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I. INTRODUCTION

This case involves an appeal from a Superior Court Order that reversed and remanded in part, by way of a bench decision, a Board of Industrial Insurance Appeals (Board) order that concluded there was no timely protest or request for reconsideration of the self-insured issued August 16, 2007, closing order and therefore that order became final and binding. The issue involves whether the August 16, 2007, self-insured issued closing order was properly communicated pursuant to RCW 51.52.050.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

The trial court erred in entering the Order of May 20, 2011, that reversed the Board order of March 5, 2010, and remanded the claim to the Department of Labor and Industries (Department) with instructions to address communication of the August 16, 2007, order to claimant's representative. CP¹ 84

B. Issue Pertaining to Assignment of Error

Was the August 16, 2007, self-insured closing order properly communicated pursuant to RCW 51.52.050?

¹ CP refers to Clerk's Papers, filed with the Court of Appeals

III. STATEMENT OF THE CASE

On March 6, 2007, Ms. Lee filed an application for benefits (also referred to as the Self-Insurer Accident Report (SIF-2)), under Washington workers' compensation claim number SB41082, for an injury she sustained on or around August 14, 2006, while in the course of her employment with Safeway Stores, Inc. (Safeway). CABR² at 148. On August, 16, 2007, Safeway, the self-insured employer, issued an order closing this claim without award for time loss or permanent partial disability. CABR at 65. Safeway mailed this closing order to Ms. Lee at 13802 6th Avenue East, Tacoma, Washington 98445, her last known address as shown by the records of the self-insured, and Dr. Kaufman, her attending physician. CABR at 65 and 77-78. No party filed a protest or appeal from this closing order until December 1, 2008. CABR at 67-69.

On December 1, 2008, Ms. Lee, through her attorney, filed a protest from the August 16, 2007, closing order alleging a failure to communicate that order to Lester B. Pittle, M.D. CABR at 67-69. Ms. Lee alleged Dr. Pittle was her attending physician at the time of claim closure and should have been copied with that order. *Id.*

² CABR refers to the Certified Appeal Board Record transmitted with the Clerk's Papers concurrently with the Certificate of Appeal Board Record.

Based on that assertion, the Department issued an order on March 12, 2009, that canceled the August 16, 2007, closing order and kept the claim open. CABR at 52. Following a timely protest by Safeway on May 11, 2009, the Department issued a further order on July 15, 2009, that affirmed the March 12, 2009, order. *Id.* Safeway received the July 15, 2009, order on July 20, 2009. *Id.* On September 11, 2009, Safeway filed a timely protest to the Department from the July 15, 2009, order. *Id.* The Department forwarded that protest to the Board as a direct appeal on September 15, 2009. CABR at 38, 52.

On September 21, 2009, the Board granted the employer's appeal from the July 15, 2009, order, subject to proof of timeliness. CABR at 40. On November 5, 2009, the parties stipulated before Judge Thorson that the employer appeal was timely. CABR at 52.

On October 3, 2009, the employer filed a Motion for Summary Judgment and argued that the August 16, 2007, closing order was final and binding because there was no timely protest from that order. CABR at 57-63. This was based on undisputed evidence that Dr. Pittle was not the attending physician as Ms. Lee alleged. *Id.*

On December 11, 2009, Ms. Lee filed a Response to Employer's Motion for Summary Judgment and argued, for the first time, that not only should Dr. Pittle have received the closing order, but also that the closing order should have been mailed to Ms. Lee's attorney. CABR at 84-90. Following replies, and a cross-motion, Judge Randall J. Hansen heard arguments on February 2, 2010. *See*, CABR – Transcripts. On March 5, 2010, Judge Hansen issued a Proposed Decision and Order finding that Dr. Lester Pittle was not claimant's attending physician as of August 16, 2007, the date of the closing order and that no notice of appearance by an attorney or request for change of address was communicated to the self-insured employer prior to September 24, 2008. CABR at 20-26. Accordingly, Judge Hansen concluded that the August 16, 2007, order was not protested or appealed within the 60-day period as required by RCW 51.52.050, and is therefore final and binding. *Id.*

