

05861-1

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No. 65861-1-I

ORIGINAL

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

MARCIA R. MAGEE,

Appellant,

v.

RITE AID,

Respondent.

BRIEF OF RESPONDENT RITE AID

Mary E. Shima, WSBA #16433
 Gretchen Neale, WSBA #36349
 Reeve Shima
 500 Union Street, Suite 800
 Seattle, WA 98101
 (206) 624-4004

Philip A. Talmadge, WSBA #6973
 Talmadge/Fitzpatrick
 18010 Southcenter Parkway
 Tukwila, WA 98188
 (206) 574-6661

Attorneys for Respondent Rite Aid

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A. INTRODUCTION

After failing to seek judicial review of a determination that she did not have an occupational disease (“OD”) claim under RCW 51.08.140 arising out of an alleged sexual relationship with her supervisor at Rite Aid, Marcia Magee submitted a second OD claim to the Department of Labor & Industries (“Department”). The Board of Industrial Insurance Appeals (“Board”) and the trial court both properly determined that her second OD claim was barred by res judicata, and she failed to establish grounds under CR 60 to vacate the Board’s 2006 decision denying her OD benefits.

Magee’s failure to seek judicial review rests squarely with her own counsel’s decision and nothing Rite Aid did.

Under the circumstances, Magee’s present appeal, prolonging litigation over a claim involving events that allegedly took place in 2000-01, and rejected by the Board more than four years ago, is frivolous as Magee offers no sustainable legal basis to overturn the Board’s or the trial court’s rejection of her present claim and her CR 60 motion.

B. ASSIGNMENTS OF ERROR

Rite Aid acknowledges Magee’s assignments of error, but believes that the issues here are more appropriately formulated as follows:

1. Did a claimant overcome the presumption that the Board's decision to deny her second OD claim was correct where the claimant was aware of a Board decision denying her first OD claim and yet the claimant failed to seek judicial review of that decision?

2. Did a claimant overcome the presumption that the Board's decision to deny her CR 60 motion to vacate a conclusion of law on OD in her first claim was correct where the Board had both personal and subject matter jurisdiction to enter that conclusion of law?

3. Is the claimant's appeal frivolous or taken for purposes of delay within the meaning of RAP 18.9(a)?

C. STATEMENT OF THE CASE

Magee's statement of the case is far from a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." RAP 10.3(a)(5). Her statement of the case is replete with argumentative assertions and captions that are themselves argumentative, in violation of the rule.¹ For example, Magee argues she was "forced to quit in 2001 ... as a result of repeated, sexually violent attacks perpetrated against her by her manager..." Br. of Appellant at 2. This was *never* established before the Board. Similarly, she claims "limited mental

¹ Magee's factual assertions are often offered without a record citation, as required by RAP 10.3(a)(5). An egregious example of this failing is her attribution of a lack of knowledge to the IAJ, when that surmise is unsupported by the record. Br. of Appellant at 8 n.5.

capacity.” *Id.* This assertion, too, is not documented, and was contested by Rite Aid. She asserts repeatedly that the Board exceeded its “jurisdiction.” *Id.* at 3, 8, 10. This is argument.²

Magee also *misleads* the Court on the facts. The trial court in the first case effectively *granted* Rite Aid’s motion for summary judgment, CABR II:200-01,³ contrary to Magee’s claim in her brief at 3. Magee fails to disclose that the Board ruled *against* her on Rite Aid’s alleged failure to report. Br. of Appellant at 3 n.1. Magee asserts that Rite Aid “suddenly reversed its position” on her OD claim. *Id.* at 13. That is untrue for the reasons set forth below. Finally, Magee misrepresents the contents of the parties’ Board stipulation. *Id.* at 8-9. Contrary to her argument at 9, *nowhere* does that stipulation reference the Board’s jurisdiction.

The Court should disregard Magee’s unsupported factual claims.

Moreover, Magee omits reference to very important facts in this case. This case arises out of a sexual relationship between Magee and Alan Woolford, her Rite Aid supervisor, which she claims was an assault; Woolford asserts the relationship was consensual. As recounted in *Magee*

² The use of multiple fonts and argumentative captions further reinforces the proposition that Magee’s statement of the case was all too often argument in the guise of a statement of the case.

³ The Certified Board Record for Docket No. 09-11730 in Cause No. 10-2-07562-3 is referenced as CABR I. The Record for Docket No. 09-11730 in Cause No. 10-2-04461-2 is referenced as CABR II.

v. Rite Aid, 144 Wn. App. 1, 182 P.3d 429, *review denied*, 164 Wn.2d 1036 (2008), Magee's industrial injury claim arising out of those events was not timely filed.

However, Magee also asserted that she had an OD claim within the meaning of RCW 51.08.140⁴ against Rite Aid.

