

66506-5

66506-5

NO. 66506-5-I

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

WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES,

Appellant,

v.

NIGISTI TEKLEHAIMANOT,

Respondent.

BRIEF OF APPELLANT

ROBERT M. MCKENNA
Attorney General

Sarah L. Martin
Assistant Attorney General
WSBA No. 37068
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 389-3822

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR3

III. STATEMENT OF THE ISSUES3

IV. STATEMENT OF THE CASE4

 A. Department Administrative Action.....4

 B. Board Decision.....6

 C. Superior Court Appeal7

V. STANDARD OF REVIEW.....8

VI. ARGUMENT9

 A. The Board Did Not Exceed Its Scope Of Review Of The Department Order Because In Closing The Claim, The Department Considered And Rejected Ms. Teklehaimanot’s Entitlement To All Benefits9

 1. The Board’s scope of review is determined by the Department order on appeal, as limited by the notice of appeal9

 2. Appeals from closing orders can include the extent of benefits, if any, for newly contended medical conditions not previously accepted by the Department12

 3. The Department fully considered Ms. Teklehaimanot’s alleged mental health conditions and any resulting disability or need for treatment20

 4. Ms. Teklehaimanot raised the issues of treatment and time loss compensation in her notice of appeal, and she fully litigated these issues at the Board25

B. The Doctrine Of Invited Error Should Preclude Ms.
Teklehaimanot's Argument That The Board Exceeded Its
Scope Of Review26

VII. CONCLUSION30

TABLE OF AUTHORITIES

Cases

<i>Beels v. Dep't of Labor & Indus.</i> , 178 Wash. 301, 34 P.2d 917 (1934)	13
<i>Brakus v. Dep't of Labor & Indus.</i> , 48 Wn.2d 218, 292 P.2d 865 (1956).....	11, 16, 17
<i>Callihan v. Dep't of Labor & Indus.</i> , 10 Wn. App. 153, 516 P.2d 1073 (1973).....	10
<i>Cole v. Department of Labor and Industries</i> , 137 Wash. 538, 243 P. 7 (1926)	13
<i>Cowlitz Stud Co. v. Clevenger</i> , 157 Wn.2d 569, 141 P.3d 1 (2006).....	9
<i>Dep't of Labor & Indus. v. Allen</i> , 100 Wn. App. 526, 997 P.2d 977 (2000).....	8
<i>Dolman v. Dep't of Labor & Indus.</i> , 105 Wn.2d 560, 716 P.2d 852 (1986).....	9
<i>Dougherty v. Dep't of Labor & Indus.</i> , 150 Wn.2d 310, 76 P.3d 1183 (2003).....	10
<i>Floyd v. Dep't of Labor & Indus.</i> , 44 Wn.2d 560, 269 P.2d 563 (1954).....	10
<i>Hama Hama Co. v. Shorelines Hearings Bd.</i> , 85 Wn.2d 441, 536 P.2d 157 (1975).....	9
<i>Hubbard v. Dep't of Labor & Indus.</i> , 140 Wn.2d 35, 992 P.2d 1002 (2000).....	28
<i>Hyatt v. Dep't of Labor & Indus.</i> , 132 Wn. App. 387, 132 P.3d 148 (2006).....	15

<i>In re Anton E. Worklan,</i> BIIA Dec., 26,538, 1967 WL 90370 (1967).....	16, 22
<i>In re Barbara E. Nelson,</i> Dckt. No. 05 21796, 2007 WL 1413108 (Feb. 15, 2007).....	17
<i>In re Dennis Johnson,</i> Dckt. No. 00 15837, 2002 WL 342030 (Jan. 29, 2002).....	14, 18, 19, 24
<i>In re Harijs Mindenbergs,</i> Dckt. No. 48,426, 1977 WL 182022 (Nov. 2, 1977).....	27
<i>In re Hjalmar D. Pearson,</i> Dckt. Nos. 90 4667 & 91 2875, 1992 WL 322511 (Jul. 2, 1992).....	23, 24
<i>In re James R. Shreve,</i> Dckt. Nos. 01 16260 & 01 16261, 2003 WL 22479569 (Aug. 1, 2003).....	14, 18, 22
<i>In re Josephine Carroll,</i> Dckt. No. 09 15466, 2010 WL 4267701 (Aug. 4, 2010).....	15
<i>In re Kidan Glegziabher,</i> Dckt. No. 03 10416, 2003 WL 23269382 (Dec. 5, 2003).....	15
<i>In re Laura L. Haller,</i> Dckt. No. 08 20961, 2009 WL 6268514 (Dec. 15, 2009).....	17, 18
<i>In re Mary E. Truedsson,</i> Dckt. Nos. 06 17967 & 06 19441, 2008 WL 5598532 (Oct. 7, 2008).....	15
<i>In re Merle E. Free, Jr.,</i> BIIA Dec., 89 0199, 1990 WL 304314 (1990).....	15, 16, 17
<i>In re Orena A. Houle,</i> BIIA Dec., 00 11628, 2001 WL 395827 (2001).....	10, 27
<i>In re Randy M. Jundul,</i> BIIA Dec., 98 21118, 1999 WL 1446257 (1999).....	14, 17, 18

<i>Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.</i> , 121 Wn.2d 776, 854 P.2d 611 (1993).....	11
<i>Lenk v. Dep't of Labor & Indus.</i> , 3 Wn. App. 977, 478 P.2d 761 (1970).....	passim
<i>Marley v. Dep't of Labor & Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994).....	10
<i>Noll v. Dep't of Labor & Indus.</i> , 179 Wash. 213, 36 P.2d 809 (1934)	12, 13, 16, 22
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	8
<i>Roller v. Dep't of Labor & Indus.</i> , 128 Wn. App. 922, 117 P.3d 385 (2005).....	9
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999).....	8
<i>W. Nat'l Assurance Co. v Hecker</i> , 43 Wn. App. 816, 719 P.2d 954 (1986).....	27, 30
<i>Weyerhaeuser Co. v. Tri</i> , 117 Wn.2d 128, 814 P.2d 629 (1991).....	9
<i>Woodard v. Dep't of Labor & Indus.</i> , 188 Wash. 93, 61 P.2d 1003 (1936)	11

Statutes

RCW 51.04.010	9, 10, 11
RCW 51.32.090	28
RCW 51.52.050	10
RCW 51.52.060	10
RCW 51.52.060(4).....	21

RCW 51.52.102	16
RCW 51.52.115	8
RCW 51.52.140	8
RCW 51.52.160	10, 14

Appendix

Proposed Decision and Order	Certified Appeal Board Record at 31-39
-----------------------------------	--

I. INTRODUCTION

This is an appeal under the Industrial Insurance Act, Title 51 RCW. The Department of Labor and Industries appeals a superior court judgment holding that the Board of Industrial Insurance Appeals exceeded its scope of review of the Department's order closing Nigisti Teklehaimanot's workers' compensation claim. The Superior Court reversed the Board decision affirming the Department's order closing the claim without further benefits.

The pivotal issue in this case is whether the Board properly acted within its scope of review of the Department order. Because the Board's jurisdiction is appellate only, the issues the Board may properly consider are determined by the Department order on appeal, as limited by the notice of appeal. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). When the Department closes a claim, it implicitly denies any additional medical conditions, and benefits stemming from them, that could have been raised while the claim was open, even if the closing order is silent regarding those conditions. Additionally, numerous Board decisions have held that when the Department issues an order closing a claim but not accepting a newly contended medical condition, the Board may, in addition to determining that the newly contended condition should be allowed, determine whether the claimant is entitled to benefits based on that condition.

Here, Ms. Teklehaimanot raised the issue of her mental health to the Department while her claim was still open. The Department ordered an independent medical examination by a psychiatrist for the sole purpose of determining whether she had any psychiatric condition related to her industrial injury. The Department closed her claim without allowing any mental health condition. Ms. Teklehaimanot raised the issues of depression and chronic pain syndrome, treatment, and time loss compensation (temporary total disability benefits) in her notice of appeal. She fully litigated these issues in her hearing at the Board.

