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

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

TAMRA ARCHER LEIGH,

Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT

Case No. 17-2-13374-0

ARGUMENT AND REBUTTAL OF RESPONDENTS 03-06-2019 BRIEF

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

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I. INTRODUCTION

This is a credible evidence case arising from a workers' compensation appeal. The decision(s) of the Superior Court should be reversed because the legislatively structured mandates of the Industrial Insurance Act¹ RCW 51.04.080 Sending Notices, Orders, Payments to Claimants and RCW 51.52.050 Service of Departmental Action—Demand for Repayment—Orders Amending Benefits—Reconsideration or Appeal and RCW 51.52.060 Notice of Appeal—Time—Cross-Appeal—Departmental Options have not been met by the Department of Labor and Industries² for the misaddressed non-communicated non-protested order dated April 01, 2011 and the ensuing affirming order dated July 25, 2011, as evidenced in the Board of Industrial Insurance Appeals³ certified record successfully transmitted to the Superior Court and now designated as the certified court clerk administration record for the Appellate Court.⁴

The Superior Court Decision(s) on May 18, 2018 and July 20, 2018 applied Ms. Leigh's representative Nate D. Mannakee's⁵ communication dated June 15, 2011 as the protest to the misaddressed non-communicated

¹ Industrial Insurance Act will be referenced as "Act"

² The Department of Labor & Industries will be referenced as "Department"

³ Board of Industrial Insurance Appeals will be referenced as "Board"

⁴ The designation of court clerk administration record is cited as "CP" followed by the page number(s).

⁵ Nate D. Mannakee – 5268; Resignation in Lieu of Discipline, Effective Date: 8/10/2015. Will be referenced as "Mr. Mannakee"

Department order dated April 01, 2011. This is a false narrative presented by the Department which is inconsistent with the law and not based or supported by facts in evidence previously reviewed by the Board. *See* CP 181, 215, 224-225; 05/18/18 RP 11-12⁶

The Superior Court decisions are inconsistent with the Board orders dated August 24, 2017 Order Denying Appeal, and the Board order dated November 13, 2017 Order Denying Motion to Vacate Order Denying Appeal⁷ as presented in the Board-certified record successfully transmitted to the Superior Court for its de novo review. *See* CP 60, 82-83

The Board applied the March 31, 2011 communication as the protest to the misaddressed non-communicated Department order dated April 01, 2011, per the Department record presented in the Board-certified record.

The Department entered the March 31, 2011 communication as being received on April 01, 2011, this is inconsistent with the Department date and time stamped evidence Ms. Leigh presented to the Board and successively included in the Board-certified record effectively transmitted to the Superior Court for review de novo. *See* CP 24-29

The above-mentioned Board orders affirmed the misaddressed non-communicated non-protested Department order dated April 01, 2011 as

⁶ Transcript of hearing held on May 18, 2018, is cited as “5/18/18 RP” followed by the page number.”

⁷ Ms. Leigh actually submitted a Petition for Review on September 02, 2017. *See* CP 62-66 The Board chose to consider the filing as a motion for reconsideration. *See* CP 69

being protested on April 01, 2011. There is no statutory directive within the Act that permits the Department or claimant to apply a pre-dated “general protest” to any future orders. The Board-certified record does not establish a valid recognized protest from April 01, 2011 through July 25, 2011. *See* CP 20, 121

In addition, the above-mentioned Board orders proclaim the Department order dated July 25, 2011 as the final affirming order to the misaddressed non-communicated non-protested April 01, 2011 Department order.

The Department order dated July 25, 2011 was issued 115 days after the misaddressed non-communicated non-protested April 01, 2011 order, well beyond the very specific time-frame mandates within RCW 51.52.050(1),.060(1)(a). This deadline may not be extended by the Department, the Claimant, the Board, or the Courts except in narrowly defined circumstances.⁸

Ms. Leigh has the burden of proceeding with the valid recognized history and evidence within the Board-certified record successfully transmitted to the Court and designated as certified court clerk administration record to establish a prima facie case and has done so consistently in regard to failure to communicate a discretionary determinative order in addition to the validity of the ensuing affirming order.

⁸ *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 937 P.2d 565 (1997).

The cases Ms. Leigh cites are not included with preference to either party, the cases cited are relevant to the facts and law presented in this case.

The consequences should not out-weigh the law,⁹ that being said, this Court should reverse the Superior Court orders dated May 18, 2018 and July 20, 2018, due to the law and facts consistently presented by Ms. Leigh.