Magee filed her first claim in January 2004 for an alleged industrial injury or OD allegedly arising in October 2000. CABR II:26. The Department issued an order denying her claim for benefits. *Id.* Magee protested that order, but the Department affirmed it. *Id.* Magee appealed to the Board, where hearings were held. *Id.*

Magee's first Board appeal reflected her intention to adjudicate her claims as an industrial injury *and* an OD. In her notice of appeal to the Board in that appeal, Magee sought "claim allowance." *Id.* at 156-57. Throughout the proceedings, Magee's attorney consistently argued that he

⁴ An occupational disease is "such disease or infection arises naturally and proximately out of employment. . ." See *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987) ("a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment."). As the *Dennis* court observed, an OD claim is not present unless the worker shows that "his or her particular work conditions more probably caused his or her disease-based disability than conditions in everyday life or all employments in general." *Id.* It is for this reason the Board in its August 1, 2006 decision found no OD claim arising out of work-related sexual activities in Magee's case. See also, *Gast v. Dep't of Labor & Indus.*, 70 Wn. App. 239, 852 P.2d 319, *review denied*, 122 Wn.2d 1024 (1993) (stress from rumors, innuendos, and inappropriate comments of fellow workers relating to alleged sexual relationship with co-workers was unfortunate occurrences of everyday life and employment, and did not constitute an OD).

was presenting *both* an industrial injury and an OD theory on Magee's behalf. *Id.* at 153-54. During questioning of Department witnesses, for example, Magee's counsel inquired as to whether the Department adjudicated an OD claim. *Id.* at 155.

Because Magee raised the OD issue, the Board's Industrial Appeals Judge ("IAJ") addressed the issue in his Proposed Decision and Order ("PDO"). *Id.* at 164-73. There, the IAJ indicated one of the issues was:

Did the sexual assaults on Ms. Magee by her supervisor at her place of employment over a period of months arise naturally and proximately out of distinctive conditions of her employment so as to constitute an occupational disease within the meaning of RCW 51.08.140?

Id. at 167. He then discussed the OD issue at length in the PDO:

II. OCCUPATIONAL DISEASE

A. AUTHORITY OF BOARD TO DETERMINE ISSUE

The Board has ruled that the issue of occupational disease properly is before the Board even though the Department's only stated reason for rejecting the claim was that it did not constitute an industrial injury. *In re Susanne Ryan*, BIIA Dec., 46,094 (1977). Where the Department has allowed a claim as an industrial injury and the employer has appealed, the Board has the authority to determine whether the claim should have been allowed as an occupational disease. *In re Joe Callender, Sr.*, BIIA Dec., 89 0823 (1990). However, where a worker consistently alleged that an industrial injury had caused his carpal tunnel syndrome, the Board did not have authority to allow the condition as an occupational disease resulting from the repetitive use of his hand. *In re Roy Benson*, BIIA Dec., 53,294 (1980).

Based on these decisions, the Board has the authority to determine whether the series of assaults on Ms. Magee constituted an occupational disease. Ms. Magee suffered a series of assaults, approximately 15 during her employment and at her workplace. These occurred over a period of three months. The self-insured employer ultimately had sufficient knowledge of the multiple assaults, and so did the Department. The self-insured employer was not correct in referring to the first assault in October, 2000 as the date “the” industrial injury occurred.

Too, Ms. Magee has not repetitively insisted that all of her mental and physical conditions stemmed from that one assault. She has alleged a series of assaults over a three-month period. That is sufficiently similar to a repetitive injury over time to require consideration of the issue. It was the self-insured employer which attempted to narrow the issue in its initial request to deny the claim as not timely filed as an industrial injury. The Benson facts do not apply to deprive the Board of jurisdiction.

B. REQUIREMENTS FOR AN OCCUPATIONAL DISEASE

An occupational disease must arise naturally and proximately out of distinctive conditions of employment. RCW 51.08.140. *Dennis*, above. Sometimes, a claim could be filed for each of a series of events or as an occupational disease. Sharon Baxter suffered a series of needle pricks while employed as a dental assistant. The Board held that the condition had not developed to the extent that it was disabling or required treatment until later, and the need for such treatment after this series of events allowed the condition to be considered an occupational disease. Ms. Baxter worked in a profession in which the use of needles was a factor of her employment distinctive from the exposure to needles in the general workplace and the exposure of the general public, so her exposure to needles constituted a distinctive condition of her

employment. *In re Sharon Baxter*, BIIA Dec., 92 5897 (1994).

Ms. Magee's exposure to sexual assault at Rite Aid does not meet the test for being a distinctive condition of employment. There was nothing in her workplace that distinguished her vulnerability to sexual assault there from the vulnerability of workers to such assaults in all employments in general or in everyday life. Thereby, Mr. Woolford's series of sexual assaults on Ms. Magee from October, 2000 through January, 2001 cannot constitute an occupational disease. *Dennis*.

Id. at 175-76. The IAJ then made the following conclusions of law:

5. The series of Mr. Woolford's physical and sexual assaults on Marcia R. Magee at the downtown Bellevue, Washington Rite Aid Store between October, 2000 and January, 2001 did not constitute "distinctive conditions of employment" within the meaning of *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467 (1987).

6. The series of Mr. Woolford's physical and sexual assaults on Marcia R. Magee at the downtown Bellevue, Washington Rite Aid Store between October, 2000 and January, 2001 did not constitute an occupation disease within the meaning of RCW 51.04.140.