The Department considered and implicitly rejected her entitlement to all benefits for any mental health condition when it closed her claim without allowing any such condition. Thus, the Board did not exceed the proper scope of its review when it found that depression and chronic pain syndrome are related to Ms. Teklehaimanot's industrial injury, but that she is not entitled to further benefits based on these conditions. The Superior Court erred in ordering piecemeal litigation of the appeal by remanding the matter to the Department so that the Department may determine whether Ms. Teklehaimanot is entitled to further benefits for her depression and chronic pain syndrome. Furthermore, Ms. Teklehaimanot invited any error that she asserts by fully litigating at the Board her entitlement to benefits for her mental health conditions.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in entering its Order Granting Partial Summary Judgment on Issue of Mental Health Condition and Chronic Pain on October 1, 2010. CP at 40-41.
2. The Superior Court erred in entering its Order Granting Motion for Reconsideration and Remanding the Entire Case on December 2, 2010. CP at 133-34.
3. The Superior Court erred in entering its Judgment on January 19, 2011. CP at 230-32.

III. STATEMENT OF THE ISSUES

1. The Department considered and rejected Ms. Teklehaimanot's assertions that she had psychological conditions caused by her industrial injury and was entitled to benefits for those conditions when it closed her claim without allowing those conditions. Ms. Teklehaimanot raised these issues in her notice of appeal and fully litigated them at the Board. When administrative decisions and appellate case law establish that the Board may decide issues that the Department has previously addressed and is required to avoid piecemeal litigation of appeals, did the Superior Court err in holding that the Board exceeded the proper scope of its review when

the Board found that she was not entitled to further benefits for her psychological conditions?

2. The doctrine of invited error provides that a party may not complain on appeal that the trial court erred in considering and resolving an issue that the party submitted and argued to the trial court. When Ms. Teklehaimanot litigated and asked the Board to decide her entitlement to further benefits for her newly contended psychological conditions, did the Superior Court err in allowing her to argue that the Board exceeded its scope of review in ruling on those very issues?

IV. STATEMENT OF THE CASE

A. Department Administrative Action

Ms. Teklehaimanot injured her low back during the course of her employment on May 26, 2006. CABR at 37-38 (Finding of Fact 1).¹ The Department allowed her industrial insurance claim and provided her with benefits. *Id.*

While her claim was open, Ms. Teklehaimanot had medical treatment for depression with Dr. Keyes, a psychologist. Keyes Tr. at 16.

¹ The Certified Appeal Board Record is the record of this case before the Board of Industrial Insurance Appeals. It was filed with the Court of Appeals under separate cover from the rest of the Clerk's Papers. Perpetuation deposition transcripts are included in the Board record but are paginated separately. Therefore, citations to the transcripts will be by the witness' last name and the page number, and citations to the other documents in the Board record will be by "CABR" and the large, stamped number in the lower right corner. *E.g.*, Keyes Tr. at 2; CABR at 1.

At the Department's request, Ms. Teklehaimanot also underwent an independent medical examination with Dr. Snodgrass, board certified psychiatrist, in order to be evaluated for possible psychiatric conditions caused by her industrial injury. Snodgrass Tr. at 5, 9, 14. These two providers sent their opinions to the Department regarding whether Ms. Teklehaimanot had mental health conditions from her injury. Keyes Tr. at 47, 52-53; Snodgrass Tr. at 66. Later, Dr. Lohmann, the claimant's treating psychiatrist, also sent a letter to the Department concluding that depression was a result of the industrial injury. Lohmann Tr. at 31. Despite this information, the Department did not issue an order accepting any mental health condition.

The Department on October 23, 2007 issued an order closing Ms. Teklehaimanot's claim and awarding her permanent partial disability for her low back condition. CABR at 38, 44. The closing order did not award any other benefits or address any additional medical conditions. CABR at 44. After considering the claimant's protests, the Department affirmed the closing order on February 19, 2008. CABR at 38, 42. Ms. Teklehaimanot again filed a protest and request for reconsideration of the closing order with the Department. CABR at 38, 41. The Department forwarded the protest as a direct appeal to the Board of Industrial Insurance Appeals, and the Board granted the appeal. CABR at 38, 46-48.

B. Board Decision

Hearings were held before an Industrial Appeals Judge. Ms. Teklehaimanot presented the testimony of her treating psychologist, Dr. James Keyes; her treating psychiatrist, Dr. Donna Lohmann; her treating occupational physician, Dr. Maureen Johnson; herself; and three lay witnesses. The Department presented the testimony of Dr. Lanny Snodgrass, a psychiatrist, and Dr. Dean Ricketts, an orthopedic surgeon, both of whom had examined Ms. Teklehaimanot in independent medical examinations.

The Judge considered this evidence and issued a Proposed Decision and Order, including findings of fact and conclusions of law. CABR at 31-39. The Judge found that Ms. Teklehaimanot's industrial injury proximately caused a low back condition (which the Department had accepted), as well as depression and chronic pain syndrome. CABR at 38 (Finding of Fact 3). The Judge also found that as of the date the Department affirmed its order closing the claim (February 19, 2008), Ms. Teklehaimanot's conditions were not in need of further medical treatment, and they did not prevent her from working between July 26, 2007 and February 19, 2008. CABR at 38 (Findings of Fact 4, 6).

Further, the Judge found that these conditions did not permanently prevent Ms. Teklehaimanot from working as of February 19, 2008.

CABR at 39 (Finding of Fact 8). The Judge found that Ms. Teklehaimanot was entitled to a permanent partial disability award for her low back condition but did not address permanent disability for her depression or chronic pain syndrome. CABR at 38 (Finding of Fact 7). The Judge affirmed the February 19, 2008 Department order closing her claim with permanent partial disability as awarded. CABR at 39 (Conclusion of Law 5).

Ms. Teklehaimanot sought review of the proposed decision by the three-member Board. CABR at 2. The Board denied her petition for review, adopting the Proposed Decision and Order as its final Decision and Order. CABR at 1.

C. Superior Court Appeal

Ms. Teklehaimanot appealed to King County Superior Court (CP at 1) and filed a motion for summary judgment (CP at 5). In her motion, Ms. Teklehaimanot argued that once the Board found that she had depression and chronic pain syndrome caused by her work injury, the Board should not have decided her entitlement to further benefits for those conditions, but should have remanded the matter to the Department to make that determination. CP at 10-11 (Issue B).

The Superior Court initially granted only partial summary judgment (CP at 40), but upon reconsideration, granted Ms.

Teklehaimanot's motion and remanded the entire matter to the Department based on her theory that the Board exceeded its proper scope of review in deciding the issues of further benefits (treatment and temporary total disability) for her mental health conditions (CP at 66). The Superior Court entered Judgment in accordance with its ruling. CP at 230.

The Department timely appealed to this Court. CP at 131.

V. STANDARD OF REVIEW

The Board's decision is presumed to be correct, and the party challenging the Board's decision in superior court must convince the fact-finder from a fair preponderance of credible evidence that the Board's findings are incorrect. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); RCW 51.52.115.

The Court of Appeals reviews the superior court's decision as it does in "other civil cases." RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009), *review denied*, 167 Wn.2d 1015, 220 P.3d 209 (2009). This Court reviews the superior court's conclusions under the error of law standard, determining the law independently and applying it to the facts as found by the agency. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

Courts give "considerable judicial deference" or "substantial weight" to an agency's interpretation of statutes and regulations within its

area of expertise. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975); *Roller v. Dep't of Labor & Indus.*, 128 Wn. App. 922, 926-27, 117 P.3d 385 (2005). Courts give deference to interpretations of Title 51 RCW by both the Department (*Dolman v. Dep't of Labor & Indus.*, 105 Wn.2d 560, 566, 716 P.2d 852 (1986)) and the Board of Industrial Insurance Appeals (*Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991)).