II. COUNTER-STATEMENT OF THE ISSUES PRESENTED TO THE BOARD AND COURT

RCW 51.52.115 The Act's requirement that Superior Court review is de novo only on the evidence or testimony in the Board's record (or in the record of its predecessor, the joint board) has been in effect since 1927. See Laws of 1927, ch. 310, § 8; *Floyd v. Dept of Labor & Indus.*, 44 Wn.2d 560, 573-74, 269 P.2d 563 (1954)¹⁰

III. COUNTER-STATEMENT OF THE CASE

A. Evidence is substantial if sufficient to persuade a fair-minded, rational person of the truth of the matter.

Ms. Leigh has consistently presented evidence to the Board and Court obtained from the primary source, the Departments own Account and Claim Center for claim AE62982, indexed within the Claim Imaged Documents.

⁹ *In re Ronnie McCauley*, BIIA Dec., 89 3189 (1991); *In re Anna Khomyak*, BIIA Dec., 07 25120 & 07 25211 (2009); *In re David Clay*, BIIA Dec., 10 13138 (2012). “The suspension of benefits under the provisions of RCW 51.32.110 by the Department or self-insurer, with the Department's approval, may apply to future benefits only. The retroactive suspension of benefits is not permitted.”

¹⁰ Laws of 1927, ch. 310, § 8; On such appeal the hearing shall be de novo, but the appellant shall not be permitted to offer, and the court shall not receive, in support of such appeal, evidence or testimony other than, or in addition to, that offered before the joint board or included in the record filed by the department.

The evidence presented by Ms. Leigh demonstrates the Departments deficient mail-handling procedures in this case.

B. Ms. Leigh's time loss benefits were suspended on March 21, 2011. An order for this action was not legally communicated to Ms. Leigh or her representative per statute, or per the Board-certified record, thus denying Ms. Leigh her right to challenge the action with the appropriate documentation submitted to the Department by Ms. Leigh prior to the action. WAC 296-14-410(4)(a)(b)

Ms. Leigh has not questioned the content of the Department order dated April 01, 2011 before the Board or Court as of yet, nor was the content of said order argued within the appeals submitted to the Board or Court by Ms. Leigh. The subject of suspension was addressed as it pertained to the issue of failure to communicate and void affirming order, in addition to being denied the right to challenge. *See* CP 172-173

This has not been an issue to be argued within the appeal(s) Ms. Leigh filed with the Board or Court and is inaccurately¹¹ and inappropriately discussed in this instance, as evidenced in the jurisdictional history entry July 27, 2011. *See* CP 122

C. There is no statutory directive within the Act that permits the Department or claimant to apply a pre-dated "general protest" to any future orders.

¹¹ Claim was suspended on March 21, 2011 per the Department closing order dated July 27, 2011 and recorded as such in the Board-certified record. Ms. Leigh was informed of the action by SCA Pacific Case Management, Jodie Easley, CDMS verbally at her office on or around March 21, 2011. The Department did not issue an order for this action at that time.

The Board order dated August 24, 2017 Order Denying Appeal, and the Board order dated November 13, 2017 Order Denying Motion to Vacate Order Denying Appeal specifically state the following;

1. August 24, 2017, “The claimant also filed a protest with the Department on April 01, 2011, from the Department order dated April 01, 2011. On July 25, 2011, the Department affirmed its order dated April 01, 2011. Therefore, the order dated April 01, 2011, is not the Departments final determination from which an appeal may be taken. *In re Santos Alonzo*, BIIA Dec., 56,833 (1961).” *See* CP 60
2. November 13, 2017, “The claimant also filed a protest with the Department on April 01, 2011, from the Department order dated April 01, 2011... Ms. Leigh’s arguments have no legal validity. The April 01, 2011 suspension was protested by her attorney, affirmed by the Department, and appealed by her attorney.” *See* CP 82-83

It does not matter if the previously submitted protest is one day or one year prior to the forthcoming order, if this action is permitted, it would create endless chaos within the Acts appeal process. Such a result cannot be tolerated as it is inconsistent with the “sure and certain relief” mandated by the Act.