Id. at 182.

Both parties filed a petition for review of the PDO to the Board pursuant to RCW 51.52.104. *Id.* at 137. In her petition, Magee objected to conclusions of law numbers 5 and 6, framing the issues in her petition for review as follows:

1. Did the claimant, Marcia Magee, properly put her employer, Rite Aid, on notice that she had suffered an injury or occupational disease?

2. Did the claimant, Marcia Magee, timely put her employer, Rite Aid, on notice that she had suffered an injury or occupational disease?

Id. at 206. Thus, *Magee herself* put the OD issue squarely before the Board.

After the Board issued the PDO, Magee and Rite Aid entered into a written stipulation regarding the issues before the Board in a document entitled “Parties’ Agreement/Stipulation Regarding the Scope of the Board’s Review.” *Id.* at 453-54. The parties stipulated that the issue they believed the Board had to resolve was whether Magee timely filed her application for industrial injury benefits within one year of her alleged industrial injuries. *Id.*⁵

However, when the Board issued its Decision and Order (“DO”) pursuant to RCW 51.52.106 on August 1, 2006, it nevertheless addressed the issue of whether Magee experienced an OD, despite the parties’ stipulation, stating: “We agree that the claimant’s application for benefits was not timely filed. Recognizing that although the Department order addressed only the timeliness of an application for benefits for an industrial injury, we also address the claimant’s argument that she has a claim for an occupational disease.” *Id.* at 185. The Board then stated:

⁵ The stipulation *nowhere* states that the Board lacked jurisdiction in this case.

Finally, we turn to the claimant's argument that she may have a claim for an occupational disease. An occupational disease is defined in RCW 51.08.140 as a disease or infection that arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title. A series of assaults inflicted upon a worker does not constitute an occupational disease.

Id. at 188. The Board entered conclusion of law number 3 in its August 1, 2006 DO which states:

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.

Id. at 190. In effect, the Board disregarded the parties' stipulation and decided the OD issue.

Both parties filed separate appeals with the King County Superior Court, which were consolidated. *Id.* at 137-38. In her notice of appeal to superior court, Magee stated that she appealed from "each and every part" of the Board's August 1, 2006 DO. *Id.* at 199. She did not limit the issues to the timeliness of her application for benefits. *Id.* Magee eventually moved for summary judgment. *Id.* at 252-64. In her motion, Magee chose not to present the issue of whether she had suffered an OD to the superior court, nor did she argue that she was moving for partial summary judgment on that issue. *Id.*

Rite Aid also filed a cross-motion for summary judgment, asking the court to affirm the Board's DO. *Id.* at 265-89. On January 29, 2007, Judge Jeffrey Ramsdell entered an order denying Magee's motion for summary judgment, and implicitly granted Rite Aid's motion by stating in his order that "the Decision and Order of the Board of Industrial Insurance Appeals dated August 1, 2006 is affirmed." *Id.* at 290-91. Magee filed a motion for reconsideration of the order "affirming the Board decision," *id.* at 292-96, which the court denied. *Id.* at 297.

Dissatisfied with the results of the superior court decision, Magee appealed to this Court, stating that she sought review of the "King County Superior Court Order entered on January 29, 2007, and the Order Denying Reconsideration dated February 6, 2007." *Id.* at 139. In her appeal, Magee argued the timeliness of her industrial injury claim, but never presented an argument on the OD issue. This Court affirmed the trial court's order and the Board's August 1, 2006 decision. *Id.* at 402-10. Magee petitioned the Washington Supreme Court for review, which that Court denied. *Id.* at 411.

On December 9, 2008, Magee asked the Department yet again to determine whether she had suffered an OD. *Id.* at 412-13. The Department denied her second OD claim in an order dated February 6, 2009 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.

Id. at 414.

Magee appealed this order to the Board, *id.* at 27, where Rite Aid and Magee each filed motions for summary judgment, *id.* at 93-135, and the Board’s IAJ issued a PDO on November 9, 2009, whose conclusions of law numbers 2 and 3 stated:

2. The Conclusion of Law No. 3 as contained in the Board’s Decision and Order dated August 1, 2006 is final and binding and becomes res judicata as to the parties to this appeal, pursuant to the provisions of *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994) and *In re Orena A. Houle*, BIIA Dec., 00 11628 (2001).
3. The claimant’s CR 56 motion to reverse and remand the Department order dated February 6, 2009 for further action is denied. The Employer’s CR 56 motion to affirm the Department’s order dated February 6, 2009 is granted.

Id. at 27. Magee petitioned the Board for review of the November 9, 2009 PDO, which it denied, adopting the PDO as its decision, as it is permitted to do so by RCW 51.52.106. *Id.* at 1-3.

Magee also filed a CR 60 motion with the Board to vacate conclusion of law number 3 from the August 1, 2006 Board DO claiming the Board lacked subject matter jurisdiction to address her OD claim in that August 1, 2006 DO, thereby rendering the decision void under CR 60(b)(5). CABR I:1255-59. The Board denied Magee's motion. *Id.* at 1252-53. In particular, the Board found Magee was seeking to correct an error of law through her motion, which is not an available remedy under CR 60. *Id.* at 1252.

