney who had been representing Leigh on her claim. CP 137-38. The day before, on March 31, the Department had received a notice of representation from a new attorney, Nathaniel Mannakee, stating that he represented Leigh. CP 133.

On April 12, 2011, the Department sent a letter to Mannakee, acknowledging that it had received his notice of representation. CP 144. The Department enclosed a microfiche copy of the entire claim file with

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<sup>3</sup> The Department "has the authority to reduce, suspend or deny benefits when a worker (or worker's representative) is noncooperative with the management of the claim." WAC 296-14-410(1); *see also* RCW 51.32.110. Non-cooperation means behavior by the worker or worker's representative that obstructs or delays the Department from reaching a timely resolution of the claim. WAC 296-14-410(2). It includes failing to participate in vocational services. WAC 296-14-410(2)(i).

the letter, and it informed Mannakee that he could view his client's claim file documents online. CP 144.

On April 25, 2011, Mannakee sent an electronic message to the Department, requesting that Leigh receive time loss compensation and stating that claim suspension "has been lifted":

Based on the claim status, the suspension has been lifted. Due to this, and the corresponding worker verification form, we know our client should be issued back time loss, and all future time-loss that she is entitled to. How long will it take for the department to restart Ms. Leigh's time-loss as she is still unable to work?

CP 35.

Mannakee's message was a timely protest to April 1, 2011 order because it requested action inconsistent with that order. *See Boyd v. City of Olympia*, 1 Wn. App. 17, 28-29, 403 P.3d 956 (2017), *review denied*, 190 Wn.2d 1004, 413 P.3d 10 (2018). Specifically, the message stated that the suspension had "been lifted," and it requested back time loss compensation. CP 35.<sup>4</sup>

On June 15, 2011, Mannakee's paralegal sent a letter to the Department, confirming that his office had protested the April 1, 2011

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<sup>4</sup> The attorney's belief that the Department had lifted the suspension appears to have been incorrect, but the attorney's message nonetheless constituted a protest from the April 2011 order because it requested action—payment of back time-loss compensation—that was inconsistent with the April 2011 order. *See Boyd*, 1 Wn. App. at 28-29.

order. CP 149 (noting Mannakee's "ensuing protest" to the April 1, 2011 order).

On July 25, 2011, the Department sent a letter to Mannakee acknowledging that he had protested the April 1, 2011 order and stating that suspension of the claim was correct. CP 153-54. Also on July 25, the Department issued an order affirming the April 1, 2011 suspension order. CP 155.

On July 27, 2011, the Department issued an order that closed Leigh's claim. CP 157. That order stated that Leigh had no permanent partial disability. CP 157.

Leigh then appealed four Department actions to the Board: the July 25, 2011 order affirming the suspension, the July 25, 2011 letter stating the suspension was correct, a July 26, 2011 order segregating a medical condition, and the July 27, 2011 closing order. CP 122.

**C. As Part of a Settlement at the Board, Leigh Dismissed Her Appeal of the July 25, 2011 Order, and She Agreed to Close Her Claim in Exchange for Disability Awards**

At an administrative hearing on June 7, 2012, Leigh, the employer, and the Department settled the appeals. CP 88. Leigh attended the hearing and was present when the parties settled. CP 88. At the hearing, Leigh, through her attorney, dismissed the appeals of the July 25, 2011 suspension order, the July 25, 2011 letter, and the July 26, 2011 order

segregating the medical condition. CP 88. The Board issued an order that dismissed those three appeals. CP 85.