The claimant filed a Petition for Review on April 20, 2010, and on May 6, 2010, the Board issued an Order Denying Petition for Review in accordance with RCW 51.52.106. CABR at 1. The Proposed Decision and Order became the Decision and Order of the Board. *Id.*

Ms. Lee filed a timely appeal to Pierce County Superior Court on June 1, 2010. CP 2-5. Following a bench trial before The Honorable Katherine M. Stolz, Judge Stolz affirmed in part, and denied in part, the Board's March 5, 2010, order. CP 84. Judge Stolz affirmed that Dr. Pittle was not Ms. Lee's attending physician, but reversed the Board's decision that the August 16, 2007, order was properly communicated and remanded the matter to the Board to address communication of the August 16, 2007, order to claimant's representative. *Id.* The Court entered an Order on May 20, 2011, that reflected this decision. *Id.*

On June 16, 2011, Safeway filed a timely appeal to the Court of Appeals, Division II. CP 85-87. The Verbatim Report of Proceedings was filed on July 18, 2011.

IV. ARGUMENT

A. Standard of Review

Under Washington law, the Board's decision is *prima facie* correct and the burden of proof is on the party attacking that decision. *Ruse v. Department of Labor and Industries*, 138 Wn.2d 1, 5 (1999); *see also* RCW 51.52.115. On review, the trier of fact may substitute its own decision only if it finds by a preponderance of the evidence that the Board's findings were incorrect. *See Ruse*, 138 Wn.2d at 5.

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

B. No Aggrieved Party Filed a Written Protest to Safeway's, the Self-Insured Employer, August 16, 2007, Closing Order Within the Statutory Time Frame, thus Pursuant to RCW 51.52.050 the Order is Final and Binding.

This case has arrived at the Court of Appeals of Washington due to a blatant error committed by the Respondent. Specifically, the Law Offices of David B. Vail & Jennifer Cross-Euteneier and Associates, PLLC (Ms. Lee's Counsel), erroneously addressed a letter of representation and Notice of Change of Address to Safeway, the self-insured employer. As a result of this error, Safeway communicated the closing order to Ms. Lee at her address rather than Ms. Lee's Counsel's address.

Ms. Lee did not protest the closing order within the statutory time frame and therefore the order is final and binding. Ms. Lee, realizing the significance of her Counsel's mistake, has decided rather than taking responsibility for her actions, to place the blame on another party and argue that the closing order is not final because the order was never communicated to her Counsel.

As an initial matter, it is important to note that the Appellant is aware the Industrial Insurance Act is to be liberally interpreted in favor of injured workers. *See Dennis v. Department of Labor & Industries*, 109, Wn.2d 467, 470 (1987). However, this rule does not dispense with the requirement that the worker and his or her counsel comply with the procedures set forth in the Industrial Insurance Act. Unfortunately, in this case, it was the error of Ms. Lee's Counsel that lead to adverse consequences for Ms. Lee. However, when a worker hires counsel, the counsel acts on behalf of the worker; they become a single entity. To allow this claim to remain open despite the material error committed by Ms. Lee's Counsel would be unjust to the employer, Safeway, who complied with all the appropriate statutes, and set a dangerous precedent that would allow a worker's representative to commit material errors without any consequences for the worker.

The controlling statute in this matter is RCW 51.52.050, which states in part that a Department, “order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or is filed with the board of industrial insurance appeals, Olympia.” 51.52.050(1).

On August 16, 2007, Safeway, the self-insured employer, issued an order closing this claim SB41082 with medical benefits only, and without award for time loss compensation or permanent partial disability. CABR at 65. Pursuant to RCW 51.52.050, any aggrieved party must have filed a written protest or appeal within sixty days from communication of that August 16, 2007, order, otherwise that order would become final and binding.

