

No. 42703-6-II

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

---

ERIKA HARDY,

Appellant,

v.

FRED MEYER STORES, INC.,

Respondant,

---

APPELLANT'S OPENING BRIEF

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Karla E. Rood, WSBA# 42091  
Vail/Cross & Associates  
819 Martin Luther King Jr. Way  
P.O. Box 5707  
Tacoma, WA 98415-0707  
(253) 383-8770  
Attorney for Erika Hardy

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## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments**

1. Finding of Fact No. 6 insofar as it states that Ms. Hardy did not sustain any right shoulder condition arising naturally and proximately out of the distinctive conditions of her employment for Fred Meyer Stores, Inc., and becoming manifest on May 1, 2004.
2. Finding of Fact No. 12 to the extent Ms. Hardy's allowed bilateral shoulder claim was not fully considered and insofar as it states that during the period of March 29, 2006, through and as of December 20, 2007, Ms. Hardy's left shoulder strain, proximately caused by the occupational disease that became manifest on May 1, 2004, did not restrict her work activities.
3. Finding of Fact No. 13 to the extent Ms. Hardy's allowed bilateral shoulder claim was not fully considered and insofar as it states that during the period of March 29, 2006, through and as of December 20, 2007, the residual effects of the left shoulder strain that became manifest on May 1, 2004, did not preclude Ms. Hardy from obtaining or performing reasonably continuous gainful employment in the competitive labor market, when considered in conjunction with her age, education, work history, and preexisting disabilities.
4. Finding of Fact No. 14 to the extent Ms. Hardy's allowed bilateral shoulder claim was not fully considered and insofar as it states as of December 20, 2007, Ms. Hardy's condition, proximately caused by the left shoulder strain that became manifest on May 1, 2004, was fixed and stable and not in need of any proper and necessary medical treatment.
5. Finding of Fact No. 15 to the extent Ms. Hardy's allowed bilateral shoulder claim was not fully considered and insofar as it states as of December 20, 2007, Ms. Hardy had

no permanent impairment proximately caused by the left shoulder strain that became manifest on May 1, 2004.

6. Conclusion of Law No. 4 to the extent Ms. Hardy's allowed bilateral shoulder claim was not fully considered and insofar as it states that Fred Meyer Stores, Inc., is responsible for a left shoulder strain that became manifest on May 1, 2004. The self-insured employer is not responsible for any right shoulder, back, or mental conditions.
7. Conclusion of Law No. 5 to the extent Ms. Hardy's allowed bilateral shoulder claim was not fully considered and insofar as it states during the period of March 29, 2006, to December 20, 2007, Ms. Hardy was not temporarily totally disabled, nor did she experience a loss of earning power, as a proximate result of the left shoulder strain that became manifest on May 1, 2004, within the meaning of RCW 51.32.090.
8. Conclusion of Law No. 6 to the extent Ms. Hardy's allowed bilateral shoulder claim was not fully considered and insofar as it states that as of December 20, 2007, Ms. Hardy's left shoulder strain, proximately caused by the occupational disease that became manifest on May 1, 2004, was medically fixed and stable and not in need of further proper and necessary medical treatment, within the meaning of RCW 51.36.010.
9. Conclusion of Law No. 7 to the extent Ms. Hardy's allowed bilateral shoulder claim was not fully considered and insofar as it states that as of December 20, 2007, Ms. Hardy was not permanently partially disabled as a proximate result of the left shoulder strain that became manifest on May 1, 2004, within the meaning of RCW 51.32.080.
10. Conclusion of Law No. 8 to the extent Ms. Hardy's allowed bilateral shoulder claim was not fully considered and insofar as it states that as of December 20, 2007, Ms. Hardy was not permanently totally disabled as a proximate result

of the left shoulder strain that became manifest on May 1, 2004, within the meaning of RCW 51.08.160.

11. Conclusion of Law No. 9 to the extent Ms. Hardy's allowed bilateral shoulder claim was not fully considered and insofar as it states that the December 20, 2007 Department order is correct and is affirmed.

(1) Assignments of Error at the Superior Court

1. The trial court erred in entering Conclusion of Law Number 2
2. The trial court erred in entering Conclusion of Law Number 4.
3. The trial court erred in failing to consider evidence properly before it regarding the Department of Labor and Industries Order dated June 22, 2004.

