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STATE OF WASHINGTON
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No. 42703-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Erika Hardy,
Appellant,

v.

Fred Meyer Stores, Inc.,
Respondent.

Brief of Respondent Fred Meyer Stores, Inc.

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I. INTRODUCTION

This is a workers' compensation matter under RCW Title 51, of the Industrial Insurance Act. Appellant Erika Hardy (hereinafter "Hardy") appeals from a Pierce County Superior Court decision which affirmed an administrative decision by the Board of Industrial Insurance Appeals (hereinafter "Board"). The Board had previously affirmed determinations by the Department of Labor and Industries (hereinafter "Department") relating to two separate workers' compensation claims filed by Hardy.

The argument put forth by Hardy in this appeal relates to only one of her claims, W970668. Based on the evidence presented to the Board, that claim was filed for a left shoulder condition. Her claim was allowed and Hardy was provided with applicable benefits. After her claim was closed by the Department, Hardy appealed to the Board seeking additional benefits, including allowance of an alleged right shoulder condition as well as back and mental health conditions. Hardy, aggrieved by the Board decision finding that she did not have a right shoulder condition causally related to the claim, appealed to Superior Court, which affirmed the Board's decision.

Hardy now seeks to reverse those decisions through the novel and unsupported legal theory that the Department's original order allowing her claim necessarily included allowance of her alleged right shoulder

condition. She contends that because the Department's allowance order was not appealed, acceptance of her alleged right shoulder condition under the claim is "res judicata." Thus, under her theory—a theory that was raised for the first time at Superior Court—the decisions reached by the Board and Superior Court were erroneous in that they concluded that Hardy did not have an occupationally-related right shoulder condition, an issue she claims they did not have authority to consider.

The problem for Hardy is that the only evidence in the Board record regarding the Department's allowance order suggests that it was **silent** as to the conditions allowed and in no way apprised the parties that certain conditions were or were not accepted under the claim as a matter of law. Thus, Hardy's argument that the allowance order included acceptance of a right shoulder condition necessarily fails.

Undeterred, Hardy sought to introduce new evidence at Superior Court which was not presented to the Board or part of the Board record. This evidence was properly rejected by the trial court based on RCW 51.52.115, which mandates that review of Board decisions must be based solely on the evidence presented to the Board.

Additionally, Hardy provides no legal authority of any kind supporting her theory. Rather, the legal authority she does cite refers to the generally accepted notion that parties aggrieved by a Department order

must appeal within the statutory time frame and that failure to do so renders that order final and binding. Respondent Fred Meyer has no dispute with that as a general proposition. However, Hardy does not and cannot provide legal authority supporting her argument that a party has an obligation to appeal an order that is **silent** as to the conditions accepted. The reason for this is that the legal authority stands for the exact opposite: that only when a party has clear and unequivocal notice of the issues adjudicated by an order, and such notice is provided within the actual terms of such order, can a party be precluded by the principles of “res judicata” from litigating a specific issue at a later time should it fail to appeal that order. That is simply not the case here. Hardy is well aware that the Department’s allowance order was silent as to the alleged right shoulder condition; thus, her “res judicata” argument was properly rejected by the trial court.

Despite the knowledge that the allowance order was silent, Hardy still attempts to argue that Fred Meyer had “notice” that she was contending a right shoulder condition under the claim and thus had an obligation to appeal the silent allowance order. As with her other arguments, this is again based upon documents which were properly rejected by the trial court as they were not contained in the Board record.

Notwithstanding the fact that there is no legal authority supporting her “notice” theory, the evidence in this case does not establish that Fred Meyer actually had notice within the statutory time frame for appealing the Department’s allowance order. Hardy’s failure to put forth such evidence at hearing before the Board is fatal to her argument here. Indeed, even if this Court decides to consider the improperly offered evidence it does not support her arguments.

Finally, Hardy also relies in large part on the proposition that the Industrial Insurance Act (Title 51 RCW) is to be liberally construed in favor of the injured worker, in this case Hardy. However, other than very general references to that fact, Hardy identifies no part of Title 51 which she would have this Court construe in her favor. Further, acceptance of Hardy’s argument would actually be contrary to the Industrial Insurance Act’s mandate of providing sure and certain relief to all workers, as it would undoubtedly result in more litigation at the onset of a claim.

Fred Meyer respectfully requests that this Court affirm the decisions reached by the trial court, Board and Department and reject Hardy’s arguments here.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Board and Superior Court have jurisdiction to and properly adjudicate whether Hardy’s alleged right shoulder condition was

causally related to her claim W970668 when the Department's order allowing the claim was silent as to the conditions allowed or accepted under the claim and the parties presented evidence on the causal relationship of the right shoulder at hearings before the Board?

2. Did the Superior Court properly reject Hardy's newly offered evidence and arguments that the doctrine of "res judicata" precluded any consideration of the causal relationship between her alleged right shoulder condition and her claim when the parties did not have clear and unequivocal notice in the Department's allowance order as to what conditions were being allowed?