VI. ARGUMENT

A. **The Board Did Not Exceed Its Scope Of Review Of The Department Order Because In Closing The Claim, The Department Considered And Rejected Ms. Teklehaimanot's Entitlement To All Benefits**

1. **The Board's scope of review is determined by the Department order on appeal, as limited by the notice of appeal**

The Industrial Insurance Act is the product of a compromise between employers and workers through which employers accepted limited liability for claims that might not have been compensable under the common law, and workers forfeited common law remedies in favor of sure and certain relief. RCW 51.04.010; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572, 141 P.3d 1 (2006). Accordingly, the Act abolished the superior courts' original jurisdiction over workplace injuries and provided that civil actions may proceed only as provided in the statute.

RCW 51.04.010; *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003).

The Department possesses original jurisdiction over workers' compensation cases. *Id.* Parties may appeal final Department orders to the Board, a quasi-judicial agency that is separate from the Department and was created in 1949 to review Department orders. *Floyd v. Dep't of Labor & Indus.*, 44 Wn.2d 560, 574-75, 269 P.2d 563 (1954). The Board's jurisdiction is provided by statute; the Board has jurisdiction over final Department orders appealed within 60 days of communication of the order. RCW 51.52.050, .060; *Callihan v. Dep't of Labor & Indus.*, 10 Wn. App. 153, 155-56, 516 P.2d 1073 (1973). Likewise, the superior courts' jurisdiction over appeals from the Board is appellate only. *Dougherty*, 150 Wn.2d at 314.

Because the Board's and the superior court's jurisdiction is appellate in nature, they cannot consider issues unless the Department has first determined them.² *Lenk*, 3 Wn. App. at 982. The issues the Board

² This case involves the scope of the Board's review, not the Board's jurisdiction. Subject matter jurisdiction refers to the "type of controversy" the court or agency has authority to adjudicate, not whether the agency has authority to take a particular action. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). The Board has subject matter jurisdiction over final Department orders. RCW 51.52.050, .060. If the Board exceeds its scope of review, it is not a defect in subject matter jurisdiction, but is merely an error of law appropriate for appeal. *In re Orena A. Houle*, BIIA Dec., 00 11628, 2001 WL 395827, at *3 (2001) (significant decision). (The Board publishes its significant decisions and makes them available to the public. See RCW 51.52.160 and footnote 4, below.)

may properly consider on appeal are determined by the Department order on appeal (*Woodard v. Dep't of Labor & Indus.*, 188 Wash. 93, 95, 61 P.2d 1003 (1936)), as limited by the notice of appeal (*Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 219-20, 292 P.2d 865 (1956)). *Lenk*, 3 Wn. App. at 982. To prevent the Board from considering issues passed upon by the Department and raised in the notice of appeal would encourage piecemeal litigation, which should be avoided. *Lenk*, 3 Wn. App. at 986. Indeed, one of the purposes in creating the Board was to reduce litigious delay and provide “sure and certain relief for workers.” *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 785, 854 P.2d 611 (1993) (quoting RCW 51.04.010).

In this case, an examination of both the Department order on appeal (Sections VI.A.2 and VI.A.3) and Ms. Teklehaimanot's notice of appeal to the Board (Section VI.A.4) reveals that the Board properly considered the issues Ms. Teklehaimanot raised and fully litigated when it determined that she was not entitled to any additional benefits for her depression and pain syndrome.

///

///

///

///

2. Appeals from closing orders can include the extent of benefits, if any, for newly contended medical conditions not previously accepted by the Department

In this appeal from a Department order closing the claim, the Board's proper scope of review included whether Ms. Teklehaimanot was entitled to further benefits for her psychological conditions.

If the Department has impliedly passed on an issue, such as the extent of a claimant's disability, in its order, the Board can reach the issue on appeal. Although no appellate court decision is directly on point, an early case provides guidance. *See Noll v. Dep't of Labor & Indus.*, 179 Wash. 213, 36 P.2d 809 (1934). There, the Supreme Court held that the trial court did not exceed its scope of review on appeal of a Department order denying a worker's application to reopen his claim for aggravation (objective worsening) of his industrial injury. *Id.* at 214-15.

Although the Department in *Noll* had denied the worker's application to reopen his claim, the superior court reversed, finding that his medical condition had objectively worsened. The superior court went further, finding that the worker was entitled to an increased permanent partial disability for his injury, even though the Department had not explicitly ruled on such disability. *Id.* at 215. The Supreme Court affirmed, reasoning that the Department had impliedly denied any award for increased disability when it examined the worker's physical condition,

found that his condition had not objectively worsened, and denied his application to reopen his claim. *Id.* at 216-17, 218. The Court also recognized that its decision avoided piecemeal litigation, which would not further the purposes of the Act. *Id.* at 218 (citing *Beels v. Dep't of Labor & Indus.*, 178 Wash. 301, 309, 34 P.2d 917 (1934) (“To hold otherwise would permit and encourage trial of these cases piecemeal, which would not accord with the spirit and purpose of the entire act.”)).³

Similarly in this case, the Department fully considered Ms. Teklehaimanot’s alleged mental health conditions yet determined that her industrial injury did not cause any mental health condition when it closed her claim without allowing any such condition. As in *Noll*, by doing so, the Department impliedly determined that not only did the claimant not have any mental health disorder caused by her injury, but she was not entitled to further benefits (including treatment and temporary total disability) for mental health symptoms. Thus, the Department exercised its original jurisdiction over the issue, and the Board did not exceed its scope of review in deciding it.

³ The court in *Noll* distinguished *Cole v. Department of Labor and Industries*, 137 Wash. 538, 243 P. 7 (1926), a case in which the Department rejected the worker’s claim for industrial injury. *Noll* explained that while in *Cole*, the Department had addressed only the question of whether an injurious event had occurred, in *Noll* the Department had decided “the whole issue of fact which was before it as to [the worker’s] physical condition.” *Noll*, 179 Wash. at 216. Although Ms. Teklehaimanot argued in the Superior Court that *Cole* is comparable to her case (CP at 62), it is, in fact, distinguishable for the same reasons discussed in *Noll*. See 179 Wash. at 216-17.

Closing orders are different from, and generally broader in scope than, other types of Department orders; therefore, the scope of the Board's review from closing orders is also different and broader. In discussing its jurisdiction and scope of review, the Board has explained the legal significance of a closing order:

The [closing order] determined, explicitly or by necessary implication, the totality of the claimant's entitlement to all benefits of whatever form, as of the date of claim closure.

In re Randy M. Jundul, BIIA Dec., 98 21118, 1999 WL 1446257, at *2 (1999) (significant decision).⁴ A closing order determines all of the benefits to which a worker is entitled regarding any condition a worker may have, even if the Department was silent on that condition. *In re James R. Shreve*, Dckt. Nos. 01 16260 & 01 16261, 2003 WL 22479569, at *3 (Aug. 1, 2003); *In re Dennis Johnson*, Dckt. No. 00 15837, 2002 WL 342030, at *2 (Jan. 29, 2002).

Applying this principle, the Board has continued to follow the *Randy Jundul* decision and hold that it may consider a claimant's entitlement to all types of benefits in an appeal from a closing order even

⁴ RCW 51.52.160 requires the Board to designate and publish its "significant decisions." The Board publishes these decisions in several forms, including providing access on its website at www.bia.wa.gov. Board decisions, significant and non-significant, are also accessible on Westlaw in the database WAWC-ADMIN. The convention for citing a significant decision is "BIIA Dec., ___" and provides only the year of the decision, while the docket number for a decision not designated as significant is cited "Dckt. No. ___" and provides the full date of the decision.

when the closing order did not explicitly address those specific types of benefits. *E.g.*, *In re Kidan Glegziabher*, Dckt. No. 03 10416, 2003 WL 23269382, at *2 (Dec. 5, 2003) (Department implicitly considered and rejected a protest to claim allowance in its order closing the claim); *In re Mary E. Truedsson*, Dckt. Nos. 06 17967 & 06 19441, 2008 WL 5598532, at *2 (Oct. 7, 2008) (considering the claimant's entitlement to loss of earning power benefits in an appeal from a closing order); *In re Josephine Carroll*, Dckt. No. 09 15466, 2010 WL 4267701, at *4 (Aug. 4, 2010) (vocational services issues could be raised in an appeal from a closing order); *see also Hyatt v. Dep't of Labor & Indus.*, 132 Wn. App. 387, 392 n.2, 399, 132 P.3d 148 (2006) (holding that the closing order in Warren Adrian's case had resolved his wage rate as of the date of the closing order).