With regard to the July 27, 2011 closing order, the parties stipulated to entry of an agreed order by the Board. CP 88. The Board's agreed order reversed the July 27, 2011 closing order and ordered the Department to pay permanent partial disability awards to Leigh for cervical and lumbar injuries, to affirm the closing order in all other respects, and to close the claim. CP 88. No party appealed the Board's agreed order to superior court within 30 days, so it became final and binding. *See* RCW 51.52.110; *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 542-43, 886 P.2d 189 (1994).<sup>5</sup>

**D. Five Years Later After the Settlement, Leigh Appealed the April 1, 2011 Order, and the Board Denied Her Appeal**

Five years later, in August 2017, Leigh filed a document called "Department's failure to communicate order" with the Board. CP 130-32. The document stated, in relevant part, that she appealed the original April 1, 2011 suspension order. CP 130.<sup>6</sup> Leigh alleged that the Department had

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<sup>5</sup> In July 2012, the Department issued two ministerial orders to effectuate the Board's two orders. CP 123. Leigh protested the July 2012 ministerial orders, and the Department affirmed the two orders in a September 2012 order. CP 123. No party protested or appealed the September 2012 ministerial order. *See* CP 123. Because there was no protest or appeal to the September 2012 ministerial order, it also became final and binding. RCW 51.52.060(1); *Marley*, 125 Wn.2d at 539, 542-43.

<sup>6</sup> Leigh challenged other actions of the Department in the document. CP 130-32. But those actions are not at issue in this appeal because Leigh's appeal to this Court is

“failed to properly serve” the order on her “attorney of record (Nate D. Mannakee).” CP 130.

The Board denied Leigh’s appeal from the April 1, 2011 order. CP 128. In its order, the Board explained that the April 1, 2011 order was not the Department’s final determination of the suspension issue because the Department subsequently issued an order on July 25, 2011 that affirmed the April 1, 2011 suspension order. CP 128. The Board followed its long-standing decision in *Santos Alonzo*, No. 56,833, 1981 WL 375946, at \*3 (Wash. Bd. Indus. Ins. Appeals Dec. 9, 1981)—providing that if a party protests a Department order, the Board cannot consider an appeal from that order because it is no longer a final order—to conclude that Leigh could not appeal from the April 1, 2011 order.

The Board explained

[T]he order dated April 1, 2011, is not the Department’s final determination from which an appeal may be taken. *In re Santos Alonzo*, BIIA Dec., 56,833 (1981). The claimant’s appeal to the July 25, 2011 Department order has been assigned Docket No. 1119779, and will be determined by separate orders in that matter.

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from a superior court decision that affirms the Board’s denial of her motion to vacate its order denying her appeal of the April 1, 2011 order. *See* CP 128.

CP 128.<sup>7, 8</sup>

In response, Leigh filed a brief, which the Board treated as a motion to vacate its order denying the appeal of the April 1, 2011 order.

CP 88; 101-105. The Board denied the motion to vacate, explaining:

The April 1, 2011 suspension order was protested by her attorney, affirmed by the Department, and appealed by her attorney. At a hearing in the presence of Ms. Leigh, her attorney moved to dismiss the appeal and an order was issued so doing. That order is final and binding and the matter is res judicata. Ms. Leigh's motion to vacate the Order Denying Appeal dated August 24, 2017, is DENIED.

CP 89.

Leigh appealed to superior court. CP 1. The superior court affirmed the Board decision, concluding that the April 1, 2011 order was not an appealable order and that Leigh's arguments about that order were moot because they were resolved when Leigh appealed the July 25 and 27, 2011 orders and later dismissed those appeals. *See* CP 224-25.

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<sup>7</sup> Because the Board stated that it would address Leigh's appeal of the July 25, 2011 order—which she also raised in her pleading titled “Department's failure to communicate order”—under a separate docket number, her appeal of the July 25, 2011 order is not before this Court. *See* CP 128. It is the Department's position that because she dismissed her appeal of that order, it is final and binding, but this Court need not reach that issue in this appeal.

<sup>8</sup> The Board consistently cites and follows *Santos Alonzo*. *See, e.g. Manuel D. Gipson*, No. 16 19195, 2018 WL 6111404 (Wash. Bd. Indus. Ins. Appeals Sept. 24, 2018); *Jerry D. Bartlett*, No. 08 11051, 2009 WL 1504237 (Wash. Bd. Indus. Ins. Appeals Feb. 19, 2009); *Dorothy E. Cady*, No. 07 10683, 2007 WL 3054887 (Wash. Bd. Indus. Ins. Appeals July 2, 2007); *Robert C. Uerling*, No. 99 17854, 1999 WL 33601707 (Wash. Bd. Indus. Ins. Appeals Aug. 31, 1999).