Magee then appealed these two Board decisions to the King County Superior Court. CP 1-4. The case was assigned to the Honorable James S. Rogers. Both parties moved for summary judgment, CP 88-110, 117-45, and the trial court granted Rite Aid's motion and denied Magee's motion. CP 249-51. This appeal followed. CP 252-57.

D. SUMMARY OF ARGUMENT

Magee has not overcome the presumption under RCW 51.52.115 that the Board's December 29, 2009 and January 20, 2010 DOs were correct. There is no genuine issue of material fact before the trial court and Rite Aid was entitled to judgment as a matter of law.

Because Magee failed to seek judicial review of conclusion of law number 3 in the Board's August 1, 2006 DO, the Board's decision to deny her OD claim was final and binding under res judicata principles. Magee

repeatedly misstates the nature of the Board's "jurisdiction," confusing scope of review with subject matter jurisdiction.

Rite Aid is not judicially estopped to argue res judicata applies where the parties entered into a stipulation on scope of review before the Board, and the Board rejected the stipulation, entering conclusion of law number 3.

Magee is not entitled to relief under CR 60(b)(5) because the Board had both personal and subject matter jurisdiction to enter conclusion of law number 3 in its August 1, 2006 DO. Any error in the Board's decision to address the DO question, a decision Rite Aid believes the Board had discretion to decide, was a legal issue relating to scope of review which Magee was obligated to appeal to superior court. Such an appeal, not CR 60, was the procedure for any relief to which she was entitled.

Magee offers no authority that sustains her position on appeal. Her appeal is frivolous and sanctions under RAP 18.9(a) should be imposed against her and/or her counsel.

E. ARGUMENT⁶

⁶ Both parties below moved for summary judgment asserting there was no genuine issue as to any material fact. CR 56(c). Rite Aid properly contended it was entitled to judgment as a matter of law. *Id.* The trial court's decision is reviewed de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

(1) The Board's Decisions Here Were Prima Facie Correct and Magee Never Overcame that Presumption

RCW 51.52.115 provides that upon judicial review of the Board's DO, it is deemed prima facie correct ("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.").

From a practical standpoint, this statutory presumption means that the Board's findings and decision were presumptively correct unless Magee presented a preponderance of credible evidence to overcome that presumption. If the evidence is "evenly balanced" then the findings must stand. *Hadley v. Dep't of Labor & Indus.*, 116 Wn.2d 897, 903, 810 P.2d 500 (1991).

Here, Magee pleaded there was no genuine issue as to any material fact in seeking summary judgment. CP 128. The Board's decision, based on decisions of our Supreme Court and its own controlling significant decisions, was correct. Magee failed to bear her burden to overcome the statutory presumption.

(2) Magee Is Barred by Res Judicata from Relitigating Her OD Claim

Magee insists upon misreading clear Washington precedents on res judicata in the industrial insurance context and trying to blame Rite Aid

for her lawyers' failure to appeal conclusion of law number 3 in the Board's August 1, 2006 DO. This Court should reject Magee's effort.

The Board's August 1, 2006 DO concluded that the series of assaults between October, 2000 and January, 2001 did not constitute an OD within the meaning of RCW 51.04.140. Magee appealed "each and every part" of that order. But for whatever reason, Magee chose not to challenge the Board's conclusion that she had not suffered an OD before Judge Ramsdell or the appellate courts in her first appeal. Magee cannot litigate her OD claim a second time when the August 1, 2006 Board decision is final and binding under res judicata principles.

Because conclusion of law number 3 stated that Magee had not suffered an OD, it was her obligation to bring that issue before the superior court. Instead, Magee never raised the issue in superior court or thereafter, waiving it.

(a) Res Judicata Principles Apply to Board Decisions

Washington law clearly rejects Magee's effort to revive her OD claim. She mischaracterizes Washington law on res judicata, misunderstanding that the present case involves claim preclusion. Br. of Appellant at 26-28. Under res judicata principles, a party is barred from relitigating a claim that *could have been litigated* in a prior action. *Marley*

v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 866 P.2d 189 (1994); *see also, In re Orena A. Houle*, BIIA Dec., 00 11628 (2001).

In *Marley*, an industrial injury case, Mrs. Marley failed to appeal a Department calculation of the benefits to which she was entitled as a result of her husband's death. Our Supreme Court stated:

If a party to a claim believes the Department erred in its decision, that party must appeal the adverse ruling. The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim.

125 Wn.2d at 538. This analysis was confirmed in *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997) ("The Act provides finality to decisions of the Department. An unappealed Department order is *res judicata* as to the issues encompassed within the terms of the order, absent fraud in the entry of the order . . .") The Board in *Houle* stated:

When the Board exceeds the scope of its review, it commits an error of law by passing on an issue or issues not properly before it. In doing so, it is exposed to potentially dramatic and unpleasant reversal either by Superior Court, the Court of Appeals, or the Supreme Court. Obviously, this Board labors to stay within the scope of its review. 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.