**II. APPELLANT'S STATEMENT OF THE ISSUES**

1. Whether the Board, and the Superior Court below in affirming, committed error by adjudicating out Ms. Hardy's right shoulder condition, not considering all residual effects of her allowed bilateral shoulder conditions in making benefit related determinations, and affirming the Department Order closing Claim No: W-970668 when this Department Order allowed Ms. Hardy's claim for bilateral shoulder conditions and was final and binding?
2. Whether the Superior Court below erred in not considering evidence regarding the Department Order allowing Ms. Hardy's bilateral shoulder conditions?

### III. APPELLANT'S STATEMENT OF THE CASE

Appellant Erika Hardy is an injured worker. During the course of her employment with Fred Meyer Stores, Inc. (hereinafter Fred Meyer) which commenced in 1985, Ms. Hardy worked many years at the service desk and as a customer service representative before being transferred to the position of general cashier or checker in January 2004. Clerk's Papers (hereinafter CP) at 33. On May 1, 2004, after approximately nineteen years working at Fred Meyer, Ms. Hardy sought medical attention from Dr. Louis Enkema at the Pacific General Medical Clinic for bilateral shoulder conditions. CP at 34. Dr. Enkema testified that when he saw Ms. Hardy for the first time, "both shoulders seemed to be involved," and that the examinations were basically symmetrical between the right and the left with the exception that she had more pain complaints on the left. CABR at 13, 15. He diagnosed Ms. Hardy with bilateral shoulder strain and bilateral shoulder tendonitis and assisted with the filing of her application for Worker's Compensation benefits under Claim No: W-970668 in accordance with RCW 51.28.020. CP at 7, 49. Dr. Enkema listed on the Physician's Initial Report his diagnosis of bilateral shoulder strain and bilateral A-C joint tendonitis. *Id.* When Dr. Enkema saw Ms. Hardy again on May 8<sup>th</sup> or 9<sup>th</sup> of 2004, his impressions again included "bilateral shoulder strain." CABR at 20.

The Department of Labor and Industries (hereinafter Department) issued an order dated June 22, 2004 stating “The above named worker sustained an injury or occupational disease while in the course of employment with a self-insured employer. Payment of time loss compensation by the self-insured employer has been reported in accordance with WAC 296-15-420. This claim is allowed. The self-insured employer will pay all medical and time loss benefits as may be indicated in accordance with the industrial insurance laws.” CP at 50. That order further conspicuously stated that it “will become final 60 days after your receive it unless your file a written request for reconsideration or an appeal within that time. Your request or appeal should include the reasons you believe this decision is wrong.” CP at 50. Sixty days elapsed with no filing of a protest or an appeal; in fact no protest or appeal of this order has ever been made.

On October 21, 2004, the Department issued a letter stating Ms. Hardy had previously filed an accident report, with Claim No. W-970668, for the bilateral shoulder injury/occupational disease of May 1, 2004, thus its received second accident report for the same condition(s) was a duplicate of Claim No. W-970668 and would be consolidated under the Claim No W-970668. CP at 54. Claim No. W-970668 was closed with the Department Order dated August 2, 2007. CARB 89-90. This order stated

that the claim was closed without further award of time-loss compensation or an award of permanent partial disability. *Id.* On September 21, 2007, this Department Order was timely protested, preventing it from becoming final and binding, by Ms. Hardy. CARB at 90. On December 20, 2007, the Department affirmed its August 2, 2007 closing order and Ms. Hardy timely appealed to the Board of Industrial Insurance Appeals (hereinafter Board). *Id.*

The Board granted the appeal and docketed it number 08 11627. *Id.* This docket number was consolidated with another appeal for hearing efficiency purposes, but the Industrial Appeals Judge (hereinafter IAJ) issued two separate proposed decisions and orders to address each claim number. CP at 36. On April 30, 2009, the IAJ issued his proposed decision and order addressing Claim No. W-970668 in which he affirmed the claim closure and included a finding of fact and conclusion of law that Ms. Hardy's occupational disease manifested itself as of May 1, 2004, and included only her left shoulder. CABR at 67. Ms. Hardy proceeded to file a Petition for Review where she properly raised the issue that the IAJ failed to consider her right shoulder condition and its impact on her ability to maintain employment with success and continuity. CABR at 30.