#### IV. STANDARD OF REVIEW

The Industrial Insurance Act, RCW Title 51, governs the judicial review procedures in a workers' compensation case. *See* RCW 51.52.100, .110, .115; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179–80, 210 P.3d 355 (2009). The Administrative Procedures Act does not apply and the court does not review the Board decision. *Rogers*, 151 Wn. App. at 179–81. This Court's review is limited to the superior court's decision, not the Board's decision. RCW 51.52.140.

This case involves the legal question of whether Leigh can appeal the Department's April 1, 2011 order. This Court reviews legal conclusions de novo. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

#### V. ARGUMENT

The superior court correctly affirmed the Board's decision to deny Leigh's appeal of the April 1, 2011 suspension order. Leigh can no longer challenge the April 1, 2011 order for two reasons. First, Leigh timely protested that order, and the Department reconsidered its decision, issuing a new order affirming the suspension on July 25, 2011. CP 24, 35. So, as the Board and superior court correctly recognized, the Department's April 1, 2011 order was not its final appealable decision on the suspension issue.

Leigh instead had to appeal the Department's final decision on July 25, 2011 regarding that issue.

Second, Leigh appealed the July 25, 2011 order to the Board, but dismissed that appeal over six years ago. Leigh never appealed the Board's order dismissing the appeal or the Board's order closing the claim. The Board's order dismissing the appeal (as well as the Board's order closing the claim) is therefore final under res judicata principles. Leigh can no longer challenge the contents of the April 1, 2011 and July 25, 2011 orders, or any consequences that flow from them.

**A. Leigh Can No Longer Appeal the April 1, 2011 Order Because It Was Not the Department's Final Order About Suspension and Because She Dismissed Her Appeal From the Final Order**

The Department reconsidered its April 1, 2011 order after Leigh's protest, so the April 1, 2011 order was not the Department's final determination of the suspension issue. Leigh focuses on whether the Department communicated that order to her and suggests that because it did not, that order "never became final and binding." AB 2-6. Leigh characterizes the Department's failure to communicate the April 1, 2011 order to her a "pivotal event which significantly obscured the chronology of the administration of this claim." AB 4. Leigh's arguments have no merit because she protested that order, appealed the order that affirmed

that order, and dismissed the appeal from the affirming order. Res judicata bars her claim.

The Department communicated the April 1, 2011 order to Leigh when it sent a copy of her claim file to her attorney—that is why her attorney protested the order and why the Department issued an order on July 25, 2011 affirming the April 1, 2011 order. By appealing the July 25, 2011 order to the Board, Leigh had the opportunity to litigate any issues related to the suspension of benefits that she wished—including whether the Department failed to communicate its earlier order to her, and whether any issue regarding the communication of that order undermined the validity of the July 25, 2011 order. But because Leigh dismissed her appeal from the July 25, 2011 order, she can no longer raise any issue about communication of the April 1, 2011 order, or its impact on the correctness of the July 25, 2011 order, now.

**1. The April 1, 2011 order was not the Department's final decision**

As an initial matter, Leigh is wrong that she did not protest the April 1, 2011 order. *See* AB 3-5. Her attorney's April 25, 2011 message to the Department asked for back time loss compensation and stated that the suspension was lifted. CP 35. That request constituted a protest because Leigh's request for relief—paying time loss for a period of time for which

the worker's benefits had been suspended—was inconsistent with the Department's determination in its April 1, 2011 suspension order. *See Boyd*, 1 Wn. App. 2d at 29. Leigh's attorney sent that message within the 60-day protest period in RCW 51.52.050(1), so it was a timely protest.<sup>9</sup>

When a party protests a Department order within 60 days, the Department can modify, reverse, or change its decision. RCW 51.52.060(4)(a). The Department has original jurisdiction in workers' compensation cases. *Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 220-21, 292 P.2d 865 (1956). The Board has appellate jurisdiction. *Karniss v. Dep't of Labor & Indus.*, 39 Wn.2d 898, 901-02, 239 P.2d 555 (1952).

