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STATE OF WASHINGTON
BY: *KSL*

No. 42240-9-II

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

KIM L. LEE,

Respondent,

v.

SAFEWAY STORES, INC.,

Appellant,

BRIEF OF RESPONDENT

Tara Jayne Reck, WSBA# 37815
Vail/Cross & Associates
819 Martin Luther King Jr. Way
P.O. Box 5707
Tacoma, WA 98415-0707
(253) 383-8770
Attorney for Kim Lee

ORIGINAL

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I. INTRODUCTION

Comes now the Respondent, Kim L. Lee, Plaintiff below, by and through her attorney of record, Tara Jayne Reck of the Law Offices of David B. Vail and Jennifer Cross-Euteneier & Associates, and hereby offers this responsive brief.

This case originates from an Administrative Law Review (ALR) appeal from a Proposed Decision and Order of the Board of Industrial Insurance Appeals (Board) dated March 5, 2010, review denied May 6, 2010 in which the Board granted the employer, Safeway's motion for summary judgment holding that there was no genuine issue of material fact as to whether an August 16, 2007 claim closing order was properly communicated to Kim Lee's then attending physician and her legal representative.

Following Kim Lee's appeal to Superior Court the employer filed a Motion for Summary judgment at that level. However, due to scheduling conflicts this motion was not heard until the bench trial date. Before entering her decision, Pierce County Superior Court Judge Katherine M. Stolz reviewed all of the material submitted in support and in response to the motion for summary judgment and through the parties trial briefing, she also heard oral argument for the parties. The Court affirmed the

Board's decision in part, refusing to expand on *Shafer*, a recent Supreme Court decision and finding that the attending physician was properly communicated the August 16, 2007 closing order. However, the Court reversed that portion of the Board's decision which found no genuine issue of material fact relating to communication of the August 16, 2007 order to Kim Lee's legal representative.

Kim Lee agrees that a genuine issue of material fact exists concerning this communication issue but not just with respect to the legal representative. There is also a genuine issue of material fact as to whether the order was communicated to the physician in the best position to respond to it. This matter must be remanded to the Board level for hearings to resolve the questions of fact that exist regarding communication of the August 16, 2007 closing order in claim number SB-41082.

II. ASSIGNMENTS OF ERROR

- A. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE AUGUST 16, 2007 CLOSING ORDER WAS PROPERLY COMMUNICATED TO THE PERSON PRIMARILY RESPONSIBLE FOR TREATING THE INJURED WORKER AND THE COURT WAS **INCORRECT** TO AFFIRM SUMMARY JUDGMENT ON THIS ISSUE.

1. The Board erred in granting, and the Court erred in affirming the Board's decision to grant summary judgment because a genuine issue of material fact exists as to whether Dr. Pittle was the person primarily responsible for Kim Lee's treatment as of August 16, 2007.

B. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE AUGUST 16, 2007 CLOSING ORDER WAS PROPERLY COMMUNICATED TO THE INJURED WORKER'S LEGAL REPRESENTATIVE AND THE COURT WAS **CORRECT** TO REVERSE SUMMARY JUDGMENT ON THIS ISSUE.

1. The Board erred in granting summary judgment, and the Court *correctly* reversed the Board's decision because a genuine issue of material fact exists as to whether the August 16, 2007 closing order was properly communicated to the claimant through her appointed legal representative.

III. ISSUES

A. Whether Superior Court was correct in affirming the Board's decision to grant summary judgment when a genuine issue of material fact exists as to whether the August 16, 2007 closing

order was properly communicated to Kim Lee's then attending physician.

B. Whether Superior Court was correct in reversing the Board's decision to grant summary judgment when there is a genuine issue of material fact as to whether the August 16, 2007 closing order was properly communicated to Kim Lee's appointed legal representative.

IV. STATEMENT OF THE CASE

A. FACTUAL AND PROCEDURAL HISTORY

While the statement of the case contained in Appellants brief accurately sets forth many of the facts pertinent to this appeal, some facts are missing and are therefore set out below.