The Department chose not to appropriately respond to the numerous requests for communication from Mr. Mannakee. Such as: (1) April 25, 2011, Time-loss – “Based on the claim status”; *See* CP 35 (2) April 27, 2011, Previous IME’s – “We have been waiting for a while”; *See* CP 34 (3) May 10, 2011, New AP – “We request a change of AP’s”; *See* CP 33 (4) June 15, 2011, Claim Status Open – “What the Department may not do is nothing. This practice denies the claimant her right of access to the Board and Courts to review the Department’s action. This practice is a “bad faith”

violation of the statutes obligating the Department to provide sure and certain relief to injured workers”; *See* CP 149-150 (5) July 06, 2011, Independent Medical Examination – “We would like to have the confidential flag removed”; and *See* CP 42 (6) July 19, 2011, Please address all questions the previous claims manager had not – “Please review all documents and address all of the questions and statements we have posed since April 01, 2011...The former claims manager, Andrea Rainey, had failed to address any of our issues....” *See* CP 41

As outlined above, the Department was notified by Ms. Leigh’s representative on several occasions regarding the oversight and the Department turned a blind eye to Mr. Mannakee’s requests for communication, which is evident in the certified court clerk administration record that lacks a recognized valid protest entered between April 01, 2011 and July 25, 2011. *See* CP 114, 121

Ms. Leigh discovered the failure to communicate at a Board hearing in October 2016 and proceeded to notify the Department several times during 2016 and 2017. The Department chose not to respond, therefore Ms. Leigh filed and appeal with the Board. Ms. Leigh has been diligent in pursuing her rights after discovery.

“Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or the correctness of the order.” *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 833, 123 P. 3d 102 (2005)

The Department or Claimant may not fabricate protest dates not documented in the Board-certified record successfully transmitted and designated as certified court clerk administration record previously reviewed by the Court to achieve a desired outcome. A mistake repeated more than once is a decision.

The Departments representative of record,¹² Assistant Attorney General Wilson Sosa Padilla¹³ may not proclaim the Board-certified record successfully transmitted to the Court as erroneous to justify his argument without the preponderance of supporting documentation. RCW 51.52.110

The totality of Mr. Padilla's responses are rife with false narratives¹⁴ inconsistent with the law and not based or supported by facts in evidence previously reviewed by the Board and Superior Court.¹⁵ RCW 51.52.115
Court appeal—Procedure at trial—Burden of proof. Due to this verity Mr. Padilla's responses lack merit, such as but not limited to:

¹² RCW 51.52.140 Rules of practice—Duties of attorney general—Supreme court appeal. Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal advisor of the department and the board.

¹³ Assistant Attorney General Wilson Sosa Padilla will be referenced as “Mr. Padilla”

¹⁴ *Pappas v. Hershberger*, 85 Wn.2d 152, 153-54, 530 P.2d 642 (1975); accord *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992) (appellate court generally will not consider arguments raised for the first time on appeal); *Van Vonno v. Hertz Corp.*, 120 Wn.2d 416, 426-27, 841 P.2d 1244 (1992) (refusing to consider an argument raised for the first time on appeal).

¹⁵ RCW 51.52.115 The Act's requirement that superior court review is de novo but only on the evidence or testimony in the Board's record (or in the record of its predecessor, the joint board) has been in effect since 1927. See Laws of 1927, ch. 310, § 8; *Floyd v. Dept of Labor & Indus.*, 44 Wn.2d 560, 573-74, 269 P.2d 563 (1954)

1. “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.” *See* RB 2
2. The Respondents Brief of May 07, 2018 clearly states; “The Department sent that order and a letter explaining the order to Leigh’s prior attorney of record.” *See* CP 181
3. The Respondents Brief of March 06, 2019¹⁶ clearly states the following in the footnote: “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.” *See* RB 18
4. The Respondents Brief of May 07, 2018 clearly states; “On June 15, 2011, Mannakee’s paralegal sent a letter to the Department... The Department treated this letter as a protest and on July 25, 2011, the Department affirmed the April 01, 2011 order with a final order.” *See* CP 181; AB 10 ¹⁷
5. The Respondents Brief of March 06, 2019 clearly states the following in the footnote: “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.” *See* RB 12
6. The Respondents Brief of March 06, 2019 clearly states the following: “On April 25, 2011, Mannakee sent an electronic message to the Department, requesting that Leigh receive time loss compensation and stating that the claim suspension “has been lifted... Mannakee’s message was a timely protest to April 01, 2011 order...” *See* RB 4

¹⁶ Respondents Brief of March 06, 2019 is cited as "RB" followed by the page number(s).

