

## **Gallant, Geraldine**

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### **RES JUDICATA**

#### **Clerical Error**

If a final order contains a clerical error, the finality of the order does not require that the error be ignored in subsequent litigation. ....*In re Geraldine Gallant*, BIIA Dec., **03 16903 (2004)**

Scroll down for order.



1 the doctrine of res judicata. We disagree. The Department's final determination in  
2 Claim No. P-328389 does not bar a disability determination in the subsequent Claim No. Y-288677.  
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4 Further, based upon the medical evidence in the record, we conclude that Ms. Gallant is entitled to  
5 an award for permanent impairment of her left shoulder in the amount of 11 percent of the  
6 amputation value of the deltoid insertion or by disarticulation at the shoulder for residuals  
7 proximately caused by her January 4, 2002 industrial injury.  
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10 Claim No. P-328389 was allowed for a right shoulder injury Ms. Gallant suffered while  
11 carrying a sewing machine for a customer on May 30, 1996. Board Exhibit No. 1. Ms. Gallant's  
12 right shoulder condition healed somewhat, and she was left with permanent impairment.  
13 4/21/04 Tr. at 18, Board Exhibit No. 2. The parties stipulated that Ms. Gallant has permanent  
14 impairment of her right shoulder equal to 12 percent of the amputation value of the deltoid insertion  
15 or by disarticulation at the shoulder for residuals proximately caused by her May 30, 1996 industrial  
16 injury. Although the award for permanent partial disability should have been attributed to her right  
17 shoulder in this claim, the July 2, 1998 order erroneously closed the claim with an award for  
18 permanent partial disability for her left shoulder.  
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23 It is undisputed that Ms. Gallant did not timely protest or appeal the July 2, 1998 order  
24 closing her right shoulder injury claim, Claim No. P-328389. Board Exhibit No. 1. The July 2, 1998  
25 order contained the appropriate statutory language providing notice of the finality of the decision,  
26 unless a timely protest or appeal was filed. See RCW 51.52.050. A Department decision, even if  
27 erroneous, is final and binding on all parties and cannot be reargued unless the order was void  
28 when entered. An order is not void if entered with personal jurisdiction over the parties and subject  
29 matter jurisdiction over the claim. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533, 542-43  
30 (1994).  
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35 There is no question that the Department had jurisdiction to enter the July 2, 1998 order.  
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37 Upon receipt of the untimely protest, the Department was required by statute to deny  
38 reconsideration of its July 2, 1998 final order. The Department has only limited statutory authority  
39 to set aside unappealed final orders (see RCW 51.32.240), and no statutory provision grants  
40 authority to set aside an unappealed final order denying a claim. Nor does Title 51 provide the  
41 Board or the courts with statutory authority to overturn an unappealed final order of the Department.  
42 *Kingery v. Department of Labor & Indus.*, 132 Wn.2d 162 (1997). Our industrial appeals judge  
43 made the correct determination in Docket No. 03 16904. The June 27, 2003 Department order in  
44 Claim No. P-328389 is affirmed.  
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1 We reach a different result in our review of the record and the correctness of the  
2 Department's June 27, 2003 order in Claim No. Y-288677. It is undisputed that Ms. Gallant  
3 sustained an injury to her left shoulder on January 4, 2002, when a bolt of fabric slipped and she  
4 attempted to grab it. Board Exhibit No. 4. The parties agree that Ms. Gallant has permanent  
5 impairment in her left shoulder in the amount of 11 percent of the amputation value of the deltoid  
6 insertion or by disarticulation at the shoulder for residuals proximately caused by her January 4,  
7 2002 industrial injury.  
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11 While application of the court's holding in *Marley v. Department of Labor & Indus.*, 125  
12 Wn.2d 533 (1994) may prevent a conclusion that the erroneous Department order issued in Claim  
13 No. P-328389 is void, the court's holding does not prevent us from acknowledging a clerical error.  
14 We can find that the July 2, 1998 order contained a clerical error and acknowledge that error. In  
15 *Callihan v. Department of Labor & Indus.* 10 Wn. App. 153 (1973), the court stated that the Board  
16 has the authority to correct an "inadvertent misdescription." If the Board was not allowed to do so it  
17 "would be required to treat a clerical error as if it were no error at all." *Callihan at 157.* The holding  
18 in the *Marley* decision does not prevent us from acknowledging that the order closing the prior claim  
19 referenced the wrong extremity. What occurred in the management of the claim was a clerical  
20 error, whether it was perpetuated with the assistance of one or more physicians does not change  
21 the character of the error. There is no disagreement between Ms. Gallant and the Department  
22 that an error was made. We believe this type of error is properly characterized as a clerical error.  
23 Because we need not conclude that the order is void, we are not prevented from finding that the  
24 error is indeed a clerical error, and we are not bound by the error contained in that order in making  
25 a decision in the claim that is before us.  
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30 The June 27, 2003 and May 29, 2003 Department orders in Claim No. Y-288677  
31 unequivocally denied Ms. Gallant an award for left shoulder permanent partial disability. No  
32 reference was made to the prior adjudication in Claim No. P-328389. There is no indication in the  
33 orders that there was any effort to segregate any prior permanent partial disability in accordance  
34 with the provisions of RCW 51.32.080(5). Any attempt to invoke the doctrine of res judicata in this  
35 instance would result in the denial of benefits to Ms. Gallant that all agree she is entitled to. The  
36 application of the doctrine of res judicata must not work an injustice on the party against whom it is  
37 to be applied. *Winchell's Donuts v. Quintana*, 65 Wn. App. 525, 529-30 (1992). In this situation, if  
38 we were to apply the doctrine against Ms. Gallant, in light of the undeniable error contained in the  
39 previous order, would work an injustice.  
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1 We decline to apply the doctrine in this situation. The June 27, 2003 Department order in  
2 Claim No. Y-288677 is reversed. This matter is remanded to the Department with direction to close  
3 the claim with an award to Ms. Gallant of 11 percent of the amputation value of the deltoid insertion  
4 or by disarticulation at the left shoulder for residuals proximately caused by her January 4, 2002  
5 industrial injury.  
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### 8 **FINDINGS OF FACT**