III. STATEMENT OF THE CASE

Hardy filed an Application for Benefits under claim W970668 alleging a left shoulder condition arising out of her employment with Fred Meyer. Certified Appeal Board Record (CABR) at 19, 88.¹ The Department issued an order allowing the claim on June 22, 2004. *Id.* After her claim was allowed, Hardy received industrial insurance benefits including time loss compensation and medical benefits. CABR at 88. The

¹ The CABR contains the record of the hearing before the Board, as well as the deposition transcripts of the testifying experts. References to testimony at the Board hearing is by date of the hearing and page number of the transcript. *E.g.*, Tr. 11/25/08 at 8. Deposition testimony will be referenced by name of the deponent and page number. *E.g.*, Gritzka Dep. at 10.

Department closed the claim by order dated December 20, 2007. CABR at 73. The Department's December 20, 2007 order affirmed an earlier Department order dated August 2, 2007 which closed the claim with time loss compensation benefits as paid and no award for permanent partial disability. CABR at 73-74.

Hardy subsequently appealed the Department's December 20, 2007 order to the Board. Hardy alleged, in pertinent part, as follows:

II

That the *injury or occupational exposure* occurred on or about 05/20/07; that the claimant appeals injuries consisting of *Right shoulder, right low back, left shoulder, and any other conditions relating to this industrial injury and/or occupational exposure and any other conditions aggravated by this industrial injury and/or occupational exposure. [sic]*

III

That Claimant appeals from the orders referred to herein on the grounds that said orders are unjust and unlawful in that Claimant is entitled to reopening of the claim, further treatment, *acceptance of denied conditions*, increase in the time loss compensation rate, time loss benefit, interest and penalties, payment of medical bills, loss of earning power, vocational rehabilitation, increased permanent partial disability, and/or permanent total disability.

CABR at 70 (emphasis added). On February 21, 2008, Hardy filed an Amended Notice of Appeal in which she alleged "[t]hat the injury or

occupational exposure occurred on or about 05/01/04...” CABR at 78, line 2. There was no issue raised in her Notice of Appeal (or Amended Notice) regarding the “res judicata” effect of the Department’s June 22, 2004 allowance order in her appeal. CABR at 70, 78.

On May 6, 2008, the Board held a conference to discuss the various issues raised in Hardy’s appeal, including the Board’s jurisdiction to hear the appeal. CABR at 213. Prior to this conference, the Board provided the parties with a document entitled “Jurisdictional History.” The following language appeared on the face of this document:

Please review the Jurisdictional History and note any errors or additions. This is a summary of Department actions relevant to this appeal. The summary may not include every action taken by the Department. *At the initial conference you will be asked to stipulate to the correctness of these facts for the purposes of establishing the Board’s jurisdiction to hear the case and determine the issues to be resolved.*

CABR at 88 (emphasis added).

During the May 6, 2008 conference both parties agreed that the Board’s “Jurisdictional History” was correct and should be included in the Board record for jurisdictional purposes. CABR at 88. During that same conference, the Industrial Appeals Judge, along with the parties, determined the issues to be addressed by the Board under this appeal. CABR at 96.

Following the May 6, 2008 conference, the Board issued an Order Establishing Litigation Schedule. This document delineated the issues presented in this appeal. This order, among other things, identified the following issue: “2) whether the claimant’s mental health, lower back, and right shoulder conditions were proximately caused by the May 1, 2004 industrial injury.” CABR at 96. Neither party appealed, protested or attempted to modify this order in any way. The Board subsequently held hearings and the parties presented all their evidence before the Board.

At no time did Hardy contend that her right shoulder condition had been accepted as an occupational disease under claim W970668 as a matter of law. Not only did she fail to raise this issue, she presented no evidence whatsoever regarding the “res judicata” effect of the Department’s June 22, 2004 allowance order in hearings before the Board. Rather, she proceeded to hearing and presented evidence on the issues outlined in the Board’s litigation order. Based on the evidence presented during the hearing process, the Board issued a final Decision and Order on October 13, 2009. CABR at 2-22. All of the evidence presented and relied upon by the Board is contained in the Certified Appeal Board Record currently before this Court.

Hardy subsequently appealed to Pierce County Superior Court. CP at 1. It was there that she first raised the “res judicata” issue by filing a

CR 50 motion. CP at 29-44. Attached to her motion was an affidavit from her attorney which attached a number of documents not part of the Certified Appeal Board Record. CP at 45-58. These included the June 22, 2004 allowance order. CP at 50. Hardy's motion was denied by the trial court on the basis that she failed to prove that the June 22, 2004 allowance order should be considered *res judicata* with respect to her right shoulder condition as well as on the grounds that the trial court was statutorily prohibited from considering her newly offered evidence. CP 127-30.

