658601-1

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NO. 65861-1

COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON

MARCIA M. MAGEE,

Appellant,

v.

RITE AID,

Respondent.

BRIEF OF RESPONDENT BY THE DEPARTMENT

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Appendix A (*Magee I*): Superior court, Board, and Department orders and Magee's claim and notice of appeal to the Board

Appendix B (*Magee II*): Superior court, Board, and Department orders.

I. INTRODUCTION

This is a workers' compensation claim rejection case. The Department of Labor & Industries denied Magee's claim alleging sexual assaults by a supervisor as untimely for an injury. The Board of Industrial Insurance Appeals affirmed, concluding both that her claim was late for an injury and that her allegations, even if true, did not state an occupational disease for which longer statutory limitations would apply. Magee challenged the former but not the latter conclusion in her failed appeal.

The unchallenged conclusion is res judicata. The Board's scope of review (authority to decide a given issue in a given case) is not the same as its subject matter jurisdiction. Subject matter jurisdiction refers only to the type or general category of controversy, without regard to the facts in a given case or authority to enter a given order. Although the Department and the Board play different adjudicative roles at different stages, both have power to decide an occupational disease as a general category. Washington follows the modern trend in distinguishing subject matter jurisdiction from other types of defects often described as "jurisdictional." Both the precedent and sound policy reject Magee's belated challenge to a conclusion she had an opportunity to but did not raise in her direct appeal. The Court should affirm the superior court judgment.

II. COUNTERSTATEMENT OF THE ISSUES

1. Subject matter jurisdiction is power to decide the type of controversy, without regard to the facts in a given case or authority to enter a given order. Does Magee raise an issue of subject matter jurisdiction in claiming the Board lacked authority to reach the merits of her occupational disease claim because the Department had yet to decide the issue?

2. Collateral attack to subject matter jurisdiction is not available for a party who had an opportunity to litigate the jurisdictional issue in the prior case. Even if Magee's scope of review challenge raises an issue of subject matter jurisdiction, is it too late, because she had an opportunity to but did not raise it in her direct appeal?

3. Res judicata applies to a final decision of the Board and precludes relitigation of all matters decided in the decision. Is the Board's conclusion of law 3 in round one res judicata, because Magee had an opportunity to but did not challenge it in her direct appeal?

III. COUNTERSTATEMENT OF THE CASE

This case involves three parties – Magee, Rite Aid (self-insured employer), and the Department. This case concerns two appeals with two certified appeal board records (BR). This brief refers to these appeals as round one (*Magee I*) and round two (*Magee II*), and the Board records pertaining to them as BR I (CP Sub 18) and BR II (CP Sub 20).

Round one was Magee's appeal from a 2004 Department order that denied her workers' compensation claim as untimely for an injury. BR I 130-131; *Magee I* Finding of Fact (FF) 1. This round two action is

Magee's appeal from a 2009 Department order that denied her request to consider her claim for an occupational disease. BR II 36; *Magee II* FF 1.[1]

A. Round One –Magee's 2004 Claim for Benefits

In 2004, Magee filed a claim, alleging sexual assaults by a supervisor in the course of her employment with Rite Aid. BR I Exhibit 2; CP 39; *Magee I* FF 6; *Magee II* FF 1. The Department denied her claim as not filed "within one year after the day upon which the alleged injury occurred." BR I 131; *Magee II* FF 1. Upon Magee's protest, the Department affirmed the denial. BR I 130; *Magee II* FF 1. Magee appealed to the Board, stating in the notice of appeal that the "injury occurred on while in the employ of Rite-Aid Pharmacy" and that the "relief sought is claim allowance." BR I 128; *Magee II* FF 1.[2]

At the Board, Magee testified that a supervisor sexually assaulted her multiple times between October 2000 and June 2001. *Magee I* Transcript (TR) (04/13/05) 14-17, 20, 23-24, 45-49, 53, 86-88, 102. Rite Aid objected, stating, among other things, that whether her sexual contacts

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[1] *Magee I* Findings of Fact refer to those made by the Board in its decision (BR I 2-9), affirmed by the superior court judgment in round one (BR II 200-201). Copies of the Department, Board, and superior court orders in *Magee I* are attached as Appendix A.

Magee II Findings of Fact refer to those made by the industrial appeals judge in the proposed decision (BR II 24-27), adopted by the Board as its decision (BR II 1) in round two. The Board's decision was affirmed by the superior court order, which is now on appeal in this Court (CP 249-251, 258-259). Copies of the Department, Board, and superior court orders in *Magee II* are attached as Appendix B.

[2] Copies of Magee's claim (BR I Exhibit 2; CP 39) and notice of appeal (BR I 128) are also attached in Appendix A.

were consensual or constituted assaults was not at issue, because the only issue was the timeliness of her claim for an injury. TR 18-19, 21-22.

Magee's counsel responded that Magee was "not claiming just industrial injury. It also can be found to be an occupational disease for the mental disability that she suffered in this matter." TR 18. She was "trying to establish in [the] record" a "repeated physical abuse of this woman from October up until June." TR 19. The counsel argued the "assaults either rose to the level of an occupational disease or an industrial injury," and although "the Department needs to pass on both of those issues," Magee wanted to show "the assaults took place and continued to take place," and "they were not consensual," because if "it was consensual, then you wouldn't have an assault and you wouldn't have had an injury." TR 19.

In her post-hearing brief, Magee argued she timely filed a claim for an injury and "suffered a compensable injury." BR I 641-644. She quoted the definition of an injury and said, "There is no question that the sexual assault inflicted upon [her] by [her supervisor] during the course of her employment constitutes an injury under RCW 51.08.100." BR I 641-642.

The industrial appeals judge (IAJ) issued a proposed decision affirming the claim denial. BR I 108-126; CP 203-221. The IAJ concluded that the series of sexual assaults as testified to by Magee constituted industrial injuries but that Magee failed to timely file a claim

for them. BR I 126; CP 221. The IAJ further concluded that the Board had authority to reach the issue of whether the sexual assaults constituted an occupational disease, for which longer statutory limitations would apply. BR I 119; CP 214. The IAJ concluded that the sexual assaults did not constitute an occupational disease. BR I 120, 126; CP 215, 221.

Both Magee and Rite Aid petitioned the 3-member Board for review. BR I 61-89. Magee argued the IAJ "properly concluded that the physical and sexual assaults on [her] at the Rite Aid store between October 2000 and January 2001 constituted an industrial injury." BR I 64; CP 227. But she argued she filed a timely claim, because she "put Rite Aid on notice within a year." BR I 64-67; CP 227-230. She did not address the Board's scope of review or argue the Board lacked jurisdiction to reach the merits of her occupational disease claim. Rite Aid argued the IAJ should not have decided whether the alleged sexual assaults constituted an injury. BR I 68-89. Rite Aid and Magee then submitted a stipulation about "the scope of the Board's review," stating that the Department decided only the timeliness of Magee's claim, and the parties understood the Board would not reach the merits of her claim. BR I 32-33; CP 152-153. The stipulation did not use the term "jurisdiction."

The Board issued a decision affirming the claim denial, concluding that Magee's claim was untimely for an injury. BR 2-9; CP 155-162. The

Board struck, as exceeding its "scope of review," the IAJ's various findings and conclusions as to whether Magee's sexual contacts with her supervisor were consensual. BR 3; CP 156. Instead, the Board only noted that Magee "characterized" the sexual contacts as assaults, whereas her supervisor "characterized" them as consensual. *Magee I* FF 3.

However, the Board further concluded, "Recognizing that although the Department order addressed only the timeliness of an application for benefits for an industrial injury, we also address [Magee's] argument that she has a claim for an occupational disease." BR I 3; CP 156. The Board concluded, as conclusion of law 3 in the decision, "The "sexual contact [Magee] had with her immediate supervisor between October 2000 and June 2001, does not constitute an occupational disease within the meaning of RCW 51.08.140." *Magee I* Conclusion of Law (CL) 3. The Board reasoned that an occupational disease must arise "naturally" out of employment and that a "series of assaults inflicted upon a worker does not constitute an occupational disease." BR I 6; CP 159.

Magee appealed to King County Superior Court and moved for summary judgment, arguing only that she timely filed a claim for an injury. BR II 252-264. She did not mention or challenge the conclusion of law 3 in the Board decision. Nor did she argue if her claim was untimely for an injury, the court should remand to the Department to

consider whether her claim constituted an occupational disease. Rite Aid filed a response and a counter motion, asking the court to affirm the Board decision. BR II 265-288. The court denied Magee's motion and affirmed the Board decision. BR II 290-291; CP 12-14. The court pointed out that the Board's findings and decision are prima facie correct, and Magee failed to prove otherwise. BR II 291; CP 13. After the court denied reconsideration, Magee appealed to this Court. BR II 202.

At this Court, Magee again argued she filed a timely claim for an injury. BR II 298-332 (appellant's brief), 385-401 (reply). She also argued this Court should remand to the superior court for a trial on the timeliness issue. BR II 329-330. She did not mention or challenge the conclusion of law 3 in the Board decision. Nor did she argue if her claim was untimely for an injury, this Court should remand to the Department to consider whether her claim constituted an occupational disease.

This Court affirmed, holding that Magee failed to timely file a claim, and the Supreme Court denied review. *Magee v. Rite Aid*, 144 Wn. App. 1, 3-11, 182 P.3d 429, *review denied*, 164 Wn.2d 1036 (2008).

B. Round Two – Magee's 2008 Request to Consider Her Claim for an Occupational Disease

In December 2008, Magee asked the Department to decide whether the alleged sexual assaults constituted an occupational disease. BR II 412-

413; CP 168-169. She pointed out her stipulation with Rite Aid at the Board in round one that the merits of her claim was not before the Board. BR II 412; CP 168. She asked the Department to "determine whether or not [she] suffered a mental disorder that is properly defined as an occupational disease when she was repeatedly raped and sodomized while on the job." BR II 413; CP 169.

Rite Aid filed a response, arguing that res judicata precludes Magee's request, because she did not challenge the Board's conclusion of law 3 in round one that the alleged sexual assaults did not constitute an occupational disease. BR II 603-606; CP 171-174. Rite Aid also argued that the sexual assaults as alleged by Magee do not constitute an occupational disease as a mater of law. BR II 605; CP 173. Magee replied, arguing, for the first time, that the Board in round one lacked "jurisdiction" to reach and decide the occupational disease issue and that Rite Aid argued the same at the Board in round one. BR II 31-35.

The Department denied Magee's request, agreeing with Rite Aid that the unchallenged conclusion of law 3 in round one is res judicata. BR II 30; CP 16. Magee appealed to the Board. BR II 29.

At the Board, Magee moved for summary judgment, arguing that the Board in round one lacked jurisdiction to enter the conclusion of law 3 and that the conclusion is "void" and can be attacked at any time. BR II

93-109. She also filed a CR 60 motion asking the Board to vacate the conclusion of law 3 on the same jurisdictional ground. BR II 88-92. Rite Aid filed a cross motion. BR II 115-133. After hearing the parties' arguments, the IAJ stated he was inclined to agree with Rite Aid:

> I think the Board did have jurisdiction. If they didn't have jurisdiction, too little, too late. It should have been brought to the superior court's attention, the court of appeals on up, and it wasn't. It's not – it just isn't there.

Magee II TR (11/2/09) 36. The IAJ issued a proposed decision affirming the Department's res judicata ruling. BR II 24-27. The IAJ "could find no evidence that [Magee] truly raised the current jurisdictional issue on its trail through the Board and the Courts." BR II 25.