¹⁷ Ms. Leigh’s January 03, 2019, Appellants Brief will be referenced as “AB” followed by the page number

Mr. Padilla now asserts the communication from Mr. Mannakee on April 25, 2011 as the timely protest to the Department order dated April 01, 2011.¹⁸ *See* CP 121

Why would Mr. Mannakee protest the suspension being lifted and then request time-loss? Not only is this false narrative factually incorrect, it is not recorded as such in the Board-certified record or the certified court clerk administration record presented to the Courts for review.

Once again, Mr. Padilla has chosen a communication not within the statutory time-frames to be considered as a recognized valid protest, the time for further consideration allowed to the Department by RCW 51.52.050;.060 had long since passed “if” the misaddressed April 01, 2011 order had been legally communicated and protested by Ms. Leigh.

The issue of failure to legally communicate a discretionary determinative order, including the absent entry of a recognized valid protest or request for reconsideration in the Department record or the Board-certified record from April 01, 2011, through July 25, 2011, has not been accurately addressed by the Superior Court. *See* CP 13-22, 107-116

THE COURT: “Can you address Ms. Leigh’s argument that the order should have been sent under a separate cover?” *See* 5/18/18 RP 10 ¹⁹

THE COURT: “Well, I wanted you to talk about any applicable law about requirements made for mailing of an order. *See* 5/18/18 RP 11

¹⁸ “The record in this case consists of the Certified Appeals Board Record (CABR), pursuant to RCW 51.52.110. The Department objects to Leigh’s reference to facts not contained within the CABR and this court should disregard evidence that is not part of the CABR.” *See* CP 183

MR. PADILLA: “I don’t know if there is a requirement to send an order specifically in a different envelope or a different way. But in this case, that would be irrelevant because the communication of an order with us does start the clock of how many days a claimant has to protest or appeal an order.” *See* 5/18/18 RP 11

Absent the filing of a recognized valid protest or request for reconsideration on a misaddressed non-communicated order, the Department does not have the authority to issue an affirming or adherence order beyond statutory time-frames and claim it is the final order.²⁰

D. Mr. Padilla asserts that the Department communication dated April 12, 2011 satisfies the prerequisites of RCW 51.52.050 and RCW 51.52.060. With regard to the legislative intent in establishing a presumption of mailing for determinative orders.

This assertion is wholly oblivious to well-settled law and precedent with regard to the legislative intent in establishing a presumption of mailing.

On or around April 12, 2011, the Department sent a generic form letter to Mr. Mannakee, acknowledging that it had received his notice of representation and change of address on March 31, 2011, and did not correct the mailing of the order dated April 01, 2011, which had been sent to the wrong address.

The Department enclosed a microfiche copy²¹ of the entire claim file, which may or may not have contained the order on appeal. The letter

²⁰ “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)

²¹ Microfiche is a way of storing documents via photographic film. Documents are photographed and then stored at a small size, too small to be read by the naked eye.

informed Mr. Mannakee that the mailing address had been changed and he could view his client's claim file documents online;

“Enclosed is a microfiche copy of the claim file. ... You can view your client’s claim file documents online...” And “I changed the mailing address. All claim correspondence will be sent to you.” *See* CP 144

This action falls short of the legislative intent in establishing a presumption of mailing per RCW 51.52.050 and RCW 51.52.060.²² This action does not eliminate the Departments communication obligation or mandated adherence to RCW 51.04.080; RCW 51.52.050 and RCW 51.52.060 *See* CP 144-145; 5/18/18 RP 11-12

THE COURT:

“Due process requires notice and an opportunity to be heard. And the rules that are set forth in the law and the regulations that apply to the Department of Labor and Industry are all geared toward making sure that people get notice as part of their due process rights. So, the statutes require that orders be mailed. And I think everybody agrees about that. Ms. Leigh's arguing that because the order was mailed as part of a larger package, that that wasn't sufficient to communicate the order to her or her representative. I do not believe that I need to make a finding on that because Mr. Mannakee submitted a protest [June 15, 2011] that was treated by the Department as a protest to the April 1st order. They considered that a protest. There were proceedings. And then on July 25th, a final order regarding that matter was issued. Mr. Mannakee was allowed to protest the July 25th order and file an appeal of the July 25th order. More proceedings occurred and ultimately there was a settlement agreement reached and the appeal of the July 25th order was dismissed voluntarily. Because Ms. Leigh was represented by counsel during this time, I think the law is pretty clear that she is bound by her attorney's actions, and so I am going to deny the appeal. I will affirm the Board's decision and I'm prepared to sign an order to that effect today.” *See* 5/18/18 RP 17-18