It is *undisputed* that the first protest from this order was filed on or around December 1, 2008 when Ms. Lee’s Counsel wrote a letter to Safeway disputing the closure of this claim. CABR at 67. It is also *undisputed* that this letter was mailed well over a year from the statutory time frame to file a protest to the August 16, 2007, order, per RCW 51.52.050. Accordingly, pursuant to RCW 51.52.050, the August 16, 2007, closing order for claim SB41082 is final and binding.

C. Safeway did not Receive a Notice of Change of Address from Ms. Lee's Counsel Prior to Issuing the August 16, 2007, Closing Order, Therefore Safeway Properly Complied with RCW 51.52.050 When it Sent the Closing Order to Ms. Lee's Address as Shown on her SIF-2.

To comply with RCW 51.52.050, whenever the Department (or implicitly the self-insured employer)³ has made any order, decision, or award, it shall promptly serve the worker with a copy thereof by mail, which shall be addressed to such person at his or her last known address as shown by the records of the Department (or the self-insured employer in the cases where the self-insurer is issuing the order). RCW 51.52.050(1).

It is *undisputed* that Safeway mailed the August 16, 2007, closing order to Ms. Lee at her address of 13802 6th Avenue East, Tacoma, Washington 98445, as shown on her SIF-2 (application for benefits). CABR at 148. There is no evidence in the Board record that Ms. Lee did not receive the August 16, 2007, closing order at this address. Importantly, RCW 51.52.115 specifically states that the Superior Court shall limit evidence to the Board record.

³ WAC 296-15-450(1) provides self-insurers the authority to close certain claims. Accordingly, in cases where the self-insurer is issuing a closing order, although not explicitly stated in RCW 51.52.050, it is implied the self-insurer shall mail the order to the worker at his or her last known address as shown by the records of the self-insurer.

The address on Ms. Lee's SIF-2 was her last known address as shown by Safeway's records. Accordingly, it is Safeway's position that it properly complied with the communication requirement under RCW 51.52.050, and thus the August 16, 2007, closing order is final and binding.

Ms. Lee contends that Safeway did not properly comply with RCW 51.52.050 when it issued the August 16, 2007, closing order because it failed to communicate the closing order to her authorized representative, the Law Offices of David B. Vail & Jennifer Cross-Euteneier and Associates, PLLC (Ms. Lee's Counsel).

Ms. Lee is correct in that implicit in RCW 51.52.050, in the appropriate circumstances, orders must be sent to the worker's authorized representative rather than the worker. *However*, the order shall be sent to the worker's authorized representative only in the case where that authorized representative has sent a notice of change of address to the self-insured employer so that it is the representative's address that is the worker's last known address shown by the self-insured's records.

For example, in *In re David P. Herring*, the Board of Industrial Insurance Appeals held that when the worker has notified the Department of a change of address to that of his attorney, an order sent to the claimant at his home address rather than in care of his attorney has not been “communicated” within the meaning of RCW 51.52.050. *In re David P. Herring*, BIIA Dec., 57 831 & 57 830 (1981).

In re David P. Herring, is distinguishable from the present case. In this case Ms. Lee’s Counsel did not properly communicate to Safeway a notice of change of address to that of Counsel’s office. While it appears from the record that a February 6, 2007, letter, from Ms. Lee’s Counsel with an attached Notice of Change of Address, was intended to be communicated to Safeway, neither fact nor law support any contention that Safeway received the February 6, 2007, letter and Notice of Change of Address. CABR at 93-96.

It is established that proof that a letter, sealed, stamped, and properly addressed, was deposited in United States mail on stated date, raises a presumption that it reached its destination at the regular time and was received by addressee. *Lieb v Webster*, 30 Wash.2d 43, 47-48 (1948). However, it will not be presumed that a letter admittedly mailed to the wrong address was received by the addressee. *Spokane Valley State Bank v. Murphy*, 150 Wash. 640, 645 (1929).