The Board granted Ms. Hardy's Petition for Review and on October 13, 2009, issued one decision addressing both claims. *Id.* In

doing so the Board issued Finding of Fact No. 3 stating “The medical records of Louis Enkema, M.D. placed the self-insured employer on notice that Erika Hardy was contending she had bilateral shoulder conditions arising out of her employment with Fred Meyer Stores, Inc., that became manifest on May 1, 2004.” CABR at 19. After acknowledging that Fred Meyer had notice Ms. Hardy was contending that both her shoulders manifested conditions on May 1, 2004, the Board curiously went on in its Findings of Fact Nos. 5 and 6 to state that Ms. Hardy only sustained a left shoulder strain, and not any right shoulder condition, that arose naturally and proximately out of the distinctive conditions of her employment with Fred Meyer and became manifest on May 1, 2004, when it first required treatment. CABR at 19-20.

The Board went on further only considering Ms. Hardy’s left shoulder strain, and not the bilateral shoulder condition she was contending, that the medical records showed, and that was allowed by the unprotested and unappealed Department Order dated June 22, 2004. The Board only considered the residuals and effects of her left shoulder strain, not her bilateral shoulder conditions, in making findings on treatment, work restrictions, permanent impairment, and employability. CABR at 20-21. The Board’s Conclusion of Law No. 4 stated “Fred Meyer Stores, Inc., is responsible for a left shoulder strain that became manifest on May

1, 2004. The self-insured employer is not responsible for any right shoulder...conditions.” CABR at 21. The Board further concluded that Ms. Hardy was not temporarily totally disabled for a period, permanently partially disabled, permanently totally disabled, nor did she experience a loss of earning power due to her left shoulder strain. *Id.* Also, the Board concluded that Ms. Hardy’s left shoulder strain was medically fixed and stable and not in need of further treatment and that the December 20, 2007 Department Order closing the claim was correct and affirmed. *Id.*

Following the Board’s Decision and Order, Ms. Hardy filed her Notice of Appeal on November 11, 2009. CP at 1. Ms. Hardy then made a motion for judgment as a matter of law under civil rule 50 arguing that no issues of fact exist as to the denial of her right shoulder condition as an occupational disease claim under Claim No. W-970668. CP at 2. Ms. Hardy argued that because her claim was filed for bilateral shoulder strain and bilateral shoulder tendonitis, was allowed by the Department Order dated June 22, 2004, and was neither protested nor appealed by Fred Meyer when it had notice of the claimed bilateral shoulder conditions arising out of her employment as evidenced by the Board’s unappealed Finding of Fact No. 3, the Department Order was res judicata as to the issues therein and it could not later be held that her right shoulder condition was not a part of her occupational disease claim. CP at 33.

In denying the motion, the trial court noted Ms. Hardy failed to prove the June 22, 2004 Department Order should be considered res judicata with respect to her right shoulder condition because the evidence in the record did not establish a final determination on that issue, it was prohibited under RCW 51.52.115 and *Johnson v. Weyerhaeuser*, 134 Wn.2d 795, 953 P.2d 800 (1998) from considering other evidence not in front of the Board, and because that issue was not raised in her Petition for Review to the Board, it was precluded from considering it. CP at 128. A bench trial proceeded wherein the trial court adopted the Board's Findings of Fact in their entirety and entered conclusions of law that no substantive rulings below constitute reversible error of law and the record taken as a whole indicates that the Findings of Fact by the Board are supported by substantial evidence. CP at 141. Ms. Hardy filed her Notice of Appeal on October 13, 2011. CP at 143. This appeal follows.

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

##### (1) Standard of Review

Judicial review of matters arising under the Industrial Insurance Act is governed by RCW 51.52.110 and RCW 51.52.115. *Ball-Foster Glass Container Co. v. Giovanelli*, 128 Wn. App. 846, 849, 117 P.3d 365 (2005). The hearing in the superior court is de novo. RCW 51.52.115. When a party appeals from a decision of the Board and the superior court

affirms the Board's decision, this Court's inquiry is the same as that of the superior court. *Littlejohn Construction Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994). Appellate review is limited to the evidence and testimony presented to the Board. *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002).