Prior to the *Randy Jundul* decision, the Board had addressed an issue similar to the one presented in this case. *See In re Merle E. Free, Jr.*, BIIA Dec., 89 0199, 1990 WL 304314 (1990) (significant decision). In that case, the claimant appealed from a Department order closing his claim without benefits for a contested psychiatric condition, although the Department had previously issued and then set aside an order denying responsibility for the psychiatric condition.

The Board held that the psychiatric condition was related to the industrial injury, and that it was within the Board's scope of review to determine the extent of disability due to the psychiatric condition. 1990 WL 304314, at *1. Applying *Lenk* and *Brakus*, the Board reasoned that the Department had considered whether the psychiatric condition was related to the injury, "and by clear implication had passed upon the psychiatric permanent impairment issue as well" when it closed the claim without any permanent disability and without denying responsibility for the condition. *Id.* at *1. Thus, the Department had exercised its original jurisdiction, and the issue was properly before the Board. *Id.* at *1-2 (relying on *Noll*, 179 Wash. 213; *In re Anton E. Worklan*, BIIA Dec., 26,538, 1967 WL 90370 (1967) (significant decision)).⁵

Ms. Teklehaimanot may attempt to argue that the Board can determine the extent of disability for a newly contended medical condition only in an appeal from a closing order when the Department has issued an order explicitly denying responsibility for the condition (a "segregation order"). The Board, however, has repeatedly assessed the extent of

⁵ The Board in *Anton Worklan* held that when the Department closes a claim without award for permanent disability and simultaneously denies responsibility for an unrelated condition, the Board may, in addition to determining that the condition is caused by the industrial injury, decide whether the condition renders the worker totally and permanently disabled. *In re Anton E. Worklan*, BIIA Dec., 26,538, 1967 WL 90370, at *4 (1967), RCW 51.52.102, and *Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 292 P.2d 865 (1956)). When the Department closed the claim and denied responsibility for a condition, it necessarily determined the claimant's assertion that he was entitled to benefits for that condition. *Id.*

benefits stemming from a newly contended condition in appeals from closing orders, even in the absence of a segregation order:

- *In re Merle E. Free, Jr.*, BIIA Dec., 89 0199, 1990 WL 304314, at *1-2 (1990) (significant decision) (holding in an appeal from a closing order that the Board could determine the appropriate level of permanent partial disability from mental health conditions to which the claimant was entitled, when the Department had not previously accepted the mental health conditions as caused by the injury) (citing *Lenk*, 3 Wn. App. 977; *Brakus*, 48 Wn.2d 218).
- *In re Laura L. Haller*, Dckt. No. 08 20961, 2009 WL 6268514, at *3 (Dec. 15, 2009) (in an appeal from a closing order, finding that the claimant was not in need of further treatment for, but was totally and permanently disabled due in part to, a narcotics addiction that the Department had neither accepted nor segregated) (citing *Randy Jundul*, BIIA Dec., 98 21118 (1999)).
- *In re Barbara E. Nelson*, Dckt. No. 05 21796, 2007 WL 1413108, at *1 (Feb. 15, 2007) (determining in an appeal from a closing order whether the claimant was entitled to temporary or permanent disability for pain disorder that the Department had neither accepted nor segregated) (citing *Randy Jundul*, BIIA Dec., 98 21118 (1999); *Merle Free*, BIIA Dec., 89 0199 (1990)).

- *In re Dennis Johnson*, Dckt. No. 00 15837, 2002 WL 342030, at *2 (Jan. 29, 2002) (disagreeing with the employer’s argument that the Board could not address the claimant’s newly contended depression, which the Department had not previously segregated, in his appeal from a closing order, and holding that the claimant was not entitled to further treatment or disability benefits for that condition) (citing *Randy Jundul*, BIIA Dec., 98 21118 (1999); *Lenk*, 3 Wn. App. 977).

These cases are factually indistinguishable from the present case in any significant way, and this Court should follow them here.

The reason that the Board’s scope of review properly encompasses the extent of Ms. Teklehaimanot’s disability for her psychological conditions in the absence of an order denying responsibility for those conditions, is simple: “A closing order is different.” *In re Laura L. Haller*, 2009 WL 6268514, at *3. So long as the newly contended condition was presented to the Department while the claim was still open, the Department’s silence regarding that condition in an order closing the claim is an implicit denial of all benefits relating to the condition. *In re James R. Shreve*, 2003 WL 22479569, at *3. The fact that the Department did not explicitly issue an order segregating the condition is legally irrelevant. *See id.*

As stated above, determining the proper scope of the Board's review requires an analysis of the particular Department order in question, as limited by the notice of appeal. *Lenk*, 3 Wn. App. at 982. In performing that inquiry, courts must look to the *effect* of the Department order in question, not merely the words used. *In re Dennis Johnson*, 2002 WL 342030, at *2. Although closing orders are often silent regarding additional medical conditions or other benefits, those orders are deemed to be a determination of all outstanding issues regarding the claimant's entitlement to benefits on his or her claim. *Id.* When the Department closes a claim despite evidence of a newly contended medical condition, the closing order is deemed to be a denial of that condition. *Id.* The Board may not only reach the issue on appeal, but may also reach the issue of whether any further benefits are due based on the newly contended condition. *Id.* at *2-3.

For all of these reasons, it is within the Board's scope of review to determine any benefits due for a newly contended medical condition in an appeal from a closing order, as long as the Department was made aware of the condition before it closed the claim.

///

///

///

3. The Department fully considered Ms. Teklehaimanot's alleged mental health conditions and any resulting disability or need for treatment

The record amply supports that Ms. Teklehaimanot and her medical providers raised the issue of psychological conditions to the Department while her claim was still open. Thus, as a matter of fact, the Department considered the issue.

Dr. Johnson, the claimant's treating occupational physician, testified that she requested that the Department send the claimant to an independent medical examination for treatment recommendations and referred her to Dr. Keyes for psychological or psychiatric counseling and assessment. Johnson Tr. at 38-39. On June 6, 2007, Dr. Keyes, the claimant's treating psychologist, sent a letter to the Department discussing the claimant's depression. Keyes Tr. at 52-53.

As a result of one or both of these recommendations, the Department sent Ms. Teklehaimanot to an independent medical examination with Dr. Snodgrass, board certified psychiatrist. Snodgrass Tr. at 5, 9, 14. The purpose of the exam was for Dr. Snodgrass "to evaluate the claimant, Ms. Teklehaimanot, with regards to any psychiatric condition that was causally related to the covered injury of May 26, 2006." *Id.* at 14. The Department also submitted a job analysis to Dr. Snodgrass and asked him whether, from a psychiatric perspective, Ms.

Teklehaimanot could perform the job described. *Id.* at 54. After reviewing all of the pertinent medical records, taking a history, and examining Ms. Teklehaimanot, Dr. Snodgrass memorialized his opinions, including whether Ms. Teklehaimanot was psychiatrically capable of working and whether she was in need of further psychiatric treatment, in a written report. He sent that report to the Department while the claim was still open. *Id.* at 66.

In April 2008, Dr. Keyes sent a letter as a protest for the purpose of seeking allowance of depression on the claim. Keyes Tr. at 47-48. Dr. Lohmann, a psychiatrist who began treating Ms. Teklehaimanot in March of 2008, also sent a letter to the Department concluding that depression was a result of the industrial injury. Lohmann Tr. at 31. Based in part on this information, the claimant filed a protest of the Department's order closing her claim. Rather than electing to reassume jurisdiction over the claim and modify or reverse its order, the Department forwarded the protest to the Board as a direct appeal. *See* CABR at 67; RCW 51.52.060(4) (allowing the Department to modify, reverse, change, or reassume jurisdiction over any order within 30 days after receiving a notice of appeal to the Board).