The reason for Safeway's failure to receive the February 6, 2007, letter and Notice of Change of Address from Ms. Lee's Counsel is clear from the evidence. The February 6, 2007, letter which states that Ms. Lee's Counsel represents Ms. Lee in regards to claims SB41082 and SB41077 was addressed to Michelle Morrison, claims examiner for Safeway for claim SB41082, at the following address: Zenith Administrators, P.O. Box 21505, Seattle, WA 98111. CABR at 93.

There is absolutely no evidence that Michelle Morrison or any other person at Safeway received any mail at the Zenith Administrators address. Michelle Morrison declared in her January 7, 2010, Declaration, that on February 6, 2007, the mailing address for Safeway, Inc., Risk Management, was P.O. Box 85001, Bellevue, Washington 98105. CABR at 120. Ms. Lee has offered no explanation as to how the February 6, 2007, letter and Notice of Change of Address that was sent to the Zenith Administrators address was reasonably calculated to reach Michelle Morrison, or anyone else on behalf of Safeway.

Accordingly, pursuant to the Washington State Supreme Court's ruling in *Spokane Valley State Bank*, because the February 6, 2007, letter and Notice of Change of Address was mailed to the wrong address, at Zenith Administrators, a presumption that Safeway received this letter cannot be raised.

To further strengthen the contention that Safeway never received the February 6, 2007, letter and Notice of Change of Address from Ms. Lee's Counsel, the Appellant directs the Court's attention to the Washington State Supreme Court's decision in *Ault v. Interstate Sav. & Loan Ass'n*. In that decision, the Washington State Supreme Court stated that though the mailing of a letter raises a prima facie presumption that it was received, the Washington State Court has distinctly held that it is nothing more, and will be overcome by testimony of the person to whom it was sent that it was not received. *Ault v. Interstate Sav. & Loan Ass'n*, 15 Wash. 627, 635 (1896).

Ms. Michelle Morrison stated in her January 7, 2010, Declaration that she did not receive the notice of representation dated February 6, 2007, from Ms. Lee's Counsel until alleged copies were provided to her through her attorney on November 5, 2009. CABR at 122. Therefore, even if arguendo the presumption of mailing had been created, though it was not because the February 6, 2007, letter was clearly addressed to the wrong location, pursuant to the Washington State Supreme Court's decision in *Ault*, this presumption is overcome by the declaration of Michelle Morrison stating that she did not receive the February 6, 2007, letter of representation and Notice of Change of Address from Ms. Lee's Counsel.

Due to the fact Safeway clearly did not receive the February 6, 2007, letter and Notice of Change of Address from Ms. Lee's Counsel, Safeway complied with RCW 51.52.050 when it communicated the August 6, 2007, closing order to Ms. Lee's 13802 6th Avenue East, Tacoma, Washington 98445, address, her last known address shown by Safeway's records. Once again, there is no evidence in the Board record to refute that the closing order was mailed to this address, or that Ms. Lee did not receive the closing order at this address, and pursuant to RCW 51.52.115, the evidence is limited to the Board record.

D. A Protest and Request for Reconsideration from Ms. Lee's Counsel, Sent to the Department of Labor and Industries on a Different Claim, was Insufficient to Alert the Department and Safeway of Ms. Lee's Counsel's Representation on Claim SB41082.

Ms. Lee appears to concede that her Counsel mailed the February 6, 2007, letter and Notice of Change of Address, intended for Safeway, to the incorrect address, and thus Safeway did not receive the letter or notice. This presumption is evidenced by Ms. Lee's lack of discussion of this issue in her Superior Court Trial Brief and oral argument before The Honorable Katherine M. Stolz, during the May 20, 2011, Pierce County Superior Court hearing. *See generally* VRP⁴ and CP 56-64.

⁴ VRP refers to the Verbatim Report of the Proceedings, filed on July 18, 2011.