The threshold requirement for application of the doctrine is a final judgment on the merits in a prior suit. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 587 (2000).⁷ The purpose of res judicata is to “ensure finality of judgments” and eliminate “duplicative litigation.” *Ensley v. Pitcher*, 152 Wn. App. 891, 902, 222 P.3d 99 (2009), *review denied*, 168 Wn.2d 1028 (2010). Dismissal of a subsequent action is appropriate where it matches the prior action in four respects: “(1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.” *Id.* All four of these elements are present here and dismissal is entirely appropriate.

First, the persons and parties of the prior action and the current appeal are identical. Magee, Rite Aid, and the Department were parties in the previous appeal before the Board with respect to the August 1, 2006 Board DO. All three are parties in the current appeal in which Magee is attempting to relitigate her claim. The first requirement of res judicata has been met.

Second, the causes of action are also the same. Both actions involve Magee’s OD claim. Thus, the second requirement of res judicata is met.

⁷ Res judicata is a valid basis for summary judgment. *Ensley*, 152 Wn. App. at 899.

The third element is that the subject matter of the first and second suits is identical. *Ensley*, 152 Wn. App. at 904-05. The subject matter of the current appeal is whether the Department should allow Magee's OD claim. The subject matter of Magee's first case before the Board was whether the Department should allow her claim as an industrial injury *or* an OD. Thus, the subject matter of both suits is identical.

The fourth and final element requires a "determination of which parties in the second suit are bound by the judgment in the first suit." *Id.* As a general rule, all parties in the first suit are bound by the judgment rendered in that suit, along with all persons in privity with such parties. *Id.* The parties in Magee's first appeal were identical – Rite Aid, Magee, and the Department. As parties to the first suit, they are all bound by the Board's DO which was affirmed by the courts. These are the same parties involved in the present action.

Magee cannot litigate the question of whether she suffered an OD indefinitely. The purpose of res judicata is to prevent relitigation of issues previously resolved by a competent tribunal. Magee's previous appeal matches the current suit in all four aspects required to trigger res judicata. She is precluded by res judicata from litigating, once again, the OD question.

Magee's remedy was to appeal conclusion of law number 3 in the Board's August 1, 2006 DO to superior court. When she did not, the Board's legal conclusion was final and binding upon her.

(b) Rite Aid Is Not Estopped to Argue Res Judicata

Magee tries to escape the effect of her lawyer's failure to appeal by blaming Rite Aid for that failure in her statement of the case. Br. of Appellant at 13-14. Because Magee has only mentioned Rite Aid's alleged "switch of position" on the parties' stipulation in the statement of the case and tangentially in her issues pertaining to the assignments of error (br. of appellant at 1), but has not addressed it by offering appropriate argument with citations of authority, she has abandoned the issue on appeal. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). If the Court chooses to reach Magee's contention, it is baseless.

The parties' stipulation before the Board regarding the scope of review does not estop Rite Aid to now argue Magee waived her OD claim. Notwithstanding the parties' attempt to narrow the issues by stipulation after the IAJ issued the PDO, *the Board disregarded the parties' stipulation*, which it was entitled to do, and it thereafter addressed the issue of whether Magee had suffered an OD.

In Washington, stipulations are governed by CR 2A. In general, a stipulation entered under this rule is binding on the court and the parties. *Id.* However, it has been a longstanding rule in Washington that stipulations of law are not binding on a tribunal; a stipulation of law where the parties attempt to “define the nature and scope of review must fail.” *Barnett v. Hicks*, 119 Wn.2d 151, 161, 829 P.2d 1087 (1992) (“Litigants cannot stipulate to jurisdiction nor can they create their own boundaries of review.”). Just as parties may not vest a tribunal with the authority to address an issue, they cannot confer or remove jurisdiction from a tribunal, including the Board. *Folsom v. County of Spokane*, 111 Wn.2d 256, 261-62, 759 P.2d 1196 (1988).

Rite Aid and Magee entered into a stipulation that excluded the OD question from the Board’s scope of review, an attempt to remove a question from the Board’s jurisdiction. The Board was entitled to ignore the parties and determine whether Magee had suffered an OD. And it did ignore that stipulation. Once the Board issued its August 1, 2006 decision disregarding the parties’ stipulation, Magee was obliged to protect herself by appealing the Board’s decision in the courts. She failed to do so.

Judicial estoppel does not apply here. In *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951, 205 P.3d 111 (2009), and *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007), our Supreme Court

set out the necessary elements of that doctrine: “The core factors are whether the later position is clearly inconsistent with the earlier position, whether judicial acceptance of the second position would create a perception that either the first and second court was misled by the party’s position, and whether the party asserting the inconsistent position would obtain an unfair advantage or imposes an unfair detriment on the opposing party if not estopped.” 165 Wn.2d at 951-52.⁸

First, Rite Aid is not taking a position in the current appeal that is inconsistent with a position it articulated previously. Rite Aid’s position in this appeal that the August 1, 2006 Board decision is now final and binding and Magee may not relitigate the issue of whether she suffered an occupational disease is not inconsistent with the stipulation that the Board’s scope of review was limited. Magee was fully aware that the OD question had been raised. As noted earlier, Magee argued time and again that she was presenting a claim for benefits as an industrial injury or an OD. It was not until after the PDO was issued and she lost that issue that Magee entered into a written stipulation with Rite Aid.