(2) Statutory Interpretation Under Title 51

Courts must liberally construe the Industrial Insurance Act (hereinafter IIA) in favor of the injured worker. Title 51 RCW has its own rule of statutory construction, in RCW 51.12.010, which provides, in relevant part:

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

In this state, injured workers' rights to benefits are statutory. Washington's workers' compensation law was enacted in 1911, the result of a compromise between employers and workers such that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy." RCW 51.04.010. Workers receive less than full tort damages but are spared the expense and uncertainty of

litigation. See *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 469-70, 745 P.2d 1295 (1987).

As the IIA mandates that its provisions be “liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment,” RCW 51.12.010, Courts, therefore, are to resolve doubts as to the meaning of the IIA in favor of the injured worker. *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wash.2d 222, 230, 883 P.2d 1370, 915 P.2d 519 (1994). Note that it is not any particular portion of Title 51 that is to be liberally construed. Rather, it is the *entire statutory scheme* that receives the benefit of that construction.

Each statutory provision should be read by reference to the whole act. “We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions.” *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000), *aff'd*, 144 Wn.2d 907, 32 P.3d 250 (2001). The Supreme Court noted:

Historically, this Court has followed the rule that each provision of a statute should be read together with other provisions in order to determine legislative intent. “The purpose of reading statutory provisions in *pari materia* with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provision ‘as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves, which maintains the integrity of the respective statutes.’”

*In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 810 (1998), citing *State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980).

In addition to liberal construction, Washington courts have mandated that doubts as to the meaning of the workers' compensation law be resolved in favor of the worker. See, *Clauson v. Department of Labor and Industries*, 130 Wn. 2d 580, 586, 925 P.2d 624 (1996)(where a worker who had been awarded a permanent total disability pension under one worker's compensation claim received a permanent partial disability award for a prior injury under a separate, pre-existing claim. Where the court held that the timing of the closure of claims should not work to the disadvantage of an injured worker.); see also, *McClelland v. ITT Rayonier Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992)(a case involving an employee's claim for worker's compensation benefits for an aggravation of his psychological condition of major depression coupled with simple phobia).

(3) The Act's Purpose and Policies when Looking at this Case.

In order for a proper understanding of the importance of this case and the issues presented, it is important to first look at what brought about Washington's Industrial Insurance Act and the policies and presumptions that came with it.

The Industrial Insurance Act was established to protect and provide benefits for injured workers. As noted for many years by the courts, the enactment of the Industrial Insurance Act in 1911 by the Washington State Legislature was due to a, “finding that the remedy of the injured workman had been uncertain, slow and inadequate. . . .” 1911 Wash. Law, ch. 74; *see, e.g. Lee v. Department of Labor and Industries*, 81 Wn. 2d 937, 506 P.2d 308, 309 (1973)(a case involving a Mandamus proceeding by injured workman to compel director of labor and industries to obey and carry out order of board of industrial insurance appeals directing department of labor and industries to provide workman additional treatment). The declared purpose of the Act was to provide sure and certain relief for injured workmen. *Id.*

The Washington Supreme Court has long held that the Industrial Insurance Act is to be liberally applied in favor of the injured worker. The court stated in *Johnson v. Department of Labor and Industries*, 134 Wn. 2d 795, 953 P.2d 800 (1998), “We have previously recognized the change in the common law brought about by the Legislature’s enactment of the Industrial Insurance Act and that the Act is remedial in nature and ‘is to be **liberally applied** to achieve its **purpose of providing compensation to all covered persons injured** in their employment.’” 134 Wn. 2d at 799,

953 P.2d at 802. (Emphasis added)(Quoting *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635 (1979)).

As the cases above establish, the Industrial Insurance Act was enacted to compensate as fully as possible workers injured on the job. With the long standing policy of liberal construction of the Act in favor of the worker, the remedial nature of the act, in conjunction with the mandate that any doubt be resolved in favor of the worker, supports a finding by this Court reversing the trial court's ruling as it relates to the affirmance of the Board's determinations, and the remanding of this claim back down to the Department to administer it to include consideration of the left and right shoulder occupational disease condition(s) and address all other benefit related issues including the need for treatment, entitlement to time loss compensation, permanent total disability, permanent partial disability and the causal relationship of other conditions as both the Board's and the trial court's determination that Ms. Hardy's right shoulder conditions were not a part of her accepted claim are contrary to the underlying policies of the Industrial Insurance Act.

