

65861-1

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NO. 65861-1-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARCIA M. MAGEE,

Appellant

v.

RITE AID, INC.,

Respondent

APPELLANT'S BRIEF

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COURT OF APPEALS
DIVISION I
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INTRODUCTION

This is an appeal from a Superior Court decision affirming the Board of Industrial Insurance Appeals ruling that Ms. Magee is precluded from litigating her claim for occupational disease on its merits.

ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The Superior Court erred as a matter of law in granting Rite Aid's Motion for Summary Judgment. CP 255-257.
2. The Superior Court erred as a matter of law in denying Ms. Magee's Cross-Motion for Summary Judgment. CP 255-257.
3. The Superior Court erred as a matter of law in not vacating Conclusion of Law #3 as void. CP 255-257.

B. Issues Pertaining to Assignments of Error

1. Whether the Board of Industrial Insurance Appeals exceeded its jurisdiction when it entered Conclusion of Law #3, finding Ms. Magee did not have an occupational disease, when: 1) the issue on appeal was limited to whether Ms. Magee had timely filed an application for an industrial injury; 2) the parties did not present any evidence on the issue of occupational disease; and 3) the parties and the Industrial Appeals Judge had agreed that the issue of occupational disease would be litigated "at a later time." (Assignment of Error 1, 2)

2. If the Board exceeded its jurisdiction, whether Conclusion of Law #3 is void as a matter of law. (Assignment of Error 2, 3)

STATEMENT OF THE CASE

A. Procedural History

Marcia Magee worked for Pay-n-Save (later bought out by Rite Aid), for nearly 14 years, beginning around 1987. Sub. 18 (CABR I, Testimony of 04/13/05 at 11/13-16). She was forced to quit in 2001 when, as a result of repeated, sexually violent attacks perpetrated against her by her manager, she suffered severe physical and mental injuries. Sub. 18 (CABR I, Testimony of 04/13/05 at 15/3-11; 16/15-23; 24/5-8). Despite her limited mental capacity, she took steps to protect herself from further abuse in 2001, including calling the police, seeking a protection order from her supervisor, and finally leaving her job at Rite Aid. Sub. 18 (CABR I, Testimony of 04/13/05 at 24/18 – 26/18).

In 2004, Marcia Magee filed a SIF-2 form with the Department of Labor and Industries (hereinafter the “Department,”) based upon these sexual assaults. On March 31, 2004, the Department issued an order denying Ms. Magee’s claim because “no claim has been filed by said worker within one year after the day upon which the alleged injury

occurred.” Sub. 18 (CABR I at 131). Ms. Magee, through her attorney, protested the Department Order.¹

After hearings had concluded, the Industrial Appeals Judge issued a Proposed Decision and Order (hereinafter “PD&O”) that made specific Findings of Fact regarding the merits of an occupational disease claim. Sub. 18 (CABR I at 108-127). Both parties filed Petitions For Review to the Board in response to the PD&O. The Board granted the Petitions For Review and issued a Decision and Order on August 1, 2006. Sub. 18 (CABR I at 2-10). However, the Board exceeded its jurisdiction and entered a Conclusion of Law finding that Ms. Magee did not suffer an occupational disease. The claimant timely appealed the Decision and Order to the Superior Court. Sub. 20 (CABR II at 199). Both parties moved for Summary Judgment on the issue of whether the claimant timely filed an application for benefits for an industrial injury under RCW 51.28.050. Sub. 20 (CABR II at 252-289).

The Superior Court Judge did not grant either party’s Motion for Summary Judgment, and, without having a trial or hearing Ms. Magee’s remaining evidentiary motion, entered an order affirming the Board’s Decision and Order in its entirety. Sub. 20 (CABR II at 200). Ms. Magee

¹ Ms. Magee, in her protest, asked the Department to assess a penalty against Rite Aid for its failure to report her on-the-job assaults as on-the-job injuries to the Department. This request was denied. Ms. Magee appealed the denial of the penalty to the Board and the issue was consolidated with the timeliness issue. *See* Sub. 18 (CABR I at 143-146; 717).

timely filed a Motion for Reconsideration and an appeal to the Court of Appeals. Sub. 20 (CABR II at 202; 292-296).

The Court of Appeals affirmed that Ms. Magee did not submit an application within one year of her injury and the claimant timely filed a Petition for Review to the Washington Supreme Court.² The Supreme Court denied Ms. Magee's Petition for Review. Sub. 20 (CABR II at 411). Having exhausted her appeals on the issue of whether she timely filed an application for benefits under RCW 51.28.050, Ms. Magee requested that the Department now issue an order determining whether she had suffered an occupational disease. Sub. 20 (CABR II at 412).