²² 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)

As stated in Ms. Leigh's Board appeal for Department Notice of Decision dated April 01, 2011 for claim AP00704 the final order "Order Finding Appeal Timely" Docket No. 16 13973 (same issue; communication, same day/year, same claim manager, same claimant, same attorney, same evidence, different claim (Occupational Disease))

"Here, the undisputed evidence established that Nate Mannakee became Ms. Leigh's representative for Department matters the day before the Department issued the Order on Appeal. Although the Department elicited testimony on cross that if it mailed Mr. Mannakee an imaged copy of Ms. Leigh's claim file on April 11, 2011, the fiche would have contained the Order on Appeal, this testimony falls short of establishing a presumption of mailing. Accordingly, I find the Department's failure to communicate the Order on Appeal to Ms. Leigh's attorney meant that the order never become final and binding." See CP 49-51

Ms. Leigh relies on the well-reasoned decisions which are unambiguously relevant in this case in the following decisions;

"Some cases concern situations of, what might be termed, "cured communication" or "constructive communication", where the parties wished to proceed with trial and did so. This case is different from those cases in that: 1) communication did occur at some point; and 2) a party was allowed to proceed, after the communication. *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949 (1975); *In re Larry Lunyou*, BIIA Dec., 87 0638 (1988); *In re Elmer P. Doney*, BIIA Dec., 86 2762 (1987); *In re Mollie L. McMillon*, BIIA Dec., 22,173 (1966); and *In re David P. Herring*, BIIA Dec., 57,831 (1981). None of the cases required a party to proceed in the circumstances of non-communication."

"The issue of a "cured" or "constructive communication" of an order has been addressed in a line of well-reasoned decisions by the Courts. *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949 (1975); *In re Larry Lunyou*, BIIA Dec., 87 0638 (1988); *In re Elmer P. Doney*, BIIA Dec., 86 2762 (1987); *In re Mollie L. McMillon*, BIIA Dec., 22,173 (1966); and *In re David P. Herring*, BIIA Dec., 57,831 (1981). "A cured or constructively communicated order does not eliminate the statutory requirements of presumption of mailing."

"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)

“The Court of Appeals has held that if an affected party does not receive a Department order, the order does not become final.” *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).

The question to be answered is; Should Mr. Padilla’s argument be accepted as valid and declare the above well-settled decisions untenable?²³

E. Once the Department has issued an order (April 01, 2011), 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 (July 25, 2011). In such case, the adherence order is a nullity.

²³ RCW 51.52.115 Court appeal—Procedure at trial—Burden of proof. 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. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the superior court shall refer the same to the department with an order directing it to proceed in accordance with the findings of the court: PROVIDED, That any award shall be in accordance with the schedule of compensation set forth in this title. In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court.

In this instance the Department applied Mr. Mannakee's March 31, 2011 blanket protest to the order dated April 01, 2011. The March 31, 2011 notification of representation, address change, and blanket protest cannot be a protest to the April 1, 2011 order due to the fact, it was received by the Department before said order had been issued as evidenced in the certified court clerk administration record with Department date and time stamped documents.²⁴ If this action were allowed, it would render the Act's legislative requirements in RCW 51.04.080; RCW 51.52.050; RCW 51.32.060 meaningless. In such case(s), the Courts have confirmed the adherence order is a nullity.

The Department communication of July 25, 2011 specifically states,

"Your claim was recently transferred to me for further claim management. In my review of your claim file, I note that an order was issued on 04/01/2011, which suspended your claim due to noncooperation with vocational services. I note that this Order was "protested"...Under separate cover, I have issued an order which affirms the suspension of your claim." And "The order which closes your claim has also been issued under separate cover." See CP 153-154

The Department order dated July 25, 2011, communicated under separate cover, issued 115-days following the misaddressed April 01, 2011 Order, specifically states,²⁵

²⁴ "For that reason, the Board cannot acquire jurisdiction over an appeal as no appeal may be taken from an invalid order." *In re Valentin Lima*, BIIA Dec., 96 2958 (1998).