After a bench trial the Superior Court affirmed the Board's October 13, 2009 Decision and Order. CP at 139-143.

IV. STANDARD OF REVIEW

Superior Court review of a Board of Industrial Insurance Appeals decision is *de novo*, but **must be based on the evidence presented to the Board**. RCW 51.52.115; *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998) (emphasis added).

In reviewing the Superior Court's decision on review of a determination by the Board of Industrial Insurance Appeals, the role of the Court of Appeals is to determine whether the trial court's findings, to which error is assigned, are supported by substantial evidence and whether conclusions of law flow therefrom. *Grimes v. Lakeside Industries*, 78 Wn. App. 554, 560, 897 P.2d 431, 434 (1995). Questions of law are reviewed

de novo. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998).

The Court of Appeals reviews the interpretation of the Industrial Insurance Act by the Board of Industrial Insurance Appeals *de novo* under the “error of law” standard and may substitute its judgment for that of the Board, although the Court must accord substantial weight to the agency’s interpretation. *Littlejohn Const. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583, 584 (1994).

V. ARGUMENT

A. **There Is No Evidence In The Certified Appeal Board Record Establishing A Legally Binding Determination On The Relationship Of Hardy’s Alleged Right Shoulder Condition To Her Claim; Thus, Res Judicata Cannot Apply**

The issue presented by Hardy in this appeal is simple, albeit devoid of any merit. In short, Hardy is asking this Court to hold that the Department order allowing her claim—an order that was **silent** as to what conditions were allowed or accepted under the claim—is res judicata as to allowance of her alleged right shoulder condition.

However, as will be shown in detail below, Hardy does not and cannot provide any statutory or legal authority to support her contention that there was a legally binding determination regarding the relationship of her alleged right shoulder condition to her claim, which the evidence

shows was filed for a left shoulder condition. It is telling that Hardy cites no direct authority supporting her contention other than the bald assertion that liberal construction of the entire Industrial Insurance Act, without reference to any particular provision, justifies the relief she seeks.

1. Hardy Did Not Present Any Argument Or Evidence Regarding Her “Res judicata” Theory At The Board

Despite repeated opportunities to raise the issue and present evidence at the Board regarding the alleged legal relationship between her right shoulder symptoms and her claim, Hardy did not present sufficient evidence to establish the existence of such a relationship. In fact, notwithstanding Hardy’s repeated representations before the Superior Court and now this Court, there is simply no evidence in the Certified Appeal Board Record to establish that she filed claim W970668 for a “bilateral shoulder” occupational disease. *See, e.g.*, CABR at 88-90. Nor is there evidence in the CABR that the Department legally determined that such condition was related to this claim. *See, e.g.*, CABR at 88-90.

The only evidence presented to the Board concerning Hardy’s Application for Benefits or the June 22, 2004 allowance order appears on the Board’s “Jurisdictional History.” CABR at 88-90. Hardy stipulated to the accuracy of this document and agreed that it should be made part of

the record for the purpose of establishing the Board's jurisdiction to hear her appeal and to determine the issues to be resolved. CABR at 88.

According to this document, Hardy only identified a left shoulder condition on her Application for Benefits. CABR at 88. Hardy's own medical witness, Dr. Gritzka, confirmed this fact when he testified before the Board. When asked if Hardy had only identified a left shoulder condition on the Application for Benefits he responded "yes." Gritzka Dep. at 52. He also confirmed that there was no mention of any right shoulder symptoms or problems noted on that document. *Id.* Thus, Hardy is incorrect when she repeatedly states that she filed this claim for bilateral shoulder conditions. (Not surprisingly, Hardy declined to include her Application for Benefits among the documents she attached to her CR 50 motion at Superior Court).

Likewise, the Department's June 22, 2004 allowance order is not part of the Board record and was not offered as evidence by Hardy at any time during Board hearings. (It was first offered by Hardy as an attachment to her CR 50 motion to the trial court). Thus, the only evidence regarding the June 22, 2004 order is again contained in the Board's "Jurisdictional History," which shows that the claim was allowed on June 22, 2004 and was closed on December 20, 2007. CABR at 88-90. Further, the document does not indicate which, if any, medical conditions

were legally allowed or rejected by the Department's June 22, 2004 allowance order. *Id.* Therefore, based on the evidence in the Certified Appeal Board Record, there was no basis upon which the Superior Court could determine as a matter of law that Hardy's alleged right shoulder condition had been allowed as an occupational disease by a legally binding Department order.

There is simply no dispute that Hardy had the opportunity to present evidence during the hearing process that her right shoulder condition constituted an occupational disease under her claim both as a matter of fact and as a matter of law. Not only did Hardy fail to establish or even allege that her right shoulder condition had been allowed as a matter of law, she affirmatively and repeatedly requested that the Board make a factual determination as to the causal relationship of her alleged right shoulder condition under the claim. CABR at 70, 77, 88-90, 96-98, and 155-167. It was not until the Superior Court trial that she first raised the "res judicata" argument based almost entirely on inadmissible hearsay documents statutorily prohibited by RCW 51.52.115. CP 29-44. The fact that Hardy asked the Superior Court and now asks this Court to consider additional documentation in support of her motion is, in effect, an admission that the Board's record does not adequately support her position.

