

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 41831-2

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CHARLES A. LOOMIS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent,

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

Comes now the appellant, Charles Loomis, Plaintiff below, by and through her attorney of record, Tara Jayne Reck of the Law Offices of David B. Vail and Jennifer Cross-Euteneier & Associates, and hereby offers this Brief in support of her appeal.

This case originates from an Administrative Law Review (ALR) appeal from a Decision and Order of the Board of Industrial Insurance Appeals (Board) dated November 16, 2007 in which the Board found that the Department of Labor and Industries (Department) was correct when it issued a May 12, 2006 in which the Department affirmed its April 20, 2006 order stating that Mr. Loomis' claim was reopened effective June 19, 2003 for medical treatment only and further stated the Director decided that only payment of medical benefits is appropriate and that additional disability benefits would not be granted to Mr. Loomis because his claim was in over seven status. He appealed that decision to Superior Court asserting that the Board was incorrect in affirming the May 12, 2006 Department of Labor and Industries' (Department) order because: (a) it lacked jurisdiction over the merits of the claim because Mr. Loomis filed a reopening application within 60 days of the May 5, 1975 closing order, which should have been treated by the Department as a protest to that

closing order, after which a further and final determination should have been issued; (b) it lacked jurisdiction over the merits of the claim because on October 22, 1982 the Department's pharmacy consultant issued an interoffice communication indicating Mr. Loomis's prescription regimen needed to be altered just a few days after the Department issued a closing order on October 6, 1982 but the Department failed to issue a further and final determinative order; and (c) the action taken by the Director of the Department is inconsistent because in 1992, before the Director's present decision not to reopen Mr. Loomis's claim for disability benefits, the Director exercised his discretion in a nearly identical situation and determined that Charles Loomis' claim should be reopened for disability benefits.

Superior Court affirmed the Board's decision after considering briefing and oral argument by both parties and Mr. Loomis now appeals that decision.

II. ASSIGNMENTS OF ERROR

A. SUPERIOR COURT AND THE BOARD ERRED IN ASSERTING JURISDICTION OVER THE SUBJECT MATTER OF THIS APPEAL.

1. Both Superior court and the Board lack jurisdiction over the merits of the claim because Mr. Loomis filed a

reopening application within 60 days of the May 5, 1975 closing order, which should have been treated by the Department as a protest to that closing order, after which a further and final determination should have been issued.

2. Both Superior court and the Board lack jurisdiction over the merits of the claim because on October 22, 1982 the Department's pharmacy consultant issued an interoffice communication indicating Mr. Loomis's prescription regimen needed to be altered just a few days after the Department issued a closing order on October 6, 1982 but the Department failed to issue a further and final determinative order.

B. SUPERIOR COURT AND THE BOARD ERRED IN CONCLUDING THAT THE DIRECTOR DID NOT ABUSE HIS DISCRETION IN 2006 BY DENYING FURTHER DISABILITY AWARDS BECAUSE THIS ACTION IS INCONSISTENT WITH THE DECISION MADE APRIL 9, 1992 REOPENING MR. LOOMIS'S CLAIM TO PROVIDE DISABILITY BENEFITS.

1. The Director's action is inconsistent because in April 1992, before the Director's 2006 decision not to reopen Mr. Loomis's claim for disability benefits, the Director

exercised his discretion in a nearly identical situation and determined that Mr. Loomis's claim should be reopened for disability benefits.

C. SUPERIOR COURT ERRED IN CONCLUDING THAT BECAUSE MR. LOOMIS FAILED TO TIMELY RAISE THE ISSUES RELATED TO THE DEPARTMENT'S MAY 1975 AND OCTOBER 1982 CLOSING ORDERS, HE IS PRECLUDED BY THE DOCTRINES OF RES JUDICATA AND LACHES FROM ARGUING THAT THE DEPARTMENT IS REQUIRED TO NOW ADDRESS ANY SUCH ISSUES AND IS SIMILARLY PRECLUDED FROM RAISING ANY ISSUES REGARDING THE DEPARTMENT'S ORDER OF SEPTEMBER 2, 1975 REOPENING HIS CLAIM, THE FEBRUARY 5, 1986 ORDER REOPENING HIS CLAIM, THE CLOSING ORDER DATED NOVEMBER 30, 1987, THE APRIL 9, 1992 LETTER REOPENING THE CLAIM, THE DECEMBER 13, 1994 ORDER CLOSING THE CLAIM, AND THE OCTOBER 12, 2004 ORDER IMPLEMENTING THE SEPTEMBER 29, 2004 ORDER ON AGREEMENT FO PARTIES THAT REOPNIND HIS CLAIM FOR MEDICAL BENEFITS ONLY.