The Department had been presented with evidence from at least three physicians regarding Ms. Teklehaimanot's alleged mental health

conditions when it forwarded the protest as a direct appeal. In fact, not only did the Department receive such evidence, but it commissioned an independent medical examiner for the sole purpose of determining whether Ms. Teklehaimanot had any psychiatric condition relating to her industrial injury. After considering all of this information, the Department did not issue an order either allowing or segregating depression, pain syndrome, or any other mental health condition.

The Department impliedly denied Ms. Teklehaimanot's psychological conditions and her entitlement to any benefits stemming from them when it closed her claim with no such award (and then forwarded her protest to the Board) after considering the information from her physicians and from Dr. Snodgrass. *See Noll*, 179 Wash. at 216-17, 218; *Anton Worklan*, 1967 WL 90370, at *4; *James Shreve*, 2003 WL 22479569, at *3.

Ms. Teklehaimanot may argue, as she did at Superior Court, that the Department did not decide the extent of her disability for the psychiatric conditions because the Department had not accepted those conditions as caused by the industrial injury. *See CP* at 13 (“[A] closing order cannot be construed as determining the extent of disability and other benefits resulting from medical conditions the Department did not determine related to the industrial injury.”). The Board rejected a similar

argument in *In re Hjalmar D. Pearson*, Dckt. Nos. 90 4667 & 91 2875, 1992 WL 322511 (Jul. 2, 1992). There, the claimant appealed from a Department order closing his claim without permanent disability or time loss compensation, denying responsibility for additional lung conditions (pneumonia and empyema), and addressing other treatment benefits. The Board reversed, finding that the lung conditions were related to the industrial injury and deciding whether the claimant was entitled to permanent disability benefits as a result of those conditions.

The claimant in *Pearson* argued that the Board should remand the matter to the Department to determine the level of disability because the Department had not passed on that issue in light of its order rejecting the new lung conditions. The Board rejected that argument:

The fallacy of this argument is that the Department's order [closing the claim and denying responsibility for the additional lung conditions] did in fact make a determination on the permanent partial disability issue, and the claimant's appeal therefrom . . . specifically raised the issue of permanent partial disability. . . . Although it may be arguable that the issue of permanent partial disability was not fully litigated, the issue was raised and it would be consistent with the Board's holding in *Merle E. Free, Jr.* . . . to enter findings on this issue. . . . The issue of permanent partial disability is squarely before the Board.

Id. at *1 (internal citation omitted).

Similarly here, the Department's closing order decided the issues of treatment and disability benefits under the assumption that the mental

health conditions were not related to the claimant's work injury. Even though the Board disagreed with that assumption, as in *Pearson*, it was not beyond the scope of the Board's review to assess the need for treatment and disability benefits based on the newly contended conditions that the Department had passed on.

In her briefing at Superior Court, Ms. Teklehaimanot argued that the Department factually considered her entitlement to time loss compensation benefits, but only with a "narrow view" of her medical condition, not with a "broadened scope" including her mental health conditions. CP at 61-62 (emphasis in original). There is no authority for such a distinction. The Department considered the claimant's need for benefits for her psychiatric conditions because it was made aware of those conditions yet chose to close the claim without allowing those conditions or allowing further benefits. *See Dennis Johnson*, 2002 WL 342030, at *2 ("[A]lthough the [Department closing] orders were silent with regard to Mr. Johnson's depression, the Department had the opportunity each time it closed Mr. Johnson's claim to address responsibility for his depression. Therefore, we are satisfied that the Department has passed upon the mental health issue within the meaning of *Lenk*.").

///

///

4. Ms. Teklehaimanot raised the issues of treatment and time loss compensation in her notice of appeal, and she fully litigated these issues at the Board

Ms. Teklehaimanot's notice of appeal did not limit the Board's scope of review. Rather, her notice of appeal raised the issues of treatment and time loss compensation (temporary total disability) benefits, and she fully litigated those issues at the Board. This Court should deny her attempt to have a second bite at the apple to prove her case through piecemeal litigation.

A claimant's notice of appeal to the Board may limit the Board's scope of review. *Lenk*, 3 Wn. App. at 982 (Board's scope of review is limited by the issues raised in the notice of appeal). That did not occur here. Ms. Teklehaimanot's notice of appeal states in relevant part:

The recent medical received from Donna Lohmann, MD, treating psychiatrist under this claim, supports that Ms. Teklehaimanot suffers from depression as a result of her industrial injury and is in need of treatment. She also supports that Ms. Teklehaimanot has been unable to return to work due to this depression.

In his medical report of February 13, 2008, James Keyes, Ph.D., also supports that Ms. Teklehaimanot has depression directly related to her injury and is in need of treatment.

....

Based on the enclosed, please find Ms. Teklehaimanot entitled to further benefits

CABR at 41 (emphasis added). The notice of appeal clearly sought *benefits* for the claimant's depression, in addition to seeking allowance of depression and chronic pain syndrome. Thus, Ms. Teklehaimanot placed this benefits issue squarely within the Board's review.

The Board held a conference to schedule the case for hearing. At the conference, the parties identified the issues on appeal as:

Whether claimant is entitled to additional treatment, time loss from July 26, 2007 to February 19, 2008, and/or permanent partial disability and/or total permanent disability.

CABR at 76.⁶ This statement also reflects that Ms. Teklehaimanot sought additional benefits, not merely allowance of her mental health conditions.

In short, Ms. Teklehaimanot's notice and prosecution of her appeal did not limit the Board's scope of review, but specifically included the issues of psychological treatment and time loss compensation for inability to work due to her psychological conditions.

B. The Doctrine Of Invited Error Should Preclude Ms. Teklehaimanot's Argument That The Board Exceeded Its Scope Of Review

Under the doctrine of invited error, this Court should reject Ms. Teklehaimanot's argument that the Board should not have decided her

⁶ Quoted is the issue statement in the amended interlocutory order. Presumably due to a typographical error, the Board issued the amended order clarifying the issues. Compare CABR at 76, with CABR at 69.

entitlement to benefits when she asked the Board to decide the issue and presented evidence to support her position.

The doctrine of invited error states, “When a party submits an issue and argues it before the court below, that party cannot complain on appeal that the trial court erred in considering and resolving that issue.” *W. Nat’l Assurance Co. v Hecker*, 43 Wn. App. 816, 821, 719 P.2d 954 (1986).⁷ Because the Board’s scope of review is not jurisdictional, it can be waived. See *In re Harijs Mindenbergs*, Dckt. No. 48,426, 1977 WL 182022, at *2 (Nov. 2, 1977 (scope of the Board’s review can be waived); *In re Orena A. Houle*, BIIA Dec., 00 11628, 2001 WL 395827, at *3 (2001) (significant decision) (If the Board exceeds its scope of review, it is not a defect in subject matter jurisdiction.).

In this case, Ms. Teklehaimanot specifically asked the Board for the relief she now complains of. She stated in her notice of appeal that the relief she sought was the acceptance of mental health conditions *and* benefits for treatment and her inability to work based on the mental health conditions. CABR at 41. At the scheduling conference, she stated that the

⁷ Although the Department did not raise the doctrine of invited error by name in the Superior Court, it made substantially the same argument. In its superior court briefing, the Department argued that Ms. Teklehaimanot herself urged the Board to consider the very issues she later complained of in superior court, and that she should not be permitted to complain of the alleged error when she fully took advantage of her opportunity to litigate those issues at the Board. CP at 58. The Department likened such inconsistent positions to “gamesmanship” and argued that Ms. Teklehaimanot should not get a “second bite at the apple” merely because she lost on the merits of her appeal. CP at 59.

issues to be decided in the case included treatment, time loss compensation for her inability to work,⁸ and permanent disability. CABR at 76.