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- 10 1. On June 10, 1996, the claimant, Geraldine R. Gallant, filed an  
11 application for benefits with the Department of Labor and Industries,  
12 alleging an industrial injury to her right shoulder, which occurred on  
13 May 30, 1996, while she was in the course of her employment with Gee  
14 Gee's Hobby Craft and Gifts. On September 6, 1996, the Department  
15 issued an order in which it allowed the claim. On July 2, 1998, the  
16 Department issued an order in which it closed the claim with payment of  
17 a permanent partial disability award equal to 12 percent of the  
18 amputation value of the left arm at or above the deltoid insertion or by  
19 disarticulation at the shoulder.  
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21  
22 On January 18, 2002, the claimant, Geraldine R. Gallant, filed an  
23 application for benefits with the Department of Labor and Industries,  
24 alleging an industrial injury to her left shoulder, which occurred on  
25 January 4, 2002, while she was in the course of her employment with  
26 Gee Gee's Hobby Craft and Gifts. On March 29, 2002, the Department  
27 issued an order in which it allowed the claim. On May 29, 2003, the  
28 Department issued an order closing the claim with no further time loss  
29 compensation and no payment of an award of permanent partial  
30 disability.  
31

32 On June 5, 2003, the claimant filed a Protest and Request for  
33 Reconsideration of the July 2, 1998 and May 29, 2003 Department  
34 orders. On June 27, 2003, the Department issued two orders. In one  
35 order, the Department determined that it could not reconsider the  
36 Department order dated June 2, 1998, as neither a protest nor an  
37 appeal were received within this 60-day time limitation, and determined  
38 that the Department order dated June 2, 1998, was final and binding.  
39 On June 27, 2003, the Department issued another order that affirmed  
40 the provisions of the Department order dated May 29, 2003.  
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42 On July 7, 2003, the claimant filed two Notices of Appeal with the Board  
43 of Industrial Insurance Appeals. In Docket No. 03 16904, the claimant  
44 appealed from the Department order dated June 27, 2003. On  
45 August 19, 2003, this Board issued an order granting the appeal subject  
46 to proof of timeliness from the Department order dated June 27, 2003.  
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1 In Docket No. 03 16903, the claimant appealed from the Department  
2 order dated June 27, 2003. On July 29, 2003, this Board issued an  
3 order granting the appeal from the Department order dated June 27,  
4 2003.

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- 6 2. Ms. Gallant sustained an industrial injury to her right shoulder on  
7 May 30, 1996, and to her left shoulder on January 4, 2002, while in the  
8 course of employment with Gee Gee's Hobby Craft and Gifts.
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- 10 3. Ms. Gallant's right shoulder conditions were fixed and not in need of  
11 further necessary and proper treatment as of July 2, 1998.
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- 13 4. Ms. Gallant's left shoulder conditions, proximately caused by the  
14 January 4, 2002 industrial injury, were fixed and not in need of further  
15 necessary and proper treatment as of May 29, 2003.
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- 17 5. Ms. Gallant neither timely appealed nor protested the Department order  
18 of July 2, 1998.
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- 20 6. As of May 29, 2003, Ms. Gallant's left shoulder impairment, proximately  
21 caused by the industrial injury of January 4, 2002, resulted in residual  
22 impairment equal to 11 percent permanent impairment of her left  
23 shoulder of the amputation value of the deltoid insertion or by  
24 disarticulation at the shoulder.

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26 **CONCLUSIONS OF LAW**

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- 28 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
29 parties to and the subject matter of these timely filed appeals.
- 30
- 31 2. As of May 29, 2003, Ms. Gallant was a permanently partially disabled  
32 worker within the meaning of RCW 51.32.080
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- 34 3. The doctrine of res judicata does not bar Ms. Gallant from receiving an  
35 award for 11 percent permanent impairment of her left shoulder of the  
36 amputation value of the deltoid insertion or by disarticulation at the  
37 shoulder for residuals proximately caused by her January 4, 2002  
38 industrial injury.
- 39
- 40 4. In Docket No. 03 16903, the Department order dated June 27, 2003, is  
41 incorrect and is reversed. It is remanded with direction to close the  
42 claim with an award to Ms. Gallant of 11 percent of the amputation value  
43 of the deltoid insertion or by disarticulation at the left shoulder for  
44 residuals proximately caused by her January 4, 2002 industrial injury.
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1 5. In Docket No. 03 16904, the Department order dated June 27, 2003, is  
2 correct and is affirmed.  
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4 It is so **ORDERED**.

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6 Dated this 22nd day of November, 2004.  
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8 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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11  
12 /s/ \_\_\_\_\_  
13 THOMAS E. EGAN Chairperson  
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17 /s/ \_\_\_\_\_  
18 FRANK E. FENNERTY, JR. Member  
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22 /s/ \_\_\_\_\_  
23 CALHOUN DICKINSON Member  
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