1. Because Mr. Loomis's claim was not properly administered by the Department beginning in May 1975, the entirety of the claim is tainted by this improper administration and Mr. Loomis should not be penalized for his inability to recognize these serious errors prior to consulting with an attorney.

III. ISSUES

Whether Superior Court was correct when it affirmed and adopted the decision and order of the Board of Industrial Insurance Appeals dated January 29, 2008 which affirmed the May 12, 2006 Department of Labor and Industries' order when:

(1) the Board's and Superior Court lacked jurisdiction over the merits of the claim because Mr. Loomis filed a reopening application within 60 days of the May 5, 1975 closing order, which should have been treated by the Department as a protest to that closing order, after which a further and final determination should have been issued;

(2) the Board's and Superior Court lacked jurisdiction over the merits of the claim because on October 22, 1982 the Department's pharmacy consultant issued an interoffice communication indicating Mr. Loomis's prescription regimen needed to be altered just a few days after the Department issued a closing order on October 6, 1982 but the Department failed to issue a further and final determinative order; and

(3) The Director's action is inconsistent because in 1992, before the Director's present decision not to reopen Mr. Loomis's claim for disability benefits, the Director exercised his discretion in a nearly

identical situation and determined that Charles Loomis' claim should be reopened for disability benefits?

IV. STATEMENT OF THE CASE

A. FACTUAL AND PROCEDURAL HISTORY

Because the underlying facts in this case are undisputed, evidence was presented at the Board and Superior Court through a series of "stipulated facts" contained within the Appeal Board Record (Herein after cited as "ABR"). For the Court's ease, those facts are as follows:

1. On or about June 16, 1971, Charles Loomis filed an application for benefits after receiving a back injury during the course of his employment with West Coast Door, Inc. on May 20, 1971. The Department allowed his claim and paid him benefits.
2. On April 22, 1975, the Department closed his claim with 84% of maximum allowed for unspecified disabilities and 5% allowed for unspecified disabilities less overpayment deduction. Time loss was ended as paid.
3. On May 5, 1975, the Department issued an order correcting and superseding the April 22, 1975 order and closing his claim with a payment of 84% of maximum allowed for unspecified disabilities and 5% of maximum allowed for unspecified disabilities less previous award. An overpayment of \$141.00 was assessed and time loss compensation was ended as paid.
4. On July 3, 1975, Charles Loomis filed an aggravation application. The form was signed by Dr. Thomas Miskovsky on June 26, 1975.

5. On September 22, 1975, the Department issued an order reopening Charles Loomis' claim effective June 26, 1975 for treatment only and effective July 3, 1975 for authorized treatment and action as indicated. Charles Loomis did not protest or appeal this order.
6. On April 8, 1977 the Department issued an order paying two semi-monthly time loss compensation payments beginning March 31, 1977.
7. On March 13, 1979, the Department issued an order closing Charles Loomis' claim 100% for back problems, 15% for psychiatric problems, 5% for partial impotence, with \$12,750 maximum payable for unspecified disabilities, 100% maximum allowed for unspecified disabilities less previous award and ending time loss compensation as paid.
8. On March 23, 1979, Charles Loomis filed a notice of appeal to the March 13, 1979 Department order.
9. On June 15, 1979 an Order on Agreement of Parties was entered; pursuant to that agreement, on November 19, 1979, the Department issued an order reopening Charles Loomis' claim effective March 14, 1979 for further treatment as indicated in his doctor's February 28, 1979 letter and for such other and further action as indicted.
10. Charles Loomis' claim remained open, during which time he completed vocational retraining to be a draftsman, until October 6, 1982, when the Department issued an order closing his claim because the record showed treatment was no longer necessary, and with no award for permanent partial disability. Charles Loomis did not protest or appeal this order.
11. On October 22, 1982, Bud Davidson, Pharmacy Consultant for the Department, submitted an interoffice communication

stating the time had come to get Charles Loomis off Darvocet N 100 because he had been on that drug since 1979 and it appeared he had become dependent on it.

