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No. 92730-8

SUPREME COURT OF THE STATE OF WASHINGTON

KATHRYN A. LANDON,

Petitioner,

v.

THE HOME DEPOT, INC. AND THE DEPARTMENT OF
LABOR & INDUSTRIES,

Respondents.

**THE HOME DEPOT, INC.'S ANSWER TO PETITION
FOR REVIEW**

Rebecca A. Watkins, WSBA No. 45858
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Depot

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 ORIGINAL

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Singletary v. Manor Healthcare Corp., 166 Wn. App. 774, 271 P.3d 356, *review denied*, 175 Wn.2d 1008 (2012).....4

I. ANSWER TO RELIEF SOUGHT

Appellant Kathryn Landon asks the Court to accept discretionary review of a published opinion of the Court of Appeals, on the basis that the court erred in its decision on jurisdiction. Respondent does not believe review is warranted, and disagrees with appellant's characterization of the issue. The board, and hence the trial court, had subject matter jurisdiction over Ms. Landon's claim; she failed to preserve what is accurately characterized as legal error.

II. ANSWER TO STATEMENT OF THE CASE

The Home Depot generally agrees with the procedural history of this case as set out by Ms. Landon, although Ms. Landon omits some relevant facts.

Ms. Landon's appeal of the Department's order raised the sole issue of whether she had an occupational disease or infection proximately caused by her employment. CP 52. During a mediation conference she stipulated to the board's jurisdiction, and the issues were clarified in a scheduling conference. CP 58, 63. At no time in this process did Ms. Landon raise an issue regarding the board's scope of review or its ability to address the merits of her occupational disease claim.

After a hearing judge issued a Proposed Decision and Order on April 16, 2013, Ms. Landon filed a June 13, 2013 Petition for Review with

the board raising the sole issue of whether she had an occupational disease arising naturally and proximately from the distinctive conditions of her employment. CP 4. She did not raise any issue about the board's ability to address the merits of the occupational disease claim. The board issued a July 3, 2013 Order Denying Petition for Review adopting the hearing judge's order as its own Decision and Order. CP 3.

Ms. Landon appealed to the Cowlitz County Superior Court, and the parties proceeded to a jury trial on the sole issue of whether the board correctly concluded Ms. Landon's condition is not an occupational disease arising naturally and proximately out of the distinctive conditions of her employment. Ms. Landon again raised no issue regarding the scope of review. The jury issued a verdict in favor of The Home Depot, and a Judgment on Verdict was entered on August 25, 2014. CP 401-02.

On September 4, 2014, Ms. Landon filed a Motion to Vacate Judgment on Verdict and Remand to the Department of Labor and Industries for Further Action, contending for the first time that the board and court lacked jurisdiction over the occupational disease claim. CP 405-06. The superior court denied the Motion to Vacate. CP 428. Ms. Landon appealed the denial to Division II of the Court of Appeals. It held that the board and superior court had jurisdiction, and denied Ms. Landon's appeal.

III. ANSWER TO ARGUMENT

Ms. Landon argues the Court of Appeals wrongly decided this case on subject matter jurisdiction rather than “statutory appellate jurisdiction”, a matter she tries to define as distinct from subject matter jurisdiction, even calling it a scope of review issue. Ms. Landon contradicts her own position below.

When Ms. Landon initially sought to vacate the jury verdict, she did so on the basis that the trial court and the board lacked jurisdiction to decide the merits of the case. CP 405-06. She acknowledged that subject matter jurisdiction could be raised at any time, and expressly stated she was raising jurisdiction, not scope of review. Appellant’s Reply Brief at 3. She indicated that what she labeled statutory appellate jurisdiction was really subject matter jurisdiction. Appellant’s Reply Brief at 2. Now, Ms. Landon asserts she is not raising subject matter jurisdiction, but instead “appellate jurisdiction” which she calls a “scope of review issue.” Petition for Review at 3, 4.

Ms. Landon did not preserve any scope of review issue at hearing, at the board, or at trial, so can only challenge subject matter jurisdiction. As the Court of Appeals stated, subject matter jurisdiction is frequently confused with authority to consider an issue in a given case. Subject matter jurisdiction refers to the category or type of controversy that an

agency has authority to decide. *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 782, 271 P.3d 356, *review denied*, 175 Wn.2d 1008 (2012). In assessing subject matter jurisdiction, the appropriate focus of the inquiry is whether the “type of controversy” is within the agency’s given subject matter jurisdiction. Statutory appellate jurisdiction, as Ms. Landon labels her issue, is simply the subject matter jurisdiction of the board or court in this matter. The Court of Appeals correctly found the board and court had subject matter jurisdiction.

The Court of Appeals’ decision does not conflict with *Hanquet v. Dep’t of Labor & Indus.*, 75 Wn. App. 657, 663–64, 879 P.2d 326 (1994), *review denied*, 125 Wn.2d 1019, 890 P.2d 20 (1995) or *Lenk v. Dep’t of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). Those cases address authority to review an issue or scope of review, not subject matter jurisdiction. Unlike Ms. Landon, the parties in *Hanquet* and *Lenk* had properly raised and challenged the board’s ability to address issues not already passed on by the Department. The board may exceed the scope of review by resolving issues not properly before it, and in doing so, commit an error of law. Such error is not jurisdictional and does not deprive the board of subject matter jurisdiction. *Matthews v. State Dept. of Labor and Industries*, 171 Wn. App. 477, 288 P.3d 630 (2012), *review denied*, 176

Wn.2d 1026, 301 P.3d 1047 (2013). The Court of Appeals addressed and rejected Ms. Landon's reliance on *Hanquet* and *Lenk*.

As the Court of Appeals held, any error by the board in addressing claimant's claim as an occupational disease goes to something other than jurisdiction. Ms. Landon did not raise or preserve the error by the board; to the contrary, she argued and fully litigated the merits of her occupational disease claim without suggesting it was outside the board's scope of inquiry. Only after an unfavorable jury verdict did she assert for the first time that the board lacked jurisdiction. Similarly now, after the Court of Appeals held the board had jurisdiction, she changes her argument in an attempt to characterize her appeal as a scope of review issue.

IV. CONCLUSION

This appeal does not present a novel idea or contradiction in rulings from the Court of Appeals. It focuses solely on jurisdiction because no other error was preserved. The Court of Appeals rightly understood the distinction between jurisdiction and scope of review, and held consistent with prior decisions that the board and superior court had

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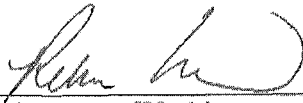
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jurisdiction over the occupational disease claim. The Home Depot joins the Department of Labor & Industry in requesting the Court deny the petition for discretionary review.

Dated: February 18, 2016

Respectfully submitted,



Rebecca A. Watkins
Of Attorneys for Respondent The Home Depot

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed a copy of **THE HOME DEPOT INC.'S ANSWER TO PETITION FOR REVIEW** via e-filing with the following:

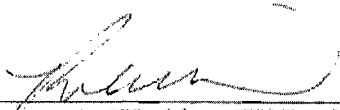
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Attached for filing is The Home Depot, Inc.'s Answer to Petition for Review regarding the above-named matter from Rebecca Watkins, Phone (503) 595-2134, WSBA 45858; rwatkins@sbhlegal.com. Copies have been served on all counsel of record.

Thank you
Teresa

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