When the Department decided to reconsider the April 1, 2011 order in response to Leigh's protest and issue a further order, it exercised its original jurisdiction to reconsider the suspension issue. *See Brakus*, 48 Wn.2d at 220-21. As the Board has long recognized, a timely protest "automatically operates to set aside the Department's order and hold in abeyance the final adjudication of the matter until the Department officially acts to issue its final decision by a 'further appealable order.'"

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<sup>9</sup> The Department agrees with Leigh that the June 15, 2011 letter was not the protest to the April 1, 2011 order. AB 10. But her attorney's April 25, 2011 message was a valid protest.

*Santos Alonzo*, 1981 WL 375946, at \*3; *see* RCW 51.52.050, .060. As the

Board reasoned:

It has long been our understanding of the law of this state, as well as the administrative policy of the Board, that a “protest or request for reconsideration” [under RCW 51.52.050] filed with the Department in response to the admonitory language in the order automatically operates to set aside the Department's order and hold in abeyance the final adjudication of the matter until the Department officially acts to issue its final decision by a “further appealable order.” RCW 51.52.060 authorizes the Department to direct the submission of further evidence or the investigation of any further fact during the time limited for filing a notice of appeal, which action will effectively toll the appeal filing period. In addition, that same section authorizes the Department “within the time limited for appeal” to “modify, reverse, or change any order, decision, or award, or may hold any such order ... in abeyance ... pending further investigation.”

*Id.* The Board lacks the authority to hear an appeal from an original order after the worker files a timely protest to it since it is not a final order. *Id.*

Because Leigh timely protested the April 1, 2011 order, that order was set aside, and the Department had to issue a final order on the issue.

*Alonzo*, 1981 WL 375946, at \*3. The April 1, 2011 order was not the Department’s final order and it was not appealable, as the Board recognized in this case, because the July 25, 2011 order affirmed it. Thus, the July 25, 2011 order (rather than the April 1, 2011 order) was the Department’s final order on the issue, and thus the only order that Leigh

could appeal to pursue that issue. And Leigh did appeal the July 25, 2011 order.

Because Leigh seeks to challenge a non-final order of the Department that the Department has already reconsidered and addressed through a further order, the superior court correctly characterized her attack on the April 1, 2011 as moot. Issues become “moot when the court can no longer provide effective relief.” *Brown v. Vail*, 169 Wn.2d 318, 337, 237 P.3d 263 (2010). As both the Board and superior court recognized, they could not provide relief to Leigh for her late challenge to a non-final determination. Leigh’s only avenue for relief was to challenge the Department’s final order, which she did by appealing the July 25, 2011 order. Leigh may now regret the decision to dismiss the appeal from the July 25, 2011 order, but that does not change the fact that Leigh’s only way to obtain relief regarding the suspension issue was to pursue the appeal from the July 25, 2011 order.

**2. Even if the Department made a mistake in communicating the April 2011 order to her or about whether there was a protest when it issued its July 2011 order, Leigh would have had to raise those issues in appeal to the July decision**

Even if this Court decides that the Department did not communicate the April 2011 order to her or that Leigh’s attorney’s April 25, 2011 message was not a protest to the April 1, 2011 order, that does

not change the fact that the July 25, 2011 order became final and binding, which precludes any argument regarding whether the Department properly communicated the April 1, 2011 order to Leigh. It is true that it would be legal error for the Department to issue the July 25, 2011 order if no protest had been filed from the April 1, 2011 order. RCW 51.52.060(4)(a).

However, even when the Department commits legal error by issuing an order that it should not have issued, the erroneously issued order is final and binding—and entitled to res judicata effect—if no party timely appeals the order. *See Marley*, 125 Wn.2d at 539, 542-43, 542; *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 782, 271 P.3d 356 (2012).