In response to Ms. Magee's request, on February 6, 2009, the Department issued an order stating "In its Decision and Order of August 1, 2006, the Board of Industrial Insurance Appeals stated in Conclusion of Law number 3 that 'the sexual contact that the claimant had with her immediate supervisor between October 2000 and June 2001, does not constitute an occupational disease within the meaning of RCW 51.08.140.' Because Conclusion of Law number 3 was not reversed or vacated by any later court decision, it is now [a] final and binding conclusion that the department must follow." Sub. 20 (CABR II at 30).

² Although Ms. Magee had again argued and asked that the matter be remanded to the Superior Court for trial on the remaining issues, this request was not addressed by the Court of Appeals in its decision. *See* Sub. 20 (CABR II at 402).

Ms. Magee timely filed an appeal to the Board of Industrial Insurance Appeals. On November 9, 2009, the Industrial Appeals Judge affirmed the Department Order on Summary Judgment. Sub. 20 (CABR II at 24-28). The claimant filed a Petition for Review, which was denied on December 29, 2009. Ms. Magee timely filed an appeal to the Superior Court. CP 1-4.

While the Board was hearing the Cross-Summary Judgment Motions concerning the Board's jurisdiction to decide the issue of occupational disease, the claimant filed a CR 60 Motion to Vacate Conclusion of Law No. 3 with the Board. Sub. 20 (CABR II at 88). The Board did not consolidate the two matters and on January 20, 2010, the Board issued an Order Denying Ms. Magee's CR 60 Motion. Out of an abundance of caution, Ms. Magee later filed a second appeal in Superior Court based on the January 20, 2010 Order. The appeals were consolidated before the Superior Court. CP 31-32.

At Superior Court, both parties filed Motions for Summary Judgment. CP 88-112; CP 117-176. After hearing oral argument, the Superior Court granted the Employer's Motion for Summary Judgment which affirmed the Board of Industrial Insurance Appeals' ruling that Conclusion of Law #3 was final and binding. CP 255-257. On August 12, 2010, Ms. Magee timely filed an appeal to this court.

B. Factual History

The record plainly shows that throughout the litigation involving the issue of timeliness, neither party contemplated litigating the merits of an occupational disease claim. That is because the order on appeal concerned only the timeliness of an application for an industrial injury under RCW 51.28.050.

1. The Department Order on appeal dealt only with the issue of timeliness for an industrial injury under RCW 51.28.050.

In 2004, Marcia Magee filed a SIF-2 form with the Department of Labor and Industries (hereinafter the “Department,”) based upon a series of sexual assaults perpetrated on the job. On March 31, 2004, the Department issued an order denying Ms. Magee’s claim because **“no claim has been filed by said worker within one year after the day upon which the alleged injury occurred.”** Sub. 18 (CABR I at 131). Ms. Magee timely protested the Department Order.

After a telephone conference³ amongst the parties and the assigned Industrial Appeals Judge, an “Interlocutory Order Establishing Litigation Schedule” was prepared which plainly identified the issues on appeal as: **“Did the claimant file the application for benefits within one year of**

³ The purpose of this conference is, among other things, to simplify the issues of law or fact on appeal and to modify the notice of appeal as necessary. Any agreements made in the conference are then put on the record, which is the Interlocutory Order Establishing Litigation Schedule. The agreement of issues, as stated on the record, shall control the subsequent course of proceedings. RCW 51.52.095.

the date of injury? Did the self-insured employer fail to file the claim and/or report an on-the-job injury? If so, what penalties should be assessed?” Sub. 18 (CABR I at 143-146). The litigation schedule does not address the issue of occupational disease.⁴

After both parties had presented their cases to the IAJ based on the issues identified in the litigation schedule but before the IAJ had issued his decision, the Employer submitted a Post-Hearing Brief. Sub. 18 (CABR I at 646-664). In its Post-Hearing Brief, Rite Aid addresses the issues of whether Ms. Magee timely filed an application for benefits and/or put her employer on notice that an industrial injury had occurred. *See* Sub. 18 (CABR I at 651). The only mention of occupational disease comes in a footnote, in which Rite Aid notes that under RCW 51.28.055, there is a two-year filing period for occupational disease, but **“that is not at issue here. According to the Interlocutory Order dated October 12, 2004, the issue on appeal is whether Ms. Magee filed her application within one year of her alleged injury. The order on appeal stated she had failed to file within one year of the injury.”** *Id.* at 652-53, fn. 6.