#### **V. ARGUMENT FOR REVERSAL**

- (1) The Doctrine of Res Judicata Applies to the Department Order Dated June 22, 2004, Thus Precluding Any Reargument on or Readjudication of the Allowed Conditions Under the Claim.

The doctrine of claim preclusion applies to a final judgment by the Department as it would to an unappealed order of a trial court; if a party to a claim believes the Department decision is in error it must appeal. *Marley v. Department of Labor and Industries*, 125 Wn.2d 533, 537, 866 P.2d 189 (1994). “The failure to appeal an order,...turns the order into a final adjudication, precluding any reargument of the same claim.” *Id.* A Department order is final and conclusive, unless it is set aside on an appeal authorized by statute, or unless fraud, or something of like nature, which equity recognizes as sufficient to vacate a judgment, has intervened. Thus, **an unappealed Department order is res judicata as to the issues encompassed within its terms.** *Department of Labor and Industries v. Fields*, 112 Wn. App. 450, 455, 45 P.3d 1121 (2002) (emphasis added).

Here, the Department Order and Notice dated June 22, 2004, in regards to claim number W-970668, stated that Erika Hardy suffered an injury or occupational disease while in the course of employment with Fred Meyer, Inc. (hereinafter Fred Meyer) on May 1, 2004, and that the claim was allowed. CP at 50. That order further conspicuously stated that it “will become final 60 days after you receive it unless you file a written request for reconsideration or an appeal within that time. Your request or appeal should include the reasons you believe this decision is wrong.” *Id.*

Additionally, Dr. Louis Enkema's initial physician's report for Claim No. W-970668, completed on May 1, 2004, while assisting Ms. Hardy in filing her claim, was mailed to Fred Meyer and clearly listed the diagnoses of strained bilateral shoulder and bilateral A-C joint tendonitis with a manifestation date of May 1, 2004. CP at 49. Thus, Fred Meyer was on notice as to what Ms. Hardy was contending in her worker's compensation claim, bilateral shoulder conditions that arose out of the distinctive conditions of her employment.

The Board and trial court even stated as much in their Findings of Fact. In its Decision and Order, the Board's Finding of Fact No. 3, which was not appealed and was adopted by the trial court, stated "the medical records of Louis Enkema, M.D., placed the self-insured employer on notice that Erika Hardy was contending she had bilateral shoulder conditions arising out of her employment with Fred Meyer Stores, Inc., that became manifest on May 1, 2004." CABR 19. Fred Meyer cannot argue that it did not have notice of the fact that Ms. Hardy was contending she had bilateral shoulder conditions that became manifest on May 1, 2004. Fred Meyer had notice that both her left and right shoulders were being contended under the claim and it had an opportunity to appeal the June 22, 2004 Department Order which allowed Ms. Hardy's occupational disease claim for bilateral shoulder conditions.

Moreover, it is clear that the Department intended to allow both shoulders under Claim No. W-970668. In its October 21, 2004 letter, the Department stated that an accident report had previously been filed under Claim No. W-970668 for the bilateral shoulder injury or occupational disease of May 1, 2004. CP at 54. A second accident report was deemed duplicative and was consolidated with Claim No. W-970668. *Id.* The Department intended to and did allow both shoulder conditions under the Claim No. W-970668.

The time for an appeal of a Department order is also specified in RCW 51.52.060(1)(a) which provides in pertinent part:

[An] employer...aggrieved by an order...must, before he or she appeals to the courts, file with the board and the director, by mail or personally, **within sixty days from the day on which a copy of the order...was communicated to such person**, a notice of appeal to the board. (emphasis added).

If the employer fails to appeal within the 60 day time limit, “the claim is deemed res judicata on the issues the order encompassed, and the failure to appeal an order...turns the order into a final adjudication, precluding any reargument.” *Pearson v. Dep’t of Labor & Indus.*, 164 Wn. App. 426, 433, 262 P.3d 837 (2011).

Because neither a protest nor an appeal was made, this Department Order, establishing that both Ms. Hardy’s left and right shoulder conditions were included in the claim, became a final adjudication. The

doctrine of res judicata precludes the rearguing or readjudicating of this. The issue of whether Ms. Hardy's right shoulder was allowed under the claim was settled; bilateral shoulder conditions were accepted under the claim. The Board could not readjudicate the issue of whether Ms. Hardy's right shoulder was involved and erred by finding and concluding that only the left shoulder condition was caused by her employment with Fred Meyer.