At the hearing, Ms. Teklehaimanot presented witnesses supporting her need for treatment and temporary total disability benefits (time loss compensation) for her alleged inability to work due to her psychological conditions. For example, she presented the testimony of Dr. Keyes, the psychologist who treated her while her claim was open. Through counsel, Ms. Teklehaimanot elicited testimony from Dr. Keyes that she was in need of further treatment for depression as of the date the Department affirmed its order closing her claim (February 19, 2008). Keyes Tr. at 34-35, 47. She also questioned Dr. Keyes at length regarding her ability to work (*i.e.*, eligibility for time loss compensation) from a psychological perspective. *Id.* at 37-43, 46, 58-59, 53-54 (cross-examination).

Dr. Lohmann, Ms. Teklehaimanot's treating psychiatrist, also testified regarding the claimant's need for psychological or psychiatric treatment (Lohmann Tr. at 27-28, 35, 38) and her ability to work from a psychological perspective (*Id.* at 39-40). Finally, Dr. Johnson, the

⁸ Temporary total disability, or time loss, benefits are appropriate when a claimant is temporarily and totally disabled from performing any work at any gainful employment. RCW 51.32.090; *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000). It is an assessment of a claimant's ability to work due to the injury. *Id.*

claimant's treating occupational medicine physician, testified regarding the claimant's need for treatment (Johnson Tr. at 32, 33, 39, 42, 57) and limitations on return-to-work and other types of functioning (*Id.* at 35, 38, 39, 41), both of these from a psychological perspective.

Whether Ms. Teklehaimanot was entitled to further benefits for her low back condition was also within the scope of the Board's review in this case. Ms. Teklehaimanot, however, did not present evidence to the Board that she was entitled to further benefits, including temporary total disability, permanent partial disability, or treatment, due to her physical low back condition. Consequently, the Board Judge considered those issues waived. *See* CABR at 36-37 (Discussion). Rather, Ms. Teklehaimanot focused her evidence on her psychological conditions and benefits to which she was entitled for her psychological conditions.

In sum, Ms. Teklehaimanot fully litigated her entitlement to benefits, specifically for her mental health conditions, through the testimony of her treating physician, psychologist, and psychiatrist. Not only did she present some evidence to support her theory that she was entitled to benefits based on depression and chronic pain syndrome, but that evidence was the entirety of her case in chief. She presented no evidence regarding her entitlement to benefits for her low back.

By explicitly asking the Board to consider her entitlement to benefits for her mental health conditions and then presenting evidence regarding those issues at the Board, Ms. Teklehaimanot invited any alleged error in the Board's consideration of those issues and should have been precluded from complaining of it at superior court. *See W. Nat'l Assurance Co.*, 43 Wn. App. at 821. This Court should reject the claimant's attempts to get a second bite at the apple simply because she did not present sufficiently persuasive evidence to prove her entitlement to benefits when she had the opportunity.

VII. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court reverse the Superior Court Judgment as a matter of law and remand the case to the Superior Court for a jury trial on the merits of Ms. Teklehaimanot's appeal from the Board's November 19, 2009 Decision and Order.

RESPECTFULLY SUBMITTED this 13 day of April, 2011.

ROBERT M. MCKENNA
Attorney General



Sarah L. Martin
Assistant Attorney General
WSBA No. 37068

Appendix

ORIGINAL

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: NIGISTI T. TEKLEHAIMANOT) DOCKET NO. 08 19081
2 CLAIM NO. AC-61001) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Carol J. Molchior
4

5 APPEARANCES:

6 Claimant, Nigisti T. Teklehaimanot, by
7 Foster Staton, per
8 Robert A. Silber

9 Employer, University of Washington,
10 None

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Rachel Feldstein, Assistant

14 The claimant, Nigisti T. Teklehaimanot, filed an appeal with the Board of Industrial Insurance
15 Appeals on July 29, 2008, from an order of the Department of Labor and Industries dated
16 February 19, 2008. In this order, the Department affirmed Department orders dated October 23,
17 2007 and December 5, 2007, which modified from final to interlocutory an August 24, 2007
18 Department order closing the claim with a permanent partial disability award for Category 2
19 dorsolumbar / lumbosacral impairment. The Department order is **AFFIRMED**.

20 **PROCEDURAL AND EVIDENTIARY MATTERS**

21 On February 20, 2009, the parties agreed to include the Jurisdictional History in the Board's
22 record. That history establishes the Board's jurisdiction in this appeal.

23 The June 3, 2009 deposition of James Keyes, Ph.D., was published upon receipt at the
24 Board with all objections overruled and all motions denied. Deposition Exhibit No. 1 is renumbered
25 as Exhibit No. 2 and admitted.

26 The June 3, 2009 deposition of Donna Lohmann, M.D., was published upon receipt at the
27 Board with all objections overruled and all motions denied.

28 The June 22, 2009 deposition of Maureen Johnson, M.D., was published upon receipt at the
29 Board with all objections overruled and all motions denied.
30
31

1 The July 14, 2009 deposition of Lanny L. Snodgrass, M.D., was published upon receipt at
2 the Board with all objections overruled and all motions denied. Deposition Exhibit No. 1 is
3 renumbered Exhibit No. 3 and rejected as cumulative and hearsay.

4 The August 4, 2009 deposition of Dean S. Ricketts, M.D., was published upon receipt at the
5 Board with all objections overruled and all motions denied.

6 ISSUES

7 The issues presented by this appeal are whether Ms. Teklehaimanot is
8 entitled to additional treatment, temporary total disability compensation
9 from July 26, 2007 through February 19, 2008, and/or a permanent
10 partial disability award, and/or a total permanent disability pension.

11 EVIDENCE

12 Nigisti Teklehaimanot

13 Nigisti Teklehaimanot testified that she was born and raised in Eritrea. Her education was
14 through the sixth grade. In 1986, she left Eritrea and spent two years in Sudan. Because of war
15 with Ethiopia, she came to the U.S. in 1988 at age 23. She came to Seattle to be with relatives
16 here.

17 In her first year in America, Ms. Teklehaimanot took English classes. In her second year,
18 she worked as a factory assembler, with no problems. She left that job on maternity leave.

19 After having a baby, Ms. Teklehaimanot went to work with Harborview as a housekeeper.
20 She did vacuuming, mopping and cleaning. Before May 2006, she felt very good, physically and
21 mentally. She never saw a psychiatrist or counselor. She never had back or shoulder problems. A
22 2002 auto accident injured her low back, but after physical therapy and 20 days off work, she was
23 fine. She returned to full-duty work.

24 On May 26, 2006, Ms. Teklehaimanot lifted a heavy container of garbage and experienced
25 pain from her low back down her left leg. She reported it to her supervisor, who took her to the
26 emergency room. She followed up with treatment by her attending physician, Dr. Dobyne. Activity
27 increased her pain, for which she took medication.

28 Ms. Teklehaimanot tried to return to work in late 2006. She stopped working in
29 December 2006 and has not worked since. Since the injury, she has been unable to do much
30 cooking or housekeeping, and she has gained weight.
31
32

1 Nuguse Weldemichael

2 Nuguse Weldemichael testified that he is Ms. Teklehaimanot's husband of almost 19 years.
3 Before the industrial injury, she was very active. She had no problems. Everything has changed.
4 Now she does only a little bit. For the first six months after the injury, she was mostly in bed.

5 Tekle Tewoldeberhan

6 Tekle Tewoldeberhan testified that he is a friend of Nuguse Weldemichael. He visited
7 claimant's house before the injury, and she would cook for everyone. After the injury, things
8 changed. Somebody would help her. The first year was the worst; it was a little bit better after that.

9 James Keyes, Ph.D.

10 James Keyes, Ph.D., testified that he is a licensed psychologist, who treated
11 Ms. Teklehaimanot from March 19, 2007 through April 30, 2008. Dr. Keyes diagnosed major
12 depression and chronic pain with psychological factors and a general medical condition. As of
13 February 19, 2008, there had been positive progress in her treatment, but some barriers remained.
14 Dr. Keyes wanted her seen by a psychiatrist for her depression, which was not totally resolved, and
15 which was caused by the industrial injury. She also needed further treatment with Dr. Keyes.