As a result of Ms. Lee's concession that the February 6, 2007, letter intended to be communicated to Safeway was incorrectly addressed and thus never received by Safeway, in an effort to place the blame for Ms. Lee's Counsel's failure to receive the August 16, 2007, closing order elsewhere, Ms. Lee turns to the Department. Ms. Lee asserts that a February 6, 2007, Protest and Request for Reconsideration sent to the Department by Ms. Lee's Counsel on another claim, SB41077, should have alerted the Department, and thus in turn Safeway, that Ms. Lee's Counsel for claim SB41077 was also her authorized representative on the current claim, SB41082. Accordingly, she argues, the August 16, 2007, closing order for claim SB41082 should have been communicated to Ms. Lee's Counsel's address. VRP at 15-16 and CABR at 227. This argument fails for a number of reasons to be discussed.

To attempt to understand Ms. Lee's misguided reasoning, attention must first be directed to the February 6, 2007, Protest and Request for Reconsideration entered in the Jurisdictional History for claim SB41077. CABR at 227.

An examination of the February 6, 2007, Protest and Request for Reconsideration reveals that claim number SB41082 as well as SB41077 were entered in the subject line of the letter. CABR at 97. The letter advises the Department, “this office represents the claimant in the above-referenced state industrial insurance claim.” *Id.* The office referred to in the letter is Law Offices of David B. Vail and Jennifer Cross-Euteneier & Associates, PLLC. *Id.* Enclosed with the letter is a Notice of Change of Address and Authorization to Inspect File. CABR 98-100. The letter also notifies the Department of the claimant’s protest and request for reconsideration to any adverse order communicated to the claimant within the last 60 days. CABR at 97.

As stated above, Ms. Lee asserts that the February 6, 2007, Protest and Request for Reconsideration that referenced claim numbers SB41082 and SB41077 in the subject line, should have put the Department, and thus Safeway, on notice that Ms. Lee’s Counsel was representing Ms. Lee on both claim SB41077 and claim SB41082.

This argument is illogical. To begin, an examination of the Jurisdictional History for claim SB41082 reveals no notice of representation or any correspondence was received from Ms. Lee's Counsel until a November 4, 2008, Protest and Request for Reconsideration. CABR at 52. It is telling that Ms. Lee stipulated to the jurisdictional history for this claim on November 5, 2009. *Id.*

Secondly, an examination of the February 6, 2007, letter to the Department reveals, as previously discussed, it is both a letter advising the Department that Ms. Lee's Counsel represents her in referenced state industrial claims, and a notification to the Department of the claimant's protest and request for reconsideration to any adverse orders communicated to the claimant within the last 60 days. CABR at 97. It should be noted that on claim SB41077, no adverse orders had been entered as of February 6, 2007, and thus there was nothing for Ms. Lee to protest. Accordingly, although the jurisdictional history for claim SB41077 lists the February 6, 2007, letter as a Protest and Request for Reconsideration, there is no evidence the Department treated this letter as anything other than a notice of representation for claim SB41077.

However, Safeway was not forwarded a copy, or informed by the Department, of any notice of representation from Ms. Lee's Counsel on claim *SB41082* prior to the date Safeway issued the closing order for this claim on August 16, 2007. In her January 7, 2010, Declaration, Michelle Morrison, claims examiner for Safeway on claim SB41082, as well as the custodian of the claim file for SB41082, states:

11. I had not received any letter of representation from the Law Offices of David B. Vail & Jennifer Cross-Euteneir & Associates, PLLC ("Claimant's Counsel") or any other attorney representing Ms. Lee, on claim SB41082, when I issued the closing order on this claim on August 16, 2007.

12. The first record that I have in my file regarding representation by Claimant's Counsel on claim number SB41082 is dated September 24, 2008, [...].

16. I did not receive the notices of representation dated February 6, 2007, allegedly sent to the Department of Labor and Industries on claim number SB41082, [...], until alleged copies were provided to me through my attorney on December 14, 2009.

CABR at 121-122.

