BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LYLE R. APPLEGATE	)	**DOCKET NO. 18 16730**
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEAL**
CLAIM NO. SJ-90338	)	**FOR FURTHER PROCEEDINGS**

Self-insured employer CenturyLink, Inc., appealed the Department's April 18, 2018 (second) order affirming its February 22, 2018 (first) order allowing and closing worker Lyle Applegate's claim for occupational hearing loss. The Department contends that CenturyLink's appeal was untimely, because the Department had no statutory authority to issue the second order, and the employer appealed the first order more than 60 days after it was communicated to it. Our industrial appeals judge agreed with the Department and dismissed CenturyLink's appeal based on our lack of authority to review a Department order that had become final and binding. We conclude that while CenturyLink did not timely appeal the Department's first order, and the Department's second order must be vacated, CenturyLink is entitled to equitable relief from its failure to timely appeal the Department's first order. The Proposed Decision and Order of April 25, 2019, is vacated and this appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DISCUSSION

1. Facts

Based on the parties' cross-motions for summary judgment, the following facts are not disputed:

On February 22, 2018, the Department issued an order allowing and closing Mr. Applegate's claim for occupational hearing loss arising from his employment with CenturyLink, Inc. The employer's counsel filed a notice of appearance with the Department on February 27, 2018. On April 18, 2018, the Department issued a second order, which affirmed the February 22, 2018 order. CenturyLink received the second order on April 20, 2018, approximately five business days before its appeal rights to the first order would have lapsed. (This assumes the employer received the first order on February 26, 2018, three mailing days after it was issued. The record is not clear as to when the employer received the first order.) The order expressly advised the parties that they had 60 days from the date they received the order to file an appeal. Within 60 days after the first order was communicated to CenturyLink, it had no reason to believe that the Department issued its second order without statutory authority. In particular, within 60 days after the first order was communicated to CenturyLink, it was not privy to information that could have alerted it that the Department issued

the second order without statutory authority, such as if a protest was filed by Mr. Applegate, his medical provider, or some other interested party. In discovery, the Department admitted that it "sometimes" receives protests from workers that the workers fail to send to the employer.

In reliance on the Department's second order, CenturyLink did not file a request for reconsideration or appeal of the Department's first order within 60 days of the date that order was communicated to it. Instead, CenturyLink filed an appeal to the Department's second order on June 12, 2018, within 60 days of the date that order was communicated to it. After it appealed the Department's second order, in formal discovery before the Board, CenturyLink learned for the first time that the Department had construed CenturyLink's counsel's notice of appearance as a protest to the first order, and that it had done so "mistakenly."

2. The Department lacked authority to issue the order dated April 18, 2018, and the order is incorrect as a matter of law.

In law, without any consideration of equity, our industrial appeals judge properly analyzed this appeal and correctly concluded that CenturyLink in effect appealed an order that was incorrect as a matter of law and the order it purported to affirm had become final and binding. He concluded we have no authority to consider the merits of the February 22, 2018 or April 18, 2018 orders.

The analysis can be summarized as follows: CenturyLink's counsel's notice of appearance cannot reasonably be construed as a challenge to the Department's February 22, 2018 order; it was only a notice of appearance and it said nothing about challenging any order of the Department.[1] Because the Department received no valid protest to, or appeal of, the February 22, 2018 order it became final and binding under the law. And because no protest of the February 22, 2018 order was received before the Department issued its April 18, 2018 adherence order, the latter order was issued without statutory authority and must be vacated.

CenturyLink's citation to *Marley*[2] in support of a contrary conclusion regarding the Department's authority to issue the April 18, 2018 order is misplaced. *Marley* makes clear that the Department had **jurisdiction** to issue its April 18, 2018 order, and that **if** the employer had not appealed it, it would have become final and binding. But because the order *was* appealed and *was*

[1] *Boyd v. City of Olympia*, 1 Wn. App. 2d 17, 30 (2017).
[2] *Marley v. Dep't of Labor & Indus*., 125 Wn.2d 533 (1994).

issued without statutory authority, we have no choice but to vacate it based on the applicable statutes and our prior decisions. [3]

3. CenturyLink is Entitled to Equitable Relief

CenturyLink contends that it is entitled to be equitably relieved from its late filing of its appeal to the Department's February 22, 2018 order. The Department counters that the employer has not shown its right to equitable relief, arguing among other points that we lack a stare decisis basis to grant such relief.

