

No. 72646-3-1

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

LORENZO THOMAS,
Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent.

APPELLANT'S REPLY BRIEF

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I. REPLY ARGUMENT

A. Division Two's holding in *Singletary* does not recognize State and Federal constitutional due process protections.

Mr. Thomas incorporates his opening brief into this reply and continues to respectfully disagree with the *Singletary* decision and ask this Court not to follow the decision from Division Two of the Court of Appeals. *Singletary v. Manor Healthcare Corp.*, 166 Wash. App. 774, 271 P.3d 356 (2012). The Department of Labor and Industries (Department) argues that due process was addressed in the *Singletary* decision, but they are mistaken. *See generally id.* Although *Singletary* touched on whether notice was material, they failed to address whether the lack of notice was unconstitutional. *See id.* The application of the *Singletary* decision created unconstitutional case law contrary to statute RCW 51.52.050(1). *Id.*; *see* Wash. Rev. Code Ann. § 51.52.050 (West 2015).

When RCW 51.52.050 is plainly read, there is no provision which allows for implied notice. RCW 51.52.050(1) states:

Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, or if the worker, beneficiary, employer, or other person affected thereby chooses, the department may send correspondence and other legal notices by secure electronic means except for orders communicating the closure of a claim.

See § 51.52.050(1). The Department’s misapplication of *Singletary* is contrary to the legislative intent of the statute which is clearly meant to provide constitutional protections regarding communication of Department orders and notice to the injured worker. *See Singletary*, 166 Wash. App. at 774. The only notice Mr. Thomas received prior to 2006 was a reopening order stating in its’ entirety: “This claim is reopened effective 5/11/2001 for authorized medical treatment and benefits as appropriate under the industrial insurance laws.” This language is in no way sufficient to justify not insuring that Mr. Thomas receives a Department order that closes his claim.

In *Shafer*, it was determined that an order was not final until it was communicated to Shafer’s doctor. *See Shafer v. Dep’t of Labor & Indus.*, 166 Wash. 2d 710, 213 P.3d 591 (2009). Even though Shafer knew of the closing order, the Court concluded “that Shafer’s claim is not final for purposes of appeal because her attending physician, Dr. Cook, did not receive a copy of the Department’s closure order.” *See id.* Surely if the Supreme Court of Washington went as far as to require giving notice to one’s doctor before a closing order could become final, then at a minimum it can be concluded that our state’s Supreme Court intended for an injured worker to receive a copy of the closing order before it could become final.

Yet, the Department never offered any evidence of the receipt of a closing order by Mr. Thomas in 2002. Additionally, the Department neither challenged nor rebutted the lack of receipt of the closing order, which was attested to by Mr. Thomas via his sworn declaration, during litigation before the Board of Industrial Insurance Appeals or in their motion for summary judgment in the superior court. Therefore, it stands as a verity that Mr. Thomas's case was never technically closed in 2002 because the plain reading of the statute states "shall... serve order". The Department is required to serve a closing order upon Mr. Thomas. This means that the order has to be communicated to Mr. Thomas and it is only communicated when Mr. Thomas actually receives it. Therefore the 2002 Department order closing the claim could not become a final order until Mr. Thomas was served with said order.

To apply *Singletary* in this matter would be to deny Mr. Thomas his statutory notice protections under RCW 51.52.050 and, more importantly, his state and federal constitutional due process protections. Wash. Const. art.1, § 3; U.S. Const. amend. V; *see* § 51.52.050.

B. The Superior Court's decision should not be upheld because res judicata cannot apply when it violates constitutional notice requirements, nor should it be so readily applied in a claim under the Industrial Insurance Act.

This Court has held that res judicata is inappropriate when it violates due process notice requirements: “fundamental fairness requires that a claimant must be clearly advised of the issue before the issue is barred by res judicata.” *Lynn v. Wash. Dep't of Labor and Indus.*, 130 Wash. App. 829, 125 P.3d 202 (2005). Mr. Thomas was never given proper notice, via receipt of the 2002 closing order, that his claim was closed and therefore it would be contrary to due process requirements as well as fundamental fairness to apply res judicata to the case at hand. Wash. Const. art.1, § 3. Additionally, res judicata should not be so readily applied under the Industrial Insurance Act.

As mentioned in *Lynn*, this Court has declared that res judicata should not be retroactively applied or overused. *See id.*

The res judicata effect of final decisions already rendered is not affected by subsequent judicial decisions giving new interpretations to existing law. As the Washington Supreme Court has observed: “If prior judgments could be modified to conform with subsequent changes in judicial interpretations, we might never see the end of litigation.”

See id. at 836. Additionally, there was never any “concurrence of identity with the quality of the persons for or against whom the claim is made”,

which is the fourth element required when applying res judicata. *See Gold Star Resorts, Inc. v. Futurewise*, 167 Wash.2d 723, 222 P.3d 791 (2009). To apply res judicata to Mr. Thomas's claim, when he was never notified of the Department order in 2002 that closed his claim because he never received said order, would be to promote the exact type of res judicata situation this Court intended to avoid and prevent.

C. *Singletary* was decided after the time of injury, and its application to the case at hand would be retroactive not prospective.