2. The Board Did Not Exceed Its Jurisdiction Or Statutory Authority

Hardy asserts that it was error for the Board to adjudicate whether her right shoulder condition was part of her claim. Appellant's Brief ("AB") at 18. However, once Hardy appealed the Department's December 20, 2007 order closing her claim, it was the Board's statutory obligation to decide whether the Department correctly determined that Hardy's industrially related conditions were medically fixed and stable and that her claim should be closed with time loss as paid to March 29, 2006 and with no award for permanent partial disability. CABR at 88-90. In reviewing the correctness of the Department's decision it was within the Board's jurisdiction to determine specifically what medical conditions were factually and/or legally related to the May 1, 2004 claim. RCW 51.52.115.

In her Notice of Appeal to the Board, Hardy stated that she ". . . appeals injuries consisting of right shoulder, right low back, left shoulder and any other conditions relating to this industrial injury and/or occupational exposure . . ." CABR at 70. Hardy identified these same issues during various Board conferences and in her Petitions for Review. CABR at 69-71, 96-98, 155. As a result, the Board was obligated to

consider the legal and factual relationship of Hardy's alleged right shoulder condition to her claim.

Likewise, and contrary to her argument that the res judicata effect of the allowance order was not an issue until the Industrial Appeals Judge made it one, Hardy was obligated to present evidence at the Board to establish her theory of relief, whether that be a strictly legal or factual argument. AB at 19. As noted above, Hardy failed to present any evidence or provide any legal arguments regarding the theory she first put forth at superior court: the "res judicata" effect of the Department's June 22, 2004 allowance order. The Board's ruling on the cause of Hardy's right shoulder condition, as well as the other legal and factual issues raised by Hardy prior to and during the hearing process, was appropriately based on the evidence presented. CABR at 5-6.

Hardy also attempts to explain away her failure to raise the res judicata issue by stating that she properly raised it in her Petition for Review to the Board. AB at 6. However, there were no allegations in her Petition for Review that allowance of the alleged right shoulder condition was "res judicata" based on the Department's June 22, 2004 allowance order. CABR at 25-38. In fact, there was nothing in Hardy's memorandum or assignments of error to suggest that the Board should have found the right shoulder condition allowed under the claim **as a**

matter of law. *Id.* Neither was there any evidence presented to the Board to that effect. Rather, Hardy continued to argue that the evidence contained in the Board's record established that the alleged right shoulder condition "should" have been allowed under the claim. CABR at 33. Thus, her statement that the issue was "raised" in her Petition for Review is misleading when considering the context of her arguments to this Court.

The fact that the Board determined that the May 1, 2004 claim had not been filed for a bilateral shoulder condition is well within its statutory jurisdiction when considering the correctness of the Department's December 20, 2007 order. A tribunal has authority to render judgment in an action when it has jurisdiction of subject matter of action, and: (1) the party against whom judgment is to be rendered has submitted to jurisdiction of court; or (2) adequate notice has been afforded the party and court has territorial jurisdiction of action. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538, 866 P.2d 189, 193 (1994), citing *Restatement (Second) of Judgments § 1*.

Clearly, the Board had both personal and subject matter jurisdiction over the parties when it considered this issue as well as the other issues raised by Hardy during the hearing process. The Decision and Order rendered by the Board was based on and was consistent with the evidence it received during the hearing process. While Hardy may

disagree with the Board's Decision and/or regret not attempting to pursue or offer evidence on this theory of relief earlier, she has provided this Court with nothing to establish that the Board did not have the authority to issue the Order that it did.

3. Even If This Court Chooses To Review The June 22, 2004 Order It Does Not Support Hardy's Arguments

Fred Meyer does not dispute that the Department's June 22, 2004 order is final and binding or that Hardy's May 1, 2004 claim is allowed as a matter of a law. However, contrary to Hardy's numerous assertions and assuming for argument's sake that the June 22, 2004 order will be reviewed by this Court, nowhere on the face of this order does the Department allow or deny any specific condition. CP at 50. The fact that the Department stated it was allowed for an *injury or occupational disease* is indicative of the fact that at this early stage of the claim it was not certain about the nature or extent of Hardy's physical problems and/or their causal relationship to her work, if any. Rather, such questions are subject to the normal claims administration process and further Departmental adjudicative determinations down the line.² Indeed, even

² Final determinations by the Department as to the totality of benefits a worker may be entitled to regarding any condition a worker may have are more commonly and appropriately reserved for the Department's closing orders, which are broader in scope than other types of Department orders. *See, e.g., In re Randy M. Jundul*, BIIA Dec., 98 21118, 1999 WL 1446257, at *2 (1999) (significant decision); *In re James R. Shreve*,

Hardy was unwilling to so limit herself when she put in her Notice of Appeal to the Board that she was alleging various conditions relating to her “industrial injury and/or occupational exposure.” CABR at 70.