The question naturally arises as to why the Department informed Safeway it had received a February 6, 2007 notice of representation from Ms. Lee's Counsel for claim SB41077, but did not inform Safeway that it had received a notice of representation from Ms. Lee's Counsel for claim SB41082. The answer is that it would be illogical for the Department to recognize, or forward to Safeway, a February 6, 2007, notice of representation from Ms. Lee's Counsel on claim SB41082 because *claim SB41082 did not exist as of February 6, 2007.*

RCW 51.28 sets forth the requirements for the notice and report of accident – the worker's application for compensation. RCW 51.28.050 mandates that a worker file an application for benefits within one year of the date an injury occurred in order to receive compensation under the act. Under RCW 51.28.050, filing an application means a written document must be filed with the department or self-insured employer. *Wheaton v. Dep't of Labor & Indus.*, 40 Wash.2d 56, 58 (1952). While it is not a formal and highly technical requirement, in order to comply with the statute, writing filed must reasonably direct attention to the fact that an injury, with its particulars, has been sustained and that compensation is claimed. *Nelson v. Dep't of Labor and Indus.*, 9 Wash.2d 621, 629 (1941).

It is clear from the jurisdictional history for claim SB41082 that the application for benefits (SIF-2) was not even received by the Department until March 6, 2007. CABR at 52 and 148. Thus, pursuant to RCW 51.28.050, and as clarified by the Court of Appeals of Washington in *Nelson*, claim SB41082 did not exist until March 6, 2007. This is *one month after* Ms. Lee's Counsel sent the Department its February 6, 2007, notice of representation on this unborn claim. In fact, Ms. Lee did not even sign the SIF-2 for claim SB41082 until February 11, 2007, *five days after* Ms. Lee's Counsel purportedly sent the Department its notice of representation. CABR at 148. In fact, Michelle Morrison states in her January 7, 2010, Declaration that Ms. Lee was provided with the SIF-2 for claim SB41082 on February 11, 2007, and not before that date. CABR at 122.

It is preposterous that Ms. Lee attempts to assert that the Department is to recognize a February 6, 2007, notice of representation for a claim that according to RCW 51.28.050, did not even exist until March 6, 2007. To accept such an argument would require the Department to keep on file every notice of representation for claim numbers it has yet to have a record of, based on the possibility that some day an application for benefits will be filed for that claim number. To place such a requirement on the Department would be completely impractical, to say the least.

E. Pursuant to RCW 51.52.050, Even if Safeway had Received Ms. Lee's Counsel's February 6, 2007, Notice of Change of Address, it was Still Required to Send the August 16, 2007, Closing Order to Ms. Lee's Address as shown on her SIF-2 Because This was her Last Known Address as Shown by Safeway's Records.

Even if arguendo Safeway had received the February 6, 2007, representation letter and Notice of Change of Address from Ms. Lee's Counsel, or been forwarded the February 6, 2007, notice of representation sent to the Department, pursuant to RCW 51.52.050, Safeway was still required to send the August 16, 2007, closing order to Ms. Lee at 13802 6th Avenue East, Tacoma, Washington 98445. CABR at 148.

As previously discussed, RCW 51.52.050 states that whenever the self-insured employer has made any order, decision, or award, it shall promptly serve the worker with a copy thereof by mail, which shall be addressed to such person at his or her *last known address as shown by the records of the self-insured*. (Emphasis added).

On February 6, 2007, Ms. Lee's Counsel attempted to send Safeway a Notice of Change of Address. The notice stated that all communications related to claim SB41082 shall be communicated to the Law Offices of David B. Vail, P.O. Box 5707, Tacoma, WA 98415.