⁴ The one year statute of limitations under RCW 51.28.050 applies only to industrial injury claims. However, under RCW 51.28.055, an injured worker has up to two years to apply for benefits based on a claim for occupational disease. Thus, a finding that Ms. Magee did not timely file a claim for industrial injury under RCW 51.28.050 would not preclude a later finding that she had timely filed a claim for occupational disease under RCW 51.28.055.

2. Both parties understood and agreed that any findings made by the Board concerning the merits of an occupational disease claim were beyond the Board's jurisdiction.

Despite the Litigation Schedule and the Employer's Post Hearing Brief, the Proposed Decision and Order (hereinafter "PD&O") made specific Findings of Fact regarding the merits of an occupational disease claim. Sub. 18 (CABR I at 108-127). Both the claimant and the Employer agreed that such findings were beyond the scope of appeal and the evidence presented to the Board. In response to the PD&O, the Self-Insured Employer drafted the Parties' Agreement/Stipulation Regarding the Scope of the Board's Review. Sub. 18 (CABR I at 32-33). The Stipulation unequivocally sets forth that the parties "**agree and stipulate that the issue on appeal in regard to docket number 04 19326 is whether Ms. Magee timely filed an application for benefits within one year of the alleged industrial injuries.**" The document goes on to explain that the parties discussed with Industrial Appeals Judge Laura Bradley⁵ "**that a determination regarding whether the alleged events constituted industrial injuries or an occupational disease were not determinations currently before the Board under either appeal . . .**

⁵ The parties, along with Judge Laura Bradley, agreed that based on the orders on appeal, the Board did not have jurisdiction to reach the issues of whether an industrial injury or occupational disease had occurred. However, the Proposed Decision and Order was authored by a different Industrial Appeals Judge who had not taken part in these pre-hearing discussions nor had he presided over the entire course of hearings. He therefore was not aware of the agreed upon jurisdictional limits of this appeal.

given the language of the orders under appeal. The parties agreed that any determinations regarding whether the alleged events constituted an industrial injury or an occupational disease were left, by the Department, for its consideration at a later date and time, but would not be considered as part of these appeals.” *Id.* As the Stipulation clearly states, neither party has ever litigated the issue of whether Ms. Magee has suffered an occupational disease and that, as a jurisdictional matter, this issue was never before the Board. The Employer filed the Stipulation with the Board on May 23, 2006. Sub. 18 (CABR I at 37).

In Rite Aid’s Petition for Review, Rite Aid again argued its position that “the Board only has jurisdiction to decide whether a claim was timely filed within one year of the alleged industrial injuries,” and that “the Board exceeded its jurisdiction . . . when it concluded that the alleged events did not constitute an occupational disease.” Sub. 18 (CABR I at 39/16-18; 43/13-15). Rite Aid went on to note that “The Department did not determine whether an occupational disease had arisen from events that allegedly occurred in October of 2000 and November 2000 within the meaning of RCW 51.08.140.” Sub. 18 (CABR I at 43/26; 44/1-2). Rite Aid added “all parties and the original IAJ assigned to these appeals recognized the limited issue

before the Board. The parties and Judge Bradley agreed that the Board did not have jurisdiction to address the issue of whether an industrial injury or occupational disease had occurred. That is why no medical evidence was presented, no employer witness regarding the nature of the relationship, etc. [sic]” Sub. 18 (CABR I at 44/17-23). Finally, Rite Aid devoted over three pages of its Petition For Review, to argue **“The Board lacked jurisdiction to conclude an industrial injury occurred [] and, that an occupational disease had not arisen naturally and proximately from employment.”** Sub. 18 (CABR I at 53-56).

The Board, in response to the Petitions For Review filed by both parties, issued a Decision and Order on August 1, 2006. Sub. 18 (CABR I at 2-10). The Board again exceeded its jurisdiction when it entered Conclusion of Law #3, which found that Ms. Magee did not suffer an occupational disease. The claimant timely appealed the Decision and Order to the Superior Court. Sub. 20 (CABR II at 199). Both parties moved for Summary Judgment on the issue of whether the claimant timely filed an application for benefits for an industrial injury under RCW 51.28.050. Sub. 20 (CABR II at 252-289).

In a footnote from its Cross-Motion for Summary Judgment, Rite Aid reaffirmed **“The Board ruled that Magee ‘characterized the contacts as assaults. Woolford characterized the contact as**

consensual.’ (Citation omitted.) An ultimate determination as to whose characterization was correct was neither necessary nor within the Board’s jurisdiction. This appeal dealt simply with whether her application for benefits was timely filed, not whether the incidents alleged constituted industrial injuries.” Sub. 20 (CABR II at 266, fn. 1).