1. Claim number SB-41077:

On December 4, 2006 the Department of Labor and Industries (Department) received an application for benefits for Kim Lee for a respiratory system claim. This claim was allowed and assigned claim number SB-41077. (Certified Appeal Board Record – CABR at p. 253). On February 6, 2007 Kim Lee retained the services of the Law Offices of David B. Vail and Jennifer Cross-Eutenier and Associates. Paralegal Tonja Holcomb submitted a notice of representation to the Department of

labor and Industries on that date. (CABR at p. 218). The Law Offices of David B. Vail and Jennifer Cross-Euteneier and Associates were added as representatives on the claim and the protest to any adverse orders issued within the precious sixty days was acknowledged. (CABR at p. 253).

2. Claim number SB-41082:

On March 6, 2007 the Department of Labor and Industries (Department) received an application for benefits from Kim Lee for a back injury sustained while working for Safeway stores on August 14, 2006. (CABR at p. 52). The claim was allowed. On August 16, 2007 the self-insured employer, Safeway, issued an order closing this claim. (CABR at p. 65). This order was mailed to Kim Lee and to Dr. Kaufman. (*Id.*) The notice of representation sent to the Department of Labor and Industries by paralegal Holcomb on February 6, 2007 contained both claim numbers, SB4-1082 typed and SB-41077 hand written. (CABR at p. 218). The subsequent paralegal, Teja M. Cronk discovered on March 7, 2008 that she had no access to this claim number. (CABR at p. 238). She contacted the Department on several occasions and finally submitted a new notice of representation on October 30, 2008. (CABR at p. 239).

3. Procedure Before the Board:

When Ms. Cronk discovered that an August 16, 2007 order had been issued that closed the claim, she protested the closure pointing out that the order had been sent to Dr. Kaufman when Kim Lee was treating with Dr. Pittle in August 2007. (CABR at pp. 265-266). Acting upon the protest, the Department canceled the closure by order dated March 12, 2009. (CABR at p. 52). The employer protested and the Department affirmed its order on July 15, 2009. (CABR at p. 52). As a result the employer appealed to the Board. The Board granted the appeal on September 21, 2009 and assigned it docket number 09 19536. (CABR at pp. 52-53). On October 3, 2009 the employer filed a motion for summary judgment before the Board. (CABR at pp. 57-63). After reviewing briefing and hearing oral argument the Board granted the employers motion for summary judgment on March 5, 2010 (CABR at pp. 20-26). Kim Lee petitioned for review and the Board denied that petition on May 6, 2010. (CABR at 1).

4. Superior Court Action:

Kim Lee timely appealed the Board's decision to Pierce County Superior Court. The matter was assigned to Department two, the Honorable Judge Katherine M. Stolz. ("Clerk's papers" herein after "CP")

at p. 23). Bench trial was set for March 8, 2011. (CP p. 23). On October 18, 2010 Safeway filed a motion for summary judgment. (CP at pp. 25-32). Kim Lee responded to that motion for summary judgment on January 10, 2011. (CP at p. 35).

However, when the parties appeared for argument, the Court did not have a copy of the “certified Appeal Board Record” and could not rule on the motion. (CABR at p. 54). On January 26, 2011 Safeway submitted a letter to the court asking the court to “consider the motion withdrawn”. (CABR at p. 54). The previously scheduled Bench Trial was reset to May 20, 2011 and the parties provided the court with trial briefing. (CABR at p. 56, p. 65, and p. 80).