On February 11, 2007, *five days after* Ms. Lee's Counsel attempted to send Safeway the Notice of Change of Address, Ms. Lee completed and signed the SIF-2 for claim SB41082. CABR at 148. An examination of the SIF-2 clearly reveals that listed on the "mailing address" line is the following address: "13802 6th Avenue E. Tacoma, Washington 98445." Ms. Lee's SIF-2 for claim SB41082 was received by Safeway on March 6, 2007, *one month after* Ms. Lee's Counsel's February 6, 2007, Notice of Change of Address. Accordingly, even if Safeway had received Ms. Lee's Counsel's February 6, 2007, Notice of Change of Address, the mailing address on Ms. Lee's SIF-2, signed on February 11, 2007, and received by Safeway on March 6, 2007, would have subsequently updated Safeway's records to reflect this address as Ms. Lee's last known address. Thus Safeway properly complied with RCW 51.20.050, when it communicated the August 16, 2007, closing order to Ms. Lee at 13802 6th Avenue East, Tacoma, Washington 98445, the address on Ms. Lee's SIF-2 and the last known address of Ms. Lee as shown by Safeway's records.

F. It is Vital All Appropriate Parties be Placed on Notice When a Claimant has Retained Counsel, and in Cases Involving a Self-Insurer, it Should be Required that Counsel Send its Notice of Representation to the Department as Well as the Self-Insurer.

This case brings to light an extremely important issue in industrial insurance cases – placing all appropriate parties on notice of crucial matters. Washington State Industrial Insurance Law has explicitly recognized the importance of providing notice to all appropriate parties at certain times in the life of an industrial insurance claim.

For example, RCW 51.52.110 sets forth the requirements for taking an appeal to the Superior Court from a Board decision. RCW 51.52.110 states that an appeal to Superior Court shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board. *If the case is one involving a self-insurer, a copy of the notice of appeal shall also be served by mail, or personally, on such self-insurer.* (Emphasis added).

In cases involving a self-insured employer, the self-insurer has the authority, in certain circumstances to issue the closing order itself. Safeway contends that because it possesses this power it is vital that a worker's authorized representative not only serve the Department with a notice of representation, but the self-insurer as well, so that the self-insurer may communicate the closing order and any other orders to that authorized representative. Serving the self-insurer with the notice of representation is just as vital as serving the self-insurer with the notice of appeal to Superior Court. It appears that Ms. Lee's Counsel is aware of the importance of such notice, as evidenced by Counsel's attempt to send the February 6, 2007, notice of representation to Safeway, albeit to the wrong address. CABR at 93.

The Court of Appeals of Washington has held that the RCW 51.52.110 requirement of notice is a practical one meant to insure interested parties receive actual notice of appeals of Board decisions and is satisfied upon 1) receipt of actual notice to the Superior Court, or 2) service of the notice of appeal in a manner reasonably calculated to give notice. *Vasquez v. Department of Labor & Industries*, 44 Wash.App. 379, 385 (1986) (citing *In re Saltis*, 94 Wash.2d 889, 896 (1980)).

In City of Spokane, the Court of Appeals of Washington held that an employer's notice of appeal to Superior Court from the Board of Industrial Insurance Appeals' decision was not properly served on the Director of Department of Labor and Industries where notice was in an envelope erroneously addressed to the Director at the office of the Board. *City of Spokane v. Department of Labor and Industries*, 34 Wash.App. 581, 584-589 (1983).

The Court held that although the Board's secretary testified that in such cases she would readdress an envelope properly to the Director, whose office was in another building, and place it in interagency mail, there was no finding that such procedure was reasonably calculated to effect service on the Director. *Id.*

If the Court agrees that in cases involving self-insured employers, where the employer possesses the power to issue its own closing order, providing notice of representation to the employer itself is just as important as providing notice of an appeal to Superior Court, Appellant asks the Court issue a ruling in accordance with its decision in *City of Spokane*. Specifically, Appellant asks that the Court hold that a notice of representation erroneously addressed by Ms. Lee's Counsel and not received by Safeway, nor communicated in a manner reasonably calculated to be received by Safeway, was not sufficient to place Safeway on notice that Ms. Lee's Counsel represented Ms. Lee on claim SB41082. In addition, a notice of representation sent to the Department cannot be reasonably calculated to effect communication of the notice to Safeway. Accordingly, Safeway was not required to send the August 16, 2007, closing order to Ms. Lee's Counsel.