Our courts have designed equitable doctrines "to relieve certain parties under special circumstances from the harshness of strict legal rules,"[4] and have recognized "a very narrow equitable power . . . apart from the provisions of Title 51 RCW, to set aside actions of the Department."[5] In turn, we have recognized that we have jurisdiction to rule on claims based in equity.[6] We have an obligation to admit evidence relevant to such claims and to make findings and conclusions attendant thereto.[7]

The Board's powers are limited to those the legislature has granted it. The legislative grant of authority does not include the exercise of broad equitable powers.[8] For nearly 40 years however, under the principle of stare decisis, we have stated that we will grant equitable relief in cases *factually similar* to cases that have been passed upon by courts of final jurisdiction. Our Supreme Court has defined stare decisis in ways that support application to those situations with identical or similar facts[9] and also describes stare decisis as "the doctrine of precedent, generally dictates that a court follow earlier judicial decisions when the same points of law arise again in litigation."[10] In certain circumstances we relied on stare decisis to apply equitable principles because, "Under those circumstances, the Board can say with reasonable certainty that failure to apply equity at this level would only result in its application at a higher level."[11] We declined to use stare decisis in cases in which we believed the facts were sufficiently dissimilar that we should not use principles of equity to

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[3] RCW 51.52.050; RCW 51.52.060; *In re Richard Wagner*, BIIA Dec., 88 0962 (1988); *In re Gregory L. Watson*, Dckt. No. 16 15362 (March 13, 2017).
[4] *Hyatt v. Dep't of Labor & Indus*., 132 Wn. App. 387, 398 (2006).
[5] *Kingery v. Dep't of Labor & Indus*., 132 Wn.2d 162, 173 (1997).
[6] *In re William H. Place*, Dckt. No. 96 3023 (October 14, 1997).
[7] *Place*, at 2.
[8] *In re State Roofing & Insulation, Inc*., BIIA Dec., 89 1770 (1991).
[9] *Floyd v. Dep't of Labor & Indus*., 44 Wn.2d 560, 565 (1954).
[10] *Roberson v. Perez*, 156 Wn.2d 33, 41 (2005) (citations omitted).
[11] *In re William H. Pingree,* Dckt. No. 91 0116 (May 19, 1992).

resolve an appeal.[12] In other circumstances we will view the facts as sufficiently similar to appellate cases so that we can apply equitable principles to resolve the appeal.[13] The definitions of stare decisis acknowledged by the Supreme Court do not require we only apply the doctrine in cases with such similar facts as to be almost identical. We are able to apply equity if the facts allow us to apply equitable principles consistent with application of the principles by our appellate courts. We are fully capable of granting equitable relief within the guidelines set by our courts when we are confident that the courts would grant the same relief—without needing the facts before us to be nearly identical to those in a published court decision. We continue to honor stare decisis; we will grant equitable relief "where the circumstances are appropriate and within those situations and guidelines set out by our courts."[14] This standard ensures that we are not creating equitable remedies, but granting them where our courts have determined them applicable.

In the circumstances provided by this appeal, we believe CenturyLink is entitled to relief from the finality of the February 22, 2018 order based on the application of equitable estoppel. Equitable estoppel prevents a party from taking a position inconsistent with a previous one where inequitable consequences would result to a party who has justifiably and in good faith relied on the earlier position.[15] Our courts have implied that if all of the doctrine's elements have been established, the Department can be estopped from contending a party has untimely appealed its order in an industrial insurance case.[16]

When equitable estoppel is asserted against the government, the party asserting estoppel must establish five elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims, (2) the asserting party acted in reliance upon the statement or action, (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action, (4) estoppel is necessary to prevent a manifest injustice, and (5) estoppel will not impair governmental functions.[17] Our industrial appeals judge suggested that CenturyLink could only show "injury" by proving that Mr. Applegate's occupational disease claim is not valid. The law does not appear to support the contention. For

