

COURT OF APPEALS
DIVISION II

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No. 41601-8-II

STATE OF WASHINGTON
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SINAIPUA LEULUAIALII, Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF LABOR AND
INDUSTRIES and FRANCISCAN HEALTH SYSTEMS WEST a/k/a
CATHOLIC HEALTH INITIATIVES, Respondents

BRIEF OF CATHOLIC HEALTH INITIATIVES, Respondent

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I. INTRODUCTION

This case concerns whether the Department of Labor and Industries has authority to correct a clerical error in a previous order more than sixty days after issuance of that order. The Department's October 14, 2008, order attempted to correct a clerical error in an earlier May 16, 2008, closure order, in which the Department mistakenly identified the wrong body part in its permanent partial disability award to the Appellant, Ms. Leuluaiali.

The applicable law in this matter clearly establishes that the Department is without authority to reconsider the May 16, 2008, order, despite the existence of a clerical error, because the order was final and binding. The order was properly communicated to all parties, including the Appellant's attending physician, and was not timely appealed within the sixty-day time period.

Although a clerical error in a final and binding order can subsequently be acknowledged and accounted for by the Board or a reviewing court, the Department does not have the authority to reconsider such an order.

The Defendant, Catholic Health Systems, respectfully requests that the Court affirm the Superior Court's November 17, 2010, Order, affirming the Board's October 6, 2009, Decision and Order, which held that the Department was without authority to reconsider and reissue the Department's final and binding order from May 16, 2008.

II. STANDARD OF REVIEW

Review by this Court is limited to an examination of the record to determine whether substantial evidence supports the findings of the superior court's de novo review of the Certified Appeal Board Record (CABR), and whether the superior court's conclusions of law flow from those findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6 (1999); *Young v. Dep't of Labor & Indus.*, 81 Wash.App. 123, 128 (1996).

III. ISSUES

1. Whether the Department had authority to issue the October 14, 2008, order correcting a clerical error in the May 16, 2008, order, when the May 16, 2008, order was final and binding.
2. Whether the Appellant met her burden to establish that the May 16, 2008, order was not properly communicated to her attending physician.
3. Whether additional evidence submitted by the Appellant after the Proposed Decision and Order was issued and after the Appellant's Petition for Review was filed can be considered by the Court on appeal.
4. Whether res judicata bars reconsideration of the Department's May 16, 2008, order.

5. Whether an error in body part in a final and binding Department order can be corrected by the Board or a court without giving the injured party an opportunity to reargue the Department order.
6. Whether interests of public policy should give the Appellant an opportunity for repetitive and multiple determinations on the merits of her claim.

IV. STATEMENT OF THE CASE

This case concerns an October 14, 2008, Department order that set the Appellant, Ms. Leuluaialii's, wage and closed the claim with an award for 19% of the amputation value of the right leg above the knee joint with a short thigh stump (3" or below the tuberosity of the ischium), less prior awards for permanent partial disability paid under this claim. CABR at 217-219.

The Department's October 14, 2008, order was a correction of an earlier order dated May 16, 2008, which closed the Appellant's claim with a permanent partial disability award that mistakenly identified the injury to the Appellant's right arm instead of her right leg. CABR at 212-219. Specifically, in an October 9, 2008, letter to the Department, the Appellant noted that the her claim had been allowed for an injury to her right *lower* extremity but that the May 16, 2008, order had, as a result of a clerical error, listed the Appellant's injury as being of the right *upper* extremity.

The Appellant requested that an order be entered with a correct description of the injury. CABR at 131-132. In response, the Department issued its October 14, 2008, order, which corrected the clerical error. CABR at 188-189.

Aside from correcting the error in body part, the October 14, 2008, order otherwise affirmed the May 16, 2008, order, including the amount of the permanent partial disability award. CABR at 212-214 and 217-219.

Yet despite receiving exactly what she had requested, Ms. Leuluai appealed the October 14, 2008, order to the Board of Industrial Insurance Appeals (Board), on the basis that decision was “unjust and unlawful.” CABR at 159. Further, the Appellant requested additional treatment, time-loss compensation or loss of earning power, an increased permanent partial disability award or a permanent total disability award, and/or adjustment of benefits. *Id.* In its May 11, 2009, Brief to the Board Re: Issue of Timeliness, the Appellant again asserted that an adjustment of benefits was in order and that the Appellant was entitled to a permanent total disability pension. *Id.* at 194.

Prior to the hearing before the Board, the parties entered into a Stipulation of Facts, wherein they agreed that the May 16, 2008, order was “properly communicated to all parties and no party filed a protest or appeal within sixty (60) days.” CABR at 126-127.

Following briefing by both parties and hearing, Industrial Appeals Judge Greg J. Duras issued a Proposed Decision and Order, dated June 23, 2009, wherein he reversed and remanded the October 14, 2008, order on the basis that the Department lacked jurisdiction to issue that order because the Department's May 16, 2008, closure order was not protested or appealed and had therefore become final. CABR at 141-150.