The Board denied Magee's petition for review and adopted the IAJ's proposed decision as its final decision. BR II 1. The Board then issued a decision denying Magee's CR 60 motion, rejecting her jurisdictional argument and concluding that "CR 60 does not provide an avenue for relief from the offending conclusion of law after the appellate remedies have been exhausted." BR II 1252. Magee appealed the two Board decisions to King County Superior Court. CP 1-2.

At the superior court, both Magee and Rite Aid moved for summary judgment. CP 88-110, 117-145, 177-247. The Department also filed briefs asking the court to affirm the Board decisions. CP 113-114,

177-183. The superior court granted Rite Aid's motion, denied Magee's, and affirmed the Board decisions. CP 249-251, 258-259. The court reasoned that although the Board in round one "may well have exceeded the scope of review" in entering the conclusion of law 3, "the Board had subject matter jurisdiction to decide/reach conclusions on the issue of occupational disease." CP 250. "When Magee failed to appeal [the conclusion], it became final." CP 250. This appeal follows.

IV. STANDARD OF REVIEW

The industrial insurance act, Title 51 RCW, governs the administrative decision making and judicial review procedures in a workers' compensation case. *See* RCW 51.52.100, .110, .115; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-180, 210 P.3d 355 (2009). A workers' compensation case involves two state agencies: the Department and the Board. The Department is a "front-line" agency that administers claims in an ex parte manner, whereas the Board, as a "quasi-judicial" agency, conducts an evidentiary hearing when a party aggrieved by a Department decision appeals. *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 780-781, 854 P.2d 611 (1993).

The Board replaced the Department's joint board in 1949 as an independent agency to conduct a "full and complete" hearing, consider evidence gathered at the Board, and make "findings of fact and an order."

Karlen v. Dep't of Labor & Indus., 41 Wn.2d 301, 303-304, 249 P.2d 364 (1952). The Board's role is appellate in the sense its review "is limited to those issues which the Department previously decided." *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994) (citation omitted). However, the Board hearing is "not a review" in the sense "the matter comes on for hearing completely de novo." Ivan C. Rutledge, *A New Tribunal in Washington*, 26 Wash. L. Rev. 196, 205 (1951).

At the Board, Magee had "the burden of proceeding with the evidence to establish a prima facie case for the relief" she sought. RCW 51.52.050(2)(a). Magee points out the IAJ's interlocutory order setting litigation schedule in round one that identified as issue the timeliness, but not the merits, of her claim. Appellant's Brief 6-7. However, the IAJ in round one ultimately concluded that the Board had authority to decide Magee's occupational disease claim. BR I 119.

At the superior court, the Board's "findings and decisions" were "prima facie correct," and Magee had the burden of proving otherwise. *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987); RCW 51.52.115. The superior court shall "confirm" the Board decision, if the Board "has acted within its power and has correctly construed the law and found the facts"; otherwise, the Board decision "shall be reversed or modified." RCW 51.52.115. In both rounds one and

two, the superior court affirmed and thus confirmed the Board decisions. BR II 290-291; CP 12-14, 249-251, 258-259.

This Court reviews the superior court decision "as in other civil cases." RCW 51.52.140; *Rogers*, 151 Wn. App. at 180 ("our review in workers' compensation cases is akin to our review of any other superior court trial judgment"). The superior court affirmed the Board decisions by summary judgment. BR II 290-291; CP 249-251. This Court reviews summary judgment ruling de novo. *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683-684, 162 P.3d 450 (2007) (citation omitted). However, unchallenged findings are "verities," and unchallenged conclusions of law become "the law of the case." *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733 n.6, 57 P.3d 611 (2002) (unchallenged findings are "verities"); *Detonics .45 Associates v. Bank of Cal.*, 97 Wn.2d 351, 353, 644 P.2d 1170 (1982) ("law of the case").

Subject matter jurisdiction and res judicata are questions of law reviewed de novo. *See Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003) (jurisdiction); *Lynn v. Dep't of Labor & Indus.*, 130 Wn. Ap. 829, 837, 125 P.3d 202 (2005) (res judicata).

V. ARGUMENT

All parties agree the Board's scope of review is limited to the issues first decided by the Department. *See Hanquet*, 75 Wn. App. at 661.

However, Magee is incorrect in arguing that, where the Department rejected her claim as untimely for an injury, the Board had subject matter jurisdiction only to decide the timeliness of her claim for an injury and exceeded its jurisdiction by addressing the merits of her claim for an occupational disease. Appellant's Brief 15-26. Magee confuses subject matter jurisdiction with authority to enter a given order in a given case.

Courts have often confused the term "subject matter jurisdiction" with authority "to rule in a particular manner," and this "has led to improvident and inconsistent use of the term." *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (citation omitted). "A court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order." *Marley*, 125 Wn.2d at 539. Instead, subject matter jurisdiction is the power to decide the "type of controversy," and the "type" means "the general category without regard to the facts of the particular case." *Dougherty*, 150 Wn.2d at 317 (citing Robert J. Martineau, *Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse*, 1988 BYU L. Rev. 1, 26-27 (1988)).

Although the Department and the Board play different adjudicative roles, often described as "original" and "appellate," they both have the power to decide an occupational disease claim, a type of controversy frequently decided in workers' compensation cases. Even assuming that

the Board erred in deciding the merits of Magee's claim, the error would go to the authority to enter a given order, not subject matter jurisdiction. In any event, the modern trend of the law rejects a collateral challenge to subject matter jurisdiction by a party who could have made it in a direct appeal. *See, e.g.,* Restatement (Second) of Judgments § 12, cmt. c (1982).

This case is about res judicata (claim preclusion). "The doctrine of claim preclusion applies to a final judgment by the Department [and the Board] as it would to an unappealed order of a trial court." *Marley*, 125 Wn.2d at 537. Res judicata precludes relitigation of "all matters determined by" an order. *Perry v. Dep't of Labor & Indus.*, 48 Wn.2d 205, 209, 292 P.2d 366 (1956). "A party's failure to appeal an adverse ruling to the next level transforms the ruling into a final adjudication." *Marley*, 125 Wn.2d at 537 n.2. Because Magee had an opportunity to but did not challenge the conclusion of law 3 in her direct appeal, this conclusion is res judicata.

A. Subject Matter Jurisdiction Refers to the Type of Controversy, Not Authority to Enter a Given Order, and Occupational Disease Is a Subject Matter the Board Has Power to Decide

Magee treats subject matter jurisdiction as referring to the issues the Board may decide *in a given case* in arguing that the Board acquired jurisdiction to decide the timeliness, but not the merits, of her claim. Appellant's Brief 15-26. However, subject matter jurisdiction "is not a

light bulb which can be turned off or on during the course of the trial." *Silver Surprise, Inc. v. Sunshine Min. Co.*, 74 Wn.2d 519, 523, 445 P.2d 334 (1968). "Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding." *Silver Surprise*, 74 Wn.2d at 523. "A lack of subject matter jurisdiction implies that an agency has no authority to decide the claim at all, let alone order a particular kind of relief." *Marley*, 125 Wn.2d at 539.

Washington has adopted the definitions of "valid judgment" and "subject matter jurisdiction" in Restatement (Second) of Judgments Sections 1 and 11. *Marley*, 125 Wn.2d at 539, 541-542. Under the definitions, a valid judgment depends on "jurisdiction of the subject matter of the action, as stated in § 11," and additional elements not at issue here. Restatement (Second) of Judgments § 1. Subject matter jurisdiction is "authority to adjudicate the type of controversy involved in the action." Restatement (Second) of Judgments § 11. Subject matter jurisdiction "refers only to the *kinds* of controversies a court may adjudicate." Restatement (Second) of Judgment § 11, cmt. a (emphasis added).

Professor Martineau's law review article cited with approval by our Supreme Court in *Marley* and *Dougherty* illustrates the difference between subject matter jurisdiction and authority to enter a given order. As the article explains, the "focus" of subject matter jurisdiction must be

on the words "type of controversy," and "all other defects or errors go to something other than subject matter jurisdiction." Martineau, *supra*, at 28; *Marley*, 125 Wn.2d at 539; *Dougherty*, 150 Wn.2d at 316. When a court having authority to decide the type of controversy "grants relief for which it has no express authority, has not been requested by the parties to do so, or grants relief after the time for doing so has expired, it is a defect in the court's authority to perform a particular act." Martineau, *supra*, at 29. "It is not one of subject matter jurisdiction." Martineau, *supra*, at 29.

For example, the Rhode Island Supreme Court has rejected a subject matter jurisdiction challenge to a divorce court's award of attorney fees as res judicata, although a divorce court's powers are purely statutory, and no express statutory authority supported the award. *Hartt v. Hartt*, 397 A.2d 518, 520-524 (R.I. 1979) (cited with approval in Martineau, *supra*, at 29). The same court later distinguished "the lack of jurisdiction over a particular action for failure to comply with the conditions precedent" ("appropriate exercise of power") from "a lack of jurisdiction over the class of cases to which that action belongs" ("absence of power"), only the latter being a matter of subject matter jurisdiction. *Mesolella v. City of Providence*, 508 A.2d 661, 665 (R.I. 1986).

Other states have consistently recognized this distinction. *See Buckalew v. Buckalew*, 754 N.E.2d 896, 898 (Ind. 2001) (although courts

sometimes refer to "jurisdiction over the particular case," the "imperfections of this kind, however, merely make a judgment voidable through appeal" upon "specific and timely objections"); *Bd. of Nursing v. Nechay*, 701 A.2d 405, 410 (Md. 1997) ("Once a court acquires fundamental jurisdiction of a case, any judgment that it renders in that case [is] not invalidated because of an alleged improper exercise of that jurisdiction."); *State v. Mandicino*, 509 N.W.2d 481, 482 (Iowa 1993) ("A court may have subject matter jurisdiction but for one reason or another may not be able to entertain a particular case.").

Washington follows this modern trend and distinguishes "subject matter jurisdiction" from "authority to enter a given order." *Marley*, 125 Wn.2d at 539; Restatement (Second) of Judgments § 11 cmt. e ("modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction"). As the *Marley* court explained, classifying an error as one of subject matter jurisdiction "transforms it into one that may be raised belatedly, and thus permits its assertion by a litigant who failed to raise it at an earlier stage in the litigation." *Marley*, 125 Wn.2d at 541 (citing Restatement (Second) of Judgments § 12, cmt. b).

The "type of controversy" involved in *Marley* was "eligibility for worker's compensation benefits as a beneficiary." *Marley*, 125 Wn.2d at

543. The *Marley* Court held the Department has jurisdiction to decide this general category, because it has "jurisdiction to adjudicate all claims for worker's compensation." *Marley*, 125 Wn.2d at 542 (citation omitted).

Magee tries to distinguish *Marley* as describing the type of controversy the Department, not the Board, has power to decide. Appellant's Brief 19-20. However, *Marley* used the term "Department" "broadly" to address the "multiple levels of review . . . by the Department itself, by an Industrial Appeals Judge [of the Board], and by the Board itself." *Marley*, 125 Wn.2d at 537 n.2. *Marley* thus recognizes that, although the Department and the Board play different roles at different stages, both have power to decide workers' compensation eligibility, the "type of controversy." *Marley* rejects Magee's argument that equates the scope of review ("authority to enter a given order") with subject matter jurisdiction ("type of controversy"). *Marley*, 125 Wn.2d at 539.