Washington courts have held that in the absence of a clear and unmistakable final finding that a condition is caused or aggravated by an industrial injury or occupational disease, a party should not be precluded by the principles of “res judicata” from thereafter litigating the casual relationship between the injury/occupational disease and the alleged condition. *See, e.g., King v. Dep’t of Labor and Indus.*, 12 Wn. App. 1, 4-5, 528 P.2d 271, 273-74 (1974). *See also In re Lyssa Smith* BIIA Dec., 86 1152, 1991 WL 172060, at *3 (1988) and *In re Gary G. Johnson*, BIIA Dec., 86 3681, 1987 WL 61371, at *3 (1987).³

Based on the evidence the Board did have, it is clear that the Department’s June 22, 2004 order did not allow the claim as an occupational disease for “bilateral shoulder conditions” as Hardy

Dckt. Nos. 01 16260 & 01 16261, 2003 WL 22479569 at *3 (Aug. 1, 2003); *In re Dennis Johnson*, Dckt. No. 00 15837, 2002 WL 342030, at *2 (Jan. 29, 2002).

³ RCW 51.52.160 requires the Board to designate and publish its “significant decisions.” The Board publishes these decisions in several forms, including providing access on its website at www.bia.wa.gov. Board decisions, significant and non-significant, are also accessible on Westlaw in the database WAWC-ADMIN. The convention for citing a significant decision is “BIIA Dec., ___” and provides only the year of the decision, while the docket number for a decision not designated as significant is cited “Dckt. No. ___” and provides the full date of the decision.

While not binding, significant decisions published by the Board are persuasive authority. *O’Keefe v. Dep’t of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005).

repeatedly asserts, nor did it provide either party with clear and unmistakable notice that it was accepting or denying any particular conditions under the claim.

However, even if this Court accepts Hardy's improper submissions to the Superior Court and reviews the June 22, 2004 order, there is no mistaking the fact that that order was **silent** as to the conditions allowed or not allowed under the claim. Rather, the Department did nothing more than allow her claim for an industrial injury or occupational disease suffered while in the course of employment with Fred Meyer on May 1, 2004. It did not and does not constitute a legally binding determination that any specific condition had been allowed or rejected.

Despite that, Hardy contends that she has the power to establish the conditions allowed under a claim by simply asserting a causal relationship. If this were the case, the Department would have no role in adjudicating claims. It is disingenuous for Hardy to now contend that the June 22, 2004 order is so clear and should be "res judicata" when it took her over two years and numerous proceedings to even raise the argument for the first time. The fact remains that there is no authority and no evidence supporting Hardy's arguments. As such, the Superior Court's decision must be affirmed.

B. There Is No Authority For The Proposition That “Notice” Of An Alleged Condition Constitutes A Legally Binding Determination And Even If It Does, Hardy Did Not Prove Such Notice Here

Undeterred by the fact that the Board record is devoid of any evidence establishing that the June 22, 2004 order specifically allowed her alleged right shoulder condition under the claim, Hardy argues that Fred Meyer had “notice” of the fact that she was “contending” bilateral shoulder conditions under the claim and therefore had the “opportunity” to appeal the June 22, 2004 allowance order. AB at 16.

Again, Hardy cites no authority for the proposition that in the absence of a specific Department order, “notice” of an alleged condition constitutes a legally binding determination as to the causal relationship of that condition to the claim. Indeed, not only is there no authority to support her argument about “notice,” neither does she provide any authority for her contention that an **alleged** condition can somehow be transformed into an allowed or accepted condition simply by virtue of a claim being allowed (without reference to any specific conditions). Such a contention is particularly illogical in this case since Hardy’s own treating doctor testified that he did not believe she even had a right shoulder condition under the claim. Enkema Dep. at 31-32.

Even assuming for argument’s sake that notice alone is sufficient to constitute a binding determination, there is no evidence that Fred Meyer

had actual notice that Hardy was contending a right shoulder condition under the claim with sufficient “opportunity” to appeal the allowance order.

At best, all the evidence shows is that Fred Meyer was on notice at some unspecified point that Hardy was contending a right shoulder condition. That said, there is no evidence establishing when Fred Meyer was on notice or if such notice was timely enough for Fred Meyer to appeal the Department’s June 22, 2004 allowance order within the 60 day statutory appeal period. Indeed, even if this Court decided to accept and review the improperly offered evidence put forth by Hardy at Superior Court, that evidence does not establish that Fred Meyer had notice within the statutory appeal period for contesting the allowance order.