The crucial fact here is that the Board disagreed with the parties’ stipulation, and issued the August 1, 2006 DO with conclusion of law number 3. Rite Aid and Magee were obliged at that point to take steps to

⁸ This Court reviews a judicial estoppel decision for an abuse of discretion. 165 Wn.2d at 952.

protect their interests. Magee failed to do so and Rite Aid is not responsible for her error.

Second, the acceptance of Rite Aid's position that the August 1, 2006 DO is final and binding did not mislead the Board. Rite Aid argued that the PDO exceeded the scope of review on appeal and entered into a stipulation in a further attempt to restrict the determination of the Board. *The Board did not adopt the stipulation and entered the DO in contradiction to Rite Aid's position and the stipulation of the parties.* There is no indication that the Board was misled by Rite Aid's position. It simply disagreed with Rite Aid's (and Magee's) position.

Finally, Rite Aid does not gain an unfair advantage or impose an unfair detriment upon Magee. Because the August 1, 2006 DO addressed those issues that Rite Aid felt were beyond the scope of review, Rite Aid filed an appeal. Magee was in the same position.

In sum, Magee abandoned any contention that Rite Aid is estopped to contend that Magee failed to appeal conclusion of law number 3 in the Board's August 1, 2006 DO, rendering that conclusion final and binding upon her.

- (3) Magee's CR 60 Motion to Vacate Conclusion of Law Number 3 Was Properly Denied

Magee misreads Washington law on the Board's subject matter jurisdiction, confusing scope of review, a legal issue that must be appealed, with subject matter jurisdiction. Her argument on jurisdiction is sloppy, apparently attempting to draw a distinction not recognized in case law between "original" and "appellate" jurisdiction of the Board. Rather than analyze the seminal Washington case of *Marley*, she cites instead to *Black's Law Dictionary* for support. Br. of Appellant at 15-26. Magee is not entitled to vacate the Board's conclusion number 3 because it had jurisdiction to enter it. CR 60(b)(5).⁹

Washington courts have repeatedly stated that the Board has subject matter jurisdiction over OD and industrial injury claims. *Marley*, 125 Wn.2d at 539-40. In *Marley*, the widow of a deceased employee applied for benefits as a beneficiary in 1984. After conducting an investigation, the Department issued an order denying Marley's claim on the basis that she did not meet the statutory definition of a beneficiary. Marley did not appeal. Six years later, her new attorney filed a request for reconsideration of the order denying benefits. The request was denied and Marley ultimately appealed to the Supreme Court. Marley argued that her appeal was not barred by res judicata because the order itself was void, the

⁹ Magee has never contended that the Board lacked personal jurisdiction over the parties.

very same argument Magee now makes with regard to the Board's August 1, 2006 decision.

The *Marley* court held that an order is only void when the issuing tribunal lacks personal or subject matter jurisdiction. *Id.* at 539, 541. All other defects or errors in the order go to scope of review. A tribunal has subject matter jurisdiction when it has the authority to decide the type of controversy presented, and the determination of jurisdiction turns on the type of action, not the facts of the case. *Id.* at 539.

Under *Marley*, the Board had jurisdiction to issue its decision of August 1, 2006. Subject matter jurisdiction is the "authority to adjudicate the type of controversy involved in the action." 125 Wn.2d at 533, 539. The Board's "appellate" or subject matter jurisdiction is "limited to review of IIA [Industrial Insurance Act] issues," *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006). The "type" of case the Board has the authority to adjudicate involve issues under Title 51 RCW.¹⁰

Thus, in *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003), our Supreme Court found that where a venue statute was violated, that did not deprive the court of subject matter jurisdiction because the court could adjudicate the type of case involved there. The

¹⁰ The Board has ruled that it has jurisdiction to address an OD issue even when the Department's only stated reason for denying a claim related to an industrial injury. *In re Susanne Ryan*, BIIA Dec., 46,094 (1977). CABR I:175.

Marley court also made clear that subject matter jurisdiction is *not* the same as a tribunal’s scope of review. An error of law does not deprive a court of subject matter jurisdiction. The *Marley* court observed that the reason for this distinction is also practical to avoid transforming “the Department’s mistakes in statutory construction, errors of law, into jurisdictional flaws.” 125 Wn.2d at 541. Judge Becker in her concurrence in *Sprint Spectrum, LP v. State*, 156 Wn. App. 949, 235 P.3d 849 (2010) reinforced this point:

Treating subject matter jurisdiction as though it were a fleeting and fragile attribute of a court diminishes the authority of the court, creates a trap for the unwary, and prevents worthy cases from being heard on the merits even when the procedural violation has not prejudiced the opposing party.

...

Classifying procedural errors as jurisdictional flaws thus has serious implications for the finality of judgments. It must always be a matter of institutional concern to the courts when the casual and imprecise use of the term “subject matter jurisdiction” leads to an increase in the number of decisions that are subject to attack indefinitely.