Dougherty likewise determined the superior court's subject matter jurisdiction in a workers' compensation case based on "the authority of a court to adjudicate a particular type of controversy, not a particular case." *Dougherty*, 150 Wn.2d at 317 (citing *State v. Franks*, 105 Wn. App. 950, 22 P.3d 269 (2001)). The court noted prior cases that used the term "appellate jurisdiction," "unfortunately" mixing "procedural requirements with jurisdictional principles." *Dougherty*, 150 Wn.2d at 315 (citation

omitted). Our courts continue to follow the "type of controversy" subject matter jurisdiction principle. *See Shafer v. Dep't of Labor & Indus.*, 140 Wn. App. 1, 6-7, 159 P.3d 473 (2007) (failing to serve a copy of a claim closing order on the worker's doctor as required by the statute is not a matter of subject matter jurisdiction), *aff'd*, 166 Wn.2d 710 (2009); *Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 964-967, 235 P.3d 849 (2010) (Becker, J., concurring) (failing to comply with the APA service requirement is not a matter of subject matter jurisdiction); *Mutual of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 266, 199 P.3d 376 (2008) ("subject matter jurisdiction over torts as a whole"); *Franks*, 105 Wn. App. at 954-957 (jurisdiction over "juvenile felony cases").[3]

The Board consistently determined in a significant decision that its scope of review is not synonymous with subject matter jurisdiction and that if the Board exceeds its scope of review, it is an error of law subject to a timely challenge in a direct appeal, not a defect in subject matter

[3] In *Shafer*, the closing order did not become final when the order was not communicated to the worker's attending doctor as required by the statute, because the attending doctor plays an "important" statutory role as a "party," and notice to the doctor is to allow the doctor's input before a claim could be closed. *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 720-721, 213 P.3d 591 (2009). Once "a claim is made the worker's chosen physician becomes an intricate part of the process until the claim is closed." *Shafer*, 166 Wn.2d at 720. Thus, when the worker timely appealed a later order denying her reopening application, she was not precluded from challenging the claim closure. Unlike *Shafer*, Magee's case does not involve a notice issue. Further, unlike the situation in *Shafer*, where the attending doctor (party) did not know of the claim closure and testified she would have appealed it had she known of it, *id.* at 714, Magee knew of the Board's conclusion of law 3 but chose not to challenge it in round one.

jurisdiction. *In re Orena A. Houle*, BIIA Dec., 00 11628, at *3 (2001) (available at 2001 WL 395827). The Board publishes its significant decisions available to the public. *See* RCW 51.52.160.

In a workers' compensation case, the Department makes an initial decision, and the Board, upon appeal, makes a de novo determination of the issues decided by the Department. *See* RCW 51.52.050, 104. It is undisputed that the Department has subject matter jurisdiction to decide an occupational disease. It follows that the Board also has subject matter jurisdiction to decide an occupational disease. Whether the issue was previously decided by the Department goes to the Boards' scope of review or authority to decide a given case, not subject matter jurisdiction.

B. "Original" versus "Appellate" Jurisdiction Describes Different Nature and Scope of Decision Making Authority, Not Subject Matter Jurisdiction, and Magee Shows No Contrary Case Law

Magee cites statements in several cases using the terms "original" and "appellate" jurisdiction as distinguishing the subject matter jurisdiction of the Department and the Board. Appellant's Brief 14, 15-26. But these terms describe the different nature and scope of decision making authority of trial and appellate courts, not subject matter jurisdiction. *See, e.g., Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 471-472, 24 P.3d 1079 (2001) ("original" and "appellate" jurisdictions "ordinarily are used in reference to courts," but the "scope

and nature of an administrative appeal or review must be determined by the provisions of the statutes and ordinances which authorize them, not by applying an abstract definition of the word 'appeal'").

Unlike a typical appellate tribunal, the Board conducts an evidentiary hearing and makes its own findings. RCW 51.52.104. Thus, a simple analogy of the Board as an "appellate" court does not fully explain the Board's role in a workers' compensation case, let alone subject matter jurisdiction, which, as shown above, turns on the type of controversy. *See State ex rel. Lige & Wm. B. Dickson Co. v. Pierce County*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992) ("tribunal with only appellate jurisdiction is not permitted or required to make its own findings"); Rutledge, *supra*, 26 Wash. L. Rev. at 205 (Board "proceeding is not a review"; "the matter comes on for hearing completely de novo"). Further, none of the cases cited by Magee holds that the Board's appellate role or scope of review is a matter of subject matter jurisdiction subject to collateral challenge.

General "expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved." *Wilber v. Dep't of Labor & Indus.*, 61 Wn.2d 439, 445, 378 P.2d 684 (1963) (citations omitted). Care must be taken in examining the word "jurisdiction," because "no word is more deserving of characterization as a 'weasel word

of the law' than the much used and often abused word 'jurisdiction.'" *O'Keefe v. Dep't of Revenue*, 79 Wn.2d 633, 634, 488 P.2d 754 (1971).

None of the cases Magee cites addressed the Board's subject matter jurisdiction; nor did they involve a collateral challenge to a conclusion entered and unchallenged in a prior case. *See Hanquet*, 75 Wn. App. at 661-663 (direct appeal challenging the Board's scope of review); *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 978-981, 478 P.2d 761 (1970) (same); *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 574, 141 P.3d 1 (2006) (declining to address a jurisdictional issue); *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 8, 977 P.2d 570 (1999) (court of appeals' discussion on an issue not addressed below was unnecessary dicta); *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169-170, 937 P.2d 565 (1997) (unappealed Department order is res judicata).

For example, *Hanquet* involved a claim denial based on the "sole proprietor or partner" coverage exemption, and the Board affirmed by applying a separate "private home" exemption, a "highly fact-specific" issue neither party litigated. *Hanquet*, 75 Wn. App. at 661-663. The Board erred in reaching the issue not passed on by the Department, and the error was prejudicial. *Id.* at 662-663. This Court reasoned that the Board divided 2 to 1 on the nature of a structure for a "private home," and if the claimant had been aware of the issue, "he might have been able to present

additional evidence or argument bearing on the question and the outcome may well have been different." *Hanquet*, 75 Wn. App. at 662-663.

Hanquet did not use the term "subject matter jurisdiction" or "type of controversy." In fact, the harmless error analysis indicates the court's understanding that the error was not a matter of subject matter jurisdiction, because, otherwise, the decision would be "void," regardless of prejudice. *See Wesley v. Schneckloth*, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959) (order entered without subject matter jurisdiction "is void ab initio"). Unlike the claimant in *Hanquet*, who challenged the Board's scope of review in his direct appeal, Magee did not challenge the Board's occupational disease conclusion in her direct appeal. *Hanquet* does not support Magee here. Nor does *Lenk* support her. *Lenk* also involved a direct appeal from a Board finding as outside the scope of review, and this Court found no error. *See Lenk*, 3 Wn. App. at 985-987. *Lenk* did not use the term "subject matter jurisdiction" or "type of controversy."

Magee cites *Cowlitz* and *Ruse* and claims *Hanquet* has been "reaffirmed by the Supreme Court since *Marley*." Appellant's Brief 23. But no party argues the *Hanquet* scope of review holding was incorrect or overturned. Nor did *Cowlitz* or *Ruse* use the term "subject matter jurisdiction" or "type of controversy." *Cowlitz* declined to address a purported "jurisdiction" challenge as not preserved on the record. *Cowlitz*,

157 Wn.2d at 574. *Ruse* affirmed the court of appeals' holding that the claimant failed to prove a causal link between his disability and work and then stated the court thus "had no need to address" a newly raised "distinctive conditions issue." *Ruse*, 138 Wn.2d at 8-9. Neither *Cowlitz* nor *Ruse* supports Magee's claim that the Board's scope of review is a matter of subject matter jurisdiction.

Magee quotes a statement in *Kingery*, which is a quote from a 1934 case, that the Department has "original and exclusive jurisdiction" to determine the "mixed questions of law and facts" as to an industrial injury or occupational disease. Appellant's Brief 17 (citing *Kingery*, 132 Wn.2d at 169 (citing *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934)). But, at the time of *Abraham*, the Board did not exist, and the Department engaged in both claim administration and hearing, the latter currently being the Board's role. Thus, the quoted language, which was used for the res judicata holdings in *Abraham* and *Kingery*, does not support Magee's attempt to narrowly define the Board's subject matter jurisdiction. Further, like all the other cases Magee cites, *Kingery* did not involve a collateral challenge or the Board's subject matter jurisdiction.

To the extent *Hanquet*, *Lenk*, *Cowlitz*, *Ruse*, and *Kingery* used the term "jurisdiction," the use only illustrates the concern stated in *Marley* and *Dougherty* and other cases that courts have often used the term

"jurisdiction" without truly addressing "subject matter jurisdiction." *See Marley*, 125 Wn.2d at 539; *Dougherty*, 150 Wn.2d at 315; *Franks*, 105 Wn. App. at 955 ("But *Sponburgh* does not actually discuss the superior court's 'subject matter jurisdiction.' Rather, it merely uses the term 'jurisdiction.'"). Magee's reliance on the term used in these cases without regard to the context of the use is thus misplaced.

Magee argues that allowing the Board to decide an issue not first decided by the Department would ignore the statutory scheme, in which the Department makes an initial decision. Appellant's Brief 20. Magee's concern is misplaced. If the Board commits such an error, the aggrieved party may appeal and have the error corrected, as in *Hanquet*. *See In re Houle*, BIIA Dec., 00 11628, 2001 WL 395827, at *3 (Board "labors to stay within the scope of review," and if it exceeds its scope of review, "it is exposed to potentially dramatic and unpleasant reversal either by Superior Court, the Court of Appeals, or the Supreme Court").

Magee points out her stipulation with Rite Aid in round one that the Board's "scope of review" (not "jurisdiction") was limited to the timeliness issue and suggests Rite Aid was estopped from taking a contrary position. Appellant's Brief 6-14. But the stipulation is irrelevant to the subject matter jurisdiction analysis, because parties cannot decide subject matter jurisdiction "by agreement between themselves." *Wesley*,

55 Wn.2d at 93-94. Also, "courts are not bound by stipulations to legal conclusions." *State v. Drum*, 168 Wn.2d 23, 33, 225 P.3d 237 (2010) (citations omitted). Further, judicial estoppel "concerns itself with inconsistent assertions of *fact*, not with inconsistent positions taken on points of *law*." *CHD, Inc. v. Taggard*, 153 Wn. App. 94, 102, 220 P.3d 229 (2009) (emphasis added). The Department otherwise agrees with Rite Aid that Rite Aid's scope of review argument in round one is not inconsistent with its res judicata argument here. Rite Aid Brief 21.

No authority supports Magee's claim that the Board's scope of review is a matter of subject matter jurisdiction. Magee's collateral challenge to the Board's scope of review presents at most a waived procedural error, not a lack of subject matter jurisdiction.

Finally, citing CR 60(b), Magee argues she is entitled to relief from the Board's conclusion of law 3. Appellant's Brief 28-29. But her argument is based entirely on her theory of subject matter jurisdiction, which, as shown above, fails. Further, "CR 60(b) is not a substitute for appeal." *Bjurstrom v. Campbell*, 27 Wn. App. 449, 451, 618 P.2d 533 (1980) (citation omitted). The "exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion." *Bjurstrom*, 27 Wn. App. at 451.

C. Even If the Board's Scope of Review Is a Matter of Subject Matter Jurisdiction, Magee's Challenge Is Too Late

Marley did not decide whether a party may *collaterally* challenge subject matter jurisdiction, because the Court concluded that the asserted error was not a matter of subject matter jurisdiction. *See Marley*, 125 Wn.2d at 542-543. However, collateral challenge to subject matter jurisdiction is generally not available for a party who had an opportunity to raise it in a direct appeal. *See* Restatement (Second) of Judgments § 11, cmt. c; Martineau, *supra*, at 32 ("As a result of a series of Supreme Court decisions beginning in the 1930s, however, it became almost impossible to challenge subject matter jurisdiction *collaterally*.").

"Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter." *Stoll v. Gottlieb*, 305 U.S. 165, 171-172, 59 S. Ct. 134, 83 L. Ed. 104 (1938). Where adverse parties appear, a court by necessity determines its subject matter jurisdiction, and a party may not collaterally challenge the lack of subject matter jurisdiction. *Stoll*, 305 U.S. at 172; *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, 60 S. Ct. 317, 84 L. Ed. 329 (1940) (same); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1052-53 (5th Cir. 1987) (same). "When the question of the tribunal's jurisdiction is raised in the original action, in a modern procedural regime

there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion." Restatement (Second) of Judgments § 12, cmt. c. "Principles of res judicata attach to the jurisdictional ruling and prevent relitigation." *In re Marriage of Murphy*, 90 Wn. App. 488, 498, 952 P.2d 624 (1998) (citations omitted).

In round one at the Board, Magee and Rite Aid submitted a stipulation as to the Board's scope of review. BR I 32-33. Yet, the Board, while recognizing the stipulation, concluded it had authority to decide Magee's occupational disease claim and went on to decide the issue. BR I 3, 8. The Board further concluded it "has jurisdiction over the parties to and the subject matter of these appeals." BR I 161 (conclusion of law 1). Magee did not challenge any of these conclusions in her direct appeal. Thus, even if Magee's challenge to the Board's scope of review goes to subject matter jurisdiction, it is too late and must fail. *See Magee II* TR (11/2/09) 36 (IAJ oral ruling) ("I think the Board did have jurisdiction. If they didn't have jurisdiction, too little, too late.").

D. The Board's Conclusion of Law 3 on Magee's Occupational Disease Claim Is Res Judicata, Because Magee Had an Opportunity to But Did Not Challenge It in Her Direct Appeal

The "doctrine of claim preclusion applies to a final judgment by the Department [and the Board]." *Marley*, 125 Wn.2d at 538 (emphasis added). Citing cases addressing collateral estoppel, Magee argues that res

judicata does not apply to the Board's conclusion of law 3 in round one, claiming her occupational disease claim was not "actually litigated and necessarily determined." Appellant's Brief 26-28.

But the "actually litigated and necessarily determined" elements pertain to collateral estoppel (issue preclusion), not res judicata (claim preclusion). Res judicata precludes relitigation of the same claim or cause of action, whereas collateral estoppel precludes relitigation of the same issue. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004) (citation omitted). Res judicata precludes relitigation of "all issues which might have been raised and determined" in a prior case, whereas collateral estoppel precludes relitigation of "only those issues actually litigated and necessarily determined." *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). Magee's argument based on collateral estoppel thus misses the point and fails.[4]

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[4] *Luisi Truck* held that a prior decision that a motor carrier was guilty of hauling canned goods did not preclude a later litigation about the carrier's property rights in its permit – whether the permit allowed hauling only fresh fruits and vegetables or also included semi-processed or processed fruits and vegetables, although the prior decision included a finding that the permit allowed hauling only unmanufactured and unprocessed fruits and vegetables. *Luisi Truck Lines, Inc. v. Util. & Transp. Comm'n*, 72 Wn.2d 887, 890-897, 435 P.2d 654 (1967). The court discussed both res judicata and collateral estoppel but ultimately applied the latter in addressing the actually litigated and necessarily determined elements as well as the absence of injustice element. *See Luisi Truck*, 72 Wn.2d at 894-897. Res judicata would not apply there, because there was no identity in the subject matter of the two cases (determining guilt versus property rights).

Further, "actually litigated" means only that the "issue was actually recognized by the parties as important and by the judge as necessary to the first judgment." *Shuman v. Dep't of Licensing*, 108 Wn. App. 673, 681, 32 P.3d 1011 (2001) (collateral estoppel does not require prior litigation of the issue in a "full-blown evidentiary hearing").

The superior court correctly concluded that the Board's unchallenged conclusion in round one is res judicata. CP 250; *Magee* II BR 27. Res judicata applies whenever there is identity between a prior decision and a later action as to (1) "subject matter," (2) "cause of action," (3) "persons and parties," and (4) "quality of the persons for or against whom the claim is made." *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737, 222 P.3d 791 (2009) (citation omitted); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004) ("Res judicata is the rule, not the exception."). The fourth "quality of the persons" element "simply requires a determination of which parties in the second suit are bound by the judgment in the first suit." *Ensley v. Pitcher*, 152 Wn. App. 891, 905, 222 P.3d 99 (2009) (citing 14 A Karl B. Tegland, Washington Practice: Civil Procedure § 35.27, at 464 (1st ed. 2007)).

Here, all elements are met to apply res judicata to the Board's decision in round one, including the conclusion of law 3. Rounds one and two both involved the same cause of action (Magee's initial claim for benefits based on the alleged sexual assaults at Rite Aid) and the same parties (Magee, Rite Aid, and the Department). The two actions also involve the same subject matter – whether Magee developed an occupational disease as a result of the alleged sexual assaults. The Board decided in round one: "The sexual contact that the claimant had with her

immediate supervisor between October 2000 and June 2001, does not constitute an occupational disease within the meaning of RCW 51.08.140." BR I 8 (conclusion of law 3). Because Magee did not appeal the conclusion of law 3 in her direct appeal, the conclusion is res judicata.

Magee claims because "Rite Aid briefed extensively how the merits of an occupational disease claim were not litigated and evidence was not submitted on this issue, Rite Aid cannot prevail on a claim that Conclusion of Law # 3 is final and binding." Appellant's Brief 27. But, as shown above, estoppel does not apply to a party's positions on points of law, and Magee shows no inconsistency in Rite Aid's positions. Further, the Board noted Rite Aid's scope of review argument yet reached the occupational disease issue, deciding the issue in favor of Rite Aid. BR I 3. If Magee believed the Board's conclusion was in error, she had to "appeal the adverse ruling." *Marley*, 125 Wn.2d at 538. Magee cannot shift blame to Rite Aid for her own failure to timely challenge the conclusion.

Magee is also incorrect in claiming that "neither party submitted any evidence on the merits of an occupational disease claim." Appellant's Brief 28. She did submit evidence on the merits. She requested "claim allowance" and testified how her supervisor sexually assaulted her. BR I 128; *Magee I* TR (04/13/05) 14-17, 20, 23-24, 45-49, 53, 86-88, 102. Over Rite Aid's objection, Magee's counsel stated Magee was "trying to

establish," among other things, that "assaults took place and continued to take place" and that "they were not consensual," because otherwise "you wouldn't have an assault and you wouldn't have had an injury." TR 19. In her post-hearing brief, Magee argued on the merits, stating sexual assault "constitutes an injury under RCW 51.08.100" and further stated in her petition to the Board that the IAJ "properly concluded" the alleged sexual assaults constituted an "injury." BR I 64, 641-642; CP 227.

After submitting the evidence for and arguing the merits of her claim at the Board, Magee cannot complain she had no notice the Board would decide the merits. More importantly, if there was any irregularity at the Board, Magee could have challenged it in her direct appeal but did not.

Lastly, although unnecessary for the outcome of this case, Magee's claim does not state an occupational disease as a matter of law. An occupational disease arises "naturally" out of employment. RCW 51.08.140. The "naturally" element requires that Magee's "particular work conditions more probably caused [her] disease or disease-based disability than conditions in everyday life or all employments in general." *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987). Her conditions "must be a natural incident of conditions of [her] particular employment." *Dennis*, 109 Wn.2d at 481. Further, "mental

conditions or mental disabilities caused by stress do not fall within the definition of occupational disease." RCW 51.08.142.

For example, the "naturally" element was met when a nurse contracted hepatitis in a hospital. *See Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 637, 600 P.2d 1015 (1979). The element was also met when a sheet metal worker, who repetitively used tin snips for 38 years, developed osteoarthritis. *See Dennis*, 109 Wn.2d at 483.

Unlike the hepatitis and osteoarthritis that "naturally" arose from the nurse's and the sheet metal worker's respective employments in *Sacred Heart* and *Dennis*, Magee alleged a mental disorder as a result of sexual assaults by a supervisor. *Magee I* TR (04/13/05) 18; BR II 413. Intentional sexual assaults by a supervisor (criminal acts) cannot be said to be a "natural incident" of Magee's employment with Rite Aid. *See Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 566-568, 880 P.2d 29 (mental condition caused by workplace sexual and other harassment was not an occupational disease, because such harassment was "not particular to her occupation" but "could just as easily have occurred in any other workplace"), *reversed in part on other grounds*, 124 Wn.2d 634 (1994); *Gast v. Dep't of Labor & Indus.*, 70 Wn. App. 239, 243-244, 852 P.2d 319 (1993) ("court correctly determined as a matter of law that

rumors, innuendoes, and inappropriate comments by co-workers are not distinctive conditions of employment").

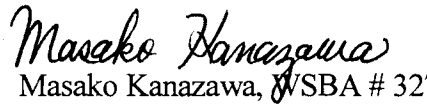
Further, Magee's allegations present "mental conditions or mental disabilities caused by stress" (from the alleged assaults), which are expressly excluded from the definition of occupational disease. RCW 51.08.142. Thus, Magee's claim does not state an occupational disease as a matter of law. A further litigation is not warranted.

VI. CONCLUSION

For the reasons stated above, the Department asks this Court to affirm the superior court judgment in this case by holding that the Board's unchallenged conclusion of law 3 in round one is res judicata.

RESPECTFULLY SUBMITTED this 21st day of December, 2010.

ROBERT M. MCKENNA
Attorney General



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Appendix A

JAN 30 2007

The Honorable Jeffrey Ramsdell
Date of Hearing: January 26, 2007
Time of Hearing: 9:00 am

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MARCIA R. MAGEE, Plaintiff, vs. RITE AID, Defendant.	Cause No. 06-2-25454-6SEA ~~[PROPOSED] ORDER GRANTING DEFENDANT'S (RITE AID'S) CROSS MOTION FOR SUMMARY JUDGMENT~~; ORDER DENYING PLAINTIFF'S (MAGEE'S) MOTION FOR SUMMARY JUDGMENT

The Defendant, Rite Aid, having moved this Court for an order granting summary judgment to affirm the decision of the Board of Industrial Insurance Appeals finding Magee failed to timely file an application for benefits and rejecting her claim, and the Plaintiff, Magee, having moved this Court for an order granting her motion for summary judgment as to her claim that she timely filed an application for benefits, and the Court having,

Reviewed the Certified Appeal Board Record;

Plaintiff Magee's Motion for Summary Judgment;

Affidavit of Kylee T. MacIntyre (with attached Exhibits 1-3);

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EXHIBIT
9

Defendant Rite Aid's Cross Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment;

Plaintiff's Response to Rite Aid's Motion for Summary Judgment; and,

Defendant's Rebuttal Regarding its Cross Motion for Summary Judgment

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

~~That Defendant Rite Aid's Cross Motion for Summary Judgment is granted;~~

That Plaintiff Magee's Motion for Summary Judgment is denied*; and

That the Decision and Order of the Board of Industrial Insurance Appeals dated August 1, 2006 is affirmed. Given this court's ruling on Plaintiff's Motion, the court finds it unnecessary to enter an order on Defendant's Cross Motion.

DATED this 29th day of ~~December~~ January 7, 2007.

By: Jeffrey Ramsdell
The Honorable Jeffrey Ramsdell

* The standard of review applicable to the issues presented is found in RCW 51.52.115 which states that "The findings and decision of the Board shall be prima facie correct and the burden of proof shall be upon the party attacking the same." Case law establishes that the applicable burden is by a preponderance. In the case at bar, this court concludes that the plaintiff has failed to meet her burden although plaintiff argues strenuously that Rite Aid was supplied written notification by plaintiff sufficient to satisfy the requirements of RCW 51.28.020. This court is not persuaded. In order for the filed application to be adequate, it must include facts sufficient to establish that the worker suffered and that the worker was seeking compensation. Nelson v. Dept. of Labor + Indus. 9 Wn2d 621 (1941). The fact that the employer is a self-insured does not eliminate the latter requirement. See In re: Charles Pierce, 1993 WL 73612 at Fn 2 (Wash. Bd Ind. Ins. App (1993); RCW 51.28.020(1)(a). Ms. Magee failed to file an application satisfying the latter requirement within the time provided by RCW 51.28.050. Therefore, the decision of the Board must be affirmed.