The Department has the power to issue orders in workers' compensation cases, including the July 2011 order, and the power to decide is the power to decide wrong. *Marley*, 125 Wn.2d at 543. Therefore, even if the July 25, 2011 order was issued in error, Leigh had to appeal it, and secure its reversal on appeal, to avoid to being bound by it. So Leigh is wrong that a Department order is a “nullity” if the Department issues the order when there is no timely protest. AB 4.

**3. The Board order dismissing Leigh's appeal to the final July 25, 2011 order was final and binding because Leigh did not appeal it within 30 days**

Leigh appealed the Department's final order regarding the suspension of her benefits when she appealed the Department's July 25,

2011 order to the Board. *See* CP 88-89. Leigh later dismissed her appeal from that order as part of a larger settlement agreement, which benefited her by awarding her permanent partial disability awards. CP 85, 88. The Board dismissed the appeal at Leigh's request, and she has never challenged that dismissal, so it is final. CP 85, 88.

Leigh did not timely appeal the Board orders dismissing the appeal of the July 25, 2011 suspension order and reversing the July 27, 2011 order closing the claim, so those orders became final and binding. The closing order resolved any outstanding protest. *Randy M. Jundul*, No. 98 21118, 1999 WL 1446257 (Wash. Bd. Indus. Ins. Appeals Dec. 28, 1999), *overruled in part by Ken D. Follet*, No. 13 16696, 2014 WL 3055483 (Wash. Bd. Indus. Ins. Appeals June 3, 2014); *Camille E. Hefton*, No. 15 21738, 2017 WL 955654 (Wash. Bd. Indus. Ins. Appeals Feb. 6, 2017). Once there was a final order, Leigh had 30 days to appeal those Board orders to superior court, but she never did. RCW 51.52.110 (30-day appeal period to challenge Board's order); *see also Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 170-71, 937 P.2d 565 (1997) ("The Board and the courts do have authority under the Act to reconsider decisions *properly appealed* by one of the parties.").

Because Leigh never appealed the Board's orders to superior court, they are final. Res judicata, or claim preclusion, prevents a party from

“[r]esurrecting the same claim in a subsequent action” so long as “the prior judgment has a concurrence of identity with the subsequent action in: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.” *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737, 222 P.3d 791 (2009) (citations, quotations, and alterations omitted). A worker’s “failure to appeal an adverse ruling to the next level transforms the ruling into a final adjudication by the Department.” *Marley*, 125 Wn.2d at 537, 542-43. And this is true regardless of whether the Department’s order was issued as a result of a clear error of law. *See id.*

Each of the elements of res judicata is met here. The Board’s orders involved the same subject matter and cause of action (suspension of time loss benefits) as the April 1, 2011 order that Leigh purports to challenge here. The Board’s orders involved the same parties (Department, Leigh, and her employer) acting in their same capacities. Leigh never appealed the Board’s orders so she is bound by them. *Marley*, 125 Wn.2d at 539, 542-43. Leigh cannot undo what has already been resolved through a final settlement.

**B. Leigh's Remaining Arguments Have No Merit**

**1. The Department communicated the April 1, 2011 order to Leigh<sup>10</sup>**

Leigh's core argument is that the Department did not communicate the April 1, 2011 order to her and that this rendered everything that happened after April 1, 2011 immaterial. *See* AB 13. But because the April 1, 2011 order was not the Department's final order, as explained above, it does not matter whether the Department communicated that order to her, because she appealed the Department's subsequent July 25, 2011 order, only to later dismiss that appeal.

First, the record reflects that the Department communicated the April 1, 2011 order to Leigh; that is the reason she protested it.<sup>11</sup> *See* CP 144; *contra*, AB 3-5. RCW 51.52.050(1) provides that whenever the Department has issued any order, decision, or award, it must promptly serve the worker, beneficiary, employer, or other affected person with a copy by mail. If an affected party does not receive a Department order, the

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<sup>10</sup> The Department agrees with Leigh that the March 31, 2011 notice of appearance and blanket protest Mannakee filed with the board is not a protest to the April 1, 2011 order as the Jurisdictional History, the August 24, 2017 order, and the November 13, 2017 order say. AB 2-3; CP 88, 121, 128. Indeed, it cannot be a protest to the April 1, 2011 order as it was filed before that order had been issued.