On May 20, 2011 the Court had reviewed the briefing, had been provided with a copy of the “Certified Appeal Board Record” and heard oral argument from the parties. (Verbatim Report of Proceedings, May 20, 2011). On May 20, 2011 the court entered its order affirming the Board’s decision in part and reversing in part. The Court affirmed the Board’s decision that “Dr. Pittle was not the claimant’s attending physician for claim no. SB-41082 and granting summary judgment as to that issue was correct and is affirmed.” (CP at p. 87). However, the Court further ordered that “the Board was not correct in granting summary

judgment as to the issue of whether the August 16, 2007 order was properly communicated to claimant's representative and this matter is hereby remanded to the Board to address communication of the August 16m, 2007 order to claimant's representative." (*Id.*) The defendant, self-insured employer, Safeway Stores Inc. Timely appealed the Courts May 20, 2011 order. This is the matter now before the present Court.

V. ARGUMENT

The issue here stems initially from the Board's initial decision that there was *no genuine issue of material fact* regarding communication of the August 16, 2007 closing order to either the attending physician or Kim Lee's legal representative. However, on Appeal is Superior Court's *de novo* review of the Board's decision to grant summary judgment in which the Superior Court Judge found no genuine issue of material fact regarding communication to the attending physician but did find that there was a genuine issue regarding communication to the legal representative and remanded the matter to the Board to address this genuine issue of material fact.

Because there are genuine issues of material fact relating the communication for the August 16, 2007 order to **both** the attending physician and the legal representative, the Superior Court order under

appeal is partially correct. The Board was not correct when it granted summary judgment as to the issue of communication to the legal representative **AND** the Board was not correct when it granted summary judgment as to the issue of communication to the attending physician under *Schafer*.

A. STANDARD OF REVIEW

The findings and decision of the Board are considered prima facie correct. Relief from a decision of the Board is proper when it has erroneously interpreted or applied the law, the order is not supported by substantial evidence, or it is arbitrary or capricious. *Mt. Baker Roofing, Inc. v. Washington State Dept. of Labor and Industries*, 146 Wash.App. 429, 191 P.3d 65 (2008), amended on reconsideration.

The hearing in Superior Court on review is de novo, but is based on the same evidence and testimony before the Board. RCW 51.52.115; *Dupont v. Department of Labor and Indus.*, 46 Wash.App. 471, 476, 730 P.2d 1345 (1986). Superior Court may substitute its own findings and decision for the Board's if it finds, "from a fair preponderance of credible evidence," that the Board's findings and decisions are incorrect. *Weatherspoon v. Department of Labor and Indus.*, 55 Wash.App. 439,

440, 777 P.2d 1084 (1989); *Department of Labor and Indus. v. Moser*, 35 Wash.App. 204, 665 P.2d 926 (1983).

Appellate review in worker's Compensation cases is governed by RCW 51.52.140 which provides that an appeal shall lie from the judgment of the Superior Court as in other civil cases and that the ordinary practice in civil cases shall apply. Further, review by the Court of Appeals is limited to an examination of 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 flow from the findings. *Rogers v. Department of Labor and Industries*, 151 Wash.App. 174, 210 P.3d 355 (2009).

However, the instant appeal is initially from summary judgment in favor of the employer at the Board level. Therefore, the Court must decide if the record before Superior Court, with all facts and inferences considered in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wash.2d 434, 656 P.2d 1030 (1982); CR 56(c). The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.*

B. THE ACT WAS CREATED TO PROTECT AND PROVIDE BENEFITS FOR INJURED WORKERS AND THEIR BENEFICIARIES.

The Act was established to protect and provide benefits for injured workers. It must be emphasized that it has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Department of Labor and Industries*, 61 Wn.2d 439, 446 (1963); *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1; *Nelson v. Department of Labor and Industries*, 9, Wn.2d 621; and *Hilding v. Department of Labor and Industries*, 162 Wash. 168. Furthermore, as noted by the Washington Supreme Court in *Clauson v. Department of Labor and Industries*, 130 Wn. 2d 580 (1996) it is mandated that any doubt as to the meaning of the workers' compensation law be resolved in favor of the worker. *Id.*, at 586.

