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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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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 REPLY BRIEF TO BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES

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I. ADDITIONAL ARGUMENTS

A. MS. HARDY HAS PROPERLY RAISED AND ARGUED THE RES JUDICATA EFFECT OF THE UNAPPEALED DEPARTMENT ORDER DATED JUNE 22, 2004

The Department of Labor and Industries (Department) argues that Ms. Hardy waived her right to argue the res judicata effect of the June 22, 2004 order by not explicitly raising it in her petition for review as required by RCW 51.52.104. RDB at 10-12¹. RCW 51.52.104 provides that a “petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.” In this case, Ms. Hardy’s petition for review did include objections that it was not simply her left shoulder condition, but rather her bilateral shoulder conditions that arose naturally and proximately out of her employment, and it was error for the Industrial Appeals Judge to take responsibility of Ms. Hardy’s right shoulder condition away from Fred Meyer Stores, Inc. (Fred Meyer), the self-insured employer.

This is explicit in Ms. Hardy’s second exception and eleventh exception, “Claimant excepts to finding of fact number 2 insofar as it addresses only her left shoulder condition and is silent regarding her right

¹ The Respondent Department of Labor and Industries brief will be cited RDB followed by the page number.

shoulder condition(s),” and “Claimant excepts to conclusion of law number 3 insofar as it states that Erika Hardy’s occupational disease manifested itself as of May 1, 2004, and included only her left shoulder, which was an aggravation of a pre-existing condition.” CABR at 26-27.²

Furthermore, RCW 51.52.115 provides that “upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or *in the complete record of the proceedings before the board.*” (emphasis added). Here, the proceedings before the board include the issue of the res judicata effect of the Department’s June 22, 2004 order. Both Ms. Hardy’s testimony and Dr. Louis Enkema’s testimony and records establish that Ms. Hardy suffered a bilateral shoulder condition which became manifest on May 1, 2004, and for which a claim was filed. CABR 11/25/08 Tr. at 12-3, 19; Enkema at 39. The Department allowed this claim filed by Ms. Hardy and Dr. Enkema. CABR at 88. This allowance order was never protested or appealed, thus it became final and binding and subject to the doctrine of res judicata. *Id.* Fred Meyer was aware of the bilateral nature of Ms. Hardy’s shoulder condition, and the Board of Industrial Insurance Appeals (Board) even stated in its October 13, 2009 Decision and Order that “if the right shoulder is to be considered a part of the claim...it would have to be

² The Certified Appeals Board Record will be cited CABR followed by the page number.

because the claim was filed for both shoulders.” CABR 6. Indicating its belief that the claim was filed for both shoulders, the Board went on to consider Ms. Hardy’s right shoulder condition, but inexplicably concluded that Fred Meyer is not responsible for Ms. Hardy’s right shoulder condition when she filed a claim for both her shoulders, the claim was allowed with the Department’s June 22, 2004 order, and the order was final and binding as no protest or appeal followed the communication of the allowance order.

Even if Ms. Hardy did not raise the res judicata issue in her petition for review with certain specificity, this Court may nevertheless address the argument pursuant to its inherent power as an appellate court to address issues which are crucial to the case and necessary for a proper decision. *Belnap v. Boeing*, 64 Wn. App. 212, 223, 823 P.2d 528 (1992) (footnote 6) (Argument raised for the first time on appeal and arguably waived by RCW 51.52.104, still considered and addressed by the Court). All three parties to this appeal have fully briefed the issue. This Court may properly address and consider this issue in order to make a proper decision. *See* RAP 12.1(b); *Falk v. Keene Corp.*, 113 Wn.2d 645, 659, 782 P.2d 974 (1989); *see also Alverado v. WPPSS*, 111 Wn.2d 424, 430, 759 P.2d 427 (1988), *cert. denied*, 490 U.S. 1004, 109 S.Ct. 1637, 104 L.Ed.2d 153 (1989).