16 Areas of progress in her treatment included her report that she was walking on a fairly
17 regular basis, cooking and following more normal routines. She was also volunteering at a food
18 bank for one hour, twice a week, but it was uncertain whether she was capable of full-time, gainful
19 employment. Dr. Keyes never indicated that her mental health issues had created such a barrier
20 that she was incapable of work. It would depend somewhat on the patient's desire.
21 Ms. Teklehaimanot had a belief that she could not work. She was not likely to return to work
22 successfully.

23 On June 6, 2007, Dr. Keyes wrote to the Department that Ms. Teklehaimanot's depression
24 was definitely improved, and he had no concern about emotional or mood factors interfering with
25 her ability to work.

26 Donna Lohmann, M.D.,

27 Donna Lohmann, M.D., testified that she is a psychiatrist, certified in her field. She first saw
28 Ms. Teklehaimanot on March 4, 2008. Her answers to a questionnaire suggested moderate
29 symptoms of depression. Dr. Lohmann diagnosed major depressive disorder, single episode,
30 moderate, and chronic pain with psychological factors affecting her physical condition. There was
31 no prior history of depression, suggesting that she would not be depressed if the injury had not
32 occurred.

1 Dr. Lohmann wanted to provide further treatment for the depression. She switched
2 Ms. Teklehaimanot to a more activating anti-depressant, switched her to Zolpidem to help her
3 sleep, and encouraged her to continue seeing Dr. Keyes.

4 Dr. Lohmann saw Ms. Teklehaimanot again on March 31, 2008. She felt worse. The
5 medication caused headache and upset stomach. She still had back, leg and shoulder pain. She
6 felt more depressed. Her depression was a result of her injury. Dr. Lohmann decided to switch her
7 to a third anti-depressant. Ms. Teklehaimanot did not tolerate that, so Dr. Lohmann went to a
8 different SSRI, continued her on the sleep medication, and weaned her off the Prozac.

9 Dr. Lohmann saw Ms. Teklehaimanot for a last visit on April 28, 2008. She became tearful.
10 She was not seeing any benefit from treatment. If treatment could have continued, Dr. Lohmann
11 would have increased the dosage of her anti-depressant and had her continue seeing Dr. Keyes.
12 Her treatment was rehabilitative rather than curative, because chronic pain is chronic.

13 When seen on March 4, 2008, Ms. Teklehaimanot was not capable of gainful employment,
14 based on her endorsement of pain and inability to function at home.

15 Maureen Johnson, M.D.

16 Maureen Johnson, M.D., testified that she is a physician, certified in internal and
17 occupational medicine. She first saw Ms. Teklehaimanot on July 20, 2006. A July 10, 2006 MRI
18 showed a small disc protrusion at L5-S1 on the left side. Her complaints included fatigue, inability
19 to sleep, thirst, weight loss of eight pounds, and feeling cold. Straight leg raise was positive on the
20 left side.

21 Dr. Johnson diagnosed low back pain with sciatica and disc protrusion. Treatment included
22 oral steroids and a neural modulator.

23 Ms. Teklehaimanot returned on August 16, 2006, with no change in her pain. On
24 August 31, 2006, she still had symptoms in her left leg to the great toe. She also started
25 complaining about the left shoulder with elevation. She continued to have muscle spasms and lack
26 of a normal curvature into the lumbosacral spine. She had a disc derangement, lumbosacral strain
27 and pain behavior, with excessive pain. Her low back symptoms were consistent with her MRI
28 findings. However, her pain behavior exceeded what one would expect in most people with the
29 same problem. Such pain behavior would be difficult to treat.

30 On September 5, 2006, Ms. Teklehaimanot was still in physical therapy, but she was not
31 making any progress at all, and she was having more problems with her shoulder. When seen on
32 November 9, 2006, her symptoms included daytime drowsiness, so she was taken off daytime

1 hydrocodone. It was clear that she was not getting any better. She probably needed a more
2 comprehensive psychological and rehab approach.

3 On December 7, 2006, her low back, radicular pain and shoulder pain continued, causing
4 her to miss work. She thought therapy had instigated some of the pain, and she wanted more pain
5 medication. She had already had physical therapy at three separate sites and a trial of work
6 conditioning with very limited participation or progress. An attempt was made to have her work four
7 hours per day, every other day, with strict physical limitations.

8 On December 27, 2006 and January 4, 2007, she was depressed, with continuing pain. MRI
9 showed a left shoulder small rotator cuff tear. She was not responding to the medication she was
10 on. A hand packager job analysis was approved for her in March 2007, based on the description of
11 physical activities. However, there was no consideration of Ms. Teklehaimanot's restrictions or
12 mental health conditions. Dr. Johnson would defer to Dr. Keyes regarding her psychiatric status. If
13 psychiatric treatment would address her fear of moving through the pain so that she could
14 participate in an active program and improve her function, it would benefit her long term.

15 Ms. Teklehaimanot's first mention of left shoulder pain was on August 31, 2006. It came
16 suddenly out of the blue, and Dr. Johnson never called it work related. As of May 30, 2007,
17 Ms. Teklehaimanot was physically capable of returning to her job of injury with modifications, and
18 also of performing the job of hand packager. Returning to work would give her structure and be
19 therapeutic. Dr. Johnson had no plans for further treatment at their last appointment on June 13,
20 2007.

21 Lanny L. Snodgrass, M.D.

22 Lanny Snodgrass, M.D., testified that he is a psychiatrist, certified in his field. He evaluated
23 Ms. Teklehaimanot on October 6, 2007. He concluded that she had no diagnosable mental
24 condition. She did not have major depression. Somatization of stress is a personality trait that
25 would have been formed long ago. Depressed mood, diminished interest in activities and fatigue,
26 are not, by themselves, enough to establish a major depression. Psychiatric treatment is not
27 indicated.

28 There was no psychiatric barrier to Ms. Teklehaimanot working between July 26, 2007 and
29 February 19, 2008. The structure of returning to work would be therapeutic. It would make her feel
30 more productive and contributing.

31

32

1 Dean S. Ricketts, M.D.

2 Dean Ricketts, M.D., testified that he is an orthopedic surgeon, certified in his field. He
3 evaluated Ms. Teklehaimanot on April 5, 2007. Her diagnoses included preexisting conditions of
4 degenerative tendinosis of the left shoulder and degenerative disc disease of the low back. Her
5 industrial injury aggravated or produced a small herniation of the L5-S1 disc. The industrial injury
6 did not cause the partial rotator cuff tear or bursitis of her left shoulder, because there was three
7 months between the injury and her first mention of any shoulder complaints.

8 Ms. Teklehaimanot's condition was at maximum medical improvement on April 5, 2007, and
9 the same would have been true on February 19, 2008, because she had no treatable lesions and
10 no objective evidence of dysfunction. Her permanent partial disability was Category 2 of
11 lumbosacral impairments. She was capable of working with lifting limited to 25 pounds, and
12 limitations on repetitive bending at the waist. She could work within those restrictions between
13 July 26, 2007 and February 19, 2008, from a physical standpoint. There are significant
14 psychological factors which have affected her response to this injury.

15
16 **DISCUSSION**

17 The first issue presented by this appeal is whether Ms. Teklehaimanot is entitled to
18 additional treatment. She presented no medical evidence that further physical treatment is needed.
19 Therefore, that issue is deemed waived.

20 Ms. Teklehaimanot did present expert testimony from Dr. Keyes and Dr. Lohmann,
21 supporting further mental health treatment, and finding a causal relationship between her May 26,
22 2006 back injury and diagnoses of major depression and chronic pain with psychological factors.
23 The Department countered with the testimony of Dr. Snodgrass, that her condition fell short of
24 those diagnoses, and that no further treatment was indicated. There is no evidence of depression
25 or a pain syndrome preceding this industrial injury, and adequate evidence that those conditions
26 existed, at least to some degree, after the injury. The preponderance of evidence supports a
27 finding that the industrial injury proximately caused depression and a chronic pain syndrome.
28 However, the preponderance of evidence does not support that those conditions required further
29 necessary and proper treatment as of February 19, 2008.