1. Dr. Enkema’s Chart Notes Were Not Offered At The Board And Cannot Be Considered; Further, They Do Not Establish Actual Notice

In order to escape the undisputed fact that the June 22, 2004 allowance order was nonspecific as to what conditions were being allowed under the claim, Hardy claims that Dr. Enkema’s physician’s initial report for Claim W970668 put Fred Meyer on notice that she was contending bilateral shoulder conditions. AB at 16.

First, as the Board correctly noted in its Decision and Order, Hardy did not attempt to present the physician’s initial report from Dr. Enkema

as an exhibit during the Board's hearing process. CABR at 5. Rather, it was not until she filed her CR 50 motion in Superior Court that this evidence was first offered. CP at 49. Not only was the offered evidence inadmissible hearsay, consideration of that evidence by the trial court and this Court is statutorily prohibited by RCW 51.52.115, which states that the "hearing in the superior court shall be *de novo*, but the court **shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board.**" RCW 51.52.115 (emphasis added).

It has long been held that the superior court's jurisdiction in cases involving Decisions and Orders issued by the Board is appellate in nature. The court can only decide matters previously ruled upon by the Board. *Shufeldt v. Dep't of Labor and Indus.*, 57 Wn.2d 758, 760, 359 P.2d 495, 496 (1961). Thus, the superior court (and this Court) cannot consider evidence or testimony other than that included in the Board's record. RCW 51.52.115; *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 316, 189 P.3d 178 (2008); *Grimes v. Lakeside Industries*, 78 Wn. App. 554, 560, 897 P.2d 431 (1995).⁴

⁴ RCW 51.52.115 does allow for consideration of new evidence but only in cases of "procedural irregularities." However, no such procedural irregularity was present in this case nor does Hardy argue such before this Court.

Even if this Court does decide to consider the improperly offered physician's initial report, that document does not support Hardy's argument. First, she alleges that the document was mailed to Fred Meyer but does not note any corroborating evidence establishing that it was in fact mailed by Dr. Enkema nor when it was received by Fred Meyer. Further, that document only purports to show that Hardy was complaining of bilateral shoulder strain, not that Dr. Enkema stated on a more probable than not medical basis that such a condition was causally related to her claim.

Contrary to Hardy's repeated assertions, the fact that Dr. Enkema noted "bilateral shoulder strain" in his initial chart note is not proof of a definitive diagnosis. Nor does it establish that Hardy's right shoulder symptoms constituted an industrial injury or occupational disease or were in any way related to her work at Fred Meyer. In fact, as the Board's record clearly demonstrates, Dr. Enkema himself did not feel that Hardy had developed a right shoulder condition as a result of her work as a cashier at Fred Meyer under either of her claims. (Enkema, pp. 31-32). Indeed, the overwhelming majority of medical evidence in the record supports the Board's determination that Hardy did not develop an occupationally related right shoulder condition under either of her two claims, a determination that Hardy does not challenge on a factual level.

Hardy also relies on the Board's finding that Dr. Enkema's medical records put Fred Meyer on notice that Hardy was contending bilateral shoulder conditions under her claim. CABR at 19. Once again, the Board's finding does not establish when Fred Meyer had such notice nor does the Board find or conclude that Fred Meyer had the opportunity to appeal the allowance order based upon that notice. Rather, as the Board explained in its decision, the issue of notice was addressed to indicate that causal relationship of the right shoulder condition to the claim (on a factual level) was properly in dispute before the Board, something that both parties agreed to as that issue was fully litigated at the Board. CABR at 6.

Based on this undated notice via Dr. Enkema's records, Hardy argues that Fred Meyer "had an opportunity to appeal" the Department's June 22, 2004 allowance order. AB at 16. However, by statute an aggrieved party has only 60 days to appeal an adverse order of the Department. RCW 51.52.060. Thus, by failing to establish that Fred Meyer had notice of her alleged right shoulder condition within 60 days after the June 22, 2004 allowance order, Hardy's argument necessarily fails. As noted by the Washington Supreme Court in *Olympia Brewing v. Dep't of Labor & Indus.*, "the risk of the failure of proof must rest with the

claimant,” in this case Hardy. 34 Wn.2d 498, 506, 208 P.2d 1181, 1185 (1949).

2. As With Dr. Enkema’s Records, Reliance On The Improperly Offered October 21, 2004 Department Letter Is Misplaced

Hardy’s final argument in support of her “notice” theory is that the Department issued an October 21, 2004 letter purportedly establishing that the Department “intended to and did allow both shoulder conditions under the Claim No. W970668.” AB at 17.

There are several problems with this argument. First and foremost, the October 21, 2004 letter was not offered at the Board and like Dr. Enkema’s initial physician’s report, was only offered for the first time at superior court. CP at 54. Thus, it is inadmissible hearsay and any consideration of the Department letter is precluded by RCW 51.52.115.