Because there are genuine issues of material fact relating to communication of the August 16, 2007 order to Kim Lee's attending physician and legal representative, the Board was incorrect when it entered summary judgment in favor of Safeway and Superior Court erred in affirming summary judgment as to the attending physician issue. However, because fair preponderance of credible evidence supports Superior Court's decision to remand the legal representative issue to the

Board because there are genuine issue so material fact, the Court did not err on this issue.

C. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE AUGUST 16, 2007 CLOSING ORDER WAS PROPERLY COMMUNICATED TO THE PERSON PRIMARILY RESPONSIBLE FOR TREATING THE INJURED WORKER AND THE COURT WAS INCORRECT TO AFFIRM SUMMARY JUDGMENT ON THIS ISSUE.

According to the Court in *Shafer*, allowing claim closure without notifying the attending physician would prevent **the person primarily responsible for treating the injured worker** from participating in the process that can result in closing a worker's claim. A central purpose of this notice requirement is to allow a party aggrieved by the closure order to seek reconsideration by the Department or to appeal the order to the Board. In *Shafer* because the doctor primarily responsible for treating the injured worker did not receive the revised closure order, the doctor's ability to appeal the order was compromised. *Shafer v. Department of Labor and Industries*, 166 Wash. 2d 710, 720, 213 P. 3d 591 (2009). In the instant case, Dr. Pittle is the doctor who was "the person primarily responsible for treating" Kim Less at the time the closing order was issued. Safeway submitted a statement from Dr. Pittle in support of his motion for summary judgment. Therein Dr. Pittle stated his position that although he treated Kim Lee for various health issues, he did not consider

himself the attending physician for claim number SB-41082, that he did not submit bills for that claim to the Department and that he was not treating Kim Lee as of September 9, 2009. (CABR at p. 126). However, Dr. Pittle's statement is from his perspective and cannot constitute a legal conclusion. Furthermore, never in this statement does Dr. Pittle state he was not the person primarily responsible for treating Kim Lee in August 2007 when the closing order was issued. This raises a genuine issue of material fact as to whether Dr. Pittle should have been communicated the August 16, 2007 order under *Shafer*. At a minimum, the Board should have heard testimony in order to make a factual determination as to whether Dr. Pittle was, in fact, the person primarily responsible for treating Kim Lee and in the best position to respond to the August 16, 2007 closing order. Evidence must be taken at the hearing level, to resolve this genuine issue of material fact.

D. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE AUGUST 16, 2007 CLOSING ORDER WAS PROPERLY COMMUNICATED TO THE INJURED WORKER'S LEGAL REPRESENTATIVE AND THE COURT WAS CORRECT TO REVERSE SUMMARY JUDGMENT ON THIS ISSUE.

As the appointed legal representative, the Law Offices of David B. Vail and Jennifer Cross-Euteneier and Associates should have been mailed a copy of the August 16, 2007 closing order because notice of

representation was submitted. However, there is a genuine issue of material fact regarding the notice of representation sent to the Department and whether Safeway was on notice under claim number SB-41082 that this law office represented Kim Lee. On February 6, 2007, Kim Lee met with David B. Vail and paralegal Tonja Holcomb as a possible new client. (CABR at p. 237). For claim no. SB-41082, Tonja Holcomb submitted a notice of representation to the Department and Self Insured claims manager Michelle Morrison. (CABR at p. 240). On February 12, 2007 Ms. Holcomb completed an "opening memo" which notes that Ms. Lee has a back claim and that the claim number is SB 41082. (CABR at p. 238). It appears that Ms. Holcomb added the claim number SB 41077 to the notice of representation and re-submitted it. (CABR at p. 244). The handwriting on the notice of representation "SB 41077" matches up to Ms. Holcomb's handwriting. (CABR at p. 238).