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARCIA R. MAGEE	)	DOCKET NOS. 04 19326 & 04 20029
	)	
CLAIM NO. W-494270	)	DECISION AND ORDER

APPEARANCES:

Claimant, Thomas A. Thompson, by
Walthew, Warner, Thompson, Eagan, Kindred & Costello, P.S., per
Thomas A. Thompson

Self-Insured Employer, Rite Aid, by
Reeve Shima, P.C. per
Mary E. Shima, and by

Talmadge Law Group, PLLC, per
Philip A. Talmadge, and by

Hodel Briggs Winter, LLP, per
Karla J. Kraft

The claimant, Marcia R. Magee, filed an appeal with the Board of Industrial Insurance Appeals on July 20, 2004, from an order of the Department of Labor and Industries dated July 9, 2004. In this order, the Department affirmed the Department order dated March 31, 2004, in which the Department denied the claim on the grounds that the claimant had not filed an application for benefits within one year after the date on which the injury occurred. The Department order is **AFFIRMED**. (Docket No. 04 19326).

The claimant, Marcia R. Magee, filed an appeal with the Board of Industrial Insurance Appeals on August 2, 2004, from an order of the Department of Labor and Industries dated June 3, 2004, in which the Department denied her request to assess penalties against the self-insured employer for failure to file the claim and failure to report an on-the-job injury. The Department order is **AFFIRMED**. (Docket No. 04 20029).

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on April 6, 2006, in which the industrial appeals judge affirmed the order of the Department dated July 9, 2004, in which the Department denied the claim because it was not timely filed. (Docket No. 04 19326).

This matter is also before the Board on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order in which the industrial appeals judge reversed the Department order dated June 3, 2004, in which the Department denied the claimant's request for a penalty against the self-insured employer for failure to report an on-the-job injury and directed the Department to assess a penalty pursuant to RCW 51.28.025(2).

The appeals were consolidated for hearing but deconsolidated for the Proposed Decision and Orders. We again consolidate the appeals for issuance of a single Decision and Order. We address those issues raised by the appeal and by the parties in trying the case, specifically, whether the claim was time barred, whether it was error to deny the claimant's motion for discovery, and whether a penalty should be assessed against the self-insured employer for failure to report an injury. We are also correcting the findings that exceeded the scope of review before us.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. All rulings, including the interlocutory order denying discovery following *in camera* review of documents issued by Judge Richard J. Mackey, are affirmed.

We agree that the claimant's application for benefits was not timely filed. Recognizing that although the Department order addressed only the timeliness of an application for benefits for an industrial injury, we also address the claimant's argument that she has a claim for an occupational disease.

We disagree that the self-insured employer should be penalized for failing to report an industrial injury as required by RCW 51.28.025:

> Whenever an employer has notice or knowledge of an injury or occupational disease sustained by any worker in his or her employment who has received treatment from a physician or a licensed advanced registered nurse practitioner, has been hospitalized, disabled from work or has died as the apparent result of such injury or occupational disease, the employer shall immediately report the same to the department on forms prescribed by it.

We have granted review to modify certain findings so as not to exceed the scope of review before us, and to affirm the Department order in which the Department denied the claimant's request for a penalty against the self-insured employer.

For purposes of this Decision and Order, the salient facts can be stated briefly.

Ms. Magee was a long-time employee of Rite Aid when she and Alan Woolford, who was her direct supervisor and an assistant manager of the store she was assigned to, began a sexual relationship that lasted from October 2000 to sometime in June 2001. Until January 2001, the

contact occurred at the worksite, and after that, at Ms. Magee's apartment. Ms. Magee terminated her employment with Rite Aid in May 2001. Her letter of resignation did not hint of any problems at work or that an industrial injury may have occurred.

Ms. Magee characterized the sexual contacts she had with Mr. Woolford as assaults. The record establishes that Mr. Woolford acknowledged the contact, but characterized it as consensual.

Ms. Magee described herself as autistic, dyslexic, and dysprophia, which led to a determination during her school years that she was mentally handicapped and to her placement in special education classes. She describes her employment history as consisting of marginal jobs although she was apparently considered a good employee. Despite that evidence, Ms. Magee does not argue that a filing deadline should be tolled due to incapacity, nor does the evidence support such an argument. We note that Ms. Magee was represented by counsel at a time when she could have filed a timely application.

Shortly after she terminated her employment at Rite Aid, Ms. Magee filed a complaint with the Equal Employment Opportunity Commission (EEOC). The complaint was served on a manager for Rite Aid. The complaint alleged harassment but did not allege an injury. Ms. Magee also sought a restraining order in King County District Court against Mr. Woolford. That action was ultimately transferred to Superior Court and resulted in an out-of-court settlement. Rite Aid was not a named party in that lawsuit, although they participated in the settlement. There are certain documents used in that settlement that Ms. Magee now seeks to obtain for use in these appeals.

By June 2002, Ms. Magee filed a police report and an application for Crime Victims' Compensation. There is no evidence that the application was allowed and or that the application was provided to Rite Aid or that Rite Aid was put on notice that Ms. Magee was alleging an injury during the course of her employment with them.

On January 26, 2004, Pinnacle Risk Management, the third party administrator, received an undated and unsigned SIF-2 form from the office of the law firm representing Ms. Magee in her workers' compensation claim. That document was the first notice of any kind Pinnacle had that Ms. Magee was alleging an industrial injury as a result of her contact with Mr. Woolford.

Insofar as the contact with Mr. Woolford was the basis for Ms. Magee's claim, her filing is not timely. The time allowed for filing and the consequences of an untimely filing are codified in RCW 51.28.050 which states:

> No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the rights

4

of dependents or beneficiaries accrued, except as provided in RCW 51.28.055.

"The timely filing of the worker's claim is a statutorily imposed jurisdictional limitation upon his right to receive compensation and upon the Department's authority to accept the worker's claim for benefits." *Wilbur v. Department of Labor & Indus.*, 38 Wn. App. 553 (1984) *Rev. denied*, 103 Wn.2d 1016 (1985), quoting *Wheaton v. Department of Labor & Indus.*, 40 Wn.2d 56 (1952).

Mr. Wilbur contended that his claim should be allowed despite the fact that it was not filed within one year from the day the injury occurred because he relied on his doctor's assurance that the claim would be filed in time. The court rejected that argument while acknowledging the duty of a physician who attends an injured worker to inform the worker of his or her rights under the Workers' Compensation Act and the physician's liability in the event that duty is not performed. Nevertheless, the court held that there was no precedent for the proposition that an attending physician's failure to perform this statutory duty excuses the injured worker from performing his statutory duty to file an application for benefits with the Department.

Mr. Wilbur also contended that the report of accident which was filed with the Department by his employer imposed a duty on the Department to forward to the worker a statement of their compensation rights, and that once the accident report has been filed, the Department is estopped from refusing to consider the merits of an untimely application.

The significance of that last holding to this appeal lies not in the employer's failure to file an accident report with the Department because we find that the employer did not have information from which it would reasonably conclude that Ms. Magee had sustained an industrial injury or occupational disease and had received treatment from a physician or licensed advanced registered nurse practitioner; had been hospitalized; disabled from work or died from the injury or disease until the SIF-2 was filed in January 2004 when the employer did, in fact, report the injury to the Department. The significance lies in the court's clear statement that the worker's statutory obligation to file a timely application does not depend on either the employer's or the Department's compliance with their duty under the law and any failure would not mitigate Ms. Magee's untimely filing.

For that reason, it is not clear that a worker is aggrieved if an employer breaches its duty to report an injury to the Department or if the Department declines to impose a penalty. Penalties pursuant to RCW 51.28.025 are paid to the supplemental pension fund. A report filed by an employer does not substitute for an application filed by a claimant, nor does it toll the time a worker

has to file an application. That notwithstanding, we affirm the Department order in which the Department denied the claimant's request for a penalty.

The claimant contends that she is entitled to certain documents in possession of the attorney who represented Rite Aid in the settlement of the lawsuit between Ms. Magee and Mr. Woolford. We have reviewed the documents that were the subject of the *in camera* review and the subsequent order denying the claimant's motion for discovery. We agree that all of the documents were either privileged or were work product, with the majority of them being work product.

Privilege, codified in RCW 5.60.060, applies to communication from a client to an attorney and the advice given by the attorney in the course of professional employment and will rarely be violated.

Work product is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategies with an eye toward litigation, free from unnecessary intrusion by his or her adversaries. Work product is subject to more exceptions than privilege is, but usually requires that the requesting party can demonstrate a substantial need for the material and an inability to obtain the material in another reasonable way. *Sofer v. Cowles Publishing Company*, 131 Wn. App. 882 (March 9, 2006). CR 26(b)(4)

In this case, the claimant is attempting to show that the employer had the kind of knowledge of her injury that obligated it to report to the Department. The difficulty the claimant had with demonstrating a substantial need for the material has to do with the factors discussed above. It does not matter whether a report was filed, and hence, she has no substantial need for it. Whether the employer reported an injury or not, the claimant's obligation to file a timely application is not affected and insofar as that is the case, the inquiry is not relevant to this appeal The claimant also failed to show that the material could not be obtained in another way. We must assume that any information in the employer's possession relating to an injury sustained by the claimant would have come from the claimant herself, or from sources, for example, a physician or a hospital, to which she would have access. The claimant does not meet either prong of the two-prong test that would entitle her to the requested material.

Finally, we turn to the claimant's argument that she may have a claim for an occupational disease. An occupational disease is defined in RCW 51.08.140 as a disease or infection that arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title. A series of assaults inflicted upon a worker does not constitute an occupational disease.

FINDINGS OF FACT

1. On January 23, 2004, the claimant, Marcia R. Magee, filed an SIF-2 with Rite Aid, alleging injuries to her shoulder, back, and abdomen during the course of her employment during the course of her employment with Rite Aid, a self-insured employer.

   On March 31, 2004, the Department issued an order in which it denied the claim because the application had not been filed within one year of the date the alleged injury occurred.

   On May 21, 2004, the claimant filed a protest and request for reconsideration of the March 31, 2004 order. On July 9, 2004, the Department issued an order in which it affirmed its March 31, 2004 order.

   On July 20, 2004, the claimant filed an appeal from the July 9, 2004 order with the Board of Industrial Insurance Appeals. On July 28, 2004, the Board issued an Order Granting Appeal and assigned the appeal Docket No. 04 19326.

   On June 3, 2004, the Department issued an order in which it denied the claimant's request for a penalty against the self-insured employer for failure to report an industrial injury to the Department.

   On August 2, 2004, the claimant mailed an appeal from the June 3, 2004 order to the Board of Industrial Insurance Appeals that the Board received on August 3, 2004. On September 13, 2004, the Board issued an Order Granting Appeal and assigned the appeal Docket No. 04 20029.

2. The claimant, Marcia R. Magee, was employed by Rite Aid, a self-insured employer, from the time Rite Aid acquired the business from the previous owner until May 31, 2001, when she resigned from her job as a stock clerk.

3. Beginning in October, 2000 through January 2001, the claimant and Alan Woolford, the claimant's immediate supervisor and an assistant manager of the Rite Aid store she was assigned to, had sexual contact at the store and thereafter, until sometime in June or July 2001, at the claimant's apartment. The claimant characterized the contact as assaults. Alan Woolford characterized the contact as consensual.