30 Between March 2007, when Dr. Keyes began seeing her, and three months later in
31 June 2007, he noted that her depression was definitely improved, and she could work. Instead, she
32 seemed, in the ensuing year of counseling by Dr. Keyes, to languish in the belief that she was in

1 too much pain to function. Her housekeeping and parenting duties were done by other family
2 members. The tenor of all expert testimony in this record is that Ms. Teklehaimanot's erroneous
3 belief that she is physically unable to function has been perpetuated by her own inactivity.
4 Dr. Snodgrass testified persuasively that structured activity would improve her mood, and the
5 record supports that when she has forced herself to engage in normal activities of daily living, she
6 has felt better. Conversely, psychiatric treatment, which began in March 2008, made her feel much
7 worse. On balance, the preponderance of evidence does not support that further counseling or
8 psychiatric treatment would be curative or rehabilitative for her.

9 The next issue is whether Ms. Teklehaimanot was temporarily totally disabled from July 26,
10 2007 through February 19, 2008. She presented no evidence that the industrial injury rendered her
11 physically unable to perform any reasonably continuous, gainful employment. Therefore, that issue
12 is deemed waived. The question remains whether the injury rendered her psychologically unable to
13 work during that period. The closest thing to support for this proposition is Dr. Lohmann, who
14 testified that when seen on March 4, 2008, Ms. Teklehaimanot was not capable of gainful
15 employment, based on Ms. Teklehaimanot's endorsement of pain and inability to function at home.
16 Given the dearth of objective reasons for continuing pain and inactivity, Dr. Keyes observation that
17 she was much improved and could work as of June 2007, and the opinions of the other expert
18 witnesses in favor of her employability, the preponderance of evidence does not support
19 Ms. Teklehaimanot's claim of temporary total disability during the period at issue.

20 The final issues are whether Ms. Teklehaimanot sustained a higher permanent partial
21 disability than the Category 2 for low back impairment, which was awarded by the Department, and
22 whether she was totally permanently disabled as of February 19, 2008. She presented no evidence
23 of any additional permanent partial disability rating, and no evidence of total permanent disability.
24 Therefore, those issues are deemed waived.

25 For the reasons set forth above, I conclude that the Department order dated February 19,
26 2008, which affirmed Department orders dated October 23, 2007 and December 5, 2007, which
27 modified from final to interlocutory an August 24, 2007 Department order and closed the claim with
28 a permanent partial disability award for Category 2 dorsolumbar/lumbosacral impairment, is correct
29 and should be affirmed.

30 FINDINGS OF FACT

- 31 1. On December 7, 2006, Nigisti T. Teklehaimanot, claimant, filed an
32 application for benefits with the Department of Labor and Industries
alleging that she sustained an injury while in the course of her

1 employment with University of Washington/Harborview Hospital on
2 May 26, 2006. The claim was allowed and benefits were paid. On
3 August 24, 2007, the Department issued an order closing the claim with
4 a permanent partial disability award for Category 2 dorsolumbar and/or
5 lumbosacral impairments. On September 4, 2007, claimant filed a
6 protest and request for reconsideration. On October 23, 2007, the
7 Department issued an order which modified the August 24, 2007 order
8 from final to interlocutory and closed the claim with a permanent partial
9 disability award for Category 2 dorsolumbar and/or lumbosacral
10 impairments. On October 25, 2007, claimant filed a protest and request
11 for reconsideration. On December 5, 2007, the Department issued an
12 order affirming the October 23, 2007 order. On February 1, 2008,
13 claimant filed in the mail a protest and request for reconsideration. On
14 February 19, 2008, the Department issued an order affirming the
15 Department orders dated October 23, 2007 and December 5, 2007.
16 Within 60 days of communication of the February 19, 2008 Department
17 order, claimant filed in the mail a protest and request for
18 reconsideration, which the Department received on April 21, 2008, and
19 forwarded to the Board of Industrial Insurance Appeals as a direct
20 appeal on July 29, 2008. On July 31, 2008, the Board issued an order
21 granting the appeal, assigning it Docket No. 08 19081, and directing that
22 proceedings be held.

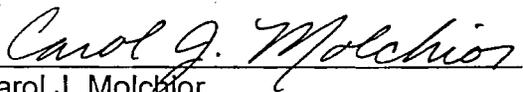
- 23 2. On May 26, 2006, Nigisti T. Teklehaimanot, claimant, sustained an
24 injury to her low back, when she lifted a heavy container of garbage in
25 the course of her employment with University of Washington/Harborview
26 Hospital.
- 27 3. The claimant's May 26, 2006 industrial injury proximately caused a small
28 disc protrusion at L5-S1 on the left side, depression and chronic pain
29 syndrome.
- 30 4. As of February 19, 2008, claimant's injury-related conditions were at
31 maximum medical improvement and were not in need of further proper
and necessary medical treatment.
5. Claimant is a 44 year old immigrant, with education through the sixth
grade and one year of English classes. Her American employment
history includes factory assembly work and hospital housekeeping work.
6. During the period from July 26, 2007 through February 19, 2008,
inclusive, the residual effects of the May 26, 2006 industrial injury did
not preclude claimant from obtaining or performing reasonably
continuous gainful employment in the competitive labor market, when
considered in conjunction with her age, education, work history, and
pre-existing state of health.
7. As of February 19, 2008, claimant's permanent impairment, proximately
caused by the May 26, 2006 industrial injury, was best described by
Category 2 of WAC 296-20-280 for dorsolumbar and/or lumbosacral
impairments.

1 8. As of February 19, 2008, the residual effects of the May 26, 2006
2 industrial injury did not permanently preclude claimant from obtaining or
3 performing reasonably continuous gainful employment in the competitive
4 labor market, when considered in conjunction with her age, education,
5 work history, and pre-existing state of health.

6 **CONCLUSIONS OF LAW**

- 7 1. The Board of Industrial Insurance Appeals has jurisdiction over the
8 parties to and the subject matter of this appeal.
- 9 2. Pursuant to RCW 51.36.010, claimant's L5-S1 disc protrusion,
10 depression, and chronic pain syndrome, proximately caused by the
11 May 26, 2006 industrial injury, had reached maximum medical
12 improvement as of February 19, 2008, and she is not entitled to further
13 proper and necessary medical treatment.
- 14 3. During the period from July 26, 2007 through February 19, 2008,
15 inclusive, claimant was not a temporarily totally disabled worker within
16 the meaning of RCW 51.32.090, and, therefore, is not entitled to time-
17 loss compensation for this period.
- 18 4. As of February 19, 2008, claimant was a permanently partially disabled
19 worker within the meaning of RCW 51.32.080.
- 20 5. As of February 19, 2008, claimant was not a permanently totally
21 disabled worker within the meaning RCW 51.08.160.
- 22 5. The order of the Department of Labor and Industries, dated
23 February 19, 2008, is correct and is affirmed.

24 DATED: SEP 29 2009

25 
26 Carol J. Molchior
27 Industrial Appeals Judge
28 Board of Industrial Insurance Appeals
29
30
31
32

NO.66506-5-I
**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,

Appellant,

v.

NIGISTI TEKLEHAIMANOT,

Respondent.

CERTIFICATE OF
SERVICE

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Appellant, Appendix A and Certificate of Service to counsel for all parties on the record as follows:

ORIGINAL and COPY hand delivered:

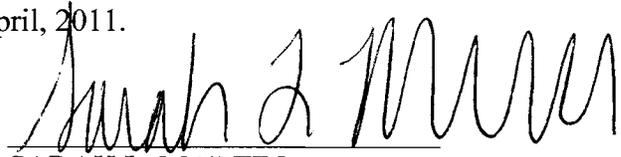
Richard D. Johnson, Court Administrator/Clerk
Court of Appeals, Division I
One Union Square
600 University St
Seattle, WA 98101-1176

ORIGINAL

COPY by depositing a postage prepaid envelope in the U.S. mail
addressed:

Robert A. Silber
Foster Law Office
8204 Green Lake Dr N
Seattle, WA 98103-4413

DATED this 13 day of April, 2011.



SARAH L. MARTIN
Assistant Attorney General
WSBA No. 37068
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740