Safeway received the notice of representation for that claim number and mailed a copy of the May 11, 2007 closing order on that claim number to Kim Lee's attorney. (CABR at p. 253). Thereafter Ms. Holcomb protested the May 11, 2007 order on July 11, 2007. (CABR at p. 253). It should be noted that the May 11, 2007 order was mailed after the March 6, 2007 application for benefits was filed on claim number SB-41082 raising the genuine question of material fact, when the same notice of

representation form was sent to the same employer listing both claim numbers, how was the employer on notice of the representation on one claim, but not the other?

Ms. Holcomb discontinued her employment with the Law Offices of David B. Vail and Jennifer Cross-Euteneier and Associates prior to February 2008. All notes in the file indicate the Law Offices of David B. Vail and Jennifer Cross-Euteneier and Associates represented claimant on both claims. On March 7, 2008 shortly after beginning her employment with this office Teja Cronk attempted to review the claims online and discovered she had no access to the back claim. (CABR at pp. 237-239). As a result Ms. Cronk contacted the Department and left a message for claims manager Catherine Jones regarding the inability to view the claim online. (*Id.*) On May 20, 2008 Ms. Cronk again contacted the Department via telephone because the Law Offices of David B. Vail and Jennifer Cross-Euteneier and Associates were still unable to view the claim online. (*Id.*) Later that day Ms. Cronk's call was returned and she was informed that both claims had been closed. (*Id.*) On October 21, 2008 Ms. Cronk again contacted the Department and informed them that the Law Offices of David B. Vail and Jennifer Cross-Euteneier and Associates still could not view the claims online. (*Id.*) For the first time, Ms. Cronk was informed that there was no notice of representation

identified and was asked to submit a new notice of representation. (*Id.*) As a result, on October 30, 2008 Ms. Cronk sent a new notice of representation. (CABR at p. 248). Still being unable to view the claims online, Ms. Cronk again sent a notice of representation on November 3, 2008. (CABR at p. 250).

Ms. Cronk's multiple failed attempts to gain access to the file for claim number SB-41082 are further circumstantial evidence of the genuine issue of material fact in the instant matter, since it appears her efforts were not the first failed attempts to provide notice of representation and gain access to the file. Circumstantially it also begs the question of why it was so difficult for Kim Lee's legal representative to gain access to this file when representation under the other claim, with the same employer, Safeway, is well established.

There is a genuine issue of material fact relating to communication of the August 16, 2007 order to Kim Lee's legal representative. The Board failed to fully consider all of these facts in a light most favorable to Kim Lee when it granted summary judgment in favor of the employer. Because fair preponderance of credible evidence supports Superior Court's decision to remand the legal representative issue to the Board, the

Court did not err on this issue. Evidence must be taken at the hearing level, to resolve this genuine issue of material fact.

VI. CONCLUSION

In conclusion, Superior Court was correct in part and incorrect in part. Genuine issues of material fact exist as to whether the August 16, 2007 closing order was properly communicated both to the person primarily responsible for treating Kim Lee and to her appointed legal representative. The Board incorrectly entered summary judgment in favor of the employer, Safeway, on both issues. Superior Court correctly reversed the Board's decision as to communication to the legal representative and remanded the matter to the Board to address this issue. Superior Court erred in part because it should have also remanded the issue of communication to the attending physician to the Board. Evidence must be taken at the hearing level, to resolve these genuine issues of material fact.

Dated this 27th day of October, 2011.

Respectfully submitted,
VAIL-CROSS & ASSOCIATES

By: 
TARA JAYNE RECK
WSBA# 37815
Attorney for Respondent

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

11 OCT 2011 11:31
STATE OF WASHINGTON
BY: *ks*

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 27th day of October, 2011, the document to which this certificate is attached, Brief of Respondent, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Robert M. Arim
The Law Office of Robert M. Arim PLLC
777 108th Ave., NE, Suite 2250
Bellevue, WA 98004

Anastasia Sandstrom
Assistant Attorney General
800 Fifth Ave., Suite 2000, MS TB-14
Seattle, WA 98104-3188

DATED this 27th day of October, 2011.

Lynn M. Venegas
LYNN M. VENEGAS, Secretary