<sup>11</sup> Leigh argues that the superior court failed to address the fact that the April 1, 2011 order was not communicated. Leigh is wrong: the superior court concluded that Leigh's arguments about the April 1, 2011 order were moot because that order was addressed in the appeal of the July 25, 2011 order. CP 225.

order does not become final. *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 717, 213 P.3d 591 (2009). “The term ‘communicated’ as used in the statute means that the order, decision, or award is received by the respective party.” *Id.* at 717. As *Shafer* observes, “A central purpose of the notice requirement is to allow a party aggrieved by the closure order to seek reconsideration by the Department or to appeal the order to the Board.” *Id.* at 721.

Here, the Department sent the entire claim file to Leigh’s counsel on April 12, which included the April 1 order. CP 144. Leigh admits that her attorney knew about the April 1, 2011 order, appealed the July 25, 2011 affirming order, and dismissed the appeal from that order.<sup>12</sup> AB 10.

Even though Leigh argues that the Department must communicate orders under separate cover notices, neither of the statutes she cites—RCW 51.52.050 and .060—nor any other statute, regulation, or case law mandate such a requirement. AB 3, 10, 11. To communicate an order to a represented claimant, the Department mails it to the claimant’s attorney.

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<sup>12</sup> Leigh argues that the issue in this appeal is the same as the one in Board docket no. 16 13973. AB 4. It is not. In Board docket 16 13973, a different appeal, the Board found that Leigh’s appeal to a different April 1, 2011 order was timely. First, the April 1, 2011 of docket 16 13973 is a different order than the April 1, 2011 suspension order at issue here, albeit issued the same day. Second, although the Board found in docket 16 13973 that the Department order was never communicated, this was due to the fact that nobody protested that Department order: here, Mannakee timely protested the suspension order.

*See* RCW 51.04.080, .050; *Renton Sch. Dist. # 403 v. Dolph*, 2 Wn. App. 2d 35, 40-41, 43, 415 P.3d 269 (2018).

Since Leigh protested the July 25, 2011 order, she could have argued that the April 1, 2011 order was never communicated to her. CP 121. Instead, Leigh agreed to dismiss her appeal from the July 25, 2011 order. Therefore, even assuming for the sake of argument that the Department should have mailed the April 1, 2011 order to Leigh's recently appointed attorney rather than simply sending the attorney a complete copy of the claim file (which included a copy of that order), Leigh surrendered the right to argue that this was a prejudicial error by dismissing the appeal from the July 25, 2011 order. That is because, by dismissing the appeal from that order, Leigh gave up the opportunity to argue that the July 25, 2011 order was wrong for any reason, including the argument that it was wrong based on an issue regarding the communication of the April 1, 2011 order. *See Marley*, 125 Wn.2d at 539, 542-43; *Singletary*, 166 Wn. App. at 782.

**2. The rest of Leigh's arguments are meritless and the cases she cites are not applicable here**

Leigh argues that, under RCW 51.52.060, the Department has 60 days to issue an order but it took it 115 days to affirm the April 1, 2011 order. AB 7. Leigh is wrong because she confuses the authority of the

Department to reassume a claim with the authority to issue an order after a protest. After the Board grants an appeal, RCW 51.52.060(3) authorizes the Department to reassume the claim for very specific determinations and for a specific time. Here, RCW 51.52.060 does not apply because there was no appeal pending under RCW 51.52.060, only a protest under RCW 51.52.050 when the Department issued the order.

Leigh also argues that the Department violated due process rights when it failed to communicate the April 1, 2011 order. AB 13. First, the Department communicated the order to her, and she protested it, so this argument has no merit. Second, Leigh also had notice and opportunity to be heard at the Board when she appealed the July 25, 2011 order, so due process was not violated. Third, to adequately present a constitutional argument, Leigh must cite to authority and present argument. RAP 10.3(a)(6); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994). “[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *U.S. v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)). Because she has not done so, the Court should decline to further consider Leigh’s due process arguments.