12. On October 28, 1983, Charles Loomis filed an aggravation application, which was denied by the Department on November 8, 1983.
13. On December 7, 1983, Charles Loomis filed a notice of appeal to the November 8, 1983 Department Order.
14. On February 5, 1986 the Department issued an order reopening Charles Loomis' claim effective October 27, 1983 for authorized treatment and action as indicated.
15. On September 2, 1987 Charles Loomis' claim was again closed with no additional permanent partial disability award.
16. On October 8, 1987, Charles Loomis filed a protest and request for reconsideration of the September 2, 1987 order.
17. The September 2, 1987 order was held in abeyance on November 19, 1987 and was affirmed on November 30, 1987. Charles Loomis did not protest or appeal this closing order.
18. On November 20, 1991 Charles Loomis filed an aggravation application.
19. On March 24, 1992 the Director of the Department wrote a letter determining that Charles Loomis would be eligible for disability benefits despite the fact that his claim had been closed for over seven years.
20. On April 9, 1992 the Department issued an order stating that the Director had exercised his discretion and decided to reopen

Charles Loomis' claim for additional disability benefits as are authorized by law effective November 11, 1991.

21. In August 1994, Charles Loomis' vocational plan was closed with a finding that he had completed his coursework in the Computer Aided Drafting portion of the Mechanical Drafting program, and was able to work in this field.
22. On December 13, 1994 the Department issued an order stating that Charles Loomis' claim had been reopened effective November 11, 1991 for authorized treatment. Because the record showed treatment was no longer necessary, no additional permanent partial disability was awarded and Charles Loomis' claim was again closed. Charles Loomis did not protest or appeal this order.
23. On August 18, 2003 Charles Loomis filed an aggravation application.
24. On December 29, 2003 the Department issued an order denying Charles Loomis' reopening application.
25. On February 12, 2004 Charles Loomis filed a protest and request for reconsideration of the December 29, 2003 Department order.
26. On March 1, 2004 the December 29, 2003 Department order was affirmed.
27. On March 19, 2004 Charles Loomis filed a notice of appeal to the March 1, 2003 Department order.
28. On May 12, 2004 the Board issued an order granting appeal and assigned docket number 04-14223.

29. On September 29, 2004, Charles Loomis and the Department entered an Order on Agreement of Parties that his industrially-related condition had worsened, that his claim was an “over-7” within the meaning of RCW 51.32.160, and that his claim would be reopened for medical treatment only.
30. On October 12, 2004 the Department issued an order reopening Charles Loomis’ claim effective June 19, 2003 for medical treatment only. Charles Loomis did not protest or appeal this order.
31. On September 8, 2005, Charles Loomis filed a protest and request for reconsideration of any adverse orders issued in the prior 60 days.
32. On January 4, 2006, the Department issued an order closing Charles Loomis’ claim with no further permanent partial disability award.
33. On February 3, 2006, Charles Loomis filed a protest and request for reconsideration asking for discretionary review with regards to payment of time loss compensation.
34. On February 23, 2006, the Department issued an order that the January 4, 2006 order was being reconsidered.
35. On April 20, 2006, the Director issued a decision that Charles Loomis was not eligible to receive time loss compensation because he was not working prior to the reopening of this claim and neither the worsening of the claim or surgery changed employment status or earnings; his claim had been reopened for medical benefits only.
36. On April 20, 2006, the Department issued an order stating that additional disability benefits would not be granted, canceling

the January 4, 2006 order, and closing his claim effective April 20, 2006.

37. On May 10, 2006 Charles Loomis filed a protest and request for reconsideration of the April 20, 2006 order.
38. On May 12, 2006, the Department affirmed the April 20, 2006 order.
39. On July 5, 2006 Charles Loomis filed a notice of appeal.
40. On August 1, 2006 the Board issued an order granting appeal and docket Number 06-16725 was assigned.
41. This is the matter currently under appeal.

1. Procedure Before the Board:

Mr. Loomis appealed the Department's May 12, 2006 order to the Board on July 5, 2006. On August 1, 2006 the Board issued an order granting appeal and assigning the matter docket number 06 16725. (ABR at p. 113). The parties agreed to present evidence through a series of stipulated facts contained in the "exhibits" section of the ABR. On November 16, 2007 the Industrial Appeals Judge issued a proposed decision and order affirming the Department's May 12, 2006 order. (ABR at p. 18). Mr. Loomis filed a petition for review on January 10, 2008.

(ABR at p. 3). On January 29, 2008 the Board issued an order denying this petition for review. (ABR at p. 2).

2. Superior Court Action:

Mr. Loomis then appealed the Board's decision to Superior Court on February 28, 2008. (Clerk's papers, herein after cited as "CP" at p. 1). Having considered the briefing and argument by both parties, on February 4, 2011 the Court entered findings of fact, conclusions of law and judgment affirming the Board's decision. (CP at p. 35). As a result, Mr. Loomis has appealed to the Washington State Court of Appeals, Division Two.