²⁵ Where the Department has held in abeyance an order previously appealed, pursuant to the provisions of RCW 51.52.060, and issued a further affirming order after the time allowed for doing so has passed, it may not thereafter hold such order in abeyance for further consideration. The Department cannot artificially extend the time for reconsideration as allowed by the Legislature.*In re Cortez Tyler*, BIIA Dec., 90 3483 (1990)

“The Department of Labor and Industries has reconsidered the order of 04/01/2011. The Department has determined the Order is correct and it is affirmed.”²⁶ See CP 155

Ms. Leigh had no actual knowledge of the contents of the Department order dated April 01, 2011 since it had never been communicated, Ms. Leigh could not pursue an appeal from the contents of said order.

F. Principles of finality. Rules of civil procedure are supplanted in compensation cases to the extent that matters of procedure are provided for in the compensation Act.

An appeal can be taken, at any reasonable time after discovery (October 2016), from the Department's failure to serve an order.

Mr. Padilla argues that actual awareness of the April 01, 2011 Department order outweighs the statutory mandates of RCW 51.52.050 and RCW 51.52.060 in regard to presumption of mailing, as indicated below;

“On June 15, 2011, Mannakee’s paralegal sent a letter to the Department. AR 62. The letter confirmed that Leigh’s counsel knew that “[o]n 04-01-2011, the Department of Labor and Industries issued a suspension order saying that the suspension will remain in effect until the claim is closed.”²⁷ See CP 181

Mr. Padilla argues that Ms. Leigh’s appearance at the Board hearing on June 07, 2012, eliminates the statutory requirements of presumption of

²⁶ The time within which the Department can modify or hold in abeyance a prior order is the “time limited for appeal.” This “time” is not 60 days from the date shown on the order, but rather, 60 days from the date the order was communicated to the aggrieved party *In re Kenneth Osborne*, BIIA Dec., 69,846 (1986) [special concurrence] [Editor’s Note: The Board’s decision was appealed to superior court under King County Cause No. 86-2-20322-2.]

²⁷ “The Supreme Court reiterated the rule that, the word communicated contained in RCW 51.52.060 requires only that a copy of the order be received by the workman. The presumption arises once proper mailing, i.e., correctly addressed with sufficient postage, of an item is established.” *Scheller v. Emp’t Sec. Dep’t*, 122 Wn. App. 484, 489, 93 P.3d 965 (2004)

mailing within RCW 51.52.050 and RCW 51.52.060. This analysis is wrong, as has been determined in the following well-thought-out relevant cases;

“The rule that a general appearance in a court proceeding will waive improper service of process and make the party so generally appearing bound by the determinations made in such proceeding, does not apply to the procedures under the Act to the extent that the procedural matters are spelled out in the Act. In effect, the Department's failure to comply with the statute heretofore quoted (RCW 51.52.060) rendered the order of August 2, 1963, null and void as to the claimant, and it was nothing more than a notice to the employer as to its intention to close the claim on the basis stated.” *In re Mollie McMillon*, BIIA Dec., 22,173 (1966); *Lacomastic Corporation v. Parker* 54 F. Supp. 138 (1944)

The issue of a “cured” or “constructive communication” of an order has been addressed in a line of well-reasoned decisions by the Courts. *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949 (1975); *In re Larry Lunyou*, BIIA Dec., 87 0638 (1988); *In re Elmer P. Doney*, BIIA Dec., 86 2762 (1987); *In re Mollie L. McMillon*, BIIA Dec., 22,173 (1966); and *In re David P. Herring*, BIIA Dec., 57,831 (1981). “A cured or constructively communicated order does not eliminate the statutory requirements of presumption of mailing.”

The Board has lacked authority to adjudicate any Department orders resulting from the misaddressed non-communicated non-proteted order dated April 01, 2011, such as:

1. The June 11, 2012, Board Decision and Order (11 19779, 11 19780, and 11 19871) Order Dismissing Appeals was entered without authority. *See* CP 85, 122
2. The June 29, 2012, Board Order on Agreement of Parties (11 19872) Department Order July 27, 2011, is reversed and remanded to Department to: 1) Pay the claimant an award for Permanent Partial Disability (PPD) consistent with category 2 of WAC 206-20-240²⁸, for cervical and cervico-dorsal impairment. 2) Pay the claimant an award for PPD consistent with Category 2 of WAC 296-20-280²⁹,

²⁸ WAC 296-20-240 Categories of permanent cervical and cervico-dorsal impairments

²⁹ WAC 296-20-280 Dorso-lumbar and lumbosacral impairments.

for dorsal-lumbar and lumbosacral impairment. 3) *Follow the July 27, 2011 Order* in all other respects, and 4) close the claim. This Order was entered without authority. *See CP 122*

“An order(s) entered without jurisdiction is void and cannot become final and binding, thus *res judicata* is not an issue.” *In re Daniel Bazan*, BIIA Dec., 92 5953 (1994)

“The time within which the Department can modify or hold in abeyance a prior order is the “time limited for appeal.” This “time” is not 60 days from the date shown on the order, but rather, 60 days from the date the order was communicated to the aggrieved party” *In re Kenneth Osborne*, BIIA Dec., 69,846 (1986) [special concurrence] [Editor’s Note: The Board’s decision was appealed to superior court under King County Cause No. 86-2-20322-2.]