None of the Board cases that Leigh cites supports her claims. *Larry Lunyou*, No. 87 0638, 1988 WL 169311 (Wash. Bd. Indus. Ins. Appeals

Mar. 25, 1988), *David P. Herring*, No. 57,831, 1981 WL 375943 (Wash. Bd. Indus. Ins. Appeals, July 30, 1981), *Elmer P. Doney*, No. 86 2762, 1987 WL 61436 (Wash. Bd. Indus. Ins. Appeals, Dec. 14, 1987), and *Mollie L. McMillon*, No. 22,173, 1966 WL 86300, (Wash. Bd. Indus. Ins. Appeals, Nov. 30, 1966) are inapplicable here. *Contra* AB 3, 4.

Communication of an order protects the appeal rights of the parties; since Leigh protested the April 1, 2011 order, her appeal rights are not at issue.

Also, *Richard P. Wagner*, No. 88 0962, 1988 WL 236561 (Wash. Bd. Indus. Ins. Appeals Mar. 14, 1988) does not apply here either. *Contra*, AB 4 n. 12. In *Wagner*, the Department issued a second “appealable only” order identical in all respect to a prior order that also adhered to an even prior order. The Board concluded that the second order was a nullity because there was no protest or request for reconsideration filed by any party which vested the Department with authority to issue the second order without first reassuming or cancelling the prior order. But here, the July 25, 2011 affirming order was in response to Leigh’s April 25, 2011 secure message protesting April 1, 2011 suspension order. This protest required the Department to respond, which it did through the July 25, 2011 order. *See* RCW 51.52.050(2)(a).

Likewise, *Daniel Bazan*, No. 92 5953, 1994 WL 16010283 (Wash. Bd. Indus. Ins. Appeals Mar. 8, 1994) does not change the analysis.

*Contra*, AB 5, 6. Unlike in *Bazan*, in which the claimant never saw the order but learned from it through a medical provider and then he appealed it, Leigh knew of the April 1, 2011 order's content and she appealed the order.

Also, while Leigh is correct that an interlocutory order does not become final and binding whether it is appealed or not, this is immaterial because none of the orders at issue here were interlocutory. AB 8; *see also Uerling*, 1999 WL 33601707. An interlocutory order is one that does not advise the worker of the right to file an appeal within 60 days of the communication of the order. *See Uerling*, 1999 WL 33601707. But since the April 2011 and July 2011 orders did advise Leigh of the right to appeal, they were not interlocutory, and the July 2011 order therefore became final when Leigh dismissed the appeal from it. Leigh's decision to dismiss that appeal precludes all of the arguments she seeks to advance here and precludes her from receiving any relief from this Court.

## VI. CONCLUSION

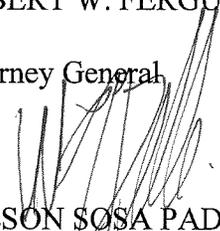
The superior court correctly affirmed the Board's denial of Leigh's appeal of the April 1, 2011 Department order. First, the April 1, 2011 Department order was not a final appealable order because Leigh protested the order, the Department issued a further order, which Leigh appealed. This made the July 25, 2011 order the only appealable order regarding that

issue. Second, Leigh dismissed her appeal from the July 25, 2011 order, and the Board issued an order granting her request to dismiss it, and Leigh failed to appeal the Board's order of dismissal. Since the April 1, 2011 is not an appealable order, and since Leigh dismissed her appeal from the July 25, 2011 order and failed to appeal the Board order dismissing that appeal, this Court should affirm.

RESPECTFULLY SUBMITTED this 6 day of March, 2019.

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Desirae Jones  
DESIRAE JONES, Legal Assistant

**ATTORNEY GENERAL OF WASHINGTON - TACOMA LNI**

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