**B. THE DEPARTMENT ORDER DATED JUNE 22, 2004
ALLOWING MS. HARDY'S CLAIM FOR HER
BILATERAL SHOULDER CONDITIONS IS FINAL
AND BINDING AND SUBJECT TO THE DOCTRINE
OF RES JUDICATA**

A final order of the Department that has not been appealed is res judicata and has the same preclusive effect as a final Superior Court order. *Marley v. Department of Labor and Industries*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994). Res judicata, or claim preclusion, prohibits the relitigation of claims or relitigation of issues that were litigated, or could have been litigated, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). The four requirements for the application of the doctrine: (1) the parties in the two successive proceedings are the same; (2) the prior proceeding ended in a final judgment; (3) a party in the second proceeding is attempting to litigate for the first time a matter that should have been raised in the earlier proceeding; and (4) application of the doctrine must not work an injustice; are satisfied in this case. *See Chavez v. Department of Labor and Industries*, 129 Wn. App. 236, 239-40, 118 P.3d 392 (2005).

Here, the parties, Ms. Hardy and Fred Meyer, are the same in the two successive proceedings, the determination allowing her claim for her bilateral shoulder conditions by the Department and the hearings before

the Board. The proceeding allowing Ms. Hardy's claim ended in a final judgment, as the June 22, 2004 Department order was neither protested nor appealed. In the hearings before the Board, Fred Meyer argued, for the first time, that Ms. Hardy's right shoulder condition was not covered under her claim when the argument should have been raised in the earlier proceeding, namely by protesting or appealing the Department's June 22, 2004 order allowing her claim for her bilateral shoulder conditions.

Additionally, no injustice would result by the application of the doctrine. Through Dr. Enkema's records, Fred Meyer was aware and had notice that Ms. Hardy was contending her bilateral shoulder conditions, and not simply a left shoulder condition, when she and Dr. Enkema filed her claim for benefits. "Fundamental fairness' requires that a [party] must be clearly advised of the issue before it will be barred by the doctrine of res judicata." *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84, 93, 52 P.3d 43 (2002) (citing *King v. Department of Labor and Industries*, 12 Wn. App. 1, 4, 528 P.2d 271 (1974)). The Board and the Superior Court below explicitly determined in their respective findings of fact that "the medical records of Louis Enkema, M.D., placed the self-insured employer on notice that Erika Hardy was contending she had bilateral conditions arising out of her employment with Fred Meyer

Stores, Inc., that became manifest on May 1, 2004.” CABR at 19, CP at 141.

Here, Fred Meyer was clearly advised of Ms. Hardy’s bilateral shoulder conditions, as diagnosed by Dr. Enkema, that were claimed by Dr. Enkema and Ms. Hardy when filing her claim for benefits with Fred Meyer. In addition to being on notice of what conditions were being claimed and were allowed under the claim by the Department’s order, Fred Meyer had an opportunity to appeal the Department’s determination. Not having done so, Fred Meyer is not prejudiced by the application of the doctrine of *res judicata*, fundamental fairness is satisfied, and no injustice results.

Furthermore, the Department acknowledges and agrees with Ms. Hardy that its unappealed June 22, 2004 order allowing Ms. Hardy’s claim for benefits based on an industrial injury or an occupational disease that is covered by the Industrial Insurance Act is final and binding and is entitled to *res judicata*. RDB at 12, 18. However, following that, the Department’s agreement with Ms. Hardy ceases. While Ms. Hardy argues that this allowance order allowed both her right and left shoulder conditions under the claim, the Department argues that no determination was made within that order regarding what conditions were allowed under

the claim, the only determination that was made, was that Ms. Hardy had a valid claim under the Industrial Insurance Act. RDB at 18.