G. WAC 296-15-450 Provides that Self-Insurers Have the Authority to Close Certain Claims; There is no Requirement set Forth in this Section that the Self-Insurer Check if the Department has Received a Notice of Representation from Claimant's Counsel Before Issuing a Closing Order.

WAC 269-15, through statutory authority, allows self-insured employers the ability to take certain actions without the intervention of the Department. WAC 296-15-450 provides for the closure of self-insured claims. Specifically, it provides that the Department has the authority to close all self-insured claims and self-insurers have the authority to close certain claims. WAC 296-15-450(1)⁵.

There is no dispute that Safeway, the self-insurer in this case, had the authority to close claim SB41082. It is also not contended Safeway improperly closed the claim. The only contention Ms. Lee makes is that Safeway did not properly communicate the August 16, 2007, closing order to Ms. Lee's Counsel, pursuant to RCW 51.52.050.

⁵ Statutory Authority: RCW 51.04.020, 51.14.020, 51.32.190, 51.14.090, and 51.14.095. 06-06-066, § 296-15-450, filed 2/28/06, effective 4/1/06. Statutory Authority: RCW 51.32.190(6), 51.32.055 (8)(a) and (9)(a). 98-24-121, § 296-15-450, filed 12/2/98, effective 1/2/99.]

While there are many steps that the self-insurer must comply with in order to close a claim, and it should be noted that these steps are put in place to protect the rights of the worker, there is no indication in WAC 269-15 that the self-insurer must first check with the Department to determine if the Department has received a notice of representation from the work's authorized representative before the self-insurer issues a closing order. The responsibility is on the claimant and his or her attorney to notify the self-insurer that he or she is represented on a claim. Once again, Ms. Lee's Counsel seems to have been aware of this responsibility because Counsel attempted to communicate a notice of representation to Safeway on February 6, 2007. Unfortunately, Ms. Lee's Counsel failed in this attempt. Thus, Safeway not only had the authority to issue the August 16, 2007, closing order on claim SB41082, per WAC 296-15-450, Safeway properly communicated the order, pursuant to RCW 51.52.050, when it mailed the order to Ms. Lee at her address as shown on her SIF-2. CABR at 65 and 148.

V. CONCLUSION

For the foregoing reasons, the Court should reverse, in part, the May 20, 2011, Superior Court Order that reversed and remanded in part, the Board's March 5, 2010, Decision and Order, which held that there was no timely protest or request for reconsideration of the August 16, 2007, order and that the order became final and binding.

The applicable law in this matter clearly establishes that the Department is without authority to reconsider the August 16, 2007, order, because it was not timely appealed within the applicable sixty-day period.

Safeway's August 16, 2007, self-insured issued closing order is also final and binding because the Respondent has failed to demonstrate that the order was not properly communicated her.

Based on the evidence, and the arguments above, the Appellant respectfully requests that the Court find that the self-insured employer's August 16, 2007, closing order was final and binding on the parties.

DATED this 29th day of August, 2011.

Respectfully submitted,



Robert M. Arim, WSBA #27868
Attorney for Appellant,
Safeway Stores, Inc.

COURT OF APPEALS
DIVISION II

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

KIM L. LEE)	No. 42240-9-II
)	
Respondent,)	
v.)	CERTIFICATE OF SERVICE
)	
SAFEWAY STORES, INC.)	
)	
Appellant.)	

I certify that I caused a true and accurate copy of the foregoing BRIEF OF APPELLANT, to be served on the following parties in the manner indicated below on August 29, 2011.

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VIA HAND DELIVERY

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Safeway Stores, Inc.

DATED this 29th day of August, 2011.

THE LAW OFFICE OF ROBERT M. ARIM, PLLC



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