4. In September 2001, the claimant filed an action in King County District Court that was later transferred to Superior Court. Alan Woolford was a named party. Rite Aid was not a named party. That action culminated in an out-of-court settlement in which Rite Aid participated. Ms. Magee was represented by counsel in that action.

5. In addition to the above-referenced action, Marcia Magee filed a complaint with the Equal Employment Opportunity Commission and an application for benefits under the Crime Victims' Compensation Act.

6. The claimant filed an SIF-2 with the self-insured employer on January 23, 2004, in which she alleged a series of events that occurred between October 2000 and June or July 2001, involving sexual contact between herself and her immediate supervisor, an assistant manager at the Rite Aid store where she was employed until May 31, 2001. The self-insured employer immediately forwarded the SIF-2 to the Department.

7. The first notice to Rite Aid of the claimant's allegation of an industrial injury occurred on January 23, 2004, when she filed the SIF-2. At no time prior to that did the self-insured employer have notice or knowledge of an injury or occupational disease sustained by Ms. Magee in her employment that resulted in treatment from a physician or a licensed advanced registered nurse practitioner, hospitalization, disability from work, or death as a result of the injury.

8. The claimant's application for benefits in which she alleged industrial injuries that occurred between October 2000 and June 2001, was received by the self-insured employer on January 23, 2004, more than one year after the day any of the events alleged to constitute the industrial injury occurred.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals

2. The claimant's application for benefits alleging an industrial injury as a result of sexual contact with her immediate supervisor that occurred between October 2000 and June 2001, filed on January 23, 2004, was not timely within the meaning of RCW 51.28.055.

3. The sexual contact that the claimant had with her immediate supervisor between October 2000 and June 2001, does not constitute an occupational disease within the meaning of RCW 51.08.140.

4. The self-insured employer, Rite Aid, did not violate the terms of RCW 51.25.025 by failing to report an injury or occupational disease to the Department prior to January 23, 2004.

5. The Department order dated June 3, 2004, in which the Department denied the claimant's request for a penalty against the self-insured employer, is correct and is affirmed. (Docket No. 04 20029).

6. The Department order dated July 9, 2004, in which the Department denied the claim because it was not timely filed, is correct and is affirmed. (Docket No. 04 19326).

It is so ORDERED.

Dated this 1st day of August, 2006.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Thomas E. Egan

THOMAS E. EGAN Chairperson

Calhoun Dickinson

CALHOUN DICKINSON Member

FROM:
STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
SELF-INSURANCE SECTION
PO BOX 44892
OLYMPIA WA 98504-4892
FAX (360) 902-6900

MAILING DATE: 03/31/04
CLAIM ID : W496270
CLAIMANT : MARCIA MAGEE
EMPLOYER : THRIFTY PAYLESS INC
INJURY DATE : 5/31/01
SERVICE LOC : OLYMPIA
UBI NUMBER : 601-637-571
ACCOUNT ID : 706108-00
RISK CLASS : 6406-16

WORK LOCATION ADDRESS:
120 106TH AVE NE
BELLEVUE WA 98009

MARCIA MAGEE
C/O DAVID B. ALLEN PHD
12221 NE 8TH ST
BELLEVUE WA 98005-3113

ORDER AND NOTICE (SELF INSURING EMPLOYER)

THIS ORDER 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. REQUESTS FOR RECONSIDERATION MUST BE SENT TO LABOR AND INDUSTRIES, SELF-INSURANCE SECTION, P O BOX 44892, OLYMPIA, WA 98504-4892. APPEALS MUST BE SENT TO THE BOARD OF INDUSTRIAL INSURANCE APPEALS, 2430 CHANDLER COURT SW, P O BOX 42401, OLYMPIA, WA 98504-2401. IF YOU REQUEST RECONSIDERATION, WE WILL REVIEW YOUR CLAIM AND SEND YOU A NEW ORDER. IF YOU STILL DISAGREE, YOU MAY THEN APPEAL TO THE BOARD.

THIS CLAIM IS DENIED IN ACCORDANCE WITH WAC 296-20-124(2) AND ANY BILLS FOR SERVICES OR TREATMENT REGARDING THIS CLAIM ARE REJECTED EXCEPT THOSE USED TO MAKE THIS DECISION.

THIS CLAIM IS DENIED BECAUSE:

NO CLAIM HAS BEEN FILED BY SAID WORKER WITHIN ONE YEAR AFTER THE DAY UPON WHICH THE ALLEGED INJURY OCCURRED.

FROM:
STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
SELF-INSURANCE SECTION
PO BOX 44892
OLYMPIA WA 98504-4892
FAX (360) 902-6900

MAILING DATE: 07/09/04
CLAIM ID : W494270
CLAIMANT : MARCIA MAGEE
EMPLOYER : THRIFTY PAYLESS INC
INJURY DATE : 10/26/00
SERVICE LOC : OLYMPIA
UBI NUMBER : 601-637-571
ACCOUNT ID : 706108-00
RISK CLASS : 6406-16

WORK LOCATION ADDRESS:
120 106TH AVE NE
BELLEVUE WA 98009

MARCIA MAGEE
WALTHEW LAW FIRM
123 3RD AVENUE SOUTH
SEATTLE WA 98104-2696

RECEIVED
JUL 13 2004
WALTHEW, WARNER, THOMPSON, EAGAN, KINDRED & COSTELLO, P.S.

ORDER AND NOTICE (SELF-INSURING EMPLOYER)

THIS ORDER WILL BECOME FINAL 60 DAYS AFTER YOU RECEIVE IT UNLESS YOU FILE A WRITTEN APPEAL WITHIN THAT TIME. YOUR APPEAL SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG. APPEALS MUST BE SENT TO THE BOARD OF INDUSTRIAL INSURANCE APPEALS, 2430 CHANDLER COURT SW, PO BOX 42401, OLYMPIA, WA 98504-2401, WITHIN 60 DAYS FROM THE DATE THIS ORDER IS COMMUNICATED TO THE PARTIES, OR THE SAME SHALL BECOME FINAL.

Labor and Industries has reconsidered the order and notice dated 03/31/04.

The order and notice has been determined to be correct and is affirmed.

SUPERVISOR OF INDUSTRIAL INSURANCE
MURIEL JACOBSON
SI CLAIMS CONSULTANT

ORIG: CLAIMANT: MARCIA MAGEE
WALTHEW LAW FIRM, 123 3RD AVENUE SOUTH,
SEATTLE WA, 98104-2696
CC: EMPLOYER: THRIFTY PAYLESS INC
C/O PINNACLE RISK MANAGEMENT, PO BOX 19990,
PORTLAND OR, 97280-0990
ATTENDING PHYSICIAN: OVERLAKE MEDICAL CLINIC PLLC
STE 110, 1135 116TH AVE NE,
BELLEVUE WA, 98004-4623

BOARD OF INDUSTRIAL INSURANCE APPEALS
OLYMPIA, WASHINGTON
RECEIVED
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S) 8-9-04

PS 07-22-2004 APPEALS

13 04 04:15p Mo Ctr Behavioral Med. 425 0982 p.2

(SIF-2)

WORKER START HERE — ALL QUESTIONS BELOW MUST BE ANSWERED OR THERE MAY BE A DELAY IN PAYMENT OF BENEFITS.

U.B.I. # 601-637-571 | CLASS

INSURED FIRM NAME: THRIFTY PAYLESS, INC. c/o SIMS

ADDRESS: P.O. BOX 19990

CITY: PORTLAND | STATE: OR | ZIP: 97280-0999

NAME OF INJURED EMPLOYEE (FIRST / MIDDLE / LAST): Marcia Magee

MAILING ADDRESS: 14049 Bellevue-Redmond Rd #12

CITY: Bellevue | STATE: WA | ZIP CODE: 98007

EMPLOYEE'S TELEPHONE NO: 425.641.4985

SOCIAL SECURITY NUMBER: 538-72-7397

EMPLOYER'S TELEPHONE NO:

HEIGHT | WEIGHT | FULL NAME OF SPOUSE AT TIME OF INJURY | IF DIVORCED, GIVE FINAL DECREE DATE | YOUR JOB TITLE WHEN INJURED: Cashier/Clerk | SEX: F | DATE OF BIRTH: 7-26-63

GIVE NAME AND BIRTH DATES OF YOUR CHILDREN UNDER 18 SUPPORTED BY YOU

NAME	RELATIONSHIP	BIRTHDATE	NAME	RELATIONSHIP	BIRTHDATE

IF DIVORCED AND YOU HAVE MINOR CHILDREN SUBMIT A COPY OF THE COURT ORDER SHOWING LEGAL CUSTODIAN OF SUCH CHILDREN. ALSO GIVE PRESENT ADDRESS OF SUCH CUSTODIAN.

NATURE OF INJURY OR DISEASE (STRAIN, CUT, BRUISE, POISONING, ETC.): Depression, Urological, Gynecological, Cervical, Shoulders, back, abdomen | PART OF BODY AFFECTED: LEFT ☒ RIGHT ☒ | DATE OF ACCIDENT: OCT NOV 2000 | HOUR ACCIDENT OCCURRED: — A.M. P.M.

DESCRIBE ACCIDENT FULLY. DESCRIBE WHAT YOU WERE DOING WHEN INJURED. IF YOU FELL, STATE IF IT OCCURRED INDOORS OR OUTDOORS. IF YOU WERE STRUCK, NAME THE OBJECT WHICH STRUCK YOU. WERE YOU LIFTING, PULLING, PUSHING OR CARRYING? IF MACHINERY WAS INVOLVED, NAME MACHINERY AND DESCRIBE ITS FUNCTION. NAME CHEMICAL INVOLVED IF APPROPRIATE.

Sexually assaulted on the job by her supervisor Al Woodford approximately 15-25 times from Oct/Nov. 2000.

NAME OF ALL WITNESSES TO YOUR ACCIDENT

IF THE EMPLOYER IS DIFFERENT THAN ONE WHERE INJURED, GIVE NAME & ADDRESS

DO YOU HAVE MORE THAN ONE PAYING JOB? YES ☐ NO ☐

GIVE DATE LAST WORKED: 5-31-01 | IF RETURNED TO WORK, GIVE DATE: N/A | HOW LONG HAVE YOU WORKED FOR THIS EMPLOYER? 1 years w/ Payless | WERE YOU DOING YOUR REGULAR WORK AT TIME OF ACCIDENT? YES ☒ NO ☐ | WHERE DID ACCIDENT OCCUR? EMPLOYER'S PREMISES ☒ PARKING LOT ☐ OTHER ☒

WAS THE ACCIDENT IN YOUR OPINION CAUSED IN ANY WAY BY SOMEONE NOT EMPLOYED BY YOUR EMPLOYER? YES ☐ NO ☒ | ADDRESS OR LOCATION WHERE ACCIDENT OCCURRED: 120-106 Ave NE Bellevue WA 98009 | COUNTY: King

TO WHOM REPORTED: (NAME & TITLE) Overlake Court to employee restraining order | DATE REPORTED TO EMPLOYER: 9/01 | IF REPORTING OF ACCIDENT WAS DELAYED, WHY? Supervisor was her assailant

WAS ACCIDENT CAUSED BY FAILURE OF A MACHINE OR PRODUCT? YES ☐ NO ☒ | HAVE YOU EVER BEEN TREATED FOR SIMILAR INJURY BEFORE? IF SO, DESCRIBE INJURY: Yes, mental health, cervical, shldr, urological, back

NAME & ADDRESS OF ATTENDING PHYSICIAN: Overlake Medical Clinics 1135 116th Ave NE Suite 100 Bellevue, WA 98004 | PAYEE ACCOUNT NO. | TODAY'S DATE: 1/23/04

NAME OF HOSPITAL: Richard Reinkens Ph.D. 1635 116th Ave NE Bellevue WA

MEDICAL RELEASE AUTHORIZATION. I HEREBY AUTHORIZE MY PHYSICIAN, HOSPITAL, AGENCY OR ORGANIZATION TO DISCLOSE TO MY EMPLOYER OR HIS REPRESENTATIVE OR THE DEPT OF LABOR & INDUSTRIES ANY MEDICAL RECORDS OR OTHER INFORMATION PERTAINING TO MY TREATMENT WHICH HAS PREVIOUSLY BEEN FURNISHED TO HIM. (WORKER'S SIGNATURE) Marcia Magee

CITY HOSPITAL LOCATED | SIGNATURE OF SUPERVISOR OR FOREMAN (OPTIONAL) | I HAVE READ LEGAL WARNING ON REVERSE SIDE OF EMPLOYEE COPY (WORKER'S SIGNATURE) Marcia Magee

EMPLOYER START HERE — DATE RETURNED TO WORK | WAS EMPLOYEE ENGAGED IN THE REGULAR COURSE OF EMPLOYMENT WHEN INJURED? YES ☐ NO ☐ | RATE OF PAY (NO OVERTIME) WRITE AMOUNT, CIRCLE RATE. $ ____ HR WK DY MO | HRS/DAY | WILL YOU PAY THIS EMPLOYEE FULL SALARY OR WAGES DURING PERIOD OF DISABILITY? YES ☐ NO ☐

DO YOU AGREE WITH EMPLOYEE'S DESCRIPTION OF THE ACCIDENT? IF NOT, EXPLAIN.