V. ARGUMENT

Mr. Loomis asserts Superior Court and the Board erred in affirming the Department's May 12, 2006 order because the Department incorrectly decided that Mr. Loomis's claim would not be reopened for disability benefits since his claim was in over seven status because. This decision is incorrect because: (1) Mr. Loomis' claim should not be in "over seven" status as a result of an administrative flaw divesting higher tribunals including the Board and Superior Court of jurisdiction over the merits of the claim because the Department failed to properly address the June 26, 1975 reopening application as a protest to the May 5, 1975 closing order

and failed to act on the internal protest to the October 6, 1982 made by Bud Davidson, pharmacy consultant; **and** (2) the Director has inconsistently applied his discretion in Mr. Loomis' claim by reopening his claim for disability benefits in 1992 and declining to do so under the present appeal.

The Department's failure to properly address the June 26, 1975 reopening application and the internal protest to the October 6, 1982 closing order, and the Director's inconsistent exercise of discretion is contrary to the beneficial purpose behind the Industrial Insurance Act. The Industrial Insurance Act was established to protect and provide benefits for injured workers, and both the Courts and the Board are committed to the rule that the Industrial Insurance Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Department of Labor and Industries*, 61 Wn.2d 439, 446 (1963); *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1; *Nelson v. Department of Labor and Industries*, 9, Wn.2d 621; and *Hilding v. Department of Labor and Industries*, 162 Wash. 168.

The result of this Department action is that Mr. Loomis's claim has been ineffectively administered from its inception. Because the June 26, 1975 reopening application acts as a protest to the May 5, 1975 closing

order, the obligation was upon the Department to treat the reopening application as a protest to the closing order and issue a further and final determination. The Department failed to do so, resulting in ***no valid first terminal date in Ms. Loomis' claim***. Without a valid first terminal date, all subsequent action taken in his claim is tainted and cannot be remedied until this first flaw is corrected. Additionally, Bud Davidson's interoffice communication stating Mr. Loomis' prescription medication program needed to be altered should be construed as a valid protest to the October 6, 1982 closing order. The duty is on the Department to act on that interoffice communication and thereafter issue a further and final determinative order. The Department did not do so, resulting in Mr. Loomis's claim being tainted by yet another serious flaw negating the "over seven" status of his claim. Since there is no valid first terminal date, the Director abused his discretion by not granting Mr. Loomis additional disability benefits and by acting inconsistently with a prior determination.

In 1992, the director exercised his discretion in Mr. Loomis's claim and allowed additional disability benefits. The director's 2006 denial is inconsistent and constitutes an abuse of discretion. Because of the glaring flaws and the inconsistent exercise of authority by the Director, the May 12, 2006 Department order must be ***reversed*** and this matter

must be *remanded* to the Department level with direction to address the protest to the May 5, 1975 closing order and issue a further and final determinative order to establish a valid first terminal date in Mr. Loomis's claim.

A. STANDARD OF REVIEW

Jurisdiction of the Superior Court on review of a decision of the Board is appellate only, and it can only decide matters decided by the administrative tribunal. *Shufeldt v. Department of Labor and Industries*, 57 Wash.2d 758, 359 P.2d 495 (1961). Review by the Court of Appeals is limited to an examination of the record to see whether substantial evidence supports the findings made after the Superior Court's de novo review and whether the Court's conclusions of law flow from the findings. *Rogers v. Department of Labor and Industries*, 151 Wash.App. 174, 210 P.3d 355 (2009).

Relief from a decision of the Board is proper when it has erroneously interpreted or applied the law, the order is not supported by substantial evidence, or it is arbitrary or capricious. *Mt. Baker Roofing, Inc. v. Washington State Dept. of Labor and Industries*, 146 Wash.App. 429, 191 P.3d 65 (2008), amended on reconsideration.

The Department is charged with administering the Workers' Compensation Act (Act), so the Court of Appeals affords substantial weight to the Department's interpretation of the Act. However, the Court of Appeals may nonetheless substitute its judgment for the Department's because its review of the Act is de novo. *McIndoe v. Department of Labor and Industries of State of Wash.*, 100 Wash.App. 64, 995 P.2d 616 (2000), review granted 141 Wash.2d 1025, 11 P.3d 826, affirmed 144 Wash.2d 252, 26 P.3d 903.