The Supreme Court of Washington has made it abundantly clear that the applicable law under Title 51, the Industrial Insurance Act, is the law in effect at the time of the worker's injury. "It has been firmly established in this state, by a consistent series of decisions of this court, that the rights of claimants under the Workmen's Compensation Act are controlled by the law in force **at time of a person's injury**, rather than by a law which becomes effective subsequently." *Ashenbrenner v. Dep't of Labor and Indus.*, 62 Wash.2d 22, 25, 380 P.2d 730 (1963) (emphasis added) (citing *Thorpe v. Dep't of Labor & Indus.*, 145 Wash. 498, 261 P. 85 (1927); *Foster v. Dep't of Labor & Indus.*, 161 Wash. 54, 296 P. 148, 73 A.L.R. 1012 (1931); *Sheldon v. Dep't of Labor & Indus.*, 168 Wash. 571, 12 P.2d 751 (1932); *Lynch v. Dep't of Labor & Indus.*, 19 Wash.2d 802, 145 P.2d 265 (1944); *Barlia v. Dep't of Labor & Indus.*, 23 Wash.2d

126, 160 P.2d 503 (1945); *Bodine v. Dep't of Labor & Indus.*, 29 Wash.2d 879, 190 P.2d 89 (1948)).

The Department appears to argue that *Moen* suggests that statutes which have been enacted by the legislature are interpreted by the state's highest court and therefore *Singletary* should govern. *State v. Moen*, 129 Wash.2d 535, 919 P.2d 69 (1996). However, not only was *Singletary* not decided by the Supreme Court of Washington, but *Singletary* was never codified into a statute. *See generally Singletary*, 166 Wash. App. at 774. Additionally, *Moen* involved a criminal case and as a result Title 51 is inapplicable to the matter at hand. *Ashenbrenner*, on the other hand, is a workers' compensation case and would be more consistent with the matter at hand. *See generally Ashenbrenner*, 62 Wash.2d at 22. The misapplication of *Moen* by the Department distracts from the fact that there are numerous cases that signify that the controlling law in a Title 51 matter is the law in effect at the time of a worker's injury. *See Moen*, 129 Wash.2d at 535. Accordingly, *Singletary* cannot apply to Mr. Thomas's claim in the matter before this Court.

D. By following *Singletary*, an affirmative duty would be placed on the injured worker to protest a favorable order which runs counter to common sense and to the policy and purpose of Title 51.

Mr. Thomas should not have been required to appeal the reopening of his case, as a procedural safeguard, when the reopening of his case was

favorable to him. Even in *Singletary* the court concedes that “the policy behind the industrial insurance claims system is for a more expedient resolution of claims.” See *Singletary*, 166 Wash. App. at 787 (citing *Dep’t of Labor & Indus. v. Fankhauser*, 121 Wash.2d 304, 315, 849 P.2d 1209 (1993); § 51.04.010). Essentially, *Singletary* created case law contradictory to the common sense of a reasonable person and to the longstanding policy and purpose of Title 51 and therefore the Division Two decision should not be followed by this Division One Court. See *id.* Following *Singletary* would be to, in essence, to acknowledge that an individual’s due process rights under the State and Federal constitutions are not steadfast or guaranteed. See *id.* Additionally, affirming the superior court’s misinterpretation of *Singletary* would undermine the legislature’s authority when they enacted RCW 51.04.010. See *id.*; see § 51.04.010.

When the legislature enacted RCW 51.04.010 they relinquished the judicial authority of the courts regarding work place injuries, to separate departments to ensure expedient, fair, consistent, and efficient results that were not being obtained in the court system at the time:

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost

of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate.

See § 51.04.010. The goal of the legislature was to advance the welfare of the state by empowering the injured worker to have recourse when the inevitable work place injury occurred, and protect those injured workers from any systematic imperfection. “Injuries in such works, formerly occasional, have become frequent and inevitable[, and t]he welfare of the state depends upon its industries, and even more upon the welfare of its wage worker.” *See* § 51.04.010. The plain reading of the statute in no way condones or promotes creating redundancies such as appealing a favorable order. To follow the Department’s misinterpretation of *Singletary*, the court would require one to protest a favorable order which would place an irrational affirmative duty on an injured worker, be detrimental to public interests, and contrary to legislative intent. *See generally Singletary*, 166 Wash. App. at 774.

E. Awarding attorney fees and costs to Mr. Thomas is appropriate in this matter.

Should this Court reverse and/or remand this matter to the superior court, Mr. Thomas would respectfully request an award of attorney fees, at both the superior court and appellate court levels, pursuant to RCW § 51.52.130. *See* § 51.52.130; *see Boyd v. Davis*, 127 Wash.2d 256, 264-65,

897 P.2d 1239 (1995) (At the appellate level, attorney fees can be requested in either the opening brief or reply brief.); *see Tobin v. Dep't of Labor & Indus.*, 169 Wash.2d 396, 405-06, 239 P.3d 544 (2010).

II. CONCLUSION

Mr. Thomas respectfully requests that this Court remand this matter to the Superior Court with a ruling that Mr. Thomas's 2012 application not be limited to medical treatment only because constitutionally required notice was never given; res judicata should not be applied; the application of *Singletary* is not permitted because it would be retroactive; and it would be bad policy and against legislative intent to require an affirmative duty to appeal to a favorable order.

RESPECTFULLY SUBMITTED this 12th day of August, 2015.



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