Id. at 965, 966.

The Board had subject matter jurisdiction to decide the OD issue in its August 1, 2006 DO. It clearly had personal jurisdiction over the parties. If a Board decision was beyond its scope of review, that was not a jurisdictional issue; it was an issue that Magee had to appeal, but did not.

The Board clearly had authority to decide an OD claim. As stated in the Board's Significant Decision in *Houle*, the Board has jurisdiction over appeals stemming from Department orders. *Houle*, BIIA Dec. 00 11628 (2001). Contrary to Magee's argument in her brief at 24-26 *Houle* is based on *Marley*, where our Supreme Court drew the distinction between "scope of review" and subject matter jurisdiction. Magee appealed from a DO, which is the "type" of controversy the Board has the authority to adjudicate. There is no question under *Marley* that the Board had jurisdiction to determine whether Magee had suffered an occupational disease. Under *Marley*, any error assigned by Magee goes to scope of review other than a lack of jurisdiction. *Marley*, 125 Wn.2d at 533.

Magee relies on *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 879 P.2d 326 (1994), *review denied*, 125 Wn.2d 1019 (1995), a 2-1 decision that predated *Marley*. Br. of Appellant at 21-22. Unlike Magee, the claimant in *Hanquet* raised the issue of the Board's scope of review in his appeal to both the Superior Court and the Court of Appeals. *Id.* at 660-61. Thus, the issue of whether the *Hanquet* order was beyond the scope of review was properly before the Court of Appeals there. In fact, the court adjudicated the case, noting the issue was whether the Board had "exceeded the proper scope of its review." *Id.* at 664.

As was made clear in *Marley*, an error in judgment does not remove the authority or jurisdiction of the Board to make a determination in an industrial insurance appeal. *Marley*, 125 Wn.2d at 543. This is precisely why Rite Aid filed an appeal of the Board's August 1, 2006 DO to superior court. Once there, Rite Aid made the affirmative choice to only litigate the issue of timeliness on summary judgment.

CR 60 is not a remedy for errors of law. Direct appeal remedies such errors. *Burlingame v. Consolidated Mines & Smelting Co.*, 106 Wn.2d 328, 722 P.2d 67 (1986). The Board so noted in its DO. CABR I:1252.

Magee knew how to appeal the OD issue. After the IAJ issued the April 6, 2006 PDO, Magee filed a petition for review to the Board that assigned error to conclusion of law number 3. Both Rite Aid and Magee appealed the August 1, 2006 DO in its entirety. It was Magee's obligation to present any alleged errors contained in that order before Judge Ramsdell and appellate courts. She did not do so. As noted by the Board, "CR 60 does not provide an avenue for relief from the offending conclusion of law after the appellate remedies have been exhausted." CABR I:1252.

- (4) Magee's Appeal Is Frivolous within the Meaning of RAP 18.9(a)

RAP 18.9(a) provides that this Court may impose sanctions against a party filing a frivolous appeal. For at least 30 years since *Streater v. White*, 26 Wn. App. 430, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980), the concept of a frivolous appeal has been well known. An appeal is frivolous if “when considering the record as a whole, ... it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal.” *Id.* at 434. This standard was adopted by our Supreme Court as well in *Miller Cas. Ins. Co. of Texas v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983).

Like the appellants in *Miller Cas. Ins. Co. of Texas* and more recently in *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003), Magee here presents no authority that justifies her position on appeal, particularly in the face of the statutory presumption of RCW 51.52.115. She misreads controlling Washington precedent that holds the decision of the Board in entering conclusion of law number 3 in its August 1, 2006 DO was res judicata on the OD issue. Decisions of our Supreme Court in *Marley*, *Kingery*, and *Doughtery*, and the Board Significant Decision in *Houle* are *clearly controlling*. There is no reasonable possibility that Magee can prevail on appeal.

Moreover, the purpose and effect of Magee’s appeal must be considered. Magee’s counsel were negligent in failing to raise conclusion

of law number 3 in her first appeal. Despite their efforts to blame Rite Aid for that failure to appeal, it was the responsibility of Magee's counsel to address conclusion of law number 3 in the Board's August 1, 2006 DO. Rite Aid did nothing to hide that decision. It was a public decision and known both to Rite Aid and Magee. Rite Aid did nothing to prevent Magee from taking an appeal. Magee simply failed to appeal. She has other remedies. Moreover, Magee's unnecessary prolongation of this litigation – in the face of clear authority against her position – has forced Rite Aid to incur unnecessary legal expenses.

This Court should impose sanctions against Magee and/or her counsel pursuant to RAP 18.9(a).

F. CONCLUSION

Magee is not entitled to relitigate her OD claim. The Board's August 1, 2006 DO was final and binding. When Magee failed to raise conclusion of law number 3 in her first appeal, Magee is now precluded by res judicata from doing so in a second claim. Furthermore, Magee is not entitled to relief under CR 60. As the Board correctly concluded, the Board had subject matter jurisdiction and, at best, a legal issue as to scope of review was presented by conclusion of law number 3. Errors of law may not be remedied through a motion to vacate. Magee was required to

raise this issue in her first appeal, but she failed to do so and must now live with the consequences of that failure.