The Superior Court Judge entered an order affirming the Board’s Decision and Order in its entirety. Sub. 20 (CABR II at 200). The Judge noted that “Ms. Magee failed to file an application satisfying the latter requirement within the time provided by RCW 51.28.050. Therefore, the decision of the Board must be affirmed.” The Superior Court Judge, in his written ruling, did not consider, address, or discuss the Board’s singular and unsupported Conclusion of Law regarding occupational disease. Neither of the parties briefed this issue in their cross-motions. The Superior Court had no basis on which to affirm Conclusion of Law #3 as part of the Board’s Order.

Ms. Magee timely filed a Motion for Reconsideration and an appeal to the Court of Appeals. Sub. 20 (CABR II at 202; 292-296). In her appeal, Ms. Magee requested that the matter be remanded to the Superior Court for trial so that the Court could enter Findings of Fact and Conclusions of Law. Sub. 20 (CABR II at 329-330). In her Reply Brief

to the Court of Appeals, Ms. Magee noted that the Superior Court did not have the authority to enter a judgment without first deciding the remaining issues of material fact. Sub. 20 (CABR II at 399).

At the Court of Appeals, Rite Aid submitted a brief in which it explained “**Whether or not Magee was injured on the job has never been litigated. This action pertained solely to the timeliness issue; whether she timely filed an application if she were injured.**” Sub. 20 (CABR II at 354, fn. 4). Rite Aid repeatedly and consistently, from the beginning of the hearing process and throughout the initial appeal process, maintained that the board never had jurisdiction to decide the issue of occupational disease.

The Court of Appeals affirmed the Superior Court and found that Ms. Magee did not submit an application within one year of her injury. Ms. Magee timely filed a Petition for Review to the Washington Supreme Court. At this level, the Department, through the Attorney General’s Office, submitted a brief in response to Ms. Magee’s Petition for Review. CP 20 CABR II at 577-601. In its brief, the Department summarizes the jurisdiction history of the case, noting that “**The Department denied Magee’s application as untimely on grounds that it had not been submitted within one year of the injuries she alleged, as required under RCW 51.28050.**” Sub. 20 (CABR II at 588). The Department

goes on to discuss how the timeliness issue was disposed of at each level of the appeal. At no point in the jurisdictional history discussion does the Department discuss where the Department found that Ms. Magee did not have a valid claim of occupational disease. That is because it can not. To date, the issue of whether Ms. Magee suffered from an occupational disease based on the series of sexual assaults while at Rite Aid has never been adjudicated by the Department.

3. It was not until Ms. Magee finally asked the Department to adjudicate the merits of her occupational disease claim did the Employer switch positions and argue that the issue had already been decided.

After exhausting her appeals on the preliminary issue of whether she timely filed an application for benefits under RCW 51.28.050, and per the terms of the Stipulation authored by the Employer and filed with the Board, Ms. Magee requested that the Department now issue an order determining whether she had suffered an occupational disease. Sub. 20 (CABR II at 412). The Employer responded in a letter dated December 19, 2008. Sub. 20 (CABR II at 603-606). Despite its extensive briefing to the contrary before the Board, and despite the Stipulation that stated this issue was reserved for consideration by the Department of Labor and Industries at “a later date and time,” the Employer suddenly reversed its position and objected to having the Department finally adjudicate this issue. The Employer now takes the convenient position that the Board’s

Conclusion of Law (the same Conclusion of Law the Employer objected to in its prior briefing before the Board and the Superior Court) is somehow final and binding.

C. Summary of Argument

To date, the Department has never adjudicated the issue of whether Ms. Magee has suffered an occupational disease. The only issue decided by the Department concerned whether or not Ms. Magee timely filed an application for an industrial injury. That issue was appealed. During the appeals process, both parties (and the Industrial Appeals Judge who initially heard the case) agreed that the issue of occupational disease was not an issue on appeal and that neither party submitted evidence on the question of occupational disease. Further, both parties agreed that such questions would be left for consideration by the Department at a “later date and time.”

The Board of Industrial Insurance Appeals, as an appellate body, exercised original jurisdiction when it entered Conclusion of Law #3 stating that Ms. Magee did not have an occupational disease. Because the Legislature has never granted the Board with this type of power, Conclusion of Law #3 is void. This case should be remanded to the Department with instructions to adjudicate the merits of Ms. Magee’s occupational disease claim.