Ms. Leigh is aggrieved by the failure of the Department to abide by the statutes which require 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).

IV. STANDARD OF REVIEW

When a Superior Court reviews a Board decision, it relies only on the certified board record but considers issues *de novo*. *Malang v. Dep't of Labor and Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). On review in Superior Court, the party challenging the Board’s decision bears the burden of proof because the Board’s decision is presumed correct. *Ruse v. Dep't of Labor and Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

V. ARGUMENT

A. RCW 51.52.115. False or misleading narratives should not be tolerated by either party. This action is bad faith, for an improper purpose, and frivolous. Definitely not in the Public’s Interest.

The Superior Court relied upon the arguments presented by Mr. Padilla in regard to the recognized valid date of protest entered in the certified court clerk administration record, as is evident within the Superior Court Decision(s) on May 18, 2018 and July 20, 2018.

Absent the filing of a valid or recognized protest or request for reconsideration for the Departments misaddressed non-communicated order dated April 01, 2011 the Department cannot simply issue a July 25, 2011 order outside the mandated statutory time-frames, which adheres to or affirms the original misaddressed non-communicated non-protested order dated April 01, 2011. In such case, the affirming or adherence order dated July 25, 2011 is a nullity.

The decision(s) must be established by way of strict adherence to the carefully crafted legislative statute(s) RCW 51.04.080 and RCW 51.52.050,.060.

For the stated reason(s), the Superior Court decisions are factually incorrect .³⁰

B. The Industrial Insurance Act provides finality to decisions of the Department if they are not protested or appealed within sixty days of actual delivery to the correct address. RCW 51.52.060 Notice of appeal—Time—Cross-appeal—Departmental options.

³⁰ 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 protest or request for reconsideration, the Department cannot simply issue a further order which only adheres 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)

Certain salient facts can be gleaned from the official record. By the Department's own admission (Mr. Padilla), it had the claimant's change-of-address in its records prior to issuing the Department order dated April 01, 2011. Whether Mr. Mannakee did in fact receive copies of the orders within the microfiche mailed on April 11, 2011 is not critical to resolution of this appeal, because this action does not rise to the required presumption of mailing.³¹

Since the misaddressed Department order dated April 01, 2011 was issued after a change of address was filed with the Department, under these circumstances, the Department's order dated April 01, 2011, in Claim No. AE62982 was not legally communicated at Ms. Leigh's last known address and therefore have remained viable and subject to appeal.

To be communicated, copies of the orders or actual knowledge of the contents and meaning of the orders must be directed to the last known address of the claimant (or her authorized representative as shown by the Department's records).³²

C. Has the misaddressed non-communicated non-protested order or the resulting affirming or adherence order achieved operable power over Ms. Leigh and become final and binding?

³¹ In *Arriaga v. Dep 't of Labor & Indus.* _ Wn. App. _ 335 P.3d 977,978 (2014) the court held that actual delivery to the correct address constitutes communication under RCW 51.52.060. See CP 24-27

³² Though the mailing of a letter is prima facie evidence that it was received, this court has distinctly held that it is nothing more, and that it will have but little weight against positive testimony that the letter was not received. *Ault v. Interstate Sav. & Loan Ass'n*, 15 Wash. 627, 47, Pac 13".

The Department has produced insufficient evidence to establish proof of mailing of the Department order of April 01, 2011. In order to establish proof of mailing and thereby establish a presumption of receipt, the Department must establish that it deposited in the United States mail a notice, properly addressed, stamped, and sealed. *Farrow v. Department of Labor and Industries*, 179 Wash. 453, 38 P.2d 240 (1934). No such proof was presented.

The mere fact that reference was made to the April 01, 2011 order is not sufficient to meet the statutory requirements providing the claimant with written notice of his rights to request reconsideration or to appeal. RCW 51.52.050.³³

No appeal can actually be made as to the contents of the order until the Department complies with its obligation to serve or communicate it to Ms. Leigh.

