

NO. 46955-3-II

COURT OF APPEALS,  
DIVISION II

OF THE STATE OF WASHINGTON

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KATHRYN A. LANDON, *APPELLANT*,

v.

THE HOME DEPOT, *RESPONDENT*.

FILED  
COURT OF APPEALS  
DIVISION II  
2015 JUL 10 PM 1:48  
STATE OF WASHINGTON  
BY   
DEPUTY

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APPELLANT'S REPLY BRIEF

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BUSICK HAMRICK PALMER PLLC  
STEVEN L. BUSICK  
Attorneys for Appellant/Defendant

By Steven L. Busick, WSBA #1643  
Busick Hamrick Palmer PLLC  
PO Box 1385  
Vancouver, WA 98666  
360-696-0228

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## ARGUMENT

The appellant, Kathryn Landon, maintains that the Board of Industrial Insurance Appeals and Superior Court for Cowlitz County did not have subject matter jurisdiction to hear this appeal, because the Department of Labor and Industries did not rule on the merits of her claim, i.e. whether she had an on the job injury or occupational disease. The Department only decided that Ms. Landon had not filed her claim within one year of injury pursuant to RCW 51.28.050. The Department never decided that Ms. Landon did or did not have an injury, or an occupational disease (CP No. 3; CABR, page 49; attached as Appendix A).

The Board only has statutory jurisdiction pursuant to RCW 51.52.050 to hear appeals of decisions made by the Department. Since the Department never decided whether Ms. Landon had an injury or occupation disease, the Board did not have appellate jurisdiction to decide claim allowance. The Board and the superior court's attempt to decide clam allowance is reversible error.

Pursuant to *Dougherty v. Dep't of Labor & Indus.*, 150 Wn. 310, 314, 76 P.3d 1183(2003), the error of law standard applies to this appeal, and the appellate court should review the question of jurisdiction *de novo*.

In *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 659, 879 P.2d 326 (1994), the court held that both the Board and the superior court erred by considering an exclusion from overage which was beyond the scope of the issue upon which the Department passed. Here, the Board also considered whether Ms. Landon had an occupational disease, but did not have jurisdiction to do so, and the issue of jurisdiction can be raised at any time. *Gilbertson v. Dep't. of Labor and Indus.*, 22 Wn. App. 813, 815, 592 P.2d 665 (1979), *Magge v. Rite Aid*, 167 Wn. App. 60, 277 P.3d 1 (2012).

This appeal involves the statutory appellate jurisdiction of the Board and superior court to decide an issue not considered by the Department. *Lenk v. Dep't. of Labor and Indus.*, 3 Wn. App. 977, 983, 478 P.2d 761 (1970) applies here. There, the Board went beyond deciding whether Mr. Lenk had an occupational disease to decide whether his medical condition was casually related to his exposure, which it did not have jurisdiction to decide because the Department had not first considered the issue. Ms. Landon is not trying to blur the lines between scope of review and subject matter jurisdiction, but to sharpen the lines. Subject matter jurisdiction can better be stated as statutory appellate jurisdiction, as the Worker Compensation Act withdraws original jurisdiction from the courts by RCW 51.04.010.

In the Summary of Argument section at page 4, the respondent's brief contends that Ms. Landon failed to preserve any error of law in superior court, noting that she did not appeal the Judgment on Verdict. The Judgment on Verdict was filed on August 13, 2014, and within 30 days as provided by CR 59(b), on September 5, 2014, Ms. Landon filed her Motion to Vacate Judgment and Remand to the Department of Labor and Industries for further action. The Order Denying Motion to Vacate was filed on October 30, 2014, and pursuant to RAP 2.2(a)(10), on November 25, 2014, Ms. Landon filed her appeal to the Court of Appeals, Division II.

In *Matthews v. Dep't of Labor and Indus.*, 171 Wn. App. 477, 481, 288 630 (2012), the court held that there was insufficient proof of willful misrepresentation to support the Department's imposition of statutory penalty of 50% for receipt of time loss benefits while she was employed. There, the Board and superior court had jurisdiction and did not exceed their scope of review in ordering the reimbursement of time loss benefits during that same period of time. Here, we do not have a scope of review issue, but a jurisdictional issue, because the Department had not decided, or even considered, whether Ms. Landon had suffered an injury or occupational disease.

*Matthews v. Dep't of Labor and Indus.*, 171 Wn. at page 490 cites *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539-540, 886 P.2d 189 (1994), stating the Department has original and exclusive jurisdiction to determine mixed questions of law and fact as to whether a compensable injury (or occupational exposure or infection) has occurred. Since the Department here has never made that determination, the Board and superior court did not have appellate jurisdiction to hear this appeal. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. at page 983, and *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. at page 659.

### CONCLUSION

The Board of Industrial Insurance Appeals and the Superior Court for Cowlitz County did not have appellate jurisdiction to consider whether Kathryn Landon had an occupational disease or infection as defined by RCW 51.08.140, and the issue should be remanded to the Department of Labor and Industries to make the initial decision.

Dated July 7, 2015



Steven L. Busick, WSBA No. 1643  
Attorney for Kathryn Landon,  
Appellant

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: 03/09/12  
CLAIM ID : SG26535  
CLAIMANT : KATHRYN LANDON  
EMPLOYER : HOME DEPOT INC THE  
INJURY DATE : 6/01/10  
SERVICE LOC :  
UBI NUMBER : 601-804-775  
ACCOUNT ID : 706094-00  
RISK CLASS : 2009-05

WORK LOCATION ADDRESS:  
NO ADDRESS REPORTED

KATHRYN LANDON  
300 SW 7TH AVE APT 807  
BATTLEGROUND WA 98604

ORDER AND NOTICE (SELF INSURING EMPLOYER)

\*\*\*\*\*  
\* THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED \*  
\* TO YOU UNLESS YOU DO ONE OF THE FOLLOWING: FILE A WRITTEN REQUEST \*  
\* FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL \*  
\* WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR \*  
\* RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS \*  
\* DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND \*  
\* INDUSTRIES, PO BOX 44892, OLYMPIA, WA 98504-4892. WE WILL REVIEW \*  
\* YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND \*  
\* IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS, PO BOX 42401, \*  
\* OLYMPIA WA 98504-2401 OR SUBMIT IT ON AN ELECTRONIC FORM FOUND AT \*  
\* HTTP://WWW.BIIA.WA.GOV/. \*  
\*\*\*\*\*

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.