ARGUMENT

A. As a matter of law, the Board of Industrial Insurance Appeals lacked jurisdiction to enter Conclusion of Law #3 in its August 1, 2006, Decision and Order

The Department denied Ms. Magee's application for benefits as untimely, stating "no claim has been filed by said worker within one year after the day upon which the alleged injury occurred." Notably, the Department did not deny the claim on the basis that it was not an industrial injury or an occupational disease. By the plain language of the Order, the only issue which could be appealed to the Board was whether Ms. Magee timely filed her claim under RCW 51.28.050. As such, the Board was without jurisdiction to enter any Findings of Fact or Conclusions of Law which exceeded the narrow issue of whether the application was timely submitted under RCW 51.28.050. Any Findings of Fact or Conclusions of Law concerning the merits of an occupational disease claim is beyond the Board's jurisdiction.

1. The Department has exclusive jurisdiction to decide the existence of an occupational disease.

The state courts' original jurisdiction over workplace injuries was abolished when the Washington Legislature enacted the Industrial Insurance Act. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003) citing *Skagit Motel v. Dep't of Labor & Indus.*,

107 Wn.2d 856, 857, 734 P.2d 478 (1987). The Act declared that “all phases of the premises are withdrawn from private controversy . . . and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided.” *Id.* citing Law of 1911, ch. 74 § 1, at 346; RCW 51.04.010. The Act provides that the Department possesses original jurisdiction of cases involving injured workers.

The term “jurisdiction” refers to a court’s power to decide a case or issue a decree. BLACK’S LAW DICTIONARY 867 (8th ed 2004). There are several types of jurisdiction, including personal and subject matter jurisdiction, as well as original and appellate jurisdiction.

Subject matter jurisdiction is defined as jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things. BLACK’S LAW DICTIONARY 870 (8th ed 2004). There is no debate that both the Department and the Board are empowered to hear and decide matters related to workers’ compensation. *See e.g.* RCW 51.52.060. However, their jurisdiction is not identical. A tribunal is limited to the nature and scope of jurisdictional authority conferred upon it. *Barnett v. Hicks*, 119 Wn.2d 151, 161-63, 829 P.2d 1087 (1992). The Department has original jurisdiction and the Board has appellate jurisdiction.

The courts have long held that the Department possesses original jurisdiction over any and all workers' compensation related matters. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539-40, 886 P.2d 189 (1994) quoting *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934). Original jurisdiction is defined as the court's power to hear and decide a matter before any other court can review the matter. BLACK'S LAW DICTIONARY 869 (8th ed 2004)(emphasis added).

It is well recognized in Washington that the Department is the original and sole tribunal with the power to determine the mixed question of law and fact as to whether a compensable injury has occurred. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997) citing *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934). Similarly, the Department is the only tribunal which has original subject matter jurisdiction to decide in this case whether the series of sexual assaults at the hands of her supervisor, and the substantial physical and mental injuries which resulted therefrom, constitute an occupational disease. To date, the Department has never adjudicated this issue. Stated another way, the Department has never exercised its original jurisdiction on this issue of whether Ms. Magee has a valid claim for occupational disease.

2. The Board of Industrial Insurance Appeals has appellate jurisdiction to review and determine only questions already decided by the Department of Labor and Industries.

On the other hand, the Board has appellate jurisdiction. See *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997). Appellate jurisdiction is defined as the power of the court to review and revise a lower court's decision. BLACK'S LAW DICTIONARY 868 (8th ed 2004). It is axiomatic that original jurisdiction must be exercised before a tribunal may exercise its appellate jurisdiction over a matter. See e.g. *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.2d 1 (2006) (noting in the section labeled "Jurisdiction" that "the Board and the superior court are limited to appellate review of IIA issues.")

The Board's scope of review is limited to only those issues which the Department has previously passed upon. *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994) citing *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). The Board's jurisdiction, therefore, is strictly limited to reviewing the specific Department action. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997)(emphasis added). The March 21, 2004, Department Order, timely appealed by Ms. Magee, determined that her claim was denied because "No claim has been filed by said worker within

one year after the day upon which the alleged injury occurred.” The Department did not make any determination as to whether Ms. Magee actually suffered an occupational disease or an industrial injury in the March 21, 2004 Order. Any Finding of Fact or Conclusion of Law that Ms. Magee suffered an occupational disease was, therefore, an exercise of original jurisdiction and beyond the Board’s appellate jurisdiction.

B. Only the Department of Labor and Industries has the authority to decide whether Ms. Magee has a valid claim for occupational disease.

A leading case on jurisdiction in the State of Washington is *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994). *Marley* involved a widow who failed to timely appeal an order from the Department of Labor and Industries which denied her claim for widow’s benefits. *Marley*, 125 Wn.2d at 534. The Court noted that the order was final and binding unless the Department lacked subject matter jurisdiction, in which case, the order would be void. *Id.* at 538. In discussing subject matter jurisdiction, the Court noted “a lack of subject matter jurisdiction implies that an agency has no authority to decide the claim at all, let alone order a particular kind of relief.” *Id.* at 539. Because the Department had jurisdiction to enter the order as the original and sole tribunal of workers’ compensation related matters, the order was not void. Notably, *Marley* did not involve an unappealed decision from the Board of Industrial

Insurance Appeals. The *Marley* Court, therefore, did not need to discuss the limits of original jurisdiction vis a vis appellate jurisdiction when discussing subject matter jurisdiction.