D. Could Ms. Leigh pursue an appeal at the Board on a non-communicated non-proteted order or an affirming or adherence order to the non-communicated non-proteted order?

Mr. Mannakee appealed the invalid affirming or adherence order dated July 25, 2011 and dismissed the appeal without actual knowledge of the misaddressed non-communicated non-proteted Department order dated April 01, 2011.

³³ *Rodriguez v. Department of Labor and Industries*, 85 Wn.2d 949 (1975). Communication of a Department order is satisfied by receipt of a copy of the actual order.

Of even greater significance to the resolution of the issue in this appeal the Department's order of July 25, 2011 neither modified, reversed, changed, or held in abeyance its order of April 01, 2011.³⁴ It simply “adhered” to the provisions of its prior order. Under the facts presented in this particular case, such action was ineffective to constitute a further and final adjudication of Ms. Leigh’s claim. The Department was without legal authority to issue an order with operative effect other than one consistent with the specific grant of authority in the final proviso of RCW 51.52.060.³⁵ It attempted to do so, so its attempt should be regarded as a nullity.³⁶

E. Res adjudicata: To challenge some aspect of an earlier and separate case when an obvious injustice occurred in the earlier case.

The doctrine of res judicata should not be applied in this case for three reasons: (1) the subject matter of the prior and present actions is dissimilar; (2) the earlier determination is so inconsistent with the law and facts that it would be unfair to apply the doctrine of res judicata in this situation; and (3) the Departments deficient mail-handling procedures in this case are not within the control of Ms. Leigh.³⁷

³⁴ When a Department order promises that a further appealable order will be issued if a protest is filed, a timely protest automatically sets the order aside and holds it in abeyance. The Board therefore lacks jurisdiction to hear an appeal from the original order since it is not a final order.*In re Santos Alonzo*, BIIA Dec., 56,833 (1981)

³⁵ Orders become final under the Industrial Insurance Act after they are “communicated.” RCW 51.52.050(1). An order is communicated when the injured worker receives it. *Shafer v. Dep’t of Labor and Indus.*, 140 Wn. App. 1, 8, 159 P.3d 473 (2007), aff’d, 166 Wn.2d 710, 722, 213 P.3d 591 (2009).

³⁶ *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 937 P.2d 565 (1997).

³⁷ 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,

Mr. Padilla cites *Singletary v. Manor Healthcare Corp.* 166 Wn. App. 774, 271 P.3d 356 (2012) without regard for the totality of the preponderance of evidence submitted by Ms. Leigh to the Board or in the certified court clerk administration record.

Other than the issue of failure to communicate an order, this case is irrelevant due to the extensive protest and appeal history documented from September 10, 2012 to August 24, 2017 in the certified court clerk administration record. The current Board appeals are not listed. *See* CP 123-126

Failure to communicate an order is not “legal error” it is a breakdown in Department mail-handling procedures.

VI. CONCLUSION

The Department may not rely on speculation, argumentative assertions, or false narratives to establish an issue of material fact. The above action(s) or inaction(s) failure to communicate a discretionary determinative order cannot be justifiably supported within the Department record, the Board-certified record, the certified court clerk administration record, or the statutory mandates of the Act, any attempt to do so would be brought in bad faith or for an improper purpose and frivolous.

For the foregoing reasons, Ms. Leigh respectfully requests that this Court reverse the decision of the Superior Court and remand to the

or the earlier determination is ambiguous due to an internal inconsistency.*In re Keith Browne*, BIIA Dec., 06 13972 (2007)

Department with instructions to either communicate the Department order of April 01, 2011 to claimant or to issue a further determinative order in this matter, without prejudice to any party to appeal therefrom, and with directions to require such benefits for Ms. Leigh as are in accord with and as may be appropriate pursuant to the facts and the law.³⁸

DATED this 1st day of April, 2019.



Tamra Archer Leigh, Pro Se

³⁸ *In re Ronnie McCauley*, BIIA Dec., 89 3189 (1991); *In re Anna Khomyak*, BIIA Dec., 07 25120 & 07 25211 (2009); *In re David Clay*, BIIA Dec., 10 13138 (2012). “The suspension of benefits under the provisions of RCW 51.32.110 by the Department or self-insurer, with the Department’s approval, may apply to future benefits only. The retroactive suspension of benefits is not permitted.”

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Tamra Archer Leigh
Pro Se

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Address:
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