On August 4, 2009, the Appellant filed a Petition for Review of Judge Duras' June 23, 2009, Proposed Decision and Order. CABR at 109. Similar to Appellant's Brief Re: Issue of Timeliness, the Petition for Review raised no facts in dispute and rested entirely on Appellant's legal jurisdictional argument. CABR at 109-135. Review of the Petition was granted on August 24, 2009. *Id.* at 70.

On August 17, 2009, the Appellant filed a Motion to Dismiss, maintaining that the Proposed Decision and Order was void because the Board lacked subject matter jurisdiction to hear the appeal because the closing orders were not final and binding. CABR at 71-107. Appellant's argument relied solely on the Washington State Supreme Court's decision in *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d. 710 (2009).

The Appellant alleged that the May 16, 2008, and October 14, 2008, department orders never became final pursuant to *Shafer*, because the attending physician was not copied with the orders. The Appellant attached additional evidence (SIF-5 form) to her Motion to attempt to establish the identity of the attending physician. CABR at 76-78.

In its September 11, 2009, Response, the Respondent urged the Board to deny the Motion on the bases that the facts in this matter were stipulated to, including a stipulation that communication of the order was proper, and further that there was nothing in the record to establish a lack of communication. CABR at 61-66. The Respondent also objected to the Appellant's attempts to introduce new evidence after resting and urged the Board to reject admission of Exhibit No. 1 (SIF-5 form) to the Appellant's Motion. *Id.* at 64.

On October 6, 2009, the Board issued a Decision and Order in this matter, which adopted the June 23, 2009, Proposed Decision and Order and thereby reversed and remanded the Department's October 14, 2008, order for lack of subject matter jurisdiction due to the finality of the May 16, 2008, order. CABR at 2-6. The Board's Decision noted that it considered the Appellant's Motion to Dismiss as well as the Defendant's Response, and further denied the Motion to Dismiss. In so doing, the Board provided the following explanation:

Fundamental to the determination of the application of the *Shafer* decision to this appeal is a factual basis to determine whether the Department orders were communicated to the attending physician. This appeal was submitted for decision based upon stipulated facts that do not provide a factual basis to determine if the court's decision in *Shafer* is applicable. The exhibits attached to claimant's motion do not provide a basis for making this determination, and **Exhibit 1 was not offered during hearing**. Even if the exhibit were considered together with the material stipulated into the record, it does not provide a basis to determine if the May 16, 2008, and the October 14, 2008, orders were communicated to the attending physician.

CABR at 3, lines 11-18 (*emphasis added*).

Additionally, the Board noted that admission of new evidence is within the Court's discretion and requires a showing that the evidence was newly discovered and that it could not have been provided at an earlier time with reasonable diligence. *Citing Rogers Walla Walla v. Ballard*, 16 Wash.App. 81 (1976). The Board concluded that the Appellant could have provided the evidence to determine the issue of communication "at the hearing with the application of reasonable diligence." CABR at 4, lines 1-2. As such, the Appellant's Motion to Dismiss was denied.

On October 16, 2009, the Appellant filed a Motion for Reconsideration of the Board's October 6, 2009, Decision and Order. CABR at 36-42. On November 4, 2009, the Appellant subsequently filed its Notice of Appeal of the Board's October 6, 2009, Decision and Order with the Pierce County Superior Court. Based on this appeal, the Board, in its letter dated November 12, 2009, determined that it no longer had authority to take further action in the case and deemed the Appellant's October 16, 2009, Motion for Reconsideration withdrawn. CABR at 20.

On November 17, 2010, the Superior Court affirmed the Board's Decision and Order, holding that the Department was without authority to reconsider and reissue the final and binding order from May 16, 2008. CP 112-119. The Court also concluded that the Appellant failed to meet her burden of establishing that the May 16, 2008, order was not properly communicated to her treating doctor. *Id.* The Court's final Judgment and Order was entered on December 3, 2010. *Id.* On December 29, 2010, the Appellant filed its Notice of Appeal to Court of Appeals, Division II. CP 120-121.

V. ARGUMENT

As an initial matter, the Defendant wishes to state that it believes that the Appellant is using the Department's clerical error in body part as a vehicle for reconsideration of the entirety of her claim in an attempt to receive a windfall in the form of a permanent total disability pension. It is telling that the Appellant decided to appeal the October 14, 2008, order despite receiving exactly what she had requested in her October 9, 2008, letter.

The Appellant continues to assert that her interests have been prejudiced by the Department's mislabeling of her injured extremity. In light of this fact, it is interesting that the Appellant sought to take the depositions of Christopher Olch, M.D., and James S. Brown, M.D., while this case was on appeal before the Board. CABR at 257 and 259. It is the Defendant's contention that it does not take the testimony of two expert medical witnesses to conclude that the Appellant's injury to her right knee is in fact an injury to her right leg rather than an injury to her right arm.

Thus it seems clear that Dr. Olch and Dr. Brown were to be deposed for the purpose of calling the severity of the Appellant's knee injury into question, presumably in an attempt to seek additional benefits beyond those already determined to be appropriate.

In light of the above, it appears that the Appellant is essentially trying to use a clerical error that is completely un-prejudicial to her interests as a way to receive a larger award in benefits. Specifically, the Appellant appears to be using the error in an attempt to seek a permanent total disability pension. CABR at 203, lines 21-24.

It should be noted that if the Appellant believes that she is entitled to such relief, she is fully within her rights under the Industrial Insurance Act to seek a re-opening of her claim based on an aggravation of the accepted injury. However, aggravation is not an issue currently before this Court on appeal. The issue to be determined is whether the Department's May 16, 2008, order, under which the Appellant's injury was accepted and disability payments were made, is final and binding on the parties.

1. The Department Did Not Have Authority to Issue the October 14, 2008, Order Because the May 16, 2008, Order was Final and Binding.

It is undisputed that the Appellant filed what would constitute a timely appeal from the October 14, 2008, order. However, because the Department's May 16, 2008, order was final and binding, the Department did not have authority to issue a further closing order on October 14, 2008.

The law is well settled in Washington that a final and binding Department order precludes the parties from rearguing the same claim. *Marley v. Dep't of Labor and Indus.*, 125 Wn.2d 533 (1994).

Although the Department has authority within the time limited for appeal or within thirty days after receiving an appeal to modify or change an order pursuant to RCW 51.52.060(4)(a), the Department cannot affirm, modify, or reverse an order if an order has not been appealed and sixty days has elapsed since communication of the order to the parties.

In *In re Geraldine Gallant*, a case factually similar to the present case, the claimant received a stipulated award for permanent partial disability. However, the Department's order closing the claim incorrectly attributed the injury award to the claimant's right shoulder instead of her left shoulder. *In re Geraldine Gallant*, BIIA Dec. 03 16903 & 03 16904 (2004).

The claimant filed a protest of the Department's order but failed to do so within the required sixty-day time period. On this basis, the Board held that a final Department order awarding a permanent partial disability award for the wrong body part is final and binding on all parties and cannot be re-litigated, even if erroneous. *In re Geraldine Gallant*, BIIA Dec. 03 16903 & 03 16904 (2004).

Similarly, the Department's May 16, 2008, order in the present case became final and binding when the Appellant failed to appeal that order within sixty days of its communication to the parties. As such, the Department lacked jurisdiction to issue its October 14, 2008, order, and the Appellant was and is necessarily precluded from arguing or contesting claim closure, wage rate, permanent partial disability, termination of time loss, employability, and treatment.

The Appellant now contends that RCW 51.32.240 gives the Department jurisdiction to issue a subsequent determinative order beyond the sixty-day time period. Appellant Brief at 20. RCW 51.32.240 provides a remedy for parties when a clerical error is discovered within one year after an order becomes final and binding only in cases where a claimant is either overpaid (RCW 51.32.240(1)) or underpaid (RCW 51.32.240(2)) as a result of that clerical error. The statutory language on its face provides a remedy only in cases where the claimant was paid the wrong amount.

As Judge Duras similarly noted in his Proposed Decision and Order, RCW 51.32.240 "only applies to errors in attempting to recoup funds or an entitlement to additional funds due to errors." CABR at 148, lines 29-30.

In its October, 14, 2008, order, the Department was merely trying to correct the clerical error from its May 16, 2008, order, in which it referred to the Appellant's injury as an arm rather than a leg injury. The self-insurer did not fail to pay Appellant's benefits and the Appellant received the correct amount in benefits for her injury. As such, RCW 51.32.240 is not applicable to the facts of the Appellant's case.

a. RCW 51.32.240(1)(a), Which Pertains to the Department's Recoupment of Benefit Payments Made to a Beneficiary and the One-Year Time Limit for Seeking Recoupment, is Not Applicable to the Appellant's Case.

The Appellant attempts to argue that under RCW 51.32.240(1)(a), "Whenever any payment of benefits under this title is made because of clerical error...or any other circumstance of a similar nature,' that the statute specifically addresses 'any' payments that are made under the title." Appellant Brief at 22. This "reading" of the statute fundamentally misconstrues its meaning.

RCW 51.32.240(1)(a) specifically pertains to the Department or self-insured employer's ability to seek *recoupment* of benefits paid due to clerical error. The one-year time limit is the period in which the Department or self-insured employer can seek repayment or recoupment. RCW 51.32.240(1)(a).

As previously noted, the Department is not trying to recoup benefits paid to the Appellant. Rather, the October 14, 2008, order was an attempt to correct a clerical error in the description of the Appellant's award. As such, RCW 51.32.240(1) is not applicable to the Department's attempt to correct the classification of the Appellant's injury and the 1-year time period does not apply.

b. RCW 51.32.240(2), Which Pertains to the Department's Failure to Pay Benefits Because of a Clerical Error, is Not Applicable to the Appellant's Case.

The Appellant strains to frame the issue as one of a "failure to pay benefits" in another attempt to make RCW 51.32.240 applicable to the facts of this case. Pursuant to RCW 51.32.240(2), if the Department or self-insurer fails to pay benefits because of a clerical error, the recipient may request an adjustment of benefits to be paid from the state fund or by the self-insurer. RCW 51.32.240(2). An adjustment must be requested within one year from the date of the incorrect payment or the claim is deemed waived. *Id.*

In the present case, the Appellant admits that:

the dollar amount of the award for amputation value of the upper extremities and the lower extremities are the same under Washington Industrial Insurance Law. If a claimant is awarded a 19% permanent partial disability award of the right upper extremity at a certain level [...], it would be the same dollar amount as a 19% disability award to the right lower extremity at the same level.

Appellant Brief at 21.

Yet even though the Employer fully paid the Appellant for her injury, the Appellant attempts to argue that because the injury was mislabeled it constitutes a “failure to pay” under RCW 51.32.240(2) because “the Department in effect paid an award for a body part that was not injured [...] and in turn withholds payment for an injured body part that was administratively accepted under the claim.” Appellant Brief at 21.

Contrary to the Appellant’s assertions, the issue here is not one of failure to pay because the *exact* amount owed to the Appellant was timely paid by the Employer. Whether the payment was correctly labeled for Appellant’s right knee or incorrectly for her right arm, the Appellant was due, and received, the same amount in payment for her injury. Thus, the Employer did not “fail to pay” benefits under RCW 51.32.240(2).

The legislative history of RCW 51.32.240 further demonstrates that the statute is not applicable to the Appellant's case. Section (2) of RCW 51.32.240 was enacted in 1999, after Section (1), which had been in place for quite some time. The Legislature's Final Bill Report explained the rationale for amending the statute to provide for Section (2) as follows:

The industrial insurance law permits the Department of Labor and Industries to **recover benefits that are overpaid** to injured workers because of clerical error, mistaken identity, innocent misrepresentation, or similar circumstances. **The department must make a claim for repayment** within one year of making the overpayment or the claim is deemed waived...**This statute does not address benefits that are underpaid. If the department issues an order that underpays benefits, the worker must ask the department to reconsider the order or must file an appeal with the Board of Industrial Insurance Appeals within 60 days.** If a request for reconsideration or an appeal is not filed within the time period, the order is final and binding. The Washington Supreme Court has held that the doctrine of claim preclusion applies to final orders of the department. The court stated that failure to appeal an order, even an order containing a clear error of law, precludes reargument of the same claim [...].

Final Bill Report on EHB 1894 56th Leg., Reg. Sess. (Wash.1999) (*emphasis added*).

The legislative history cited above further clarifies that the plain reading of RCW 51.32.240(2) is correct; it provides a remedy to a claimant in cases where benefits are underpaid. Since the Appellant was not underpaid benefits, RCW 51.32.240(2) is not applicable to her case.

2. The May 16, 2008, Order is Final and Binding Because the Appellant Did Not Meet Her Burden of Establishing That the May 16, 2008, Order Was Not Properly Communicated to Her Attending Physician.

The Appellant claims that the Department's May 16, 2008, order could not be considered final and binding because it was never communicated to her attending physician. Appellant Brief at 11. The Washington State Supreme Court recently held that until a closing order is communicated to the aggrieved parties, that order is not final and binding. *Shafer v. Dep't. of Labor and Indus.*, 166 Wn.2d 710, 718 (2009).

In cases where a party alleges a lack of communication of an order, that party bears the initial burden of establishing a lack of communication under RCW 51.52.050 and 51.52.060. *Lewis v. Dep't of Labor and Indus.*, 46 Wn.2d 391, 396 (1995).

The Supreme Court's decision in *Shafer* did not alleviate a party of the burden of proof established in *Lewis*. Rather, consistent with *Lewis*, the facts of *Shafer* established that the attending physician did not receive an order closing the claim at issue. The evidence presented included an affidavit by the attending physician, which stated that the order was not communicated to her and that she would have appealed the closing order if it had been. *Shafer*, 166 Wn.2d at 714. Thus, the Court was presented with a scenario where lack of communication was in fact established, and the Court's determination was limited to whether or not lack of communication to the attending physician precluded the finality of the order.

In stark contrast to the scenario presented in *Shafer*, the Appellant in this case has failed to meet the burden set forth in *Lewis* of establishing a lack of communication under RCW 51.52.050 and 51.52.060. The Appellant made a mere allegation of a lack of communication to her attending physician in her Motion to Dismiss before the Board. CABR at 71-74. This allegation was made after both sides had rested, after the issuance of the Proposed Decision and Order, and after her own Petition for Review had been submitted. Thus, at the time of the Appellant's assertion, the Board record was entirely devoid of any evidence to support her allegation of a lack of communication.

a. The Parties Expressly Agreed in the Stipulation of Facts that Communication was Properly Made.

Although the Board record lacks any evidence of a lack of communication to the Appellant's attending physician, the record does include the Stipulation of Facts agreed upon by the parties, which specifically directed the Board to determine the case based on a stipulation that communication was proper to all parties. CABR at 210.

Thus, not only did the Appellant fail to present any evidence of lack of communication of the orders at issue to the attending physician, she actually directed the Board to refrain from consideration of the issue of communication and bound the Board to her own admission of proper communication by and through the Stipulation of the parties. The Stipulation and corresponding attachments constituted the only evidence presented to the Board, and again, the Board was directed to decide a question of law based on the stipulated facts. CABR at 210-219. Specifically, the parties stipulated to the following:

The parties agree that the 05/16/08 order **was properly communicated to all parties** and no parties filed a protest or appeal within sixty (60) days. The order dated 05/16/08 is attached hereto as Exhibit A.

CABR at 210, lines 18-21 (*emphasis added*).

The Stipulation on its face included the attending physician as a party by incorporating the May 16, 2008, order that was attached to the Stipulation as Exhibit A. The parties copied on that order are listed at the bottom of the order and specifically include the Claimant/Appellant, the Employer/Respondent, and the attending physician. CABR at 217-219. Given the evidence presented to the Board, this Court must conclude that the May 16, 2008, order constituted a final and binding order as it was properly communicated to all parties and no party filed a protest or appeal within sixty days thereof.

b. The Stipulation of Facts Included Attending Physicians as Parties.

The Appellant attempts to argue that an attending physician was not, within the meaning of the Stipulation of Facts, a party but a “person aggrieved,” and thus was not subject to the Stipulation agreement. Appellant Brief at 34.

The Court of Appeals has explicitly held that “when a final order, decision, or award is based upon a medical determination, the legislature considers the attending physician to be an interested party.” *Shafer v. Dep’t of Labor and Indus.*, 140 Wash.App. 1, 11 (2007). The May 16, 2008 order was based upon a medical determination of Ms. Leauluaialii. Thus, her attending physician was a party under the Stipulation of Facts.

Moreover, the Stipulation of Facts on its face encompasses all parties, which specifically includes any person who possessed the right to appeal from the order. Under RCW 51.52.050(2)(a), workers and other persons aggrieved, including attending physicians, may ask the Department to reconsider closure orders or appeal directly to the Board. RCW 51.52.050(2)(a). As such, the Appellant's attending physician under this claim constituted a party because this physician could file an appeal from the order. Accordingly, as set forth in the record, the Appellant acknowledged proper communication to all parties, including her attending physician.

c. Legal Precedent That an Attending Physician Constitutes a Party to a Department Order Existed Prior to the Time That the Parties Entered Into the Stipulation.

While it is true that the Supreme Court concluded in *Shafer*, 166 Wn.2d. 710, that the sixty-day timeframe for filing an appeal from a closing order does not begin to run until the attending physician receives a copy, the Court of Appeals reached the same conclusion in its published decision, which was issued prior to the time the parties in this matter entered into the Stipulation. *Shafer*, 140 Wash.App. 1. As previously noted, the Court specifically stated that:

We conclude that when a final order, decision, or award is based upon a medical determination, the legislature considers the attending physician to be an interested **party**. In such cases, the order does not become final until 60 days after the doctor received it.

Id. at 27 (*emphasis added*).

Thus, at the time that the Appellant entered into the Stipulation that the orders at issue in this appeal were properly communicated to all parties, the Court of Appeals decision in *Shafer*, holding that an attending physician constitutes a party, stood as a guiding precedent. Accordingly, in exercising reasonable diligence, the Appellant's attorney would have been aware that by entering into the Stipulation, he was in fact stipulating that the order was properly communicated to all parties, including the attending physician for this claim.

3. The Additional Evidence Submitted by the Appellant Following the Issuance of the Board's Proposed Decision and Order and Following the Appellant's Filing of a Petition for Review Cannot be Considered by this Court on Appeal.

The Appellant's assertion of a lack of communication rests entirely on her untimely submission of additional evidence to the Board after both parties rested, after the Industrial Appeals Judge issued a Proposed Decision and Order, and after the Appellant filed a Petition for Review.

In both her Trial and Appellate Briefs, the Appellant provides no explanation as to why the Board, the Superior Court, or this Court should consider the additional evidence offered. Neither the Civil Rules nor the case law provides the Court with a valid reason for consideration of such evidence. For the reasons set forth below, the additional evidence offered by the Appellant was untimely and should not be considered by the Court.

a. The Additional Evidence Offered by the Appellant Does Not Constitute Newly Discovered Evidence That Would Support a New Hearing or Reconsideration, and Should Not Be Considered.

After the Board issued its Decision and Order, the Appellant filed a Motion for Reconsideration pursuant to Civil Rule 59. Under this rule, reconsideration will only be granted based on new evidence if such evidence is “material for the party making the application, which he could not with reasonable diligence have discovered and produced at trial.” Civil Rule 59. The case law is consistent with the Civil Rules for reconsideration based on new evidence. The Court of Appeals has held that reopening a case for consideration of additional evidence requires a showing that the evidence was newly discovered and could not have been supplied to the court at an earlier point with the exercise of reasonable diligence. *Rogers Walla Walla v. Ballard*, 16 Wash.App. 81, 90 (1976).

This standard has been consistently applied in cases before the Board, where a party attempts to introduce additional evidence as part of a Petition for Review from a Proposed Decision in Order. *In re Eileen P. Cleary*, BIIA Dec., 92 1119 & 92 1119-A, (1993); *In re Christina M. Nelson*, BIIA Dec., 88 1221 (1989).

In *Cleary*, even though the claimant's attorney found evidence regarding ownership of the sidewalk where Ms. Cleary was injured after the conclusion of hearings, the Board did not remand the case for additional proceedings because it found that the claimant's attorney did not establish that he engaged in reasonable diligence to find and provide the evidence prior to the conclusion of hearings. *In re Eileen P. Cleary*, supra.

In the present case, the Appellant's Motion to Dismiss, Motion for Reconsideration, Trial Brief, and Appellate Brief are entirely devoid of any indication that the alleged evidence of lack of communication was newly discovered. They are also devoid of any reasonable explanation as to why such evidence could not be offered prior to the time that Judge Duras issued his Proposed Decision and Order with the exercise of reasonable diligence.

In fact, the evidence that the Appellant attempted to introduce appears on its face to have been discovered and able to be offered to the Board prior to the issuance of the Proposed Decision and Order. Further, it appears from the document itself that in fact the evidence was in the possession of Appellant's attorney prior to entering into the Stipulation of Facts. The document itself is stamped "Mailed to Client" on May 9, 2008. CABR 76-78. Accordingly, the Appellant entirely failed to meet her burden of establishing that the Board or this Court should consider additional evidence.

It is also noteworthy to mention that the Court in *Rogers Walla Walla Walla*, established that the trial court's decision in a motion to reopen for additional evidence should not be overturned unless the court's discretion constitutes a manifest abuse. *Rogers Walla Walla*, 16 Wash.App. at 90. In the present case, where the Appellant entirely failed to present even a plausible justification for consideration of the additional evidence, it would be reversible error for this Court to conclude that the additional evidence should be considered.

b. The Appellant's Assertion that She Could Not Rely on the Court of Appeals Decision in Shafer While it was Pending Supreme Court Review Does Not Provide a Basis for Consideration of Additional Evidence.

The Appellant asserts that she could not rely upon the Court of Appeals decision in *Shafer* at the time the parties entered into the Stipulation of Facts because the Court of Appeals' decision was pending appeal at the Supreme Court. Appellant Brief at 38-40. CABR at 37, lines 21-23.

However, the Board and the courts do in fact take notice of the decisions of higher courts even when further appeals are pending on those matters to the Supreme Court. In *In re Pamela Irene Filbeck*, the Board applied a test set forth in a decision of Division I of the Court of Appeals, even though an appeal from that decision was pending at the Supreme Court. *In re Pamela Irene Filbeck*, BIIA Dec., 85 3356, (1987).

Similarly, in a case concerning the same Court of Appeals decision, the Superior Court remanded a case back to the Board to be decided consistent with that decision despite the fact that it was not a final decision. *In re Annie B. Tucker*, BIIA Dec., 63274 (1987).

It is noteworthy to point out that in *Tucker*, unlike the case at hand, the Court of Appeals did not issue its decision until after *Tucker* reached the superior court, and thus, in contrast to the present case, the claimant's attorney exercised reasonable diligence in alerting the Court of the decision and moving for remand based on that decision, which significantly changed pre-existing case law. *In re Annie B. Tucker*, BIIA Dec., 63274 (1987).

In the Court of Appeals' decision in *Shafer*, the Court expressly identified the attending physician as a party to a closing order containing a medical determination. *Shafer*, 140 Wash.App. at 11. If the Appellant believed that her attending physician was not provided with a copy of the order at issue in this appeal, the fact that the *Shafer* decision was pending Supreme Court review at that time did not prevent the Appellant from taking that decision into consideration in formulating and/or agreeing to any stipulation.

In other words, the pendency of the appeal did not prevent the Appellant from arguing that the May 16, 2008, order was not communicated to her attending physician, nor did it force her to enter into the Stipulation in which she expressly agreed that the order was communicated to all parties including her attending physician.

Because the *Shafer* decision was issued by a higher court, the Appellant's attorney should have, in the exercise of reasonable diligence, assumed that the Board would act consistent with the Court of Appeals' decision while it was pending appeal. Accordingly, the Appellant's assertion that "[t]he Court of Appeals decision in *Shafer* was not final law and could not be relied upon while a petition was pending before the Supreme Court of our State," is incorrect. Appellant Brief at 38. The lack of finality of that decision does not provide the Appellant with a basis to undo a stipulation made following the issuance of that decision and did not provide a basis to present additional evidence that allegedly contradicts that stipulation after the parties rested and the Board issued the Proposed Decision and Order.

c. Even if the Additional Evidence is Considered, the Appellant Still Fails to Meet Her Burden of Establishing a Lack of Communication of the Department Orders.

Even in the event the Court decides to consider the additional evidence, the Appellant still fails to meet her burden of establishing a lack of communication of the Department's closing order to the attending physician. The SIF-5 Document, which the Appellant attempted to offer as "Exhibit 1," was not offered during the hearing and not considered by the Board. CABR at 76.

The Document was signed by someone who did not testify, and it identifies a person as an attending physician who likewise did not provide any testimony. CABR at 76. Although the address for the attending physician identified in that document is not the same as the address contained in the Department orders attached to the Stipulation of Facts, such inconsistency does not establish the identity of the attending physician, his address at the time of the Department order, or the fact that he did not receive a copy of the orders.

In contrast to the facts in the present case, the Supreme Court in *Shafer*, supra, held that the facts demonstrated that there was a lack of communication to the attending physician. In that case, there was an affidavit from the attending physician, which stated that she was the attending physician, that she did not receive a copy of the order, and that she would have appealed the order had she received a copy. *Shafer*, 166 Wn.2d at 714.

In the present case, the Appellant does not provide any evidence that the order was not properly communicated to her attending physician. As such, the Court should find that the Department's May 16, 2008, order was in fact properly communicated to all parties, including the attending physician, and constituted a final and binding decision.

4. Res Judicata Bars Any Change by the Parties to the Department's May 16, 2008, Order Because This Order Was Final and Binding.

The doctrine of res judicata prohibits parties from relitigating claims and issues that were, or could have been, litigated in a prior action. *Chavez v. Dep't of Labor & Indus.*, 129 Wash.App. 236, 239 (2005). Res judicata applies “where a prior final judgment is identical to the challenged action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.” *Lynn v. Dep't of Labor and Indus.*, 130 Wash.App. 829, 836 (2005) (quoting *Loveridge v. Fred Meyer Inc.*, 125 Wn.2d 759, 763 (1995)).

It is well established that a final, unappealed Department order is res judicata. *Kingery v. Dep't of Labor and Indus.*, 132 Wn.2d 162, 177 (1997). The Washington State Court of Appeals, Division I, recently noted that:

An unappealed Department order is res judicata on the issues the order encompassed, and “[t]he failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim.”

Kustura v. Dep't of Labor and Indus., 142 Wash.App. 655, 669 (2008) (quoting *Marley v. Dep't of Labor and Indus.*, 125 Wn.2d 533, 538 (1994)) (footnotes omitted).

The Appellant failed to appeal the May 16, 2008, Department order within the sixty-day statutory time period as is required under RCW 51.52.050(1). As such, the May 16, 2008, order is final and binding on the parties and res judicata bars the Appellant from rearguing the same claim.

Contrary to the Appellant's assertions, the Supreme Court's 2009 decision in *Shafer*, supra, does not change the preclusive effect of the Department's May 16, 2008, final and binding order.

It is well established that "[t]he res judicata effect of final decisions already rendered is not affected by subsequent judicial decisions giving new interpretations to existing law." *Lynn*, 130 Wash.App. at 836 (citing *Columbia Rentals, Inc. v. State*, 89 Wn.2d 819, 823 (1978)). As the Supreme Court has observed, "[i]f prior judgments could be modified to conform with subsequent changes in judicial interpretations, we might never see the end of litigation." *Columbia Rentals*, 89 Wn.2d at 823. On this basis, the Court of Appeals in *Lynn* concluded:

We have no reason to believe the legislature intended the change of circumstances statute to be a means to avoid longstanding rules of finality. Rather, we are persuaded the legislature intended the statute to apply to changes in a claimant's individual circumstances, not to changes in judicial interpretation of the applicable law.

Lynn, 130 Wash.App. at 829.

In the present case, there has been no change in the Appellant's factual circumstances regarding the delivery of the closing order to her attending physician. Thus, the Appellant cannot argue that the legal precedent in *Shafer* constitutes a change in circumstances that would make the Appellant's case a valid exception to the doctrine of res judicata.

In sum, because the May 16, 2008, Department order was final and binding on the parties, res judicata prohibits the Appellant from rearguing that order.

5. An Error in Body Part in a Final and Binding Department Order Can Be Corrected by the Board or a Court Without Giving the Injured Party An Opportunity to Reargue the Department Order.

In his Proposed Decision and Order, Judge Duras noted that:

Since the May 16, 2008 order became final, the Department did not have subject matter jurisdiction to issue the October 14, 2008, order correcting the extremity involved in the claim. If the Department was allowed to correct its error, which really had no negative effect on the claimant, it would unfairly prejudice the self-insured employer who anticipated it was a final decision after the protest/appeal period expired. Of course, as indicated in the cases discussed above, that does not prevent recognition of that mistake in future adjudication under this claim, for reopening applications and other adjudications.

CABR at 149, lines 1-7.

The Court of Appeals addressed the Board's ability to acknowledge and account for an error in body part in its decision in *Callihan v. Dep't of Labor and Indus.*, 10 Wash.App. 153 (1973), a case that likewise involved an error in body part within a final and binding order.

In *Callihan*, the Court explained that the Board can find that an order inadvertently misidentifies the injury for which the Department intended to make an award, and that a clerical error "can be corrected without reformation." *Callihan*, 10 Wash.App at 156-157. In so doing, the Court referenced Civil Rule 60, which provides in part that:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative [...].

Civil Rule 60(a).

As the Court explained, the Board is not required to treat a clerical error as if there is not one, because to do so, would allow an injured party to reargue a determination when in fact, he or she is entitled to only one determination. *Callihan*, 10 Wash.App. at 157.

Likewise, there are several Board decisions that elaborate on the ability of the Board and the courts to recognize clerical errors in later proceedings.

In *In Re Geraldine Gallant*, the Board held that although the Department was without statutory or other authority to reconsider a final and binding order due to a clerical error in body part in a permanent partial disability award, the Board was not bound by that error, and could acknowledge and account for that error in a proceeding regarding another claim. *In Re Geraldine Gallant*, BIIA Dec., 03 16903 & 03 16904 (2004).