Under the employer's proposed reading of *Marley*, the Board of Industrial Insurance Appeals would always have jurisdiction to decide issues not contained in an appealed Department Order as long as the issue decided was generally related to workers compensation. Such a reading is simplistic and ignores the Legislature's unambiguous grant of original jurisdiction to the Department of Labor and Industries and appellate authority to the Board of Industrial Insurance Appeals. The Employer appears to argue that because the issue of whether Ms. Magee suffered an occupational disease is within the realm of workers' compensation, the Board has subject matter jurisdiction to decide that specific issue. This argument clearly fails. Unless and until the Department issues an order determining the existence of an occupational disease claim, the Board does not, as an appellate body, have any authority to review that determination and/or enter its own Findings of Fact or Conclusions of Law. The Board did not have jurisdiction to enter a Finding of Fact or Conclusion of Law about the existence of occupational disease in this case.

1. Marley did not overrule the longstanding rules of Jurisdiction.

Marley does not overrule well established case law; rather, it is a logical extension of that case law. For example, in *Hanquet*, the claimant filed an application for benefits based on an injury he sustained while constructing a building. *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 660, 879 P.2d 326 (1994). The claim was rejected by the Department because Mr. Hanquet “was a sole proprietor or a partner at the time of the injury and had not elected to be insured under the provisions of the Industrial Insurance law,” and was not a “worker.” *Id.* Hanquet appealed to the Board, where the issue was defined as whether the claimant was a “worker” under the Act, or excluded from coverage by virtue of the sole proprietor exception found in RCW 51.12.020(5). *Id.* The IAJ reversed the Department Order, found Mr. Hanquet was a worker under the Act and remanded the claim to the Department for further adjudication. *Id.* The Department filed a Petition for Review arguing that Hanquet failed to establish that he was engaged in “covered employment” at the time of his injury. *Id.* The Board reversed the IAJ and denied Hanquet’s claim under RCW 51.12.020(3), the “private home” exemption, a different exemption than the sole proprietor exemption identified by the Department in its original Order denying the claim. *Id.* at 660-61. Hanquet appealed to the Superior court, who ruled in favor of the

Department based on both exemptions. *Id.* at 661. Hanquet appealed to the Court of Appeals. *Id.* The Court of Appeals reversed, noting that “The Department’s Order rejecting Hanquet’s claim framed the issue as whether Hanquet was a sole proprietor or partner at the time of the injury rather than a ‘worker’ under RCW 51.08.180.” *Id.* at 661-62. The Court went on to state that “although the Board addressed the private home exemption and, in fact, denied Hanquet’s claim based on this exemption, the Board exceeded the proper scope of its review by addressing this issue.” *Id.* at 664. The Board’s jurisdiction was strictly limited by the Department’s Order, which addressed only the sole proprietor exemption.

Similarly, the Board exceeded its jurisdiction here when it found Ms. Magee had not suffered an occupational disease because the Department Order addressed only the timeliness of her claim under RCW 51.28.050. The Board’s jurisdiction is based upon the plain language of the Department Order. The Department Order did not contain any language concerning occupational disease or even timeliness under RCW 51.28.055. The Board’s jurisdiction, therefore, was strictly limited to addressing only the issue of timeliness under RCW 51.28.050.

The case law, including *Marley* and *Hanquet*, when read together, show that the Board did not have jurisdiction to enter a Conclusion of Law about the existence of an occupational disease because the issue had never

been decided first by the Department in the order on appeal. *Marley*, 125 Wn.2d 533 (1994); *Hanquet*, 75 Wn. App. 657, 879 P.2d 326 (1994). The *Hanquet* Court explained that unless the Department passes on an issue first, the Board, and likewise the Superior Court, are without jurisdiction to decide that issue. *Id.* *Hanquet's* holding that the Board's jurisdiction is appellate in nature and therefore limited by the language of the Department Order on appeal has been reaffirmed by the Supreme Court since *Marley*. See e.g., *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 141 P.3d 1 (2006) ("Thus, both the Board and the superior court are limited to considering those issues decided by the Department." citing *Hanquet, supra*); *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 977 P.2d 570 (1999) ("An appellate court should not address an issue upon which the Department did not rely in denying the claim" citing *Hanquet, supra*).