- (2) This Matter Must Be Remanded to the Department So That All Allowed Conditions Can be Considered in Rendering a Decision on Final Claim Benefits.

Both the trial court's and Board's findings and conclusions are based upon the erroneous conclusion that Claim No. W-970668 is only a left shoulder occupational disease claim. Thus, the Board's decisions as to all other issues that stem from that error are erroneous as well. In only considering her left shoulder strain, the Board explicitly did not consider the residual effects of Ms. Hardy's allowed bilateral shoulder conditions. This was clear error. The Board had no authority to adjudicate that Ms. Hardy's right shoulder condition was not a part of the claim. Res judicata applies to the unappealed Department Order dated June 22, 2004, which was a determination that both shoulders were a part of the occupational disease claim.

Based on the final and binding nature of the Department order, the Board and the trial court cannot now say that the claim was only allowed for the left shoulder condition. Under the Board's own Findings of Fact and Conclusions of Law, this claim should go back down to the Department. The Board took responsibility for Ms. Hardy's right shoulder condition away from Fred Meyer, and only considered her left shoulder condition in determining things such as temporary total disability, loss of earning power, whether further treatment was needed, permanent partial disability, and permanent total disability. Ms. Hardy's claim was allowed for bilateral shoulder conditions, thus both right and left shoulder conditions must be considered in determining all benefit related issues. There can be no readjudication or reargument on this issue, the claim must go back down to the Department for proper adjudication of benefits.

(3) The Trial Court Could Appropriately Consider the Res Judicata Issue and Corroborative Evidence Not in Front of the Board

The Res Judicata issue in this case concerning the June 22, 2004 Department Order allowing Ms. Hardy's claim for her bilateral shoulder condition, was not an issue until the IAJ explicitly made it an issue by concluding that Ms. Hardy's occupational disease which manifested itself on May 1, 2004 included only her left shoulder. Ms. Hardy properly raised this in her Petition for Review stating that her right shoulder

condition should have been considered and the IAJ failed to fully consider it. CABR at 30. Additionally, the question of notice was also settled in the Board's Findings of Fact where it was stated that Fred Meyer had notice Ms. Hardy was contending she had bilateral shoulder conditions arising out of her employment. CABR at 19. Thus, the issue of res judicata on the Department's allowed claim for Ms. Hardy's bilateral shoulder conditions was properly explicitly raised at the trial court level as there was no issue as to whether the allowed claim covered both shoulders until the Board determined on its own, in the face of a final and binding Department order, that it only covered the left shoulder conditions and found that Fred Meyer had notice of Ms. Hardy's contention of the bilateral nature of her condition arising out of her employment.

## **VI. CONCLUSION**

Washington's Industrial Insurance Act was enacted to provide injured workers sure and certain relief. As seen in the above cases, this relief was to be provided to the fullest extent possible as allowed under the Act. Pursuant to the above case law, the Court committed error when it affirmed the Board's readjudication and determination that Ms. Hardy's occupational disease claim only involved her left shoulder and both the Court and the Board erred by not fully considering her unappealed

allowed occupational disease claim encompassing bilateral shoulder conditions.

Ms. Hardy respectfully requests this Court to reverse the Superior Court's judgment and remand this matter back to the Department of Labor and Industries to make a decision on final claim benefits fully considering all of Ms. Hardy's allowed conditions with a finding that the Department Order dated June 22, 2004 was Res Judicata and that the Board could not readjudicate the final and conclusive determination that Ms. Hardy's occupational disease allowed for bilateral shoulder conditions involved both her left and right shoulders and that the Board did not have authority to adjudicate that no right shoulder condition was involved.

DATED this 2nd day of April, 2012.

DAVID B. VAIL & ASSOCIATES

  
KARLA E. ROOD, WSBA # 42091  
Attorney for Appellant

**CERTIFICATE OF MAILING**

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 2nd day of April, 2012, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Anastasia R. Sandstrom  
Assistant Attorney General  
800 5<sup>th</sup> Ave., Suite 2000  
Seattle, WA 98104-3188

Kathy I. Eims  
Eims & Flynn  
216 1<sup>st</sup> Ave. S., Suite 310  
Seattle, WA 98104-3453

DATED this 2nd day of April, 2012.

  
LYNN M. VENEGAS, Secretary