DAYS/WK | AVG. MO VALUE OF ALL BONUSES PD 12 MOS PRIOR TO INJURY $

SEASONAL, PART TIME OR INTERMITTENT YES ☐ NO ☐ IF YES, PROVIDE 12 MOS. GROSS WAGES $ | AVG DLY EARNINGS FROM PIECEWORK, TIPS, & COMMISSIONS AS REPORTED TO IRS $ | L&I USE ONLY

FATALITY ☐ YES ☐ NO | DATE REPORTED TO EMPLOYER | 3RD PARTY INVOLVED?

I DECLARE THAT THE FOREGOING STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

DATE | SIGNATURE | TREATMENT ONLY: YES ☐ NO ☐ DATE CLOSURE MAILED / / | WORKER'S COPY MAILED YES ☐ NO ☐ | TREATMENT ONLY FOR: LT. DUTY PROVIDED YES ☐ NO ☐ ASSOC. COSTS $

BUSINESS LOCATION NAME

EMPLOYEES ASSIGNED WORK LOCATION ADDRESS — CITY, ST, ZIP

F 207-002-000 S.I. ACCIDENT REPORT (7-99)

LABOR & INDUSTRIES COPY

Board of Industrial Insurance Appeals
In re: Marcia Magee
Docket No. 0419326
Exhibit No. 2 (Two)
4/12/05

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

In re: Marcia Magee	)	**NOTICE OF APPEAL**
Claim No. W-494270	)	DOCKET NO. 04 19326

1) The above-named claimant, presently residing at P.O. Box 6105, Bellevue, WA, hereby appeals to the Board of Industrial Insurance Appeals from the order of the Department of Labor and Industries dated 7/9/04, and states:

2) The injury occurred on while in the employ of Rite-Aide Pharmacy.

3) The relief sought is claim allowance.

4) It is hereby requested that a conference be held in Seattle with any hearings necessary thereafter to be held in Seattle.

5) At the above hearing, the claimant will show per number 4 above.

I hereby certify that I have read the foregoing Notice of Appeal and I believe there are good grounds for the same.

DATED this 19th day of July, 2004.

Thomas A. Thompson

Thomas A. Thompson, WSBA #10595
WALTHEW, WARNER, THOMPSON, EAGAN
KINDRED & COSTELLO, P.S.
Attorneys for Claimant

BOARD OF
INDUSTRIAL INSURANCE APPEALS
OLYMPIA, WASHINGTON
RECEIVED
JUL 2 0 2004
BY

WALTHEW, WARNER, THOMPSON,
EAGAN & KEENAN, P.S.
123 THIRD AVENUE SOUTH
SEATTLE, WASHINGTON 98104-2696
PHONE (206) 623-5311

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Appendix B

RECEIVED
JUL 21 2010
TALMADGE/ FITZPATRICK

Counsel for Rite Aid shall promptly mail a copy of this order to all other counsel/parties.

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

MARCIA R. MAGEE, Plaintiff, v. RITE AID, Defendant.	NO. 10-2-07562-3SEA ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER having come on regularly for hearing before the undersigned judge of the above-captioned Court on the motions for summary judgment of defendant Rite Aid and plaintiff Marcia Magee, and the defendant Rite Aid having been represented by Philip A. Talmadge of Talmadge/Fitzpatrick and Mary Shima and Gretchen Neale of Reeve Shima, and the plaintiff Magee having been represented by Kylee MacIntyre Redman of Walthew, Thompson, Kindred, Costello & Winemiller P.S., and the Department of Labor and Industries having been represented by John Wasberg of the Office of Attorney General, and the Court having considered portions of the court file herein including the pleadings in the earlier Superior Court appeal as well as the following pleadings: the certified record including all decisions + pleadings of counsel and having considered

1. Rite Aid's Motion for Summary Judgment;

2. Declaration of Mary Shima;

3. Plaintiff's Cross-Motion for Summary Judgment and Response to Rite Aid's Motion for Summary Judgment;

4. Affidavit of Kylee MacIntyre Redman;

Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661 (206) 575-1397 Fax

5. Rite Aid's Response to Plaintiff's Cross-Motion for Summary Judgment;

6. Declaration of Gretchen Neale;

7. Department's Response to Ms. Magee's Motion for Summary Judgment;

8. Plaintiff's Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment.

And the parties agreeing that there are no genuine issues of material fact;

NOW IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

Under the standards of RCW 51.52.115

1. Rite Aid's Motion for Summary Judgment is GRANTED;

2. Magee's Cross-Motion for Summary Judgment is DENIED;

3. The Decision and Order of the Board of Industrial Insurance Appeals dated December 29, 2009 and the Decision and Order of the Board of Industrial Insurance Appeals dated January 20, 2010 are AFFIRMED.

DATED this 16 day of July, 2010.

JUDGE JAMES E. ROGERS

Presented by:

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Mary E. Shima, WSBA #16433
Gretchen Neale, WSBA #36349
Reeve Shima
500 Union Street, Suite 800
Seattle, WA 98101-2332
(206) 624-4004
Attorneys for Defendant Rite Aid

This order is based upon the decisions in Madley, 125 Wn.2d 533 (1994) and In re Hale, 2001 WL 395827 (BIIA). The Board's decision in August 2006 may well have exceeded the scope of review as to Conclusion of Law #3 but the Board had subject matter jurisdiction to decide/reach conclusions on the issue of occupational disease. When Magee failed to appeal COL #3, it became final.

Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
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Notice of Presentation Waived:

_____

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FILED
KING COUNTY WASHINGTON
AUG 26 2010
SUPERIOR COURT CLERK
BY DAVID J. ROBERTS
DEPUTY

No Envelopes Provided

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

MARCIA R. MAGEE, Plaintiff, v. RITE AID, Defendant.	NO. 10-2-07562-3SEA & 10-2-04461-2SEA JUDGMENT

RECEIVED
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JUDGMENT SUMMARY

1.	Judgment creditor:	Rite Aid
2.	Judgment creditor's attorneys:	Philip A. Talmadge Talmadge/Fitzpatrick 18010 Southcenter Parkway Tukwila, WA 98188 (206) 574-6661 Mary E. Shima Reeve Shima, P.C. 500 Union Street, Suite 800 Seattle, WA 98101 (206) 624-4004
3.	Judgment debtor:	Marcia Magee
4.	Attorney for judgment debtor:	Kylee T. MacIntyre Redman Thomas A. Thompson Walthew, Thompson, Kindred, Costello & Winemiller, P.S. PO Box 34645 Seattle, WA 98124 (206) 623-5311
5.	Principal amount of judgment:	$200.00

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6. Total amount of judgment: $200.00
(The judgment amount shall bear interest
at 12% after its entry)

The Court incorporates by reference its order on summary judgment entered on July 16, 2010.

The Decision and Order of the Board of Industrial Insurance Appeals dated December 29, 2009 and the Decision and Order of the Board of Industrial Insurance Appeals dated January 20, 2010 are AFFIRMED.

DONE IN OPEN COURT this 25 day of August, 2010.

Judge
JAMES E. ROGERS

Presented by:

for [signature] #36349
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Mary E. Shima, WSBA #16433
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/s/ #36349 per telephonic authorization 7/27/10

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

2430 Chandler Court SW, P O Box 42401
Olympia, Washington 98504-2401 • www.biia.wa.gov
(360) 753-6824

In re: **MARCIA R MAGEE**	Docket No. 09 11730
Claim No. W-494270	**ORDER DENYING PETITION FOR REVIEW**

A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **DAVID K CROSSLAND** on **November 9, 2009**. Copies were mailed to the parties of record.

A Petition for Review was filed **by the Claimant on December 14, 2009**, as provided by RCW 51.52.104.

The Board has considered the Proposed Decision and Order and Petition(s) for Review. The Petition for Review is denied (RCW 51.52.106). The Proposed Decision and Order becomes the Decision and Order of the Board.

Dated: December 29, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Thomas E. Egan
THOMAS E. EGAN — Chairperson

Frank E. Fennerty Jr
FRANK E. FENNERTY, JR — Member

Larry Dittman
LARRY DITTMAN — Member

c: DEPARTMENT OF LABOR AND INDUSTRIES

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARCIA R. MAGEE	)	DOCKET NO. 09 11730
	)	
CLAIM NO. W-494270	)	PROPOSED DECISION AND ORDER

INDUSTRIAL APPEALS JUDGE: David K Crossland

APPEARANCES:

Claimant, Marcia R. Magee, by
Walthew Law Firm, per
Kylee T. Macintyre and Robert Heller

Self-Insured Employer, Rite Aid, by
Reeve Shima, per
Mary E. Shima; and by Talmadge Fitzpatrick, by
Philip A. Talmadge

Department of Labor and Industries, by
The Office of the Attorney General, per
Lisa V. Brock, Assistant

The claimant, Marcia R. Magee, filed an appeal with the Board of Industrial Insurance Appeals on February 24, 2009, from an order of the Department of Labor and Industries dated February 6, 2009. In this order, the Department determined that Conclusion of Law No. 3 of the Board's Decision and Order, dated August 1, 2006, as affirmed by the Court of Appeals under Docket No. 59637-3-1 had become a final and binding order that denied the occupational disease claim. The Department order is **AFFIRMED**.

PROCEDURAL AND EVIDENTIARY MATTERS

On June 3, 2009, the parties agreed to include the Jurisdictional History in the Board' record. That history establishes the Board's jurisdiction in this appeal. The parties agreed that motions for summary judgment would be filed and argued. A date was first set for October 21, 2009, but later changed due to the appearance of Mr. Talmadge as co-counsel for the employer. The hearing on the motions was set for November 2, 2009 with additional hearing time reserved for December 18, 2009, if the motions were both denied. The parties filed appropriate CR 56 motions with legal arguments and exhibits. Responses and replies were also filed. The claimant filed a CR 60 motion with the Board to vacate Conclusion of Law No. 3, that was referred to David Threedy, Executive Secretary of the Board for processing. Argument on the CR 56 motions was held on November 2,

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2009, and a ruling from the bench was made that denied the claimant's motion for relief and granted the employer's motion to affirm the February 6, 2009 Department order.