This Court should affirm the trial court's summary judgment order upholding the Board's December 29, 2009 and January 20, 2010 DOs. Costs on appeal, including sanctions under RAP 18.9(a), should be awarded to Rite Aid.

DATED this 17th day of November, 2010.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Mary E. Shima, WSBA #16433
Gretchen Neale, WSBA #36349
Reeve Shima
500 Union Street, Suite 800
Seattle, WA 98101
(206) 624-4004
Attorneys for Respondent Rite Aid

APPENDIX

RECEIVED

JUL 21 2010

TALMADGE/FITZPATRICK

Counsel for Rite Aid shall promptly mail a copy of this order to all other counsel/parties.

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARCIA R. MAGEE,

Plaintiff,

v.

RITE AID,

Defendant.

NO. 10-2-07562-3SEA

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER having come on regularly for hearing before the undersigned judge of the above-captioned Court on the motions for summary judgment of defendant Rite Aid and plaintiff Marcia Magee, and the defendant Rite Aid having been represented by Philip A. Talmadge of Talmadge/Fitzpatrick and Mary Shima and Gretchen Neale of Reeve Shima, and the plaintiff Magee having been represented by Kylee MacIntyre Redman of Walthew, Thompson, Kindred, Costello & Winemiller P.S., and the Department of Labor and Industries

having been represented by John Wasberg of the Office of Attorney General, and the Court having considered the court file herein as well as the following pleadings:

- 1. Rite Aid's Motion for Summary Judgment;
- 2. Declaration of Mary Shima;
- 3. Plaintiff's Cross-Motion for Summary Judgment and Response to Rite Aid's

Motion for Summary Judgment;

- 4. Affidavit of Kylee MacIntyre Redman;

Order on Motions - 1

Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661 (206) 575-1397 Fax

*Portions of the court record including all decisions + pleadings
I counsel and having considered
include the pleadings in the court Superior Court appeal*

5. Rite Aid's Response to Plaintiff's Cross-Motion for Summary Judgment;
6. Declaration of Gretchen Neale;
7. Department's Response to Ms. Magee's Motion for Summary Judgment;
8. Plaintiff's Reply to Defendant's Response to Plaintiff's Cross-Motion for

Summary Judgment.

And the parties agreeing that there are no genuine issues for trial;

NOW IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:
Under the Standards of RCW 51.52.115

1. Rite Aid's Motion for Summary Judgment is GRANTED;
2. Magee's Cross-Motion for Summary Judgment is DENIED;
3. The Decision and Order of the Board of Industrial Insurance Appeals dated

December 29, 2009 and the Decision and Order of the Board of Industrial Insurance Appeals dated January 20, 2010 are AFFIRMED.

DATED this 16 day of July, 2010.

JUDGE

JAMES E. ROGERS

Presented by:

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
 Talmadge/Fitzpatrick
 18010 Southcenter Parkway
 Tukwila, WA 98188
 (206) 574-6661

Mary E. Shima, WSBA #16433
 Gretchen Neale, WSBA #36349
 Reeve Shima
 500 Union Street, Suite 800
 Seattle, WA 98101-2332
 (206) 624-4004
 Attorneys for Defendant Rite Aid

This order is based upon the decisions in Mahley, 125 Wn.2d 533 (1994) and Dore Hale, 2001 WL 395827 (BIIA). The Board's decision in August 2006 may well have exceeded the scope of review as to Conclusion of Law #3 but the Board had subject matter jurisdiction to decide/reach conclusions on the issue of occupational disease. When Magee failed to appeal COL #3, it became final.

Talmadge/Fitzpatrick
 18010 Southcenter Parkway
 Tukwila, Washington 98188-4630
 (206) 574-6661 (206) 575-1397 Fax

Notice of Presentation Waived:

Kylee MacIntyre Redman, WSBA #36850
Waltheu, Werner, Thompson, Eagan & Kindred & Costello
123 Third Avenue South
Seattle, WA 98104-2696
(206) 623-5311
Attorneys for Plaintiff Marcia Magee

John R. Wasberg, WSBA # 6409
Assistant Attorney General
Attorney General of Washington
Labor & Industries Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6039
Attorneys for Dept. of Labor and Industries

DECLARATION OF SERVICE

On said day stated below I deposited in the U.S. mail a true and accurate copy of: Brief of Respondent Rite Aid in COA number 65861-1-I to the following parties:

John R. Wasberg, Senior Counsel
Attorney General of Washington
Labor and Industries Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188

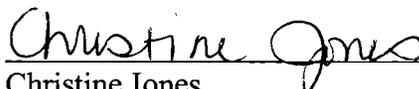
Kylee Redman
Walthew, Thompson, Kindred,
Costello & Winemiller, P.S.
123 Third Avenue South
Seattle, WA 98104-2696

Mary E. Shima
Reeve Shima
500 Union Street, Suite 800
Seattle, WA 98101-2332

Original filed with:
Court of Appeals
Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 18, 2010 at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick