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COURT OF APPEALS  
DIVISION II

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NO. 41601-8-II

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

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SINAIPUA L. LEULUAIALII,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

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**RESPONDENT'S BRIEF BY DEPARTMENT OF LABOR AND  
INDUSTRIES**

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**ORIGINAL**

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## I. INTRODUCTION

This is a workers' compensation case. Under the established precedent, an order of the Department of Labor & Industries becomes res judicata, unless it is appealed or protested within 60 days of its communications to the parties. Leuluaialii stipulated at the Board of Industrial Insurance Appeals that the Department order closing her claim with a permanent partial disability award was "properly communicated to all parties and no party filed a protest or appeal within sixty (60) days." The closing order is res judicata and is not subject to challenge here.

RCW 51.32.240 authorizes recoupment of overpaid benefits and repayment of underpaid benefits due to a clerical error. But the statute does not apply here, where the clerical error (right *arm* versus right *knee*) admittedly did not result in any overpaid or underpaid benefits. Further, the statute expressly prohibits correcting "adjudicator" (non-clerical) errors beyond the 60-day appeal period. The Department has authority generally to correct its clerical errors solely to conform its order to what it actually determined. But this authority does not permit reopening matters actually determined in an unappealed order, a result Leuluaialii seeks here.

Finally, Leuluaialii's belated claim that the closing order was not communicated to her attending physician was waived and without factual basis and was thus properly rejected by the Board and the superior court.

## II. COUNTER STATEMENT OF THE ISSUES

1. A Department order is res judicata, if not appealed or protested within 60 days of its communications to the parties. Leluaialii stipulated the closing order was communicated to all parties, and no party timely appealed or protested it. Is the order res judicata?
2. RCW 51.32.240 authorizes recoupment of overpaid benefits and repayment of underpaid benefits due to a clerical error but prohibits correcting “adjudicator” errors beyond the 60-day appeal period. Does the statute apply here, where the clerical error admittedly did not result in any overpaid or underpaid benefits? In any event, does it permit Leluaialii to challenge the actual determinations in the closing order she failed to timely appeal?
3. An administrative agency has authority generally to correct its clerical errors at any time solely to conform its order to what it actually determined, at least when no prejudice results. Did the Department properly correct the clerical error in the closing order at Leluaialii’s request, where no party claimed any prejudice? Did the superior court correctly conclude the Department, beyond correcting the clerical error, lacked authority to reopen what it actually determined in the unappealed closing order?
4. This Court held in a published opinion in *Shafer* that a worker’s attending physician is a “party” requiring communication for a closing order to be final, which holding the Supreme Court upheld. After almost two years of this Court’s *Shafer* opinion, Leluaialii stipulated that the closing order was “properly communicated to all parties,” and no party timely appealed it. Did the Board properly reject as waived her belated claim the order was not communicated to her attending physician? In any event, did the Board and the superior court properly conclude her claim lacked factual basis?
5. RCW 51.52.130 authorizes attorney fees from the Department for a prevailing worker only for the services at the court and only if the court reverses or modifies the Board decision *and* the Department fund is affected by the litigation. Is Leluaialii entitled to attorney fees when she does not prevail in this Court? Even if she prevailed, may this Court award attorney fees from the Department without her obtaining further benefits on remand?

### III. COUNTERSTATEMENT OF THE CASE

This case involves three parties: Sinaipua Leuluaialii (claimant); Franciscan Health Systems (Franciscan Health, self-insured employer); and the Department. The following facts are largely based on the undisputed findings of fact in the superior court judgment on appeal (CP 110-119). Those findings were adopted from those made by the Board and were based on the stipulation by Leuluaialii and Franciscan Health.<sup>1</sup>

**A. No Party Appealed the Closing Order Containing a Clerical Error as to Leuluaialii's Disabled Body Part (Right Arm versus Right Knee), Which Did Not Affect the Benefit Amount**

In July 2006, Leuluaialii applied for workers' compensation for a right knee injury she sustained while working for Franciscan Health. Certified Appeal Board Record (BR) 246 (stipulated history); Finding of Fact (FF) 1. The Department allowed her claim, and Leuluaialii started receiving benefits from Franciscan Health. CP 15 (stipulation ¶ 1); FF 1.

On May 16, 2008, the Department issued an order closing Leuluaialii's claim, directing Franciscan Health to pay her time loss wage replacement benefits through July 23, 2007 and a permanent partial disability award of \$18,076.23. CP 15 (stipulation ¶ 2), 17-19; FF 1. The

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<sup>1</sup> Copies of the superior court judgment and ruling (CP 110-119), the Board decisions (BR 2-6, 141-150), and the stipulation by Leuluaialii and Franciscan Health (CP 15-24) are attached as Appendices A, B, and C, respectively.

Findings of Fact refer to those made by the superior court (CP 113-116).

order stated that the disability award was for 19% of the amputation value of Leuluaialii's right *arm* (instead of right *knee*). CP 18; FF 1.

Leuluaialii acknowledges that the description of the incorrect body part in the order (right *arm* as opposed to right *knee*) was a clerical error. CP 20; Appellant's Brief 20; FF 3. She also acknowledges that this clerical error did not affect the amount of the award, because the amount of the amputation value for the upper and lower extremities are the same. Appellant's Brief 7 n.3; RP 5; FF 5; RCW 51.32.080(1).

At the time of the May 2008 closing order, Leuluaialii was represented by the same law firm that represents her in this case. CP 19. With the assistance of her counsel, Leuluaialii stipulated that the closing order was "properly communicated to *all parties* and *no party* filed a protest or appeal" from the order within the 60-day statutory appeal period. CP 15 (stipulation ¶ 2) (emphasis added). She stipulated that as of July 1, 2008, she had received from Franciscan Health full amount of the award (\$18,076.23) as required by the order. CP 16 (stipulation ¶ 6).

**B. At Leuluaialii's Request, the Department Corrected the Clerical Error, and She Then Appealed the Correcting Order, Challenging the Unappealed Closing Order as a Whole**

On October 9, 2008, about four months after the closing order, Leuluaialii's attorney wrote a letter to the Department, stating that the May 2008 closing order contained "an apparent clerical error" in

describing her disabled body part (right *arm* instead of right *knee*). CP 20-21 (letter), CP 15 (stipulation ¶ 3). In the letter, Leluaialii asked the Department to correct the clerical error, stating that the error might pose a problem in the future, when she might ask to reopen her claim for an aggravation of her “accepted condition” (i.e., right *knee*). CP 20. She did not ask to modify any other aspects of the closing order. CP 20-21.

On October 14, 2008, in response to Leluaialii’s letter, the Department issued an order correcting the clerical error (incorrectly described body part) in the May 2008 closing order, without making any change in other aspects of the order. CP 22-24 (order), CP 15 (stipulation ¶ 4); RP 5-6; FF 5. However, Leluaialii appealed this correction order to the Board, challenging not the correction but uncorrected determinations in the order, seeking further treatment, further time loss benefits, increased permanent partial disability award, or pension benefits for total permanent disability (instead of permanent partial disability). BR 158-159; FF 1.

**C. The Board Proceedings Based on the Stipulated Facts**

Leluaialii and Franciscan Health submitted to the Board “Stipulation of Facts,” attaching as exhibits May 2008 closing order, Leluaialii’s attorney’s October 2008 letter asking to correct the clerical error, and the Department’s October 2008 order correcting the clerical error (CP 15-24). In the stipulation, Leluaialii and Franciscan Health

represented to the Board that they were submitting the stipulation, “upon which the Board can issue a [decision] in [Leuluaialii’s] appeal.” CP 15.

Based solely on the stipulation, Leuluaialii and Franciscan Health submitted briefs and presented oral argument to the industrial appeals judge of the Board. BR 200-207 (Leuluaialii’s brief); BR 234-244 (Franciscan Health’s response); Hearing Transcript 2-9 (transcript located at the end of the certified appeal board record). Leuluaialii argued that the order correcting the clerical error constituted an adjustment of benefits under RCW 51.32.240 and allowed her to challenge even the uncorrected determinations in the closing order she failed to timely appeal. BR 200-207. Franciscan Health responded that the statute does not apply, because there was no adjustment of benefits due to a clerical error. BR 239-241. It argued that although the Department has authority to correct the clerical error, the correction did not permit Leuluaialii to then challenge the unappealed determinations in the closing order. BR 235-239.

**D. Board Decision Rejecting Leuluaialii’s Attempt to Challenge the Unappealed Closing Order and Her New *Shafer* Attending Physician Argument Not Presented to the Hearing Judge**

The industrial appeals judge issued a proposed decision, rejecting Leuluaialii’s attempt to challenge the determinations in the unappealed closing order. BR 141-150. The judge reasoned that the closing order was final and binding on all parties, and to conclude otherwise “would

unfairly prejudice the self-insured employer who anticipated it was a final decision after the protest/appeal period expired.” BR 149. The judge concluded the Department lacked authority to issue a correcting order “to change the terms” of the unappealed closing order. BR 150 (Conclusion of Law 2). However, the judge cautioned that this conclusion “does not prevent recognition of that [clerical error] in future adjudication under this claim, for reopening applications and other adjudications.” BR 149.

Leuluaialii petitioned the Board to review the proposed decision, making the same argument under RCW 51.32.240 based solely on the stipulated facts. BR 109-114. Two weeks later, while her petition was still pending, she filed a motion to dismiss, claiming, for the first time, that the May 2008 closing order never became final, because it was not communicated to her attending physician and that the Board thus lacked jurisdiction to decide her appeal. BR 71-74. Her motion was filed outside the statutory period for filing a petition for review. *See* RCW 51.52.106 (20 days after receipt of the proposed decision); BR 138 (Leuluaialii acknowledged her receipt of the proposed decision on June 24, 2009 and requested a 20-day extension to file a petition); BR 109 (petition filed on August 4, 2009); BR 74 (motion filed on August 18, 2009).

In her motion to dismiss, Leuluaialii attached a SIF-5 report on injury form dated May 5, 2008, which she did not present to the industrial

appeals judge or in her petition for review. BR 75-78. She claimed that according to this form, her attending physician is Dr. Vaughn of Tacoma, whereas the May 2008 closing order referenced her attending physician as St. Clare Hospital in Seattle. BR 71-74. She cited the Supreme Court's *Shafer* opinion as supporting her claim. BR 73; *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 714-722, 213 P.3d 591 (2009) (closing order did not become final, when it was not communicated to the worker's attending physician, who was a "party" for purposes of a closing order).

Leluaialii asked the Board to dismiss her appeal for lack of subject matter jurisdiction and did not cite CR 59 or CR 60 or ask for a new hearing to determine whether her attending physician received a copy of the May 2008 closing order. BR 71-74. She presented no affidavit from anyone (including herself or the author of the attached form) that identifies her attending physician or the physician's address *at the time of the May 16, 2008 closing order*. Nor did she present any affidavit stating that her attending physician did not receive the May 2008 closing order.

The Board issued a decision adopting the industrial appeals judge's findings and conclusions and rejecting Leluaialii's motion to dismiss. BR 2-6. The Board pointed out that Leluaialii submitted her appeal for a decision based on the stipulated facts and failed to explain why she could not, with reasonable diligence, have raised the attending physician issue or

submitted the attached form to the industrial appeals judge. BR 3-4. The Board pointed out that the Supreme Court's *Shafer* decision affirmed the holding of this Court's published opinion, which was available in 2007, long *before* Leuluaialii signed the stipulation in May 2009 or the industrial appeals judge issued the proposed decision in June 2009. BR 4; *Shafer v. Dep't of Labor & Indus.*, 140 Wn. App. 1, 11, 159 P.3d 473 (2007) ("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 has received it."). The Board further stated that the attached SIF-5 form did not show the May 2008 order was not communicated to Leuluaialii's attending physician. BR 3.

Leuluaialii filed a motion for reconsideration with the Board, this time citing CR 59 and CR 60. BR 36-42. She reiterated her new attending physician argument under *Shafer*, claiming the SIF-5 form attached to her motion to dismiss and the documents that were already in the Board record supported a dismissal of her appeal as a matter of law. BR 39-40. In her motion for reconsideration, Leuluaialii asked the Board to remand the case to the Department to set aside its orders as void "ab initio." BR 40. She did not ask for a new hearing to determine whether her attending physician received a copy of the May 2008 closing order.

#### **E. Superior Court Affirmed the Board Decision**

While her motion for reconsideration was pending at the Board, Leuluaialii appealed the Board decision to Pierce County Superior Court. CP 124-125. The Board sent a letter to Leuluaialii and Franciscan Health, informing them that, due to Leuluaialii's appeal to the court, the Board no longer had authority to take further action with respect to its appealed decision and would thus consider her pending motion to reconsider its appealed decision as withdrawn. BR 20. Leuluaialii did not ask the Board to reinstate her motion or otherwise ask the superior court for permission for the Board to issue a ruling on her withdrawn motion.

After de novo review of the Board record, the superior court affirmed the Board decision and made findings and conclusions, which adopted the Board findings and conclusions. CP 110-119. The court also stated that Leuluaialii failed to show the May 2008 closing order was not communicated to her attending physician. CP 110. This appeal follows.

#### **IV. STANDARD OF REVIEW**

The industrial insurance act, Title 51 RCW, governs the standard of review in this workers' compensation case. At the Board, Leuluaialii had "the burden of proceeding with the evidence to establish a prima facie case for the relief." RCW 51.52.050(2)(a). Although the act is remedial, the liberal construction rule "does not apply to questions of fact" and does

not lessen her burden of proof. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 6-7, 977 P.2d 570 (1999) (same).

The superior court review of a Board decision is de novo but limited to the Board record. RCW 51.52.115. The Board “findings and decisions” are “prima facie correct,” and Leuluaialii had the burden of proving otherwise. RCW 51.52.115.<sup>2</sup>

The appeal in this Court lies “from the judgment of the superior court as in other civil cases.” RCW 51.52.140. Thus, this Court will review the “record to see whether substantial evidence supports the findings made after the superior court’s de novo review, and whether the court’s conclusions of law flow from the findings.” *Ruse*, 138 Wn.2d at 5.

Leuluaialii does not assign error to or challenge any of the superior court findings of fact, except to challenge the factual determination that she failed to prove her attending physician did not receive a copy of the May 2008 closing order (CP 110). Appellant’s Brief 8-9. The unchallenged findings are verities here. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733 n.6, 57 P.3d 611 (2002).

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<sup>2</sup> The Department did not actively participate in the Board and the superior court proceedings below. In a case involving a self-insured employer such as Franciscan Health, the Department’s participation is discretionary – the Department “*may* appear and take part in any proceedings.” RCW 51.52.110 (emphasis added). On the other hand, if the case involves a state-fund employer, the Department “*shall*” appear and participate in the superior court appeal. RCW 51.52.110.

This case raises the issues of res judicata, interpretation of RCW 51.32.240, and the Department's authority to correct its clerical error in general. Those issues are questions of law subject to de novo review. See *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005) (res judicata question of law); *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996) (statutory interpretation); *Spokane County v. City of Spokane*, 148 Wn. App. 120, 124, 197 P.3d 1228 (2009) (scope of an agency's authority).

## V. ARGUMENT

A Department order "shall become final" unless an appeal or protest is filed within 60 days of the order's communication "to the parties." RCW 51.52.050(1). After the 60-day appeal period, the "doctrine of claim preclusion" (res judicata) applies to the final Department order "as it would to an unappealed order of a trial court." *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994). Leuluaialii stipulated that the May 2008 closing order "was properly communicated to all parties and no party filed a protest or appeal within sixty (60) days." CP 15 (stipulation ¶ 2). Because she had an opportunity to but did not appeal the order, the order is now res judicata.

To avoid the res judicata consequence of not timely appealing the closing order, Leuluaialii cites RCW 51.32.240 to argue the Department

had authority to correct the clerical error in the unappealed closing order (right *arm* instead of right *knee*). Appellant's Brief 20-30. But she does not seek to correct only the already-corrected clerical error or challenge the correction. Instead, she seeks more benefits than those the Department determined she was eligible for and awarded to her in the closing order she failed to timely appeal. The statute does not permit such a result.

The statute authorizes recoupment of overpaid benefits or repayment of underpaid benefits due to a clerical error. *See* RCW 51.32.240(1), (2). But the statute does not apply here, where the error did not cause any overpayment to be recouped or underpayment to be repaid. In any event, the statute expressly prohibits what Leuluaialii seeks here: "an adjustment of benefits because of adjudicator error," which must be appealed through the 60-day appeal process. RCW 51.32.240(2)(b).

The Department does have the authority, independent of the statute, to correct its clerical errors at any time solely to conform its order to what it actually determined, where, as here, such correction would not prejudice any party. *See Am. Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133, 145-146, 79 S. Ct. 170, 3 L. Ed. 2d 172 (1958) ("[T]he presence of authority in administrative officers and tribunals to correct [clerical] errors has long been recognized."); *Callihan v. Dep't of Labor & Indus.*, 10 Wn. App. 153, 516 P.2d 1073 (1973) (Board may correct a clerical

error in a Department order). However, the authority to correct clerical errors does not authorize a change in what was actually determined. *E.g.*, *Schmelling v. Hoffman*, 124 Wash. 1, 4, 213 P. 478 (1923) (“court cannot, in this manner, correct or modify a judgment entered in accordance with its directions”). No authority supports Leuluaialii’s claim that, by correcting the clerical error in a new order, the Department re-started the 60-day clock for her to appeal the determinations in the May 2008 closing order she failed to timely appeal. The Department lacks authority to do so. Conclusion of Law 2 (CP 117); *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 170, 937 P.2d 565 (1997) (“Department has exceedingly limited authority to set aside its own unappealed orders”).<sup>3</sup>

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<sup>3</sup> The court has power to grant equitable relief from the 60-day statutory appeal deadline upon a showing of extraordinary circumstances precluding timely appeal despite the worker’s diligent effort. *E.g.*, *Kingery*, 132 Wn.2d at 178 (relief denied when the worker “did not diligently pursue remedies available”); *Leschner v. Dep’t of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947) (“Equity aids the vigilant, not those who slumber on their rights.”). Leuluaialii never argued she was entitled to equitable relief. Nor does the record support a finding of extraordinary circumstances or diligence.

The Board and the superior court used the term “subject matter jurisdiction” in their conclusion of law 2. But subject matter jurisdiction is not at issue here. Subject matter jurisdiction is the power to decide the “type of controversy,” and the “type” means “the general category without regard to the facts of the particular case.” *Dougherty v. Dep’t of Labor & Indus.*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003). The “Department has subject matter jurisdiction to adjudicate all claims for worker’s compensation.” *Marley*, 125 Wn.2d at 542. The Department “does not lack subject matter jurisdiction solely because it may lack authority to enter a given order.” *Id.* at 539.

To the extent the superior court affirmed the Board decision that reversed the Department’s October 2008 order, which merely corrected a clerical error, this Court should reverse the superior court. However, this Court should do so not on the faulty ground Leuluaialii advocates here, but on the ground that the Department had authority to correct the clerical error in the unappealed May 2008 closing order, and this correction did not affect the finality of what was actually determined in the order.

Finally, Leuluaialii waived her belated claim that the May 2008 closing order was not communicated to her attending physician and thus never became final, when she stipulated at the Board that the order was “properly communicated to all parties.” CP 15 (stipulation ¶ 2). Further, the Board properly rejected her belated attempt to inject the SIF-5 form (new evidence) on this issue, because she offered no good reason why she could not have presented it earlier with the exercise of reasonable diligence. BR 3-4. In any event, the Board and the superior court properly concluded that the SIF-5 form she submitted did not show the order was not communicated to her attending physician. BR 3; CP 110.

**A. RCW 52.32.240 Does Not Apply, Where Correcting a Clerical Error Requires No Adjustment of Benefits, and Limits the Correction of Adjudicator Errors to the 60-Day Appeal Period**

Leuluaialii claims that because RCW 51.32.240 allows the Department to correct a clerical error within a year, and the Department did correct one in the May 2008 closing order at her request, she may now challenge every aspect of the order by appealing from the new order correcting the error. Appellant’s Brief 20-30. She is mistaken. The statute addresses recoupment of overpaid benefits and repayment of underpaid benefits and does not apply here, where the clerical error did not cause any overpaid benefits to be recouped or underpaid benefits to be repaid. *See* RCW 51.32.240(1), (2). Further, the statute expressly

prohibits adjusting benefits based on an “adjudicator error,” which must be appealed within 60 days. RCW 51.32.240(2)(b).

The statute, at subsections (1), (3), (4), and (5), describes specific circumstances where, even beyond the 60-day appeal period, the Department or a self-insured employer may assess and recoup overpaid benefits. *See* RCW 51.32.240(1), (3), (4), (5); *Stuckey*, 129 Wn.2d at 299. For example, subject to the “adjudicator error” provision addressed below, subsection (1) authorizes the Department or a self-insured employer to recoup overpaid benefits within one year of the payment, when the overpayment was caused by a clerical error, mistake of identity, or innocent misrepresentation by the recipient of the benefits. RCW 51.32.240(1). The “recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be.” RCW 51.32.240(1)(a).

Similarly, subject to the “adjudicator error” provision addressed below, subsection (2) authorizes the recipient of underpaid benefits to “request an adjustment of benefits to be paid from the state fund or by the self-insurer” within “one year from the date of the incorrect payment,” which was due to “clerical error, mistake of identity, or innocent misrepresentation, all not induced by recipient willful misrepresentation.”

RCW 51.32.240(2)(a). Subsections (6) and (7) address the right “to contest an order assessing an overpayment.” RCW 51.32.240(6), (7).<sup>4</sup>

Here, it is undisputed that the clerical error at issue did not result in any overpaid benefits to be recouped from Leuluaialii under subsection (1) or underpaid benefits to be repaid by Franciscan Health under subsection (2). FF 1, 3, 5; Appellant’s Brief 7. Thus, the statute is irrelevant here.

However, even if the statute applied to authorize the correction of the clerical error in the closing order, the statute’s “adjudicator error” provision prohibits correcting what was actually adjudicated in the order beyond the 60-day appeal period. RCW 51.32.240(1)(b), (2)(b). Both subsections (1) and (2) expressly prohibit assessment of overpayment or adjustment of benefits, respectively, beyond the 60-day appeal period, when the incorrect payment was due to an “adjudicator error”:

Except as provided in subsections (3), (4), and (5) of this section, the department may *only* assess an overpayment of benefits because of *adjudicator error* when the order upon which the overpayment is based is *not yet final* as provided in RCW 51.52.050 and 51.52.060.

RCW 51.32.240(1)(b) (emphasis added).

The recipient may *not* seek an adjustment of benefits because of *adjudicator error*. Adjustments due to

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<sup>4</sup> Subsection (3) authorizes recoupment of benefits paid before a claim rejection order; subsection (4) authorizes recoupment of benefits paid pursuant to adjudication by the Department later determined erroneous in an appeal; and subsection (5) authorizes recoupment of benefits “induced by willful misrepresentation.” There is no claim that subsection (3), (4), or (5) applies here. Nor does the record support such a claim.

adjudicator error are addressed by the filing of a written request for reconsideration with the department of labor and industries or an appeal with the board of industrial insurance appeals within sixty days from the date the order is communicated as provided in RCW 51.52.050.

RCW 51.32.240(2)(b) (emphasis added). Adjudicator error “includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.” RCW 51.32.240(1)(b), (2)(b).

Although Washington courts have yet to interpret “adjudicator error” in the statute, the Board, in its significant decision, has interpreted the term to include an error that involved the use of “judgment in reaching the determination.” *In re Flora Lacy*, BIIA Doc., 08 21768, 2009 WL 6268495, at \*3 (2009) (significant decision). In the significant decision, the Board concluded that “the way to seek modification of an order containing adjudicator error is to file an appeal within sixty days of when the order is communicated.” *In re Lacy*, 2009 WL 6268495, at \*1. The Board designates and publishes certain decisions as “significant decisions.” RCW 51.52.160. The Board’s interpretation of Title 51 RCW, while not binding, “is entitled to great deference.” *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991) (citation omitted).

The Board’s interpretation is consistent with the well-established precedent that distinguishes “clerical” errors, which a court may correct at any time, from “judicial” errors, which a court may not correct beyond the

applicable appeal period without specific statutory authorization. The court “has inherent power, independent of statute, to so modify its judgment entry as to make it conform to the judgment actually entered at any time when to do so will not affect substantial rights of innocent third persons who have acted on the faith of the entry.” *O’Bryan v. Am. Inv. & Improvement Co.*, 50 Wash. 371, 374, 97 P. 241 (1908). But this power does not authorize correction of “judicial errors.” *State v. Hendrickson*, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009). Likewise, Civil Rule 60(a), which embodies the court’s inherent power to correct clerical errors, “does not permit correction of judicial errors.” *Presidential Estates Apartment Ass’n v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996).<sup>5</sup>

Under the established precedent, an error is clerical, not judicial, if the order, “as amended, embodied the trial court’s intention, as expressed in the record at trial.” *Presidential Estates*, 129 Wn.2d at 326. The correction of a clerical error “merely corrects language that did not correctly convey the intention of the court, or supplies language that was inadvertently omitted from the original judgment.” *Id.* The correction of a clerical error is a “retroactive entry” and “is proper only to rectify the

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<sup>5</sup> CR 60(a) provides as follows (emphasis added):  
*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 initiatives or on the motion of any party and after such notice, if any, as the court orders.

record as to acts which did occur, not as to acts which should have occurred.” *Hendrickson*, 165 Wn.2d at 478 (citation omitted). Beyond correcting clerical errors, the court may not “reopen a matter that was previously closed in order to resolve substantive issues differently.” *Id.*

Leuluaialii offers no analysis of the “adjudicator error” provision. However, there is no question what she seeks to claim in this case are adjudicator, not clerical, errors. She seeks to challenge the actual determinations in the unappealed closing order, claiming more benefits than were awarded in the order, such as pension benefits available for permanent *total* disability (not for permanent *partial* disability determined in the order), an increased permanent partial disability award, more time loss benefits, and “any other relief as appropriate by law.” BR 159 (notice of appeal); RP 25 (Leuluaialii’s attorney: “We were trying to go for a pension.”); RCW 51.32.060 (pension benefits for permanent total disability); RCW 51.32.080 (permanent partial disability). There is no claim or evidence that, beyond the right arm versus right knee clerical error, the determinations in the closing order contained any clerical errors.

After failing to timely appeal the determinations in the closing order, Leuluaialii may not now claim more benefits than what the Department determined she was eligible for and awarded in the order. *See* RCW 51.32.240(2)(b), 51.52.050. “A party’s failure to appeal an adverse

ruling to the next level transforms the ruling into a final adjudication.” *Marley*, 125 Wn.2d at 537 n.2 (even an erroneous Department decision, if not timely appealed, is res judicata). The unappealed determinations in the May 2008 closing order are res judicata, not subject to challenge here.

Contrary to Leuluaialii’s argument, neither subsection (6) nor (7) re-sets the 60-day period to appeal an adjudicator error in the final closing order. Both subsections reference an order assessing an *overpayment*:

The worker, beneficiary, or other person affected thereby shall have the right to contest *an order assessing an overpayment* pursuant to this section in the same manner and to the same extent as provided under RCW 51.52.059 and RCW 51.52.060.

RCW 51.32.240(6) (emphasis added).

*Orders assessing an overpayment* which are issued on or after July 28, 1991, shall include a conspicuous notice of the collection methods available to the department or self-insurer.

RCW 51.32.240(7) (emphasis added).

These provisions address orders assessing overpayment, not orders correcting a clerical error without assessing any overpayment. To “express one thing in a statute implies the exclusion of the other.” *In re Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). “Omissions are deemed to be exclusions.” *Williams*, 147 Wn.2d at 491. Courts may not “add words or clauses to a statute when the legislature has chosen not to

include such language.” *Dot Foods, Inc. v. Dep’t of Revenue*, 166 Wn.2d 912, 920, 215 P.3d 185 (2009). There is no order assessing overpayment against Leuluaialii in this case. Thus, these provisions do not apply here.

Even if subsection (6) could be read to authorize an appeal from an order assessing repayment of *underpaid* benefits due to a clerical error under subsection (2), the appeal from the order would be from the underpayment assessment, not from what was adjudicated in an unappealed order. A contrary interpretation would contradict the express language of subsection (2)(b), which specifically prohibits an adjustment of benefits due to an adjudicator error, and must thus fail. *See Brown v. City of Seattle*, 117 Wn. App. 781, 791-792, 72 P.3d 764 (2003) (“Where there are both general and specific provisions that arguably apply, the specific governs over the general.”); *State v. Bunker*, 169 Wn.2d 571, 580, 238 P.3d 487 (2010) (court must “interpret statutes to harmonize with each other instead of conflict”). Leuluaialii points to no language in the statute or statutory purpose that would allow her to challenge the Department’s adjudication in the closing order she failed to timely appeal.

In sum, RCW 51.32.240 does not apply in this case, where the clerical error at issue admittedly did not result in any overpayment to be recouped or underpayment to be repaid, and, in any event, the statute expressly prohibits an adjustment of benefits due to an adjudicator error, a

result Leuluaialii seeks here. The superior court correctly concluded that the statute did not authorize her to challenge the determinations in the closing order she failed to timely appeal. Conclusion of Law 3 (CP 117).

**B. The Department Has Authority Generally to Correct Its Clerical Errors, But This Authority Does Not Permit Reopening Matters Determined in an Unappealed Order**

At the Board and the superior court, Leuluaialii invoked RCW 51.32.240 as the *only* source of her claimed right to challenge non-clerical determinations made in the May 2008 closing order. BR 109-114; 200-206; CP 45-56; 69-78. Thus, in rejecting her argument, the Board and the superior court did not appear to address whether the Department had authority, outside of the statute, to correct clerical errors *without reopening the matters actually adjudicated in the unappealed closing order*. The Department did have authority to correct the clerical error in the unappealed closing order. However, this authority did not extend beyond correcting the clerical error and did not authorize Leuluaialii to challenge what was actually determined in the unappealed closing order.

As stated above, a court has inherent power to correct clerical errors at any time to conform its order to what it actually determined, when such correction would not prejudice any innocent party. *O'Bryan*, 50 Wash. at 374; *Callihan*, 10 Wn. App. at 156 (“A court has inherent power to correct a clerical error in order to make the true action of the

court conform to the record.”); Annotation, *Correcting Clerical Errors in Judgments*, 126 A.L.R. 956, at 62 (originally published in 1940). “To correct such an error is an imperative duty when no innocent third person will suffer thereby.” *O’Bryan*, 50 Wash. at 374. “Delay is no defense to the correction of a clerical error, at least in the absence of a showing of prejudice.” *Callihan*, 10 Wn. App. at 157 (citation omitted). “Such a showing cannot be made when the person claimed to be prejudiced is charged with knowledge of the error.” *Id.* (citation omitted).

The power to correct a clerical is often called “nunc pro tunc,” and the court may issue a correction order, which “allows a court to date a record reflecting its action back to the time the action in fact occurred.” *Hendrickson*, 165 Wn.2d at 478 (citation omitted). “Nunc pro tunc power derives from the common law.” *Id.* (citation omitted). However, as shown above, a nunc pro tunc order must be limited to the correction of a clerical error and may not correct what was actually determined. *Schmelling*, 124 Wash. at 4; *Hendrickson*, 165 Wn.2d at 478. Courts apply the abuse of discretion standard to evaluate the exercise of the nunc pro tunc power. *See Hendrickson*, 165 Wn.2d at 478-481.

An administrative agency also has authority to correct its clerical errors, although this authority “may not be used as a guise for changing previous decisions because the wisdom of those decisions appears

doubtful in the light of changing policies.” *Am. Trucking*, 358 U.S. at 145-146 (federal interstate commerce commission has authority to correct clerical errors); *Callihan*, 10 Wn. App. at 156 (“Inadvertent clerical errors creep into both administrative and judicial proceedings.”).<sup>6</sup>

Even before the 1975 enactment of RCW 51.32.240, our Supreme Court had recognized the Department’s authority to correct clerical errors in holding that, “absent express statutory prescription, moneys paid a recipient under our industrial insurance statute by virtue of a mistake of fact, *not induced by fraud or the result of a clerical error*, may not be recouped from future payments to which the recipient is entitled.” *Deal v. Dep’t of Labor & Indus.*, 78 Wn.2d 537, 540, 477 P.2d 175 (1970) (emphasis added); *see also State v. Olson*, 172 Wash. 424, 427, 20 P.2d 850 (1933). The “Legislature enacted RCW 51.32.240 in direct response to [the Court’s] holding in *Deal*” and “gave the Department *additional* authority to recover certain previously paid benefits – specifically, those

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<sup>6</sup> Courts in other states have consistently recognized an administrative agency’s nunc pro tunc power to correct clerical errors. *See Gounaris v. City of Chicago*, 747 N.E.2d 1025, 1030 (Ill. Ct. App. 2001) (“administrative agency has the same inherent authority as a trial court to enter a nunc pro tunc order at any time to correct clerical errors or matters of form in a prior order or other written record of judgment to ensure that the record conforms to the judgment actually entered by the agency.”); *Silverhardt v. State*, 703 N.Y.S.2d 555, 556 (N.Y. App. Div. 2000) (“administrative agency has the authority to amend its own determination to correct an obvious clerical error”); *Bruno v. Zoning Bd. of Adjustment of City of Philadelphia*, 664 A.2d 1077, 1079 (Pa. Commw. Ct. 1955) (“Courts and administrative agencies have the inherent authority to correct obvious typographical and clerical errors.”).

paid because of mistake, fraud, or erroneous decisions later reversed on appeal.” *Stuckey*, 129 Wn.2d at 298-299 (emphasis added).

In addition, the Board has authority to recognize a clerical error in an unappealed Department order. *See Callihan*, 10 Wn. App. at 156-158. In *Callihan*, a case presenting facts similar to those involved here, a worker suffered a right arm injury, for which she received benefits, and the Department closed her claim with a permanent partial disability award. *Id.* at 154. However, the closing order contained a clerical error similar to the one at issue here – it incorrectly described the worker’s disabled body part as *left* arm, instead of *right* arm. *Id.* Like *Leuluaialii*, the worker accepted the award and did not timely appeal the order. *Id.* However, she later applied to reopen her claim, claiming aggravation of her right arm, and the Department denied her application. *Id.* The worker appealed to the Board and argued that because the closing order did not address her right arm, there was no closure, and the Board should thus order the Department to make a new decision on her right arm. *Id.* at 154.

This Court rejected the worker’s attempt to reopen the unappealed closing determination based on a clerical error. *Callihan*, 10 Wn. App. at 157. This Court held the Board has authority to correct “an inadvertent misdescription” in a Department order, because, “Were the rule otherwise, the board would be required to treat a clerical error as if it were no error at

all.” *Callihan*, 10 Wn. App. at 157. “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.” *Id.* “Even a liberal view of the Industrial Insurance Act does not require a repetitive departmental determination.” *Id.* This conclusion is “especially required when the injured plaintiff knows, or is charged with knowledge, that the injury is inadvertently misdescribed.” *Id.*

The Board, in its significant decisions, has followed *Callihan*. See *In re Geraldine Gallant*, BIIA Dec., 03 16903 & 03 16904, 2004 WL 3218293, at \*2 (2004) (significant decision) (Board has authority to acknowledge a clerical error in a Department order); *In re Jorge Perez-Rodriguez*, BIIA Dec., 06 18718, 2008 WL 1770918, at \*5 (2008) (significant decision) (“We have authority to correct an ‘inadvertent misdescription’ or a clerical error in a Department order.”).

Here, the Department acted within its proper authority in correcting the clerical error in the unappealed May 2008 closing order (right *arm* instead of right *knee*) at Leuluaialii’s request without changing any other aspect of the order. FF 1, 3-5. No party claimed any prejudice with respect to the correction, which did not result in any change in the benefit amount or claim closure. However, as Franciscan Health argued below, this authority “does not mean clerical mistake is a cover for an

untimely challenge to an otherwise final order, particularly those portions not containing a mistake.” BR 239. Under the established precedent, the unappealed determinations in the closing order are res judicata and not subject to challenge. Leuluaialii shows no authority holding otherwise.

Leuluaialii argues that if the disability determination in the unappealed closing order is res judicata, so would be the clerical error in the order. Appellant’s Brief 25-26. She argues that if that was the case, she could simply apply to reopen her claim to relitigate the disability level of her right *knee* existing *at the time of the closure*, because the closing order addressed only her right *arm*. Appellant’s Brief 25-26. But, as shown above, res judicata does not preclude the correction of the clerical error, and her hypothetical claim presents the same argument rejected by this Court in *Callihan*. See *Callihan*, 10 Wn. App. at 157.<sup>7</sup>

Res judicata precludes relitigation of “all matters determined by” the final closing order. *Perry v. Dep’t of Labor & Indus.*, 48 Wn.2d 205,

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<sup>7</sup> *Leuluaialii’s* attempt to distinguish *Callihan* fails. Leuluaialii claims the Board here “essentially scolds the Department for taking action and signals to it that it cannot, in the future, *take any action at all* in this type of situation.” Appellant’s Brief 30 (emphasis added). She is incorrect. The Board and the superior court concluded that the Department may not issue a new order to change the actual terms of the unappealed order. Conclusion of Law 2 (CP 117); BR 5 (Conclusion of Law 2). The Board decision specifically addresses and rejects her claim, which seeks to challenge the actual determinations (not the clerical error) in the unappealed closing order. The Board adopted the industrial appeals judge’s proposed decision on this issue, BR 4, and the proposed decision stated the decision “does not prevent recognition of that [clerical] mistake in future adjudication under this claim, for reopening applications and other adjudications,” BR 149. The Board decision thus follows *Callihan* that the Department and the Board may at least recognize clerical errors in an unappealed Department order. The superior court adopted the Board’s findings and conclusions. CP 113-118.

209, 292 P.2d 366 (1956). The unappealed closing order determined, with the correction of the clerical error, that Leuluaialii's accepted right knee condition was fixed and stable and that her claim should be closed with a 19% permanent partial disability award. FF 1, 3, 5. To reopen her claim, Leuluaialii must prove objective worsening of her accepted condition *after* the claim closure. *See Dinnis v. Dep't of Labor & Indus.*, 67 Wn.2d 654, 655-656, 409 P.2d 477 (1965) (citations omitted). The disability determination in the unappealed closing order is "res judicata as to [her] condition on that date." *Dinnis*, 67 Wn.2d at 657 (citation omitted). Thus, in Leuluaialii's hypothetical reopening application, she would not be able to challenge the unappealed 19% disability determination as to her accepted right knee condition at the time of the claim closure. There would be no "legal absurdity," because, contrary to Leuluaialii's claim, Franciscan Health would not be required to pay for her right *knee* the same amount it had already paid for her right *arm*. Appellant's Brief 26.

In sum, the superior court correctly concluded that the Department lacked authority to change the actual terms of the unappealed May 2008 closing order beyond correcting the clerical error. Conclusion of Law 2 (CP 117). However, the court was incorrect in assuming the Department attempted to do so here. Thus, to the extent the superior court affirmed the Board decision that reversed the Department's October 2008 order, which

merely corrected the clerical error, the court was in error. This Court should reverse this portion of the judgment by holding that the Department had authority to issue the October 2008 order *solely* to correct the clerical error in the unappealed May 2008 closing order and that this correction did not affect the finality of the actual determinations in the order.

**C. The Board Properly Rejected, as Waived and Unproven, Leuluaialii's Belated Claim the May 2008 Closing Order Was Not Communicated to Her Attending Physician**

Citing the Supreme Court decision in *Shafer*, Leuluaialii argues that the Board lacked subject matter jurisdiction to decide her appeal, claiming that the May 2008 closing order was not communicated to her attending physician and thus never became final. Appellant's Brief 31-40.

However, whether the closing order was communicated to her attending physician presents only the issue of finality of the order, not subject matter jurisdiction, which turns on the "type of controversy," not authority to issue a given order in a given case. *Marley*, 125 Wn.2d at 542 ("[T]he Department has subject matter jurisdiction to adjudicate all claims for worker's compensation."). This Court in *Shafer* squarely rejected the characterization of the failure to communicate a closing order to the worker's attending physician as a matter of subject matter jurisdiction, stating, "Jurisdiction is not the issue here." *Shafer*, 140 Wn. App. at 6. Contrary to Leuluaialii's suggestion, the Supreme Court in *Shafer* did not

address jurisdiction. *Shafer*, 166 Wn.2d 717 n.2. Further, the Board properly denied her motion to dismiss, because she waived her attending physician claim, and her claim lacks factual basis. BR 3-4; CP 110.

**1. Leuluaialii waived her attending physician non-communication claim by stipulating that the May 2008 closing order was communicated to “all parties”**

A Department order “shall become final” within 60 days “from the date the order is communicated to the *parties*” unless a written request for reconsideration is filed with the Department or an appeal is filed with the Board. RCW 51.52.050(1) (emphasis added). An order is “communicated” to a party when the party receives it. *Rodriguez v. Dep’t of Labor & Indus.*, 85 Wn.2d 949, 951-953, 540 P.2d 1359 (1975).

In *Shafer*, the Supreme Court affirmed this Court’s holding that a worker’s attending physician is a “party” under RCW 51.52.050 for purposes of the finality of a closing order, and a closing order was not final, when it was shown the worker’s attending physician did not receive a copy of the order. *Shafer*, 166 Wn.2d at 717-722 (term “parties” in the statute “includes the persons listed in the same subsection – the worker, beneficiary, employer, or other person affected by an order”); *Shafer*, 140 Wn. App. at 11 (when an order is based on medical determination, a worker’s attending physician is “an interested *party*”). Before *Shafer*, no

case had held a worker's attending physician is *not* a "party" for purposes of the finality of a Department order under RCW 51.52.050.

In her motion to dismiss filed with the Board (after the time for filing a petition for review), Leuluaialii argued, for the first time, that the May 2008 closing order was not final because it was not communicated to her attending physician. BR 71-74. However, Leuluaialii waived her belated claim by expressly stipulating otherwise. "Waiver is the intentional relinquishment of a known right." *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980).

At the Board, Leuluaialii, with the assistance of her attorney, stipulated that the May 2008 closing order "was properly communicated to *all parties* and *no party* filed a protest or appeal within sixty (60) days." CP 15 (stipulation ¶ 2) (emphasis added). The stipulation tracks the exact language of RCW 51.52.050(1). She further stipulated that the Board could issue a decision based on the stipulated facts. CP 15. Thus, the express language of the stipulation shows the parties' intent to remove any issue about the finality of the closing order.<sup>8</sup>

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<sup>8</sup> In interpreting a contract, such as a stipulation, the court is "to determine the parties' intent by focusing on the *objective* manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (emphasis added) (citation omitted). The court generally gives "words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Hearst*, 154 Wn.2d at 503 (citation omitted).

A stipulation “is an agreement for the final disposition of the case directed to the court which the court is bound to carry into effect.” *State v. Superior Court*, 151 Wash. 413, 418-419, 276 P. 98 (1929). “When a case is submitted to the trial court on stipulated facts, neither party may argue on appeal that the facts were other than as stipulated.” *Glen Park Assocs. v. Dep’t of Revenue*, 119 Wn. App. 481, 487, 82 P.3d 664 (2003).

Leuluaialii is bound by her own stipulation that the closing order was properly communicated to “all parties” and expressly waived any claim that the order was not properly communicated to any party, including her attending physician. *See Griffin v. Thurston County*, 165 Wn.2d 50, 57 n.1, 196 P.3d 141 (2008) (“All” means “every member or individual component of”). She is also bound by her stipulation that the Board could determine her appeal based on the stipulated facts and waived any claim that the Board needs additional evidence to decide her appeal.

In addition, the industrial insurance act deems Leuluaialii’s belated attending physician non-communication claim waived. *See* RCW 51.52.104. Leuluaialii did not raise her claim even in her petition for review she filed with the Board. BR 109-122. She raised it for the first time in her later filed motion to dismiss, after the time for filing a petition for review had passed. BR 71-74. The “petition for review shall set forth in detail the grounds therefor and the party or parties filing the same *shall*

*be deemed to have waived all objections or irregularities not specifically set forth therein.”* RCW 51.52.104 (emphasis added).

Leluaialii claims she could not have raised the attending physician issue until the Supreme Court decided the *Shafer* case in August 2009. Appellant’s Brief 38-39. She is wrong. She could have raised, and had to raise, the issue earlier to preserve it. The worker in *Shafer* raised the issue at the Board hearing without the benefit of any published decision directly on point. *See Shafer* 166 Wn.2d at 714. In contrast, Leluaialii signed the stipulation (thus waiving the non-communication claim) in May 2009, almost two years *after* this Court published its *Shafer* opinion in June 2007, holding that the attending physician was a “party” for purposes of the finality of a closing order. *Shafer*, 140 Wn. App. at 11. Thus, at the time of the stipulation, Leluaialii at least had a notice that her attending physician might be considered a “party” for purposes of the finality of the closing order. She cannot reasonably claim she could not have raised the issue the worker in *Shafer* raised years earlier. *See Leschner*, 27 Wn.2d at 926 (“ignorance of the law excuses no one”).

Further, Leluaialii’s belated attending physician claim was based on evidence that was not presented at the Board hearing and was properly rejected by the Board. BR 3-4. In *Shafer*, the worker’s attending physician submitted an affidavit *at the Board hearing*, stating that the

doctor did not receive the closing order and would have appealed it had she received it. *See Shafer*, 166 Wn.2d at 714. In contrast, Leuluaialii submitted a SIF-5 form to show the identity of her attending physician, *after* the industrial appeals judge issued a proposed decision.

The industrial appeals judge shall enter a proposed decision after “*all evidence* has been presented at hearings.” RCW 51.52.104 (emphasis added). After the proposed decision, the Board may not accept further evidence from any party, unless the party shows the party could not have offered it at the hearing with the exercise of “reasonable diligence.” BR 4; *In re Eileen Cleary*, BIIA Dec., 92 1119 & 92 1119-A, 1993 WL 308686, at \*2 (1993) (significant decision) (denying reopening the record after the hearing, when the new evidence was “readily available prior to hearing”).

According to the SIF-5 form, its copy was sent to Leuluaialii, indicating it became available to her sometime after May 5, 2008, when it was dated as signed, before Leuluaialii signed the stipulation in May 11, 2009. BR 76; CP 16. Also, the identify of her attending physician is a fact within her own knowledge and control. She fails to show why she could not have submitted the SIF-5 form, her own affidavit, or her attending physician’s affidavit earlier to prove her claimed fact.

Because Leuluaialii did not offer any good reason why she could not have submitted the SIF-5 form with the exercise of reasonable

diligence, the Board properly rejected the form and her motion to dismiss. Leuluaialii shows no abuse of discretion. *See Sligar v. Odel*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010) (no abuse of discretion in denying reconsideration based on newly discovered evidence, when there was “no showing that [the evidence] could not have been presented” earlier).

Citing WAC 263-12-135, Leuluaialii claims that the SIF-5 form is part of the Board record. Appellant’s Brief 37. But she confuses the record on review with evidence properly admitted. She did not present the SIF-5 form at the hearing, where “all evidence” must be presented, RCW 51.52.104, and did not demonstrate reasonable diligence for the Board to reopen the record, as shown above.<sup>9</sup>

**2. Unlike the worker in *Shafer*, Leuluaialii did not prove her attending physician did not receive a copy of the closing order**

Even if Leuluaialii did not waive her attending physician non-communication claim and was not otherwise precluded from raising it, the Board and the superior court properly rejected her claim, because, unlike the worker in *Shafer*, she failed to prove the closing order was not communicated to her attending physician. BR 3; CP 110.

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<sup>9</sup> Leuluaialii claims she properly raised a CR 59(a)(4) motion for reconsideration at the Board. Appellant’s Brief 37. However, the Board considered this motion withdrawn, as she filed a notice of appeal with the superior court. BR 20. Leuluaialii then abandoned this motion and never requested to reinstate the motion or asked for a new hearing based on the new evidence at the Board or superior court.

At the Board, Leuluaialii had “the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.” RCW 51.52.050(2)(a). She had to produce evidence pursuant to the evidence rules applicable in the superior court, which generally apply to the Board proceedings. RCW 51.52.140 (except otherwise provided, “the practice in civil cases shall apply to appeals proscribed in this chapter”); WAC 263-12-115(5) (Board judge’s evidentiary rulings “shall be made in accordance with rules of evidence applicable in the superior courts”). Leuluaialii failed to carry her burden of proof. CP 110; BR 3.<sup>10</sup>

In *Shafer*, based on the worker’s attending physician’s affidavit, the industrial appeals judge found “the Department’s revised closure order was not communicated to” the doctor. *Shafer*, 166 Wn.2d at 714. In contrast, Leuluaialii produced no affidavit from anyone (including herself or the author of the attached SIF-5 form) that identifies her attending physician or the physician’s address at the time of the May 16, 2008 closing order. Nor did she produce any affidavit stating with first-hand

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<sup>10</sup> Even if Franciscan Health had the burden of proving that Leuluaialii’s attending physician received a copy of the closing order, Leuluaialii waived necessity of such proof. If a party entitled to the benefit of an issue made by the pleadings impliedly withdraws the issue from dispute, the party in effect waives necessity of proof of that issue by the opposing party. *Stratton v. U.S. Bulk Carriers, Inc.*, 3 Wn. App. 790, 794, 478 P.2d 253 (1970) (citations omitted); *Darrin v. Gould*, 85 Wn.2d 859, 863, 540 P.2d 882 (1975). By confining the issues in disputes at the Board hearing to the Department’s authority to correct clerical errors and her ability to challenge the non-clerical determinations in the May 2008 closing order under RCW 51.32.240, Leuluaialii impliedly withdrew other issues she could have raised but did not raise at the hearing and thus waived necessity of proof by Franciscan Health, if any, on other issues.

knowledge that her attending physician did not receive the order. Instead, she submitted only a copy of the SIF-5 form dated *May 5, 2008* (BR 75-78) and simply claimed this form proved her attending physician was Dr. Vaughn of Tacoma, whereas the closing order referenced St. Clare Hospital in Seattle. BR 71-74. The form does not state Dr. Vaughn was Leuluaialii's attending physician as of *May 16, 2008*. Nor does it say her attending physician did not receive a copy of the closing order.

Because Leuluaialii did not present sufficient factual basis to support her claim that the closing order was not communicated to her attending physician, the Board and the superior court properly concluded that she "failed to meet her burden of establishing" that fact and properly rejected her claim. CP 110; BR 3.<sup>11</sup>

**D. Leuluaialii Is not Entitled to Attorney Fees**

Leuluaialii requests attorney fees, citing RCW 51.52.130. Appellant's Brief 41. She is not entitled to attorney fees.

The statute provides for attorney fees for a worker who prevails in court. RCW 51.52.130(1). However, the attorney fees are for the "services before the court only" and are payable from the Department only

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<sup>11</sup> Also, in contrast to the attending physician in *Shafer*, who stated she disagreed with the determination in the closing order, the SIF-5 form indicates Dr. Vaughn's opinion that Leuluaialii's condition was medically fixed with a permanent impairment of "19% R lower extremity," consistent with the closing order. BR 76.

if (1) the Board decision is “reversed or modified” *and* (2) the result of the litigation affected the Department’s “accident fund or medical fund”:

If in a worker . . . appeal the decision and order of the board is reversed or modified *and if the accident fund or medical aid fund is affected by the litigation . . .* the attorney’s fee fixed by the court, *for services before the court only*, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

RCW 51.52.130(1) (emphasis added); *Tobin v. Dep’t of Labor & Indus.*, 169 Wn.2d 396, 406, 239 P.3d 544 (2010); *Piper v. Dep’t of Labor & Indus.*, 120 Wn. App. 886, 889-890, 86 P.3d 1231 (2004).

Similarly, the attorney fees payable from Franciscan Health are for the services before the court only and available only if (1) the Board decision is “reversed and modified” *and* (2) “*additional relief is granted to*” Leuluaialii. RCW 51.52.130(1) (emphasis added); *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 257, 177 P.3d 180 (2008).

Thus, for Leuluaialii to receive attorney fees, she must show she is entitled to *additional* relief from the Department’s fund or from Franciscan Health. As shown above, the Board and the superior court correctly rejected Leuluaialii’s attempt to challenge what was actually determined in the May 2008 closing order she failed to timely appeal and properly rejected her waived and unproven attending physician claim.

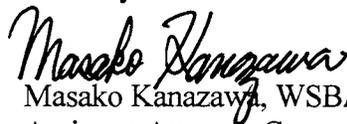
Thus, Leuluaialii does not prevail in this Court and is not entitled to any additional relief. Accordingly, she is not entitled to any attorney fees.<sup>12</sup>

## VI. CONCLUSION

For the reasons stated above, the Department asks this Court to affirm the superior court judgment in this case, except where the judgment affirms the Board decision that reverses the Department's October 2008 order, which merely corrected a clerical error. The Department asks this Court to hold that the Department properly corrected the clerical error in the May 2008 closing order and that the correction did not affect the finality of the actual determinations in the order. The Department further asks this Court to hold that the actual determinations in the unappealed closing order are res judicata and not subject to challenge by Leuluaialii.

RESPECTFULLY SUBMITTED this 1st day of August 2011.

ROBERT M. MCKENNA  
Attorney General



Masako Kanazawa, WSBA # 32703  
Assistant Attorney General  
Attorneys for Respondent

---

<sup>12</sup> Even if Leuluaialii prevails in this Court, this Court may not award attorney fees from the Department under RCW 51.52.130, unless she ultimately receives additional benefits on remand. Thus, even if she prevails here, attorney fee award from the Department must be conditioned on her obtaining additional relief on remand.

# **Appendix A**

## **Superior Court Judgment and Ruling**



09-2-15149-6 35497284 ORCR 12-07-10

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

SINAIPUA LEULUAIALII, ) Cause No. 09-2-15149-6  
)  
Plaintiff, )

v. ) JUDGMENT, ORDER,  
) FINDINGS OF FACT, AND  
) CONCLUSIONS OF LAW  
DEPARTMENT OF LABOR AND )  
INDUSTRIES OF THE STATE OF )  
WASHINGTON, and FRANCISCAN )  
HEALTH SYSTEMS WEST a/k/a )  
CATHOLIC HEALTH INITIATIVES, )  
Defendants. )

JUDGMENT SUMMARY (RCW 4.64.030)

- 1. This judgment does not provide for the payment of any money or for any right, title, or interest in real property.
- 2. Relief Granted: The October 6, 2009, Decision and Order of the Board of Industrial Insurance Appeals in Docket Number 08 21352 is affirmed.

JUDGMENT, ORDER, FINDINGS  
OF FACT, AND CONCLUSIONS OF LAW - 1

THE LAW OFFICE  
OF  
ROBERT M. ARIM, PLLC  
777 108th Ave. NE, Suite 2250  
Bellevue, WA 98004  
Tel: 425.440.7400  
Fax: 425.440.7399

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3 This matter came before the Court, sitting without a jury, the Honorable John A.  
4 McCarthy of the Pierce County Superior Court presiding, in open court on October 21,  
5 2010. The Plaintiff, Sinaipua Leuluaialii, appeared by and through her attorney of record,  
6 Robert S. Allen, of George M. Riecan & Associates, Inc., P.S., and the Defendant,  
7 Franciscan Health Systems West, a/k/a Catholic Health Initiatives, appeared by and through  
8 its attorney of record, Robert M. Arim, of the Law Office of Robert M. Arim, PLLC. The  
9 Defendant, the Department of Labor and Industries, having filed a notice of non-  
10 participation, was not present or represented at trial.

11 The Court reviewed the Certified Record of the Board of Industrial Insurance  
12 Appeals, the pleadings and authorities submitted herein, and the arguments of counsel.  
13 Having considered the evidence, the Court makes the following Findings of Fact:

14  
15 **FINDINGS OF FACT**

- 16  
17 1. On July 12, 2006, the claimant, Sinaipua L. Leuluaialii, filed an Application for  
18 Benefits with the Department of Labor and Industries, in which she alleged that  
19 she sustained an industrial injury to her right knee during the course of her  
20 employment with Franciscan Health Care Center on May 31, 2006. Her claim  
21 was allowed and benefits were paid.  
22  
23

JUDGMENT, ORDER, FINDINGS  
OF FACT, AND CONCLUSIONS OF LAW - 2

THE LAW OFFICE  
OF  
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4 On May 16, 2008, the Department issued an order in which it canceled the order  
5 and notice dated November 21, 2007; determined that the wage rate for the job of  
6 injury was based on hours worked at different rates of pay; \$12.93 per hour times  
7 10.54 average hours per day times 22 days per month totaling \$2,998.21; and  
8 \$2.50 per hour times 72 average hours per day times 5 days per month totaling  
9 \$900.

10 Additionally, the Department included in its determination for the monthly wage  
11 for the job of injury based on bonuses of \$22.41, by taking a yearly bonus of  
12 \$268.94 and dividing it by 12 months, equaling an average monthly bonus of  
13 \$22.41; adding in health care benefits of \$679.72 per month; tips totaling none  
14 per month; housing/board totaling none per month; and fuel totaling none per  
15 month; which the Department determined made the claimant's total gross wage  
16 \$4,600.34 per month. The Department further determined that the claimant's  
17 marital status was married with no children. The Department directed the self-  
18 insured employer to recalculate and repay time-loss compensation benefits based  
19 on the monthly wage shown above.  
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23

JUDGMENT, ORDER, FINDINGS  
OF FACT, AND CONCLUSIONS OF LAW - 3

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1  
2  
3 In its order of May 16, 2008, the Department closed this claim with time-loss  
4 compensation benefits paid through July 23, 2007, because the covered medical  
5 condition was stable, and direct the self-insured employer to pay the claimant a  
6 permanent partial disability award of 19 percent of the amputation value of the  
7 right arm at or above the deltoid insertion or by disarticulation at the shoulder,  
8 less prior permanent partial disability awards paid on this claim.

9 On October 10, 2008, the Department received a request from the claimant sent  
10 on October 9, 2008, asking that the Department correct the May 16, 2008 order  
11 to show that it was the right, lower extremity rather than her right, upper  
12 extremity involved.

13  
14 On October 14, 2008, the Department issued an order that was the same as the  
15 May 16, 2008 order except the Department corrected its order to reflect that it  
16 was the right leg above the knee joint with short thigh stump (3 inches or below  
17 the tuberosity of ischium) for which the Department awarded permanent partial  
18 disability. On November 26, 2008, the claimant filed a Notice of Appeal with  
19 the Board of Industrial Insurance Appeals from the October 14, 2008 order. On  
20 December 11, 2008, the Board granted the appeal under Docket No. 08 21352,  
21 and agreed to hear the appeal.  
22  
23

JUDGMENT, ORDER, FINDINGS  
OF FACT, AND CONCLUSIONS OF LAW - 4

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2. On May 31, 2006, the claimant sustained an industrial injury to her right knee during the course of her employment with Franciscan Health Care Center.

3. The May 16, 2008 order, issued by the Department in which it paid a permanent partial disability award for the claimant's right arm contained a clerical error because the claimant injured her right leg as a proximate cause of her industrial injury and not her right arm.

4. The May 16, 2008 order was not timely protested or appealed within 60 days by any party, and the Department did not correct the order within that period.

5. The Department order issued on October 14, 2008, was in response to the claimant's request to change the extremity involved. In that order the Department only corrected the extremity from the right arm to the right leg involved in the permanent partial disability award, the amount of that permanent partial disability award remained the same, and none of the other aspects of the May 16, 2008 order were changed.

CONCLUSIONS OF LAW

1. The Pierce County Superior Court has jurisdiction over the parties to and the subject matter of this appeal.

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2. The Department did not have subject matter jurisdiction to issue the October 14, 2008 order in which it attempted to change the terms of the May 16, 2008 order which became final and binding after 60 days elapsed, and there were no timely appeals or protests filed from that May 16, 2008 order.

3. RCW 51.32.240 does not give the Department jurisdiction to issue the October 14, 2008 order in which it changed the extremity involved in the permanent partial disability award, and there is no other statute that gives the Department jurisdiction to issue that order.

4. The Department order issued on October 14, 2008, is incorrect and is reversed. This matter is remanded to the Department with direction to take action as indicated by the law and the facts.

5. The Decision and Order of the Board of Industrial Insurance Appeals, dated October 6, 2009, is correct and is affirmed.

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**ORDER**

It is hereby ORDERED, ADJUDGED, and DECREED, that:

The Decision and Order of the Board of Industrial Insurance Appeals dated October 6, 2009, is hereby affirmed. As set forth above, the Court hereby adopts the Findings of Fact and Conclusions of Law of the Board of Industrial Insurance Appeals.

**IT IS SO ORDERED.**



DATED this 3 day of Dec, 2010.

*John A. McCarthy*  
\_\_\_\_\_  
JUDGE JOHN A. McCARTHY

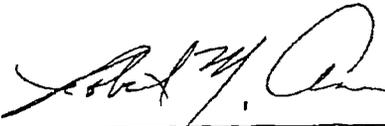
JUDGMENT, ORDER, FINDINGS  
OF FACT, AND CONCLUSIONS OF LAW - 7

THE LAW OFFICE  
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Presented by:

THE LAW OFFICE OF ROBERT M. ARIM, PLLC



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

12/1/10

Date

Copy received, approved as to form and content;  
Notice of presentation waived:

GEORGE M. RIECAN & ASSOCIATES, INC, P.S.



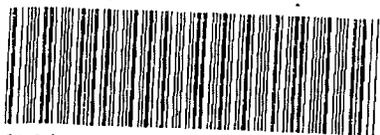
George M. Riecan, WSBA No. 12056  
Attorney for Plaintiff, Sinaipua Leuluaialii

12/2/10

Date

JUDGMENT, ORDER, FINDINGS  
OF FACT, AND CONCLUSIONS OF LAW - 8

THE LAW OFFICE  
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09-2-15149-6 35406910 CTD 11-18-10

**SUPERIOR COURT  
OF THE  
STATE OF WASHINGTON  
FOR PIERCE COUNTY**

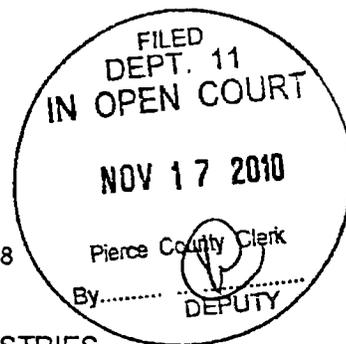
JOHN A MCCARTHY, JUDGE  
KAREN LADENBURG, Judicial Assistant  
Department 11  
(253) 798-7571

334 COUNTY-CITY BUILDING  
930 TACOMA AVENUE SOUTH  
TACOMA, WA 98402-2108

November 17, 2010

GEORGE MICHAEL RIECAN  
ATTORNEY AT LAW  
PO Box 1113  
TACOMA, WA 98401-1113

ROBERT MICHAEL ARIM  
ATTORNEY AT LAW  
777 108th Ave NE Ste 2250  
BELLEVUE, WA 98004-5178



**RE: SINAIPUA L LEULUALII vs. DEPARTMENT OF LABOR AND INDUSTRIES  
Pierce County Cause No. 09-2-15149-6**

Dear Counsel:

Trial in this matter was held on October 21, 2010. At that time I heard argument from counsel and have reviewed the file and the briefs submitted by counsel.

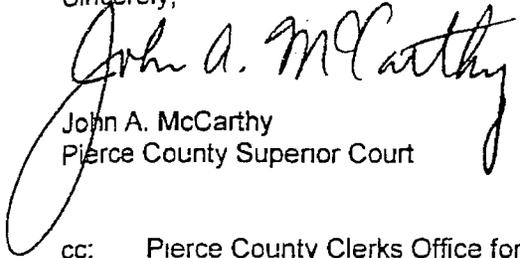
I am ruling for the defendants. I affirm the Board's October 6, 2009 decision and order which reverses the Department's October 14, 2008 order on the basis that the Department lacked jurisdiction to issue that order because the May 16, 2008 order closing the claim was final and binding.

I believe that the applicable law in this matter establishes that the Department is without authority to reconsider and reissue a final and binding order despite the existence of a clerical error within that order.

Furthermore, I believe the Plaintiff failed to meet her burden of establishing that the May 16, 2008 was not properly communicated to the treating doctor.

Please forward the appropriate order for my signature.

Sincerely,



John A. McCarthy  
Pierce County Superior Court

cc: Pierce County Clerks Office for filing

# **Appendix B**

## **Board Decisions**

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: SINAIPUA L. LEULUAIALII ) DOCKET NO. 08 21352  
2 )  
3 CLAIM NO. W-373492 ) DECISION AND ORDER

4 APPEARANCES:

5 Claimant, Sinaipua L. Leuluaialii, by  
6 George M. Riecan & Associates, Inc., P.S., per  
7 George M. Riecan

8 Self-Insured Employer, Franciscan Health Systems West, by  
9 The Law Office of Robert M. Arim, PLLC, per  
10 Robert M. Arim

11 The claimant, Sinaipua L. Leuluaialii, filed an appeal with the Board of Industrial Insurance  
12 Appeals on November 26, 2008, from an order of the Department of Labor and Industries dated  
13 October 14, 2008. In this order, the Department corrected its order issued on May 16, 2008, and  
14 directed that a permanent partial disability award was to be paid for 19 percent of the amputation  
15 value the right leg above the knee joint with short thigh stump (3 inches or below the tuberosity of  
16 ischium) rather than an award for 19 percent of the amputation value of the right arm at or above  
17 the deltoid insertion or by disarticulation at the shoulder. Otherwise, in its October 14, 2008 order  
18 the Department did not change its May 16, 2008 order. The Department order is **REVERSED AND  
19 REMANDED.**

20 DECISION

21 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
22 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order  
23 issued on June 23, 2009, in which the industrial appeals judge reversed and remanded the order of  
24 the Department dated October 14, 2008.

25 In addition to the Petition for Review, the claimant's counsel filed Claimant's Motion to  
26 Dismiss. In the Claimant's Motion to Dismiss claimant's counsel raises the question of whether the  
27 Department orders dated May 16, 2008 and October 14, 2008, were communicated to the attending  
28 physician. In her motion the claimant contends that they were not, and that neither order has  
29 become final.  
30  
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32

1 In its motion, the claimant addresses the same issue originally presented by this appeal, the  
2 Department's jurisdiction to issue the order dated October 14, 2008, but with a new factual basis.  
3 This argument is based on the Supreme Court's recent decision in *Shafer v. Department of Labor &*  
4 *Indus.*, No. 81049-9, in which the court required the communication of the Department order to both  
5 the claimant and the attending physician in order to start the sixty-day appeal period. The failure to  
6 communicate the orders as required would mean that both orders are not final. A failure of  
7 communication of the initial order would mean that the Protest and Request for Reconsideration  
8 filed on behalf of the claimant to that order was timely. If this is the case, the Department would  
9 have had jurisdiction to issue the October 14, 2008 order, and an appeal from that order allows the  
10 claimant to raise all of the issues addressed in the order.

11 Fundamental to the determination of the application of the *Shafer* decision to this appeal is  
12 a factual basis to determine whether the Department orders were communicated to the attending  
13 physician. This appeal was submitted for decision based upon stipulated facts that do not provide a  
14 factual basis to determine if the court's decision in *Shafer* is applicable. The exhibits attached to  
15 the claimant's motion do not provide a basis for making this determination, and Exhibit 1 was not  
16 offered during hearing. Even if this exhibit were considered together with the material stipulated  
17 into the record, it does not provide a basis to determine if the May 16, 2008 and the October 14,  
18 2008 Department orders were communicated to the attending physician. The record was, however,  
19 sufficient to support the resolution of the issue presented by this appeal regarding the Department  
20 order dated October 14, 2008.

21 On the issue of whether claimant should be allowed to present  
22 additional evidence, *Rogers Walla Walla v. Ballard*, 16 Wn. App. 81  
23 (1976), is determinative. The *Rogers* court stated that a motion to  
24 reopen for newly discovered evidence is addressed to the sound  
25 discretion of the trial court, disturbed only on a showing of manifest  
26 abuse. The moving party must show that the proposed evidence was  
27 newly discovered and could not have been previously supplied with  
28 reasonable diligence. *Id.*, at 90. (See, also, *In re Christina M. Nelson*,  
29 Dckt. No. 88 1221, (November 15, 1989) citing *Rogers*, in which a  
motion to reopen the record filed along with the Petition for Review was  
denied because of the moving party's failure to show reasonable  
diligence in producing relevant information prior to the time the hearings  
were concluded.)

30 *In re Eileen Cleary*, BIIA Dec., 92 1119 (1993)

1 The evidence to determine communication of the Department's orders to the attending physician  
2 could have been supplied at the hearing with the application of "reasonable diligence." Also, the  
3 Supreme Court's decision in *Shafer* followed a Court of Appeals decision in which the court  
4 reached a similar result. The claimant's motion to dismiss is denied.

5 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
6 no prejudicial error was committed. The rulings are affirmed.

7 The issue presented by this appeal and the evidence presented by the parties are  
8 adequately set forth in the Proposed Decision and Order. After review of the record and  
9 consideration of the claimant's Petition for Review, self-insured employer's Response to Claimant's  
10 Petition for Review, claimant's Motion to Dismiss, and the employer's Response to Claimant's  
11 Motion to Dismiss, we are convinced that our industrial appeals judge correctly decided this appeal  
12 in a manner supported by the record with appropriate findings and conclusions. Accordingly, we  
13 adopt the Proposed Decision and Order as our decision.

#### 14 FINDINGS OF FACT

- 15 1. On July 12, 2006, the claimant, Sinaipua L. Leuluaialii, filed an  
16 Application for Benefits with the Department of Labor and Industries, in  
17 which she alleged that she sustained an industrial injury to her right  
18 knee during the course of her employment with Franciscan Health Care  
19 Center on May 31, 2006. Her claim was allowed and benefits were  
20 paid. On May 16, 2008, the Department issued an order in which it  
21 canceled the order and notice dated November 21, 2007; determined  
22 that the wage rate for the job of injury was based on hours worked at  
23 different rates of pay; \$12.93 per hour times 10.54 average hours per  
24 day times 22 days per month totaling \$2,998.21; and \$2.50 per hour  
25 times 72 average hours per day times 5 days per month totaling \$900.  
26 Additionally, the Department included in its determination for the  
27 monthly wage for the job of injury based on bonuses of \$22.41, by  
28 taking a yearly bonus of \$268.94 and dividing it by 12 months, equaling  
29 an average monthly bonus of \$22.41; adding in health care benefits of  
30 \$679.72 per month; tips totaling none per month; housing/board totaling  
31 none per month; and fuel totaling none per month; which the  
32 Department determined made the claimant's total gross wage \$4,600.34  
per month. The Department further determined that the claimant's  
marital status was married with no children. The Department directed  
the self-insured employer to recalculate and repay time-loss  
compensation benefits based on the monthly wage shown above. In its  
order of May 16, 2008, the Department closed this claim with time-loss  
compensation benefits paid through July 23, 2007, because the covered  
medical condition was stable, and directed the self-insured employer to

1 pay the claimant a permanent partial disability award of 19 percent of  
2 the amputation value of the right arm at or above the deltoid insertion or  
3 by disarticulation at the shoulder, less prior permanent partial disability  
awards paid on this claim.

4 On October 10, 2008, the Department received a request from the  
5 claimant sent on October 9, 2008, asking that the Department correct  
6 the May 16, 2008 order to show that it was the right, lower extremity  
7 rather than her right, upper extremity involved. On October 14, 2008,  
8 the Department issued an order that was the same as the May 16, 2008  
9 order except the Department corrected its order to reflect that it was the  
10 right leg above the knee joint with short thigh stump (3 inches or below  
11 the tuberosity of ischium) for which the Department awarded permanent  
12 partial disability. On November 26, 2008, the claimant filed a Notice of  
13 Appeal with the Board of Industrial Insurance Appeals from the  
14 October 14, 2008 order. On December 11, 2008, the Board granted the  
15 appeal under Docket No. 08 21352, and agreed to hear the appeal.

- 16 2. On May 31, 2006, the claimant sustained an industrial injury to her right  
17 knee during the course of her employment with Franciscan Health Care  
18 Center.
- 19 3. The May 16, 2008 order, issued by the Department in which it paid a  
20 permanent partial disability award for the claimant's right arm contained  
21 a clerical error because the claimant injured her right leg as a proximate  
22 cause of her industrial injury and not her right arm.
- 23 4. The May 16, 2008 order was not timely protested or appealed within  
24 60 days by any party, and the Department did not correct the order  
25 within that period.
- 26 5. The Department order issued on October 14, 2008, was in response to  
27 the claimant's request to change the extremity involved. In that order  
28 the Department only corrected the extremity from the right arm to the  
29 right leg involved in the permanent partial disability award, the amount of  
30 that permanent partial disability award remained the same, and none of  
31 the other aspects of the May 16, 2008 order were changed.

#### 32 CONCLUSIONS OF LAW

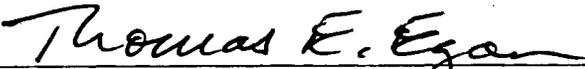
1. The Board of Industrial Insurance Appeals has jurisdiction over the  
parties to and the subject matter of this appeal.
2. The Department did not have subject matter jurisdiction to issue the  
October 14, 2008 order in which it attempted to change the terms of the  
May 16, 2008 order which became final and binding after 60 days  
elapsed, and there were no timely appeals or protests filed from that  
May 16, 2008 order.
3. RCW 51.32.240 does not give the Department jurisdiction to issue the  
October 14, 2008 order in which it changed the extremity involved in the  
permanent partial disability award, and there is no other statute that  
gives the Department jurisdiction to issue that order.

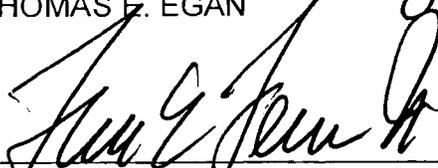
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4. The Department order issued on October 14, 2008, is incorrect and is reversed. This matter is remanded to the Department with direction to take action as indicated by the law and the facts.

Dated: October 6, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS

  
THOMAS E. EGAN Chairperson

  
FRANK E. FENNERTY, JR. Member

  
LARRY DITTMAN Member

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

IN RE: SINAIPUA L. LEULUAIALII ) DOCKET NO. 08 21352  
CLAIM NO. W-373492 ) PROPOSED DECISION AND ORDER

INDUSTRIAL APPEALS JUDGE: Greg J. Duras

APPEARANCES:

Claimant, Sinaipua L. Leuluaialii, by  
George M. Riecan & Associates, Inc., P.S., per  
George M. Riecan

Self-Insured Employer, Franciscan Health Systems West, by  
Law Office of Robert M Arim, PLLC, per  
Robert M. Arim

The claimant, Sinaipua L. Leuluaialii, filed an appeal with the Board of Industrial Insurance Appeals on November 26, 2008, from an order of the Department of Labor and Industries dated October 14, 2008. In this order, the Department corrected an order issued on May 16, 2008 and directed that the permanent partial disability award was to be paid for 19 percent of the amputation value the right leg above knee joint with short thigh stump (3 inches or below the tuberosity of ischium) rather than an award for 19 percent of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder. Otherwise, the October 14, 2008 order did not change the May 16, 2008 order. The October 14, 2008 order is **REVERSED AND REMANDED**.

**PROCEDURAL AND EVIDENTIARY MATTERS**

On May 26, 2009, the parties agreed to include the Jurisdictional History in the Board's record. They also stipulated to the facts reiterated below and submitted briefs and requested that as a preliminary matter the Board determine if the Department had jurisdiction to issue the October 14, 2008 order. This Proposed Decision and Order is based on the stipulated facts below and the attached exhibits.

**ISSUE**

Did the Department have jurisdiction to issue the October 14, 2008 order? If so, is the claimant entitled to additional treatment, an additional award for permanent partial disability, and permanent total disability?

1 **EVIDENCE**

2 The parties stipulated as follows:

- 3 1) On January 10, 2007, the Department entered an order allowing the  
4 claim assigning Claim No. W-373492.
- 5 2) On May 16, 2008, the Department entered an order which closed this  
6 claim with an award of 19 percent permanent partial disability of the  
7 claimant's right arm. The claimant sustained an injury to her right knee  
8 on May 31, 2006, not her right arm. The parties agree that the May 16,  
9 2008 order was properly communicated to all parties and no party filed a  
10 protest or appeal within 60 days. The order dated May 16, 2008 is  
11 attached hereto as Exhibit A.
- 12 3) That on October 9, 2008, within one year of the Department Order dated  
13 May 16, 2008, the claimant requested a correction of said order  
14 pursuant to RCW 51.32.240(2)(a). The claimant's request dated  
15 October 9, 2008 is attached hereto as Exhibit B.
- 16 4) On October 14, 2008, the Department issued an order correcting its  
17 order dated May 16, 2008 awarding 19 percent permanent partial  
18 disability of the claimant's right lower extremity. The order dated  
19 October 14, 2008 is attached hereto as Exhibit C.
- 20 5) On November 26, 2008, claimant's attorney timely appealed the  
21 Department order dated October 14, 2008.
- 22 6) The parties stipulate that Franciscan Health System, through their  
23 administrator, paid the claimant a permanent partial disability award in  
24 the amount of \$18,076.23, plus interest, with the last payment made on  
25 July 1, 2008.

26 **DECISION**

27 The question that must be decided in this appeal is whether or not the Department had  
28 subject matter jurisdiction under RCW 51.32.240 or any other provision to issue the October 14,  
29 2008 order. That order did not pay additional benefits and did not attempt to recoup them. It only  
30 changed the name of the injured body part which had been incorrectly identified in an earlier order  
31 issued on May 16, 2008. The claimant asserts that even though she failed to timely protest or  
32 appeal the earlier order she could appeal the corrected order. The Department's May 16, 2008  
order incorrectly identified the right arm rather than the right leg as the injured body part. The  
claimant's attorney, wrote a letter pointing out that mistake after 60 days had lapsed, and in  
response the Department issued the October 14, 2008 that indicates: "The order and notice of  
05/16/08 has been corrected as follows: . . ." (emphasis added), and then the Department changed  
the extremity for which the permanent partial disability was paid to the right leg above the knee joint  
with short thigh stump (3 inches or below the tuberosity of the ischium) from the right arm at or

1 above the deltoid insertion or by disarticulation at the shoulder. The amount of the award remained  
2 the same.

3 The parties discuss RCW 51.32.240 in their respective arguments and did not represent that  
4 there was any other statute providing jurisdiction for the order change, and none has been found.  
5 The claimant says RCW 51.32.240 provides jurisdiction for both the Department's subsequent  
6 corrective order and the right to appeal it, but the employer asserts that the Department did not  
7 have jurisdiction to issue that order and argues that even if it did, that does not give the claimant  
8 another chance to appeal when she failed to do so in the first instance. RCW 51.32.240 states in  
9 pertinent part:

10 (1)(a) Whenever any payment of benefits under this title is made  
11 because of clerical error, mistake of identity, innocent misrepresentation  
12 by or on behalf of the recipient thereof mistakenly acted upon, or any  
13 other circumstance of a similar nature, all not induced by willful  
14 misrepresentation, the recipient thereof shall repay it and recoupment  
15 may be made from any future payments due to the recipient on any  
16 claim with the state fund or self-insurer, as the case may be. The  
17 department or self-insurer, as the case may be, must make claim for  
18 such repayment or recoupment within one year of the making of any  
19 such payment or it will be deemed any claim therefore has been waived.

20 (b) Except as provided in subsections (3), (4), and (5) of this section,  
21 the department may only assess an overpayment of benefits because of  
22 adjudicator error when the order upon which the overpayment is based  
23 is not yet final as provided in RCW 51.52.050 and 51.52.060.  
24 "Adjudicator error" includes the failure to consider information in the  
25 claim file, failure to secure adequate information, or an error in  
26 judgment.

27 (2) Whenever the department or self-insurer fails to pay benefits  
28 because of clerical error, mistake of identity, or innocent  
29 misrepresentation, all not induced by recipient willful misrepresentation,  
30 the recipient may request an adjustment of benefits to be paid from the  
31 state fund or by the self-insurer, as the case may be, subject to the  
32 following:

(a) The recipient must request an adjustment in benefits within one  
year from the date of the incorrect payment or it will be deemed any  
claim therefore has been waived.

(b) The recipient may not seek an adjustment of benefits because of  
adjudicator error. Adjustments due to adjudicator error are addressed by  
the filing of a written request for reconsideration with the department of  
labor and industries or an appeal with the board of industrial insurance  
appeals within sixty days from the date the order is communicated as  
provided in RCW 51.52.050. "Adjudicator error" includes the failure to

1 consider information in the claim file, failure to secure adequate  
2 information, or an error in judgment.

3 . . . .  
4 (4) Whenever any payment of benefits under this title has been made  
5 pursuant to an adjudication by the department or by order of the board  
6 or any court and timely appeal therefrom has been made where the final  
7 decision is that any such payment was made pursuant to an erroneous  
8 adjudication, the recipient thereof shall repay it and recoupment may be  
9 made from any future payments due to the recipient on any claim with  
10 the state fund or self-insurer, as the case may be. The director,  
11 pursuant to rules adopted in accordance with the procedures provided in  
12 the administrative procedure act, chapter 34.05 RCW, may exercise his  
13 discretion to waive, in whole or in part, the amount of any such  
14 payments where the recovery would be against equity and good  
15 conscience.

16 . . . .  
17 (6) The worker, beneficiary, or other person affected thereby shall  
18 have the right to contest an order assessing an overpayment pursuant  
19 to this section in the same manner and to the same extent as provided  
20 under RCW 51.52.050 and 51.52.060. In the event such an order  
21 becomes final under chapter 51.52 RCW and notwithstanding the  
22 provisions of subsections (1) through (5) of this section, the director,  
23 director's designee, or self-insurer may file with the clerk in any county  
24 within the state a warrant in the amount of the sum representing the  
25 unpaid overpayment and/or penalty plus interest accruing from the date  
26 the order became final. . . .

27  
28 The courts and the Board have issued numerous decisions regarding RCW 51.32.240, but  
29 none are directly on point. Some of the more relevant decisions are discussed below.

30  
31 *In re Geraldine Gallant*, BIIA Dec., 03 16903 (2004), like this case, involved payment of a  
32 permanent partial disability award for the wrong extremity. The claimant was paid for her left  
shoulder instead of her right shoulder which was injured, but she did not timely protest or appeal  
the order that closed her claim and paid the erroneous award. The Board determined that a  
Department decision, even if erroneous, was final and binding on all parties and determined that it  
could not be reargued unless the order was void when entered. The Board said an order is not void  
if entered with personal jurisdiction over the parties and subject matter jurisdiction over the claim  
(citing *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533, 542-43 (1994)). The Board  
concluded that the Department was required by statute to deny reconsideration of the order that  
became final due to lack of timely protest or appeal despite the fact that it paid the disability award  
for the wrong extremity. The Board said: "[t]he Department has only limited statutory authority to  
set aside unappealed final orders (see RCW 51.32.240), and no statutory provision grants authority

1 to set aside an unappealed final order of the Department." *Gallant*, at 2. The Board characterized  
2 the use of the wrong extremity in *Gallant* as a clerical error and noted it was not bound by that error  
3 in making its decision in another claim that Ms. Gallant appealed involving that same extremity  
4 misidentified in the other claim. However, as noted in the claimant's brief, in that case five years  
5 had passed before Ms. Gallant filed a protest to have the correction made, which was too late even  
6 for application of the one-year correction period now provided by RCW 51.32.240. Nonetheless,  
7 that case seems to have the most application to this one and will be deemed to offer precedent.

8 *In re Martina Peterson*, BIIA Dec., 94 0991 (1995), offers similar rationale in a case in which  
9 the Department made a clerical mistake when it issued an order on November 4, 1993 that paid the  
10 claimant \$225 rather than deducting that amount for an Office of Support Enforcement lien in an  
11 order that paid an award for permanent partial disability. After January 4, 1994, when that order  
12 became final, the Department issued an order on January 12, 1994 wherein it declared that the  
13 order of November 4, 1993 was modified from a final to an interlocutory order and it ordered  
14 the claimant to repay \$510, \$255 for the mistaken overpayment and \$225 for the Office of  
15 Support Enforcement lien. The Board said the Department was without jurisdiction to modify the  
16 November 4, 1993 order because the 60-day appeal period had expired, so the order became final  
17 and binding on all parties, including the Department. But the Board said that even though the  
18 November 4, 1993 order became final and binding, the Department, nonetheless, retained  
19 jurisdiction over the claim to recover the \$510 of overpaid benefits under authority provided by  
20 RCW 51.32.240(1). The Board said it was evident that the Department's order of November 4,  
21 1993 contained an inadvertent clerical error, and even though the order became final and binding,  
22 under RCW 51.32.240(1) it retained jurisdiction to issue a further order to recover amounts paid  
23 due to the clerical error. Although RCW 51.32.240 has changed since that case was decided, the  
24 pertinent parts were essentially the same.

25 *Callihan v. Department of Labor & Indus.*, 10 Wn. App. 153 (1973) also involved the use of  
26 the wrong extremity. The Court of Appeals stated that the Board had the authority to correct an  
27 "inadvertent misdescription," because otherwise it "would be required to treat a clerical error as if it  
28 were no error at all." *Callihan*, at 157. In *Callihan*, the claimant injured her right arm and the  
29 Department misidentified the extremity involved and it closed her claim with a permanent partial  
30 disability award for her left arm. The claimant accepted the permanent partial disability award and  
31 took no appeal. She later applied to reopen her claim about six months later and the application  
32 was denied and she appealed, contending in part that the Department did not adjudicate the claim

1 of injury for her right arm, so the Board was without appellate jurisdiction to adjudicate an injury  
2 which had not first been decided by the Department. The industrial appeals judge agreed and  
3 issued a Proposed Decision and Order that indicated the order that closed the claim with a  
4 permanent partial disability award referring to the wrong extremity was erroneous and incorrect and  
5 then remanded the claim to the Department with directions to take such action as indicated and  
6 required by law with respect to the correct extremity. But the Board reversed the decision and  
7 ordered the industrial appeals judge to hear evidence that the Department wanted to present to  
8 establish that it referenced the left arm rather than the correct right arm through inadvertence and  
9 that the disability award was actually paid for the right arm. The Board directed that if the evidence  
10 so indicated, the hearing examiner should also hear the claimant's appeal on its merits. The  
11 claimant appealed the Board's order to Superior Court which dismissed the appeal because it was  
12 not a final order of the Board, and the claimant appealed to the Court of Appeals. The Court of  
13 Appeals framed the question as whether the Board, after necessary hearing may determine the  
14 existence of the misdescription and correct it without remand to the department for that purpose.

15 The Court noted that:

16 [I]nadvertent clerical errors creep into both administrative and judicial  
17 proceedings." The manner of handling clerical errors in judicial  
18 proceedings is clear. An appellate court may itself correct a clerical  
19 error in a judgment appealed from without remanding the judgment to  
20 the trial court for that purpose. A court has inherent power to correct a  
21 clerical error in order to make the true action of the court conform to the  
22 record. . . . substance shall not give way to form . . . Delay is no  
23 defense to the correction of a clerical error, at least in the absence of a  
24 showing of prejudice. Such a showing cannot be made when the  
25 person claim to be prejudiced is charged with knowledge of the error. . .

26 . . . .  
27 The exercise of such power may require that the board first determine  
28 whether a description contained in the order with reference to the injury  
29 for which an award is made is an inadvertent misdescription correctable  
30 by it. Were the rule otherwise, the board would be required to treat a  
31 clerical error as if it were no error at all. This would give an injured  
32 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. This conclusion reached would  
seem especially required when the injured plaintiff knows, or is  
charged with knowledge, that the injury is inadvertently misdescribed."  
P. 156-157

1 The Court of Appeals therefore indicated the Superior Court properly dismissed the appeal since  
2 the Board had not issued its final order.

3 The Board addressed both *Gallant* and *Callihan* in its Significant Decision, *In re Jorge*  
4 *Perez-Rodriguez*, BIIA Dec., 06 18718 (2008). In that case the Board dismissed the claimant's  
5 appeal from an order issued on August 21, 2006 that affirmed a July 13, 2006 order that denied an  
6 application to reopen the claim. Long before that time, on November 29, 1995, the Department  
7 issued a closing order and within 60 days the claimant filed a reopening application, which the  
8 Department construed as a protest and then it issued an abeyance order on January 23, 1996  
9 preventing the closing order from becoming final. On April 1, 1996, the Department issued an order  
10 that affirmed the January 23, 1996 abeyance order. No further action was taken by the Department  
11 until the claimant filed two more reopening applications 10 and 11 months later. The industrial  
12 appeals judge issued a Proposed Decision and Order indicating the April 1, 1996 order contained  
13 a typographical or clerical error and that the April 1, 1996 order was intended to affirm the  
14 November 29, 1995 closing order which then became final prior to the claimant's reopening  
15 applications. The Board said that if it corrected the April 1, 1996 order as the industrial appeals  
16 judge wanted to do, the April 1, 1996 order would have become final and binding if it was not timely  
17 protested or appealed. The Board said:

18 We have significant concerns about reading claim closure language into  
19 the April 1, 1996 Department order. We believe that there are very few  
20 instances in which we should infer that the Department's intent when  
21 issuing an order differed from the express terms of that order. See,  
22 *Comment (a) to Restatement (Second) of Judgments*, § 71. Changing  
23 the terms of an order when that order is several years old is likely to be  
24 unfair to one or more of the other parties. We believe the use of the  
25 power should only occur in instances such as *Callihan* and *Geraldine*  
26 *Gallant*, which describe where the error and the injustice attendant to  
27 that error are apparent to all parties. In those cases, the clerical error  
28 involved a Department order that identified the wrong extremity when  
29 benefits were adjudicated. It was clear to all parties that this error would  
30 result in an injustice if it was not corrected. In each case the other  
31 parties were not significantly prejudiced by amending the final order to  
32 reflect the correct extremity.

*Perez-Rodriguez*, at 4.

30 The Board stated that the Department should not have adjudicated the reopening  
31 applications when there was no final closing order, but concluded since the Department did  
32 consider the applications and issued an order on January 12, 1998 denying them, that denial order

1 should be given res judicata effect. The Board said it did not believe that mistake of law or an  
2 argument based on fundamental fairness ("equitable considerations") was an appropriate ground to  
3 remove the res judicata effect of the January 12, 1998 order because Mr. Perez-Rodriguez was  
4 represented by counsel at the time the order was received.

5 The claimant asserts that *In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993) is applicable to  
6 this case. Ms. Rodriguez appealed an order that determined that she was totally and permanently  
7 disabled, and that her pension benefits would be reduced for previously paid permanent partial  
8 disability awards. In determining the issues in *Rodriguez*, the Board discussed the application of  
9 both RCW 51.32.080 and RCW 51.32.240. In that case, several prior orders involving payment of  
10 permanent partial disability had been issued. The Board agreed that the amount paid by the order  
11 which never became final due to a timely protest, was erroneously paid and could be recouped  
12 under the then existing provisions of RCW 51.32.240(3). But in Ms. Leuluaialii's case the order did  
13 become final and in any event the *Rodriguez* case involved the offset of funds so it has little  
14 application when addressing whether or not the Department has jurisdiction to correct a reference  
15 to an extremity in a final order.

16 A recent case involving the application of RCW 51.32.240 is *In re Roger Gulling*, Dckt.  
17 No. 06 20684 (December 9, 2008). In that decision, the Board recognized that there is a difference  
18 between clerical errors and adjudicator errors. There the Department tried to recoup time-loss  
19 compensation paid by a closure order that became final within 60 days, and which the Board  
20 concluded was paid pursuant to adjudicator error. The Board determined that the Department  
21 lost jurisdiction to recoup the time-loss under RCW 51.32.240(1)(b) because it was not done within  
22 60 days and the order became final. Adjudicator error, as defined in the statute, "includes the  
23 failure to consider information in the claim file, failure to secure adequate information, or an error in  
24 judgment." None of those descriptions seem to apply in this case, and so the use of the wrong  
25 extremity in this case is probably better described as a clerical error rather than an adjudicator  
26 error. But even if the use of the wrong extremity constituted a clerical error, that does not  
27 mean that RCW 51.32.240 gives the Department jurisdiction to correct its error in this case.  
28 RCW 51.32.240 does not provide jurisdiction for the Department to correct any mistake in any  
29 order. By its express language it only applies to errors involving attempts to recoup funds or an  
30 entitlement to additional funds due to errors.

31

32

1 Since the May 16, 2008 order became final, the Department did not have subject matter  
2 jurisdiction to issue the October 14, 2008 order correcting the extremity involved in the claim. If the  
3 Department was allowed to correct its error, which really had no negative impact on the claimant, it  
4 would unfairly prejudice the self-insured employer who anticipated it was a final decision after the  
5 protest/appeal period expired. Of course, as indicated in the cases discussed above, that does not  
6 prevent recognition of that mistake in future adjudication under this claim, for reopening applications  
7 and other adjudications. But the May 16, 2008 order was final and binding on all parties and the  
8 Department's October 14, 2008 order was issued without jurisdiction and, therefore, it must be  
9 reversed.

### 10 FINDINGS OF FACT

- 11 1. On July 12, 2006, the claimant filed an application for industrial  
12 insurance benefits with the Department of Labor and Industries alleging  
13 she sustained an industrial injury to her right knee during the course of  
14 her employment with Franciscan Health Care Center on May 31, 2006.  
15 Her claim was allowed and benefits were paid. On May 16, 2008, the  
16 Department issued an order that indicated: The order and notice dated  
17 November 21, 2007 is canceled. The date of injury wage for the job of  
18 injury is based on hours worked at different rates of pay; \$12.93 per  
19 hour times 10.54 average hours per day times 22 days per month  
20 equals \$2,998.21; \$2.50 per hour times 72 average hours per day times  
21 5 days per month equals \$900. Additional monthly wage for the job of  
22 injury is based on bonuses – \$22.41 per month based on \$268.94  
23 divided by 12 months equals an average monthly bonus of \$22.41;  
24 health care benefits – \$679.72 per month; tips – none per month;  
25 housing/board – none per month; fuel – none per month. Worker's total  
26 gross wage is \$4,600.34 per month. Worker's marital status is married  
27 with no children. The self-insured employer is directed to recalculate  
and repay time-loss compensation based on the monthly wage shown  
above. Labor and Industries is closing this claim with time-loss benefits  
paid through July 23, 2007, because the covered medical condition is  
stable. The self-insured employer is directed to pay claimant a  
permanent partial disability award of 19 percent of the amputation value  
of the right arm at or above the deltoid insertion or by disarticulation at  
the shoulder, less prior permanent partial disability awards paid on this  
claim. This claim is closed.

28 On October 10, 2008, the Department received a request from the  
29 claimant sent on October 9, 2008, asking that the Department correct  
30 the May 16, 2008 order to show that it was the right-lower extremity  
31 rather than her right upper extremity involved. On October 14, 2008, the  
32 Department issued an order that was the same as the May 16, 2008  
order except it corrected the extremity to the right leg above knee joint  
with short thigh stump (3 inches or below the tuberosity of ischium) for  
the permanent partial disability award. On November 26, 2008, the

1 claimant filed a Notice of Appeal with the Board of Industrial Insurance  
2 Appeals from the October 14, 2008 order. On December 11, 2008,  
3 the Board issued an order granting the appeal, assigning it Docket  
4 No. 08 21352, and directing that further proceedings be held.

- 5 2. On May 31, 2006, the claimant sustained an industrial injury to her right  
6 knee during the course of her employment with Franciscan Health Care  
7 Center.
- 8 3. The May 16, 2008 order, issued by the Department that paid a  
9 permanent partial disability award for the claimant's right arm, contained  
10 a clerical error since the claimant injured her right leg as a proximate  
11 cause of her industrial injury and not her right arm.
- 12 4. The May 16, 2008 order was not timely protested or appealed within  
13 60 days by any party, and the Department did not correct the order  
14 within that period.
- 15 5. The Department order issued on October 14, 2008, was in response to  
16 the claimant's request to change the extremity involved and that order  
17 only corrected the extremity from the right arm to the right leg involved in  
18 the permanent partial disability award and the amount of that permanent  
19 partial disability award remained the same, and none of the other  
20 aspects of the May 16, 2008 order were changed.

#### 21 CONCLUSIONS OF LAW

- 22 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
23 parties to and the subject matter of this appeal.
- 24 2. The Department did not have subject matter jurisdiction to issue the  
25 October 14, 2008 order that attempted to change the terms of the  
26 May 16, 2008 order which became final and binding after 60 days  
27 elapsed and there were no timely appeals or protests filed from that  
28 May 16, 2008 order.
- 29 3. RCW 51.32.240 did not give the Department jurisdiction to issue the  
30 October 14, 2008 order changing the extremity involved in the  
31 permanent partial disability award and there is no other statute that  
32 gives the Department jurisdiction to issue that order.
4. The Department order issued on October 14, 2008, is incorrect and  
must be reversed. This matter is remanded to the Department with  
direction to reverse that order.

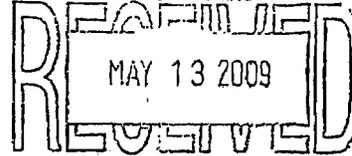
DATED:                     JUN 23 2009                    

30   
31 \_\_\_\_\_  
32 Greg J. Duras  
Industrial Appeals Judge  
Board of Industrial Insurance Appeals

# **Appendix C**

## **Stipulation**

BOARD OF INDUSTRIAL INSURANCE APPEALS TACOMA, WASHINGTON



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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON.

IN RE: SINAIPUA LEULUALII )

Claimant.

CLAIM NO.: W-373492

DOCKET NO.: 08 21352

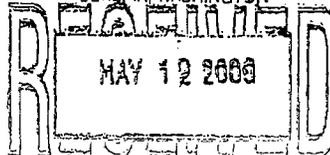
STIPULATION OF FACTS

Comes now, the claimant, Sina Leulualii, by and through her attorney, George M. Riecan of George M. Riecan & Associates, Inc., P.S., and Franciscan Health Systems, by and through their attorney, Robert M. Arim, of the Law Office of Robert M. Arim, P.L.L.C., and hereby stipulate and agree to the following facts which are hereby submitted to the Board of Industrial Insurance Appeals and upon which the Board can issue a Proposed Decision and Order in the above-referenced appeal.

- 1) On 1/10/07, the Department entered an order allowing the claim assigning claim number W373492.
- 2) On 5/16/08, the Department entered an order which closed this claim with an award of 19% permanent partial disability of the claimant's right arm. The claimant sustained an injury to her right knee on 5/31/06, not her right arm. The parties agree that the 5/16/08 order was properly communicated to all parties and no party filed a protest or appeal within sixty (60) days. The order dated 5/16/08 is attached hereto as Exhibit A.
- 3) That on 10/9/08 within one year of the Department Order dated 5/16/08, the claimant requested a correction of said order pursuant to R.C.W. 51.32.240 (2)(a). The claimant's request dated 10/9/08 is attached hereto as Exhibit B.
- 4) On 10/14/08, the Department issued an order correcting its order dated 5/16/08 awarding 19% permanent partial disability of the claimant's right lower extremity. The order dated 10/14/08 is attached hereto as Exhibit C.
- 5) On 11/26/08, claimant's attorney timely appealed the Department order dated 10/14/08.

GEORGE M. RIECAN & ASSOCIATES, INC., P.S.  
A Professional Services Corporation  
Attorneys at Law  
7105 - 27th St W,  
University Place, WA 98466  
P. O. Box 1119  
Tacoma, WA 98401  
(253) 472-8466

BOARD OF INDUSTRIAL INSURANCE APPEALS OLYMPIA, WASHINGTON



STIPULATION OF FACTS - 1

05/11/2009 15:18 2534761221

LAW OFFICES

PAGE 03

6) The parties stipulate that Franciscan Health System, through their administrator, paid the claimant a permanent partial disability award in the amount of \$18,076.23, plus interest, with the last payment made on 07/01/08

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DATED this \_\_\_\_ day of \_\_\_\_\_, 2009.

GEORGE M. RIECAN  
& ASSOCIATES, INC., P.S.

*[Signature]* 5-11-09  
George M. Riecan, WSBA #12056  
Attorney for Claimant

LAW OFFICE OF  
ROBERT M. ARIM

*[Signature]* 5/11/09  
Robert M. Arim, WSBA #35633  
Attorney for Employer

INDUSTRIAL INQUIRY APPEALS  
OLYMPIA, WASHINGTON  
**RECEIVED**  
MAY 12 2009

GEORGE M. RIECAN  
& ASSOCIATES, INC., P.S.

A Professional Services Corporation  
Attorneys at Law  
7105 - 27<sup>th</sup> St. W.  
University Place, WA 98466  
P. O. Box 1119  
Tacoma, WA 98401  
(253) 470-8566

STIPULATION OF FACTS

BY .....

FROM:  
STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
SELF-INSURANCE SECTION  
PO BOX 44892  
OLYMPIA WA 98504-4892  
FAX (360) 902-6900

MAILING DATE: 05/16/08  
CLAIM ID : W373492  
CLAIMANT : SINAIPUA LEULUAIALII  
EMPLOYER : CATHOLIC HEALTH INIT  
INJURY DATE : 5/31/06  
SERVICE LOC :  
UBI NUMBER : 601-764-447  
ACCOUNT ID : 700042-00  
RISK CLASS : 6105-00

WORK LOCATION ADDRESS:  
6220 S ALASKA ST

SINAIPUA LEULUAIALII  
RIECAN LAW OFFICE  
PO BOX 1113  
TACOMA WA 98401-1113

ORDER AND NOTICE (SELF-INSURING EMPLOYER)

\*\*\*\*\*  
\* ANY APPEAL FROM THIS ORDER MUST BE MADE IN WRITING TO THE BOARD \*  
\* OF INDUSTRIAL INSURANCE APPEALS, P.O. BOX 42401, OLYMPIA, WA \*  
\* 98504-2401 OR SUBMIT IT ON AN ELECTRONIC FORM FOUND AT \*  
\* HTTP://WWW.BIIA.WA.GOV/ WITHIN 60 DAYS AFTER YOU RECEIVE THIS \*  
\* NOTICE, OR THE SAME SHALL BECOME FINAL. \*  
\* \*\*\*\*\*

he order and notice dated 11/21/07 is canceled.

The date of injury wage for the job of injury is based on hours worked at different rates of pay:

\$12.93 per hour x 10.54 average hours per day x 22 days per month = \$2998.21.

\$2.50 per hour x 72.00 average hours per day x 5 days per month = \$900.00

Additional monthly wage for the job of injury is based on:

Bonuses \$22.41 per month

Based on: \$268.94 divided by 12 months equals an average monthly bonus of \$22.41

Health care benefits \$679.72 per month

Tips none per month

Housing/Board none per month

Fuel none per month

Worker's total gross wage is \$4600.34 per month.

EVA

MAILING DATE: 05/16/08  
CLAIM ID : W373492  
CLAIMANT : SINAIPUA LEULUAIALII  
EMPLOYER : CATHOLIC HEALTH INIT  
INJURY DATE : 5/31/06  
SERVICE LOC :  
UBI NUMBER : 601-764-447  
ACCOUNT ID : 700042-00  
RISK CLASS : 6105-00

WORK LOCATION ADDRESS:  
6220 S ALASKA ST

Worker's marital status is Married with 0 child(ren).

The self-insured employer is directed to recalculate and repay time loss compensation based on the monthly wage shown above.

Labor and Industries is closing this claim with time-loss benefits paid through 07/23/07 because the covered medical condition(s) is stable.

The self-insured employer is directed to pay you a permanent partial disability award of:

01  
19.00% OF THE AMPUTATION VALUE OF THE RIGHT  
ARM AT OR ABOVE THE DELTOID INSERTION OR BY  
DISARTICULATION AT THE SHOULDER.

01	AWARD DUE	\$18,076.23
	TOTAL AWARD DUE	\$18,076.23

Less prior permanent partial disability awards paid on this claim.

This claim is closed.

213

MAILING DATE: 05/16/08  
CLAIM ID : W373492  
CLAIMANT : SINAIPUA LEULUAIALII  
EMPLOYER : CATHOLIC HEALTH INIT  
INJURY DATE : 5/31/06  
SERVICE LOC :  
UBI NUMBER : 601-764-447  
ACCOUNT ID : 700042-00  
RISK CLASS : 6105-00

WORK LOCATION ADDRESS:  
6220 S ALASKA ST

SUPERVISOR OF INDUSTRIAL INSURANCE  
RAYMOND HERSHEY  
SI CLAIMS CONSULTANT

ORIG: CLAIMANT: SINAIPUA LEULUAIALII  
RIECAN LAW OFFICE, PO BOX 1113,  
TACOMA WA, 98401-1113  
CC: EMPLOYER: CATHOLIC HEALTH INITIATIVES  
C/O ALTERNATIVE INSURANCE MANAGEME, 3900 OLYMPIA BLVD STE 400,  
ERLANGER KY, 41018-1099  
ATTENDING PHYSICIAN: ST CLARE HOSPITAL  
DEPT 450, PO BOX 34935,  
SEATTLE WA, 98124-1935



# GEORGE M. RIECAN & ASSOCIATES, INC., P.S.

Aggressive Representation for  
Real People  
Servicios en Español  
Areas of Specialty  
Workers Compensation  
• On the job injuries  
• Labor & Industry Claims  
• Social Security Disability  
Personal Injury  
• Automobile  
• Wrongful Death

A Professional Services Corporation  
Attorneys At Law

*Attorneys*  
George M. Riecan

*Paralegals*  
Pablo A. Ortiz  
Douglas W. Lopez  
Stephanie M. Crane  
Brenda A. Crawford

*Administrative Assistant*  
Vicki L. Rupert

*Legal Assistants*  
Sara M. Money  
Courtney E. Riecan

*Investigator*  
George S. Dombek  
(1947-1995)

October 9, 2008

Raymond Hershey, SI Claims Consultant  
Department of Labor & Industries  
Self-Insurance Section  
P.O. Box 44892  
Olympia, WA 98504-4892

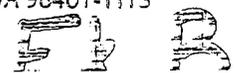
Re: Sinapua Leuluai  
CL: W-373492  
Request for Adjustment in Benefits

Dear Mr. Hershey:

This letter follows our telephone conversation of last week wherein I had pointed out that the Department order of May 16, 2008 closed this claim incorrectly with an award for a permanent partial disability for a medical condition and impairment which is not related to the claim and injury of May 31, 2006. This claim was allowed by the Department of Labor & Industries for an injury to the right lower extremity (right knee) and the Department order, as result of a clerical error, awarded impairment for the right upper extremity.

Pursuant to RCW 51.32.240(2)(a), we are requesting that a corrected order be entered for an adjustment in benefits because of this incorrect payment as the result of an apparent clerical error. To allow this order to stand as is would present many problems that would affect the Department of Labor & Industries accident fund, the self-insurer, and the claimant's rights in the future. Pursuant to the statute, the claimant has the right to reopen this claim for aggravation of her medical condition which involves injury to the "accepted condition" i.e., her right knee. Additionally, in the event that the claimant were to have any future injuries to her upper extremities, the record would be incorrect showing that she was previously awarded disability to a right upper extremity when in fact, she never

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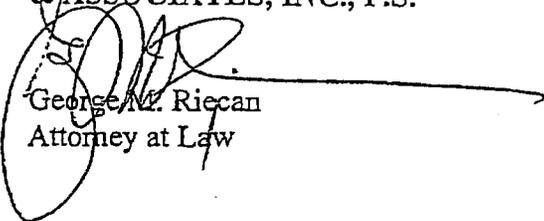


has had an injury to her right upper extremity. I can list probably no less than a dozen problematic areas should this order stand since it is incorrect on its face.

Therefore, we are formally requesting that this order be corrected by the Department pursuant to its power to do so under RCW 51.32.240.

Thank you for your prompt attention to this matter.

Very Truly Yours,  
GEORGE M. RIECAN  
& ASSOCIATES, INC., P.S.

  
George M. Riecan  
Attorney at Law

GMR/sm

FROM: STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
SELF-INSURANCE SECTION  
PO BOX 44892  
OLYMPIA WA 98504-4892  
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WORK LOCATION ADDRESS:  
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SINAIPUA LEULUAIALII  
RIECAN LAW OFFICE  
PO BOX 1113  
TACOMA WA 98401-1113

ORDER AND NOTICE (SELF-INSURING EMPLOYER)

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\* OF INDUSTRIAL INSURANCE APPEALS, P.O. BOX 42401, OLYMPIA, WA \*  
\* 98504-2401 OR SUBMIT IT ON AN ELECTRONIC FORM FOUND AT \*  
\* HTTP://WWW.BIIA.WA.GOV/ WITHIN 60 DAYS AFTER YOU RECEIVE THIS \*  
\* NOTICE, OR THE SAME SHALL BECOME FINAL. \*  
\* \*\*\*\*\*

The order and notice of 05/16/08 has been corrected as follows:

The order and notice dated 11/21/07 is canceled.

The date of injury wage for the job of injury is based on hours worked at different rates of pay:

\$12.93 per hour x 10.54 average hours per day x 22 days per month = \$2998.21.

\$2.50 per hour x 72.00 average hours per day x 5 days per month = \$900.00

Additional monthly wage for the job of injury is based on:

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Based on: \$268.94 in bonuses divided by 12 months equals an average monthly bonus of \$22.41.

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UBI NUMBER : 601-764-447  
ACCOUNT ID : 700042-00  
RISK CLASS : 6105-00

WORK LOCATION ADDRESS:  
6220 S ALASKA ST

Worker's total gross wage is \$4600.34 per month.

Worker's marital status is Married with 0 child(ren).

The self-insured employer is directed to recalculate and repay time loss compensation based on the monthly wage shown above.

Labor and Industries is closing this claim with time-loss benefits paid through 07/23/07 because the covered medical condition(s) is stable.

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19.00% OF THE AMPUTATION VALUE OF THE RIGHT  
LEG ABOVE KNEE JOINT WITH SHORT THIGH STUMP (3" OR  
BELOW THE TUBEROSITY OF ISCHIUM).

01	AWARD DUE	\$18,076.23
	TOTAL AWARD DUE	\$18,076.23

Less prior permanent partial disability awards paid on this claim.

This claim is closed.

MAILING DATE: 10/14/08  
CLAIM ID : W373492  
CLAIMANT : SINAIPUA LEULUAIALII  
EMPLOYER : CATHOLIC HEALTH INIT  
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RISK CLASS : 6105-00

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SUPERVISOR OF INDUSTRIAL INSURANCE  
RAYMOND HERSHEY  
SI CLAIMS CONSULTANT

ORIG: CLAIMANT: SINAIPUA LEULUAIALII  
RIECAN LAW OFFICE, PO BOX 1113,  
TACOMA WA, 98401-1113

CC: EMPLOYER: CATHOLIC HEALTH INITIATIVES  
C/O ALTERNATIVE INSURANCE MANAGEME, 3900 OLYMPIA BLVD STE 400,  
ERLANGER KY, 41018-1099  
ATTENDING PHYSICIAN: ST CLARE HOSPITAL  
DEPT 450, PO BOX 34935,  
SEATTLE WA, 98124-1935

No. 41601-8-II

11 AUG -2 PM 1:15

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

STATE OF WASHINGTON

DEPUTY

SINAIPUA L. LEULUAIALII,

Appellant,

v.

DEPARTMENT OF LABOR &  
INDUSTRIES,

Respondent.

CERTIFICATE OF  
SERVICE

DATED at Seattle, Washington:

I certify under penalty of perjury under the laws of the State of Washington that on the 1st day of August 2011, I caused the **RESPONDENT'S BRIEF BY DEPARTMENT OF LABOR & INDUSTRIES** and **CERTIFICATE OF SERVICE** to be served via ABC Legal Messenger to the following:

ORIGINAL  
& COPY TO:

David Ponzoha  
Clerk/Administrator  
Court of Appeals Division II  
950 Broadway Suite 300, MS TB-06  
Tacoma, WA 98402-4454

COPY TO:

Robert S. Allen, Attorney  
George M. Riecan & Associates, Inc. PS  
4301 South Pine St #543  
Tacoma, WA 98401

//

COPY TO: Robert M. Arim, Attorney  
The Law Office of Robert M. Arim, PLLC  
777 108<sup>th</sup> Avenue NE, Suite 2250  
Bellevue, WA 98004

DATED this 1<sup>st</sup> day of August, 2011.

  
Erlyn R. Gamad  
Legal Assistant