Second, Hardy conveniently ignores the fact that even if the October 21, 2004 letter did put Fred Meyer on notice as Hardy alleges, the letter was issued **four** months after the June 22, 2004 allowance order, well beyond the 60 day period for appealing that order. RCW 51.52.060. Even if Fred Meyer received such notice it would not have had the opportunity to challenge the allowance order as the appeal period had long since run.

Third, it is well established that Department letters are not appealable and it is notable that Hardy does not make this argument in her brief. Both the Board and appellate courts have held that in order to constitute a final and binding determination a Department Order must give notice of the time limit on the right to appeal. *See* RCW 51.52.050 (stating that “[w]henver the department has made any order, decision or award, it **shall**” issue the decision in a specified format with a recitation of appeal rights) (emphasis added). Further, an order cannot become final and binding unless it contains language advising the parties of their protest or appeal rights. *See, e.g., Lee v. Jacobs*, 81 Wn.2d 937, 940-41, 506 P.2d 308 (1973); *In re Kerry G. Kemery*, BIIA Dec., 62,634, 1983 WL 470517, at *2-4 (1983); *In re Richard K. Ennis*, Dckt. Nos. 93 5546 & 94 7640, 1995 WL 312449, at *1-2 (April 26, 1995); *In re Laurie E. Lathom*, Dckt. Nos. 01 18865, 01 18866 & 02 15610, 2003 WL 22696949, at *3 (Sept. 26, 2003). No such language is present on the October 21, 2004 Department letter.

Even a letter advising the employer that the Department had accepted the worker’s low back condition as causally related to the industrial injury was determined by the Board not to constitute a formal statutory order and no res judicata effect was attached to it. *In re Kerry G. Kemery*, BIIA Dec., 62,634, 1983 WL 470517, at *2-4 (1983). Indeed, *In*

re Kemery involved a very similar argument to the one put forth by Hardy in this case. In that case, the Board was asked to address whether, by reason of the employer's failure to appeal certain Department orders, it was res judicata that the worker's alleged condition was causally related to his claim. *Id.* In rejecting the res judicata argument, the Board noted that none of the Department orders "contained a specific finding or determination" that the worker's condition was causally related to his claim. *Id.* The Board, citing *King v. Dep't of Labor and Indus., supra*, further held that in the absence of such a specific finding or determination, the employer had "an unfettered right to litigate the question of causal relationship" between the worker's condition and his claim. *Id.*

The Board went on to address a secondary argument that the employer had "actual notice" that the worker's condition had been accepted by the Department by virtue of a Departmental letter advising same and that the failure to appeal that letter barred the employer under res judicata from contesting the causal relationship of that condition to the claim. *Id.* The Board again disagreed, holding that a party is not required to appeal a Department letter as it does not rise to the level of a formal statutory Department order. *Id.* Citing *Lee v. Jacobs, supra*, the Board held that "the doctrine of res judicata has no application to department letters." *Id.*

In *Lee v. Jacobs*, a state agency argued that certain letters denying benefits were final orders in a workers' compensation dispute. In making its determination the court stated that:

That is nonsense. If every letter from every agency of state government which arrives on a lawyer's desk must be scrutinized to determine if it contains an appealable order, indeed a burden of considerable magnitude will have been created by fiction.

81 Wn. 2d 937, 940-41, 506 P.2d 308 (1973). Simply put, "informal letters do not rise to the dignity of an appealable order." *Lee*, 81 Wn. 2d at 941.

Hardy does not attempt to argue, nor can she in light of the cases cited above, that Fred Meyer should have appealed the Department's October 21, 2004 letter, as clearly that letter does not meet the definition of a legally binding order and thus has no "res judicata" effect.

In sum, what the Department "intended" to do is immaterial, particularly when proof of that "intention" is in the form of a letter issued four months after the allowance order and long past the period for a party to appeal that order. What is relevant is what the Department did do, which in this case was issue an allowance order that was silent as to what conditions were accepted or allowed under the claim. Thus, Hardy's argument with regard to the notice provided by this letter is without merit.

C. There Is No Relief Available Even If This Court Accepts Hardy's Argument

Hardy requests that her claim be remanded back to the Department so that it can consider the right shoulder condition in making its final determination about benefits under her claim. AB at 18. However, even if Hardy's arguments are accepted, the relief requested is nonsensical and/or not available.

As noted above, Hardy spends considerable time arguing that the Department allowed claim W970668 for "bilateral shoulder conditions" and contends that this was clearly evident when it issued its June 22, 2004 allowance order. If this argument is correct and the issue of allowance was so clear, then the Department certainly would have known that the claim had been allowed for bilateral shoulder conditions. Consequently, the Department would have already administered this claim as a bilateral shoulder claim. Furthermore, when the Department issued its December 20, 2007 order closing claim W970668 it necessarily considered the left **and** right shoulder conditions when determining Hardy's entitlement for further benefits. Thus, if Hardy's arguments are accepted, she is asking this Court to instruct the Department to take action it has already taken. This does not make sense.