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[12] *In re James Neff*, BIIA Dec., 92 2782 (1994); *In re Isaias Chavez, Dec'd*, BIIA Dec., 85 2867 (1987), *In re Ronald Jamieson*, BIIA Dec., 62,551 (1983);
[13] *In re Seth Jackson*, BIIA Dec., 61,088 (1982); *State Roofing.*
[14] *State Roofing*, at 7.
[15] *Silverstreak, Inc. v. Dep't of Labor & Indus*., 159 Wn.2d 868, 887 (2007).
[16] *Hyatt,* at 398.
[17] *Silverstreak*, at 887.

estoppel purposes, a party has been injured if it detrimentally changed its positon in reasonable reliance on the government's act;[18] CenturyLink's loss of its right to appeal appears to qualify as such an injury.[19]

We conclude the Department is equitably estopped from contending CenturyLink's appeal of the allowance order is not timely. CenturyLink has established each of the doctrine's elements by clear, cogent, and convincing evidence. In its April 18, 2018 order, the Department expressly advised the parties that they had 60 days from the date they received the order to appeal it. Its terms, by implication, advised them that the Department's February 22, 2018 order was no longer its final order on the issue of claim allowance, and that no party had an obligation, or even a right, to appeal the February 22, 2018 order. In reliance on the Department's April 18, 2018 order, CenturyLink did not file a timely appeal to the Department's February 22, 2018 order and instead filed a timely appeal to the Department's April 18, 2018 order.

Our industrial appeals judge suggested that CenturyLink's reliance on the Department's April 18, 2018 affirming order was not reasonable because it "should have known" that the Department issued it without a valid intervening protest. We cannot agree. The suggestion would mean that a party has a duty to investigate the Department's underlying authority to issue a facially valid order in some time frame less than the 60 days set forth in RCW 51.52.050 and RCW 51.52.060 or potentially lose its right to challenge the order. Here, to preserve its appeal rights, it turns out CenturyLink would have had to start its investigation, complete it, and then act on its results, **all within about five business days**. We are aware of no law that suggests claimants and employers possess such an unreasonable duty. Moreover, the existence of such a duty is contrary to the statutorily mandated 60 days.

If the equitable estoppel is not applied, CenturyLink will suffer injury in having lost its right to appeal the order allowing the claim. Manifest injustice will result. No evidence has been presented suggesting the exercise of governmental functions will be impaired by the application of estoppel in the circumstance of this claim.

4. Conclusion

In contravention of clearly established law, on facts known only to it, the Department issued an unauthorized order affirming claim allowance and setting forth false information about the parties'

[18] *Kramarevcky v. Dep't of Soc. & Health Servs*., 122 Wn.2d 738, 747 (1993).
[19] *In re Robert E Ohman*, Dckt. No. 17 15999 (May 7, 2018).

appeal rights. The Department is equitably estopped from asserting the decision to allow the claim is final and binding. This appeal is remanded for a hearing on the merits of the February 22, 2018 order.

ORDER

The April 25, 2019 Proposed Decision and Order is vacated. This order vacating is not a final Decision and Order of the Board within the meaning of RCW 51.52.110.

This appeal is remanded to the hearings process, as provided by WAC 263-12-145(5), for further proceedings as indicated by this order. Unless the matter is settled or dismissed, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104.

Dated: September 13, 2019.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

ISABEL A. M. COLE, Member

JACK S. ENG, Member

Addendum to Order
In re Lyle R. Applegate
Docket No. 18 16730
Claim No. SJ-90338

Appearances

Claimant, Lyle R. Applegate, by Meyer Thorp Attorneys at Law, PLLC, per Rondi J. Thorp

Self-Insured Employer, Qwest Corporation dba CenturyLink, by Reinisch Wilson Weier, P.C., per Shawna G. Fruin

Department of Labor and Industries, by Office of the Attorney General, per Kevin C. Elliott

Department Order Under Appeal

In Docket No. 18 16730, the employer, Qwest Corporation dba CenturyLink, filed an appeal with the Board of Industrial Insurance Appeals on June 12, 2018, from an order of the Department of Labor and Industries dated February 22, 2018. In this order, the Department allowed Mr. Applegate's claim for occupational hearing loss and closed the claim with no permanent partial disability award.

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on April 26, 2019, in which the industrial appeals judge dismissed the appeal based on the employer's failure to file the appeal within the time allowed by RCW 51.52.060.