RELIEF REQUESTED

> The claimant seeks to have the Department order reversed and the matter remanded to the Department to exercise original jurisdiction over the allowance of an occupational disease claim. The employer seeks to have the Department order affirmed as res judicata following claimant's unsuccessful appeals to the Superior Court of King County and Court of Appeals.

EVIDENCE PRESENTED

The evidence presented and considered consists of declarations with numerous exhibits that included the Proposed Decision and Order dated April 6, 2006 (Employer's Exhibit 2), the Stipulation of the parties dated May 23, 2006 (Claimant's Exhibit F), the Board's Decision and Order dated August 1, 2006 (Employer's Exhibit 4), the Order of the King County Superior Court dated January 29, 2007(Claimant's Exhibit K), the Court of Appeals decision dated March 3, 2008 (Employer's Exhibit 16) and the Supreme Court's order dated November 6, 2008 (Employer's Exhibit 17). The claimant submitted 20 exhibits and the employer 19 exhibits. All of the evidence and legal arguments were considered in reaching a decision in this case. There were no genuine issues of any material facts with respect to the motions filed by the parties. The issue remained a legal issue regarding scope of the Board's original jurisdiction and the impact of the appeal process through the designated courts.

DECISION

The problem with the claimant's position at this stage of the long litigation life of Ms. Magee's claim is the res judicata effect of the Board's Conclusion of Law No. 3, that was affirmed on appeals to both the Superior Court of King County and the Court of Appeals. The Supreme Court merely denied review. The Department in issuing the order dated February 6, 2009 recognized the res judicata doctrine as established in *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994) and *In re Orena A. Houle*, BIIA Dec., 00 11628 (2001). I could find no evidence that the claimant truly raised the current jurisdictional issue on its trail through the Board and the Courts. In fact, the claimant now seeks to have the Board vacate Conclusion of Law No. 3 by use of a CR 60 motion. Based upon the record presented and the applicable law, I concur with the employer that the Board did have subject matter jurisdiction to issue Conclusion of Law No. 3, and that it has become final and binding upon the parties. The claimant's motion to reverse and remand for further action by the

Department in determining the issue of allowance of an occupational disease claim is denied and the employer's motion to affirm the Department order is granted.

FINDINGS OF FACT

1. On January 13, 2004, Marcia R. Magee, filed an application for benefits with the Department of Labor and Industries, alleging that on October 26, 2000, during the course of her employment with Rite Aid, she sustained an industrial injury to her shoulder, back, and abdomen. On March 31, 2004, the Department issued an order that denied the claim for failure to file within one year of the alleged incident at work. The claimant protested the denial and requested penalties be assessed against the self-insured employer for failure to timely file and report an on the job injury to the Department.

   On June 3, 2004, the Department issued an order that denied a penalty. On July 9, 2004, the Department issued an order that affirmed the March 31, 2004 denial order due to an untimely filing for benefits. These orders were then litigated through the Board of Industrial Insurance Appeals that ended with the Board's Decision and Order dated August 1, 2006, that affirmed the Department orders on appeal and additionally held that sexual contact between the claimant and her immediate supervisor between October 2000 and June 2001 did not constitute an occupational disease within the meaning of RCW 51.08.140 (Conclusion of Law No. 3).

   This ruling was made in spite of the parties filing a stipulation with the Board on May 23, 2006, that limited the issues to only the timeliness of the filing of the claim for an industrial injury and the denial of the request for penalties. The parties specifically stipulated that they would mutually be prejudiced if the Board were to expand the issues to cover whether or not the claimant had suffered an occupational disease condition during the course of her employment with Rite Aid.

   The Board's Decision and Order was then litigated through the Superior Court of King County and the Court of Appeals for the State of Washington with the Board's decision being upheld by both courts. The Supreme Court denied review.

   On December 10, 2008, the claimant filed a request with the Department to determine, pursuant to the parties previous stipulation, whether or not the claimant had suffered a mental disorder as an occupational disease condition from the sexual contact that she had with her supervisor during the course of employment at Rite Aid. On February 6, 2009, the Department issued an order declaring that based upon Conclusion of Law No. 3, which was not reversed or vacated by any later court decision, it had become final and binding. On

February 24, 2009, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals and on April 1, 2009, the Board issued an order granting the appeal.

2. There are no genuine issues of any material facts related to the CR 56 motions filed by the claimant and the employer.

3. The Conclusion of Law No. 3 was never reversed, modified, or vacated during the appeal process following the issuance of the Board's Decision and Order dated August 1, 2006

CONCLUSIONS OF LAW

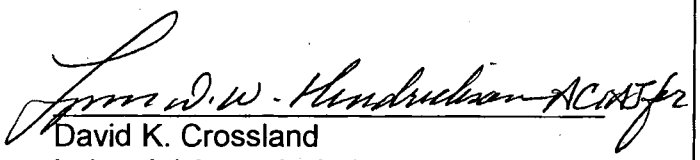
1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The Conclusion of Law No. 3 as contained in the Board's Decision and Order dated August 1, 2006 is final and binding and becomes res judicata as to the parties to this appeal, pursuant to the provisions of *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994) and *In re Orena A. Houle*, BIIA Dec., 00 11628 (2001).

3. The claimant's CR 56 motion to reverse and remand the Department order dated February 6, 2009 for further action is denied. The Employer's CR 56 motion to affirm the Department's order dated February 6, 2009 is granted.

4. The Department of Labor and Industries order dated February 6, 2009, is correct and is affirmed.

DATED: NOV 09 2009.



David K. Crossland
Industrial Appeals Judge
Board of Industrial Insurance Appeals

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BEFORE TI BOARD OF INDUSTRIAL INSUR. :E APPEALS
STATE OF WASHINGTON

IN RE: MARCIA R. MAGEE	) DOCKET NOS. 04 19326 & 04 20029
	)
CLAIM NO. W-494270	) ORDER DENYING MOTION TO VACATE

The appeal assigned Docket No. 04 19326 is an appeal filed by the claimant, Marcia R. Magee, on July 20, 2004, from an order of the Department of Labor and Industries dated July 9, 2004. In this order, the Department affirmed the Department order dated March 31, 2004, in which the Department denied the claim on the grounds that the claimant had not filed an application for benefits within one year after the date on which the injury occurred. The appeal assigned Docket No. 04 20029 is an appeal the claimant, filed on August 2, 2004, from an order of the Department dated June 3, 2004, in which the Department denied her request to assess penalties against the self-insured employer for failure to file the claim and failure to report an on-the-job injury. On August 1, 2006, we issued a Decision and Order that affirmed the Department orders. The matter was appealed to the Superior Court for King County, and then to the Court of Appeals, Division I. The superior court and the appellate court affirmed our decision. *Magee v. Rite Aid,* 144 Wn. App. 1 (2008).

On October 2, 2009, we received claimant's motion to vacate Conclusion of Law No. 3, as contained in our Decision and Order dated August 1, 2006. After consideration of the claimant's motion, the response of the employer, the claimant's reply, and the record of this appeal, we determine that the motion must be denied.

Ms. Magee requests that this Board vacate Conclusion of Law No. 3. The conclusion of law states:

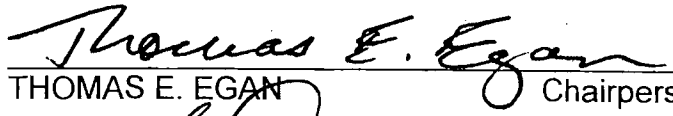
> The sexual contact that the claimant had with her immediate supervisor between October 2000 and June 2001, does not constitute an occupational disease within the meaning of RCW 51.08.140.

The claimant argues that the Board exceeded its scope of review in entering this conclusion of law denying the claim as an occupational disease, when the issue before the Board was whether the worker filed a timely application for an industrial injury claim. Accepting that the conclusion of law exceeded our scope of review, the consideration becomes whether such an error is correctable at this stage of proceedings. It clearly is not. When the Board exceeds its scope of review, it has committed an error of law. *In re Orena Houle,* BIIA Dec., 00 11628 (2001). Entering a conclusion of law beyond our scope of review is not a jurisdictional error making the conclusion void. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994). An error of law must be addressed in an appeal, it may not be corrected through a motion filed under CR 60. *Burlingame v. Consolidated Mines and Smelting Co.,* 106 Wn.2d 328 (1986). The erroneous conclusion should have been addressed in the subsequent court appeals. The failure to adequately address the scope of review error in the court appeals is dispositive of the issue. CR 60 does not provide an avenue for relief from the offending conclusion of law after the appellate remedies have been exhausted.

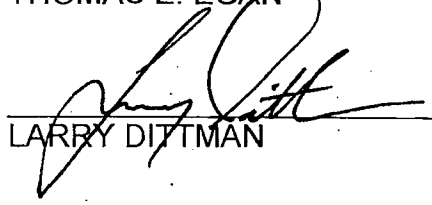
The claimant's motion for relief in the form of vacating Conclusion of Law No. 3, in the August 1, 2006 Decision and Order, is denied.

Dated: JAN 20 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS



THOMAS E. EGAN Chairperson



LARRY DITTMAN Member

FROM:
STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
SELF-INSURANCE SECTION
PO BOX 44892
OLYMPIA WA 98504-4892
FAX (360) 902-6900

MAILING DATE: 02/06/09
CLAIM ID : W494270
CLAIMANT : MARCIA MAGEE
EMPLOYER : THRIFTY PAYLESS INC
INJURY DATE : 10/26/00
SERVICE LOC : OLYMPIA
UBI NUMBER : 601-637-571
ACCOUNT ID : 706108-00
RISK CLASS : 6406-16

WORK LOCATION ADDRESS:
120 106TH AVE NE
BELLEVUE WA 98009

MARCIA MAGEE
WALTHEW LAW FIRM
123 3RD AVE S
SEATTLE WA 98104-2696

RECEIVED
FEB 09 2009
WALTHEW, THOMPSON, KINDRED, COSTELLO & WINEMILLER, P.S.

ORDER AND NOTICE (SELF-INSURING EMPLOYER)

****
* ANY APPEAL FROM THIS ORDER MUST BE MADE IN WRITING TO THE BOARD *
* OF INDUSTRIAL INSURANCE APPEALS, P.O. BOX 42401, OLYMPIA, WA *
* 98504-2401 OR SUBMIT IT ON AN ELECTRONIC FORM FOUND AT *
* HTTP://WWW.BIIA.WA.GOV/ WITHIN 60 DAYS AFTER YOU RECEIVE THIS *
* NOTICE, OR THE SAME SHALL BECOME FINAL. *
****

In its Decision and Order of August 1, 2006 the Board of Industrial Insurance Appeals stated in Conclusion of Law number 3 that "The sexual contact that the claimant had with her immediate supervisor between October 2000 and June 2001, does not constitute an occupational disease within the meaning of RCW 51.08.140." Because Conclusion of Law number 3 was not reversed or vacated by any later court decision, it is now a final and binding conclusion that the department must follow.

SUPERVISOR OF INDUSTRIAL INSURANCE
RODNEY EDGERTON
CLAIMS CONSULTANT SUPERVISOR

ORIG: CLAIMANT: MARCIA MAGEE
WALTHEW LAW FIRM, 123 3RD AVE S,
SEATTLE WA, 98104-2696
CC: EMPLOYER: THRIFTY PAYLESS INC
C/O PINNACLE RISK MANAGEMENT, PO BOX 19990,
PORTLAND OR, 97280-0990
MISCELLANEOUS: REEVE SHIMA PC
ATTYS AT LAW, 500 UNION STREET, STE #800,
SEATTLE WA, 98101
ATTENDING PHYSICIAN: -(COPY NOT SENT)

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