D. Liberal Construction Cannot Rescue Hardy's Argument

Finally, Hardy spends a considerable portion of her opening brief explaining how the Industrial Insurance Act (Title 51 RCW) should be liberally construed in her favor. AB at 10-14. However, despite her lengthy and impassioned plea for application of the liberal construction doctrine in this case, Hardy **does not identify any part of the Industrial Insurance Act that she wishes this Court to review and (presumably) construe in her favor.**

Indeed, throughout her entire argument Hardy only mentions a specific portion of the Industrial Insurance Act once, when she cites RCW 51.52.060(1)(a) for the proposition that a party aggrieved by an order of the Department must file an appeal with the Board within 60 days from the day the order was communicated. App. Br. at 17. Notwithstanding the fact that her recitation of RCW 51.52.060(1)(a) is accurate and needs no interpretation, Hardy does not explain why, how or even if she would like this Court to liberally construe that particular statute in her favor. Further, she does not explain how that statute negatively impacts her, if at all.

Fred Meyer has no dispute with the language of RCW 51.52.060 and agrees that a party aggrieved by a Department order is statutorily required to file an appeal within 60 days. Thus, without any explanation

from Hardy about how she would like this or any other statute in Title 51 construed by this Court, Fred Meyer cannot conceive of any circumstance in which liberal interpretation of Title 51 could apply.

That said, Fred Meyer presumes based upon her opening brief that Hardy would like this Court to read into some unnamed statute in Title 51 RCW the provision that any time an allowance order is issued by the Department, in particular an allowance order that is silent as to the conditions allowed, that such an order necessarily allows any and all medical conditions alleged by an injured worker to be related to their work, regardless of medical proof or a definitive determination by the Department as to causal relationship of that condition to the worker's claim.

However, there is not even a suggestion by Hardy that any statute in Title 51 includes such a provision, even tangentially. The rule of liberal construction does not authorize an interpretation of a statute (or in this case statutory scheme) that produces strained or absurd results and defeats the plain meaning and intent of the legislature. *See Senate Republican Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997); *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992).

Furthermore, the rule of “liberal construction” does not apply to findings of fact, so application of that doctrine to determine whether Fred Meyer had notice of Hardy’s right shoulder condition with sufficient opportunity to appeal the June 22, 2004 allowance order is of no use to Hardy. In *Ehman v. Department of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949), the court stated:

In the case at bar, it must be remembered that workmen’s compensation statutes shall be liberally construed, and also, that **the rule does not apply to questions of fact, but to matters concerning the construction of the statute. . .** (Emphasis added).

In this case, there is no issue pertaining to statutory construction. As a result, the doctrine of liberal construction is not applicable.

The burden is on Hardy to prove her case. Although the general rule states that workers’ compensation statutes are to be liberally construed for those workers who come within their provisions, individuals who make applications for benefits are held to strict proof of their right to receive those benefits. *Cyr v. Dep’t of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955); *D’Amico v. Conquista*, 24 Wn.2d 674, 683-84, 167 P.2d 157 (1946). In *Olympia Brewing Company v. Dep’t of Labor & Indus.*, the Washington Supreme Court stated:

We have again and again declared that, while the act should be liberally construed in favor of those who come within its terms, persons who claim rights thereunder should be held to

strict proof of their right to receive the benefits provided by the act... The rule should be the same in any hearing before the joint board where the right to the relief claimed is challenged.

34 Wn.2d 498, 505-06, 208 P.2d 1181 (1949). It is clear from a thorough reading of the Certified Appeal Board Record that Hardy has not met the burden of proof in her attempt to establish entitlement to the relief she seeks here.

Finally, Hardy cannot simply ask that the doctrine of liberal construction be used by this Court to create a new rule of law out of thin air, particularly when she cannot identify any specific statute to which this new rule of law can be applied. Indeed, application of the res judicata doctrine to nonspecific allowance orders would likely work to the disadvantage of injured workers as a whole, thereby proving contrary to the Act's stated purpose of providing "sure and certain relief for workers." If Hardy's argument is accepted, the likely result is that almost every allowance order issued by the Department would be appealed by either the employer or Department (in State Fund cases) right at the onset of a worker's claim, when relief in the form of treatment and time loss benefits is needed most and delays in receiving those benefits would be most painful. Such a new rule of law would lead to much uncertainty for workers and employers and thwart, rather than further, the goal of

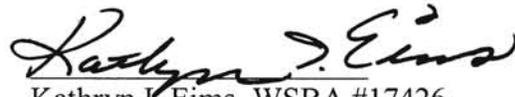
ensuring swift and certain relief for injured workers. As such, the liberal construction doctrine is of no aid to Hardy here.

VI. CONCLUSION

For the reasons discussed above, Fred Meyer respectfully requests that this Court affirm the decisions of both the trial court and Board and reject Hardy's request to remand this matter back to the Department of Labor and Industries.

Respectfully Submitted,

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