Similarly, the Board has previously acknowledged and corrected a clerical error within a final and binding Department closure order regarding the body part for which impairment was awarded. *In Re Harold D. Atkinson*, BIIA Dec., 86 4300 (1991).

Thus, although a final and binding closing order cannot be reconsidered and revisited by the Department to address a clerical error other than one resulting in an inaccurate amount of benefits paid, a clerical error that identifies the wrong body part in an impairment award can and should be acknowledged and accounted for in subsequent proceedings regarding the same claim. Thus, both the Board and the courts have authority to remedy a clerical error in subsequent proceedings even if the Department order is final and binding.

6. Policy Considerations Dictate That the Appellant Should Not be Given an Opportunity For Repetitive and Multiple Determinations on the Merits of Her Claim.

It is well established that the spirit of the Industrial Insurance Act does not favor multiple and repetitive determinations of a claim. As the Court of Appeals noted in *Callihan*:

This would give an injured plaintiff an opportunity for repetitive determination on the merits of his claim instead of only one to which all injured workmen are entitled. Even a liberal view of the Industrial Insurance Act does not require a repetitive departmental determination.

Callihan, 10 Wash.App. at 157.

As the Washington Supreme Court noted in *Columbia Rentals*:

Res judicata is a doctrine grounded on the idea that the objective of all judicial proceedings is the rendition of a judgment an authoritative determination of the legal relations of the parties with respect to some particular matter. The finality of the determination serves the interests of society as well as those of the parties by bringing an end to litigation on the claim.

Columbia Rentals, 89 Wn.2d at 821 (1978) (quoting A. Vestal, Res Judicata/Preclusion (1969)).

To avoid repetitious departmental determinations in this case, the Court should find that the Department did not have authority to issue the October 14, 2008, order correcting the May 16, 2008, order. The Court should also hold that the May 16, 2008, order was final and binding in light of the policy interests in the finality of legal proceedings.

VI. CONCLUSION

For the foregoing reasons, the Court should affirm the November 17, 2010, Superior Court Order affirming the Board's October 6, 2009, Decision and Order, which held that the Department was without authority to reconsider and reissue the Department's final and binding order from May 16, 2008.

The applicable law in this matter clearly establishes that the Department is without authority to reconsider the May 16, 2008, order despite the existence of a clerical error, because it was not timely appealed within the applicable sixty-day time period. Although a clerical error in a final and binding order can be subsequently acknowledged and accounted for, the order itself cannot be reconsidered and reissued.

The Department's May 16, 2008, order is also final and binding because the Appellant has failed to demonstrate that the order was not properly communicated to her attending physician and because the Appellant has failed to establish that this new evidence can be considered by the Board or the courts on appeal.

Based on the evidence and arguments above, the Defendant respectfully requests that the Court find that the Department's May 16, 2008, order was final and binding on the parties.

DATED this 12TH day of August, 2011.

Respectfully submitted,



Robert M. Arim, WSBA #27868
Attorney for Respondent,
Catholic Health Initiatives

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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SINAIPUA LEULUAIALII,) No. 41601-8-II
)
Appellant,)
v.) CERTIFICATE OF SERVICE
)
CATHOLIC HEALTH INITIATIVES,)
)
Respondent.)

I certify that I caused a true and accurate copy of the foregoing BRIEF OF
RESPONDENT, to be served on the following parties in the manner indicated below on
August 12, 2011:

ORIGINAL AND COPY TO: **VIA LEGAL MESSENGER**
David C. Ponzoha, Court Clerk
Washington State Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

COPIES TO: **VIA LEGAL MESSENGER**
Mr. Robert S. Allen
George Riecan & Associates, P.S.
3848 So. Junett
Tacoma, WA 98409

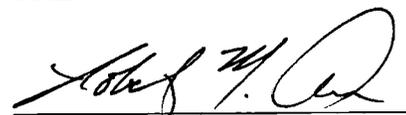
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VIA LEGAL MESSENGER
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MS TB-14
Seattle, WA 98104-3188

VIA FACSIMILE
Sedgwick CMS, Inc.

DATED this 12TH day of August, 2011.

THE LAW OFFICE OF ROBERT M. ARIM, PLLC



Robert M. Arim, WSBA No. 27868
Attorney for Respondent,
Catholic Health Initiatives



THE LAW OFFICE
OF
ROBERT M. ARIM



Professional Limited Liability Company

August 12, 2011

David C. Ponzoha, Court Clerk
Washington State Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

RECEIVED
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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Re: Employee : Sinaipua Leuluaialii
Employer : Catholic Health Initiatives
Date of Injury : 05/31/06
Claim No. : W373492
Court of Appeals No. : 41601-8-II

Dear Mr. Ponzoha:

Please find enclosed the Brief of Respondent, Catholic Health Initiatives, in the above-referenced case. Please contact my office if you have any questions or concerns regarding this matter.

Sincerely,

THE LAW OFFICE OF ROBERT M. ARIM, PLLC

Robert M. Arim
Attorney for Catholic Health Initiatives

Enclosures

cc: George M. Riecan & Associates, Inc., P.S. (w/encls.)
Ms. Masako Kanazawa, AAG, Department of Labor and Industries (w/encls.)
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