Under *Marley* and *Hanquet*, it is clear that the both the Department and the Board have broad subject matter jurisdiction to determine any and all issues related to workers' compensation; however, the Department's jurisdiction is original and exclusive while the Board's jurisdiction is appellate only. The Board does not have the authority to expand its scope of review beyond the issues appealed from the Department Order. The Courts have consistently recognized that the Board does not have jurisdiction to decide an issue that has not been decided by the Department

first, even though it is a workers' compensation matter. Thus, when read as a whole, case law supports finding Conclusion of Law #3 void as a matter of law and remanding the case to the Department of Labor and Industries to issue an order determining whether Ms. Magee's injuries constitute an occupational disease under the Act.

2. The Employer's reliance on In re Orena Houle is misplaced. Houle has never been affirmed by an appellate court and is therefore, not binding.

The Washington Courts have been clear that the Board does not have the authority to expand its scope of review beyond the specific issues on appeal from a Department Order. See e.g., *Marley*, 125 Wn.2d 533 (1994); *Hanquet*, 75 Wn. App. 657, 879 P.2d 326 (1994). However, the Employer continues to rely on a significant decision from the Board of Industrial Insurance Appeals which attempts to override this long held and well recognized principle. *In re Orena Houle*, BIIA Dec. 00 11628 (2001) is contrary to Washington Case law, has never been affirmed by a higher court and should not be affirmed here.

In *Houle*, the employer appealed an order which directed the employer to pay time loss benefits for a certain period of time. *Id.* On appeal, the Board found the employer did not have to pay benefits because Ms. Houle no longer had physical restrictions relating to her allowed occupational disease. *Id.* As part of that decision, the Board also found

that Ms. Houle's exposure was a temporary aggravation of a pre-existing condition. *Id.* Later, Ms. Houle appealed the closing order, arguing she was entitled to further treatment, PPD or a pension. *Id.* The Industrial Appeals Judge granted the employers summary judgment motion and held that the previous finding that Ms. Houle's condition was a temporary aggravation was final and binding. *Id.*

In reaching this conclusion, the Board created a non-existent distinction between the concept of 'subject matter jurisdiction' and 'scope of review.' *Id.* The Board explained that Marley "suggests that the court's use and interpretation of the two concepts is evolving." *Id.* The Board concludes that:

If, however, the Board exceeds the scope of review and its resulting order becomes final, the order is final and binding with respect to the parties, the Department, the Board and the courts. The rules of res judicata apply. Committing error of law does not deprive the Board of jurisdiction. Courts do not lose subject matter jurisdiction merely by interpreting the law erroneously.

Id. Throughout its opinion, the Board equates deciding issues outside the scope of appeal as a mere 'error of law' instead of as a jurisdictional matter. Contrary to this assertion, the Washington Supreme Court has not embraced this idea, nor has it affirmed this idea. To the contrary, the Court continues to treat the power to review a lower court's decision as a matter of jurisdiction. *See e.g., Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d

569, 141 P.3d 1 (2006) (discussion of Jurisdiction focuses on what the Board and the Courts are empowered to review).

C. The Doctrine of Res Judicata does not apply because Ms. Magee’s occupational disease claim has never been ‘actually litigated and necessarily determined.’

The general term *res judicata* encompasses two distinct theories: claim preclusion and issue preclusion. *Shoemaker v. Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). Under claim preclusion, a plaintiff is not allowed to recast his claim under a different theory and sue again. *Id.* However, where a plaintiff’s second claim is clearly a new, distinct claim, it is possible that an individual issue will be precluded in the second action under the doctrine of collateral estoppel. *Id.* In cases of issue preclusion, only those issues actually litigated and necessarily determined are precluded. *Id. citing Seattle-First Nat’l Bank v. Kawachi*, 91 Wn.2d 223, 228, 588 P.2d 725 (1978). The issue of whether Ms. Magee suffered an occupational disease has never been “actually litigated and necessarily determined.”

Res judicata is an affirmative defense to be pled by the party seeking to take advantage of its application. CR 8(c); *Banchemo v. City Council*, 2 Wn. App. 519, 526, 468 P.2d 724 (1970). The party asserting the doctrine has the burden of proof to show that the determinative issue was decided in the former proceeding. *Luisi Truck Lines, Inc. v. Util &*

Transp. Comm'n, 72 Wn.2d 887, 894, 435 P.2d 654 (1967). See also *McCarthy v. Dep't of Social & Health Servs.*, 110 Wn.2d 812, 825, 759 P.2d 351 (1988). Thus, Rite Aid bears the burden of proving that the doctrine of res judicata is applicable.