However, a valid claim under the Industrial Insurance Act requires the claimant to have suffered an injury or occupational disease in the course of his or her employment. RCW § 51.32.010, entitled Who Entitled to Compensation, provides in pertinent part that, “each worker injured in the course of employment...shall receive compensation in accordance with this chapter.” This is extended to “every worker who suffers disability from an occupational disease in the course of employment,” by RCW § 51.32.180. Thus, by arguing that Ms. Hardy had a valid claim under the Industrial Insurance Act, the Department acknowledges that Ms. Hardy suffered an injury or occupational disease in the course of her employment.

The Department’s argument that it allowed an industrial injury or occupational disease under the claim, while at the same time contending that no particular conditions were allowed under the claim, defies logic. RDB at 12-26. It should be noted that the Industrial Insurance Act should be given its natural and ordinary meaning and effect, and, if there is any ambiguity in language used, it should be liberally construed. *Lindquist v. Department of Labor and Industries*, 184 Wash. 194, 196, 50 P.2d 46 (1935). Injury is defined by RCW § 51.08.100 as a “sudden and tangible

happening, of a traumatic nature, producing an immediate and prompt result, and occurring from without, *and such physical conditions as result therefrom*" (emphasis added). Occupational disease is defined as "such *disease or infection* as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title". RCW § 51.08.140 (emphasis added).

As the definitions of injury and occupational disease illustrate, you cannot have an injury/occupational disease without having a condition or disease. So the Department's argument that it allowed the order but, in so doing, did not allow any conditions is untenable. The allowance of the claim and payment of benefits, including medical benefits, would be meaningless if there was no condition or disease to be treated with those benefits. As there cannot be one without the other, the Department must have allowed Ms. Hardy's condition in order for it to allow her claim for an injury or occupational disease. The condition allowed is evidenced by the initial records of Dr. Enkema, who assisted Ms. Hardy in filing her application, testified to, and properly coded, his diagnoses of Ms. Hardy's condition as bilateral shoulder conditions. *See* Appellant's Brief and Reply Brief. Thus, the Department's June 22, 2004 order allowing Ms. Hardy's claim for her industrial injury/occupational disease, necessarily allowed her bilateral shoulder conditions.

**C. A REMAND OF THIS CASE BACK TO THE
DEPARTMENT IS PROPER**

A remand of this case back down to the administrative level is proper. The ordinary practice of civil rules and civil cases applies to appeals of Worker's Compensation cases, except as otherwise provided in RCW title 51, chapter 52. RCW § 51.52.140. One such exception is RCW § 51.52.115 which provides in pertinent part that in cases of modification or reversal of the board "the superior court *shall* refer the same to the department with an order directing it to proceed in accordance with the findings of the court" (emphasis added). Therefore, a modification or reversal of the superior court's decision affirming the board's decision, which is analogous to the superior court modifying or reversing the board, should be referred to the department with directions to take action in accordance with the court's order.

II. CONCLUSION

Ms. Hardy has contended her conditions were bilateral shoulder conditions and not just a left shoulder condition which became manifest on May 1, 2004, as evidenced by the testimony and records of Dr. Enkema. Furthermore, the Department's allowance order accepted Ms. Hardy's claim for bilateral shoulder conditions. This is clearly evidenced

by Dr. Enkema's records, testimony, and the Department letter consolidating duplicative claims. It is undisputed that the June 22, 2004 Department allowance order was not protested or appealed.

Thus, Ms. Hardy respectfully requests that this Court find the Department Order dated June 22, 2004 as res judicata on the issue of what conditions were allowed initially under the claim, namely Ms. Hardy's bilateral shoulder conditions, preventing the Board from having the authority to readjudicate the final and conclusive determination that Ms. Hardy's right shoulder condition was involved. Ms. Hardy has properly raised and argued the res judicata effect of this Department order.

The Superior Court's judgment should be reversed as it is not supported by substantial evidence and this matter should properly be remanded 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.

DATED this 3rd day of July, 2012.

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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 5th day of July, 2012, the document to which this certificate is attached, Petition For Review, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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DATED this 5th day of July, 2012.


LYNN M. VENEGAS, Secretary

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