Before the doctrine of collateral estoppel may be applied, the party asserting the doctrine must prove: (1) the issue decided in the prior litigation is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice. *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 790, 982 P.2d 601 (1999) citing *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998). It is Rite Aid's burden to prove that all four elements of res judicata exist before the doctrine may be applied to this case. Given that Rite Aid briefed extensively how the merits of an occupational disease claim were not litigated and evidence was not submitted on this issue, Rite Aid cannot prevail on a claim that Conclusion of Law #3 is final and binding.

In addition, applying the principle of res judicata to this case would work a substantial injustice to Ms. Magee. "It is generally recognized that the doctrine of res judicata (and this applies to that branch known as

collateral estoppels by judgment) is not to be applied so rigidly as to defeat the ends of justice, or to work an injustice.” *Thompson v. Dep’t of Licensing*, 138 Wn.2d 783, 794, 982 P.2d 601 (1999) quoting *Henderson v. Bardahl Int’l Corp.*, 72 Wn.2d 109, 119, 431 P.2d 961 (1967). Justice requires that res judicata not apply where, as here, 1) all of the parties and the original Insurance Appeals Judge discussed the issues on appeal and agreed that, based on the plain language of the order on appeal, the issue of occupational disease was not on appeal, and 2) neither party submitted any evidence on the merits of an occupational disease claim. Not only would the application of this doctrine work an injustice against Ms. Magee, it would not further the stated goal and purpose of res judicata: to eliminate ‘duplicative litigation.’ See *Ensley v. Pitcher*, 152 Wn. App. 891, 902, 222 P.3d 99 (2009). Allowing Ms. Magee to finally have her claim adjudicated for the first time would not be duplicative. Particularly in light of the fact that both parties agreed that neither party submitted any evidence as to the merits of an occupational disease claim during the timeliness hearings.

D. Because the Board of Industrial Insurance Appeals lacked jurisdiction to enter Conclusion of Law #3, it is void as a matter of law.

The Civil Rules provide that a motion for relief from judgment may be granted where the judgment is void. CR 60(b)(5). Discretion to

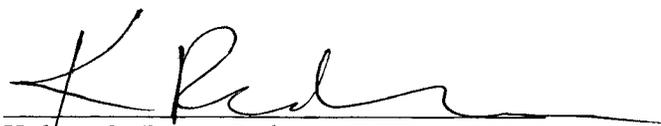
grant relief under CR 60 is very broad. *See generally, State v. Scott*, 92 Wn.2d 209, 212-213, 595 P.2d 549 (1979). Vacation of a judgment under CR 60(b) is within the discretion of the trial court. *Mitchell v. Kitsap Co.*, 59 Wn. App. 177, 180, 797 P.2d 516 (1990). However, when faced with a void judgment, the trial court has no discretion and the judgment **must** be vacated whenever the lack of jurisdiction comes to light. *Id.* at 180-81. A void judgment can be attacked at any time. *Hazel v. Van Beek*, 135 Wn.2d 45, 53, 954 P.2d 1301 (1998).

The Employer maintains that Ms. Magee has waived this issue as it was not specifically raised in her original Summary Judgment Motion in Superior Court when she appealed the issue of timeliness. However, it is irrelevant, for purposes of CR 60, whether Ms. Magee specifically raised the issue of Conclusion of Law No. 3 in her Summary Judgment Motion before the Superior Court or in her briefing to the Court of Appeals and/or Supreme Court. **A void judgment may be attacked at any time and when the lack of jurisdiction is discovered, it must be vacated.** *Mitchell v. Kitsap Co.*, 59 Wn. App. 177, 180, 797 P.2d 516 (1990); *Hazel v. Van Beek*, 135 Wn.2d 45, 53, 954 P.2d 1301 (1998). The claimant has shown the Board did not have the jurisdiction to decide this issue. Now that the Board's lack of jurisdiction has been brought to light, the Conclusion of Law **must** be vacated.

CONCLUSION

The Department entered an order adjudicating whether Ms. Magee timely filed a claim for an industrial injury. That order was timely appealed and litigated before the Board of Industrial Insurance Appeals. It was thereafter appealed to the Superior Court, the Court of Appeals and finally, the Supreme Court. The order on appeal never decided whether Ms. Magee suffered an industrial injury or an occupational disease; it dealt only with the timeliness of the application for benefits under RCW 51.28.050. As such, any finding by an appellate body that she suffered an occupational disease or not was beyond the scope of appeal and without jurisdiction. Conclusion of Law #3 should be vacated and the matter remanded with instructions for the Department of Labor and Industries to finally issue an order adjudicating Ms. Magee's claim for occupational disease.

Dated this 2nd day of November, 2010.



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