B. THE ACT WAS CREATED TO PROTECT AND PROVIDE BENEFITS FOR INJURED WORKERS AND THEIR BENEFICIARIES.

The Act was established to protect and provide benefits for injured workers. It must be emphasized that it has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Department of Labor and Industries*, 61 Wn.2d 439, 446 (1963); *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1; *Nelson v. Department of Labor and Industries*, 9, Wn.2d 621; and *Hilding v. Department of Labor and Industries*, 162 Wash. 168. Furthermore, as noted by the Washington Supreme Court in *Clauson v. Department of Labor and Industries*, 130 Wn. 2d 580 (1996) it is

mandated that *any doubt* as to the meaning of the workers' compensation law be resolved in favor of the worker. *Id.*, at 586.

Mr. Loomis has not been afforded the full protection of the Act; in fact, the Board and Superior Court have attempted to divest him of his right to have his claim properly administered following the issuance of an order establishing a valid first terminal date. Because Mr. Loomis's claim is tainted by improper administration the Board and Superior court lack subject matter jurisdiction until such time as the Department has properly exercised its original jurisdiction to remedy these flaws in the proper administration of Mr. Loomis's claim.

C. THE COURT LACKS JURSDICTION OVER THE MERITS OF MR. LOOMIS'S APPEAL OF THE MAY 12, 2006 DEPARTMENT ORDER.

Under Civil Rule 12(h)(3), "[w]henver it appears by suggestion of parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." CRs 12(h)(3). Significant Board decision *In re John A. Robinson*, 59 454 (1982), states that "a protest automatically operates to set aside and hold an order in abeyance pending the issuance of a further appealable order." In addition, according Significant Board Decision, *In re Santos Alonzo*, 56 833 (1981), when a timely protest is filed to an order that promises a further appealable order to be issued if protest is filed, the original order is set aside and held in

abeyance and the Board lacks jurisdiction to hear an appeal from the original order since it is not final as protested.

1. ***The June 26, 1975 reopening application constitutes a protest to the May 5, 1975 closing order which must be first addressed by the Department.***

In Significant Board Decision, *In re Charles Weighall*, 29-863 (1970), the Board held that an application to reopen a claim, filed in response to a Department closing order and within the time allowed for filing an appeal, is construed as a request that the Department reconsider its closure of the claim, and *requires the Department to issue a further final order*. According to Significant Board Decision *In re Gerald Wynkoop*, 34-133 (1970), when a Department order contains a promise that a further appealable order will be issued upon a protest being made to the original order, the Department is ***required*** to issue a further and final order once the protest is filed. Finally, under Significant Board Decision *In re John Robinson*, 59-454 (1982), a timely protest ***automatically*** operates to set aside and hold an order in abeyance pending the issuance of a further appealable order and leaves the Board without jurisdiction to hear the worker's appeal.

The May 5, 1975 order issued by the Department indicated that “any protest or request for reconsideration of this order must be made in

writing to the Department of Labor and Industries in Olympia within 60 days.” The subsequent reopening application completed by Dr. Miskoysky became effective June 26, 1975, *less than 60 days* after the issuance of the May 5, 1975 closing order. As a result, the June 26, 1975 reopening application must be treated as a protest to the May 5, 1975 closing order and the Department must exercise its original jurisdiction to administer the claim and issue a further appealable order. The Department has not issued a further appealable order. As a result, the June 26, 1975 protest to the May 5, 1975 closure of Mr. Loomis’s claim has not been acted upon. There is *no valid first terminal date* in Mr. Loomis’s claim which precludes any further adjudication or litigation over the merits of his claim. The Department must exercise its original jurisdiction to act upon the protest to claim closure and issue a further order before a valid first terminal date is established. Because original jurisdiction over claim administration lies with the Department, the Board and Superior Court lack jurisdiction.

2. The October 22, 1982 interoffice communication constitutes the Department’s own protest to the closing order of October 6, 2006, and the Department has issued no final determination on this matter.

According to the language contained at the top of the closing order issued October 6, 1982, “[a]ny protest or request for reconsideration of

this order must be made in writing to the Department of Labor and Industries in Olympia within 60 days.” On October 22, 1982, only 16 days after the closing order of October 6, 1982 was issued, in an interoffice communication pharmacy consultant Bud Davidson stated that Mr. Loomis needed to be taken off Darvocet N 100 because he appeared to be dependent upon it. In this communication, Mr. Davidson effectively protested the closing order of October 6, 1982 because his communication was in writing, within 60 days of the closing order, and states that continued treatment is needed to address Mr. Loomis’s possible addiction to the pain killers he had been prescribed. According to the Significant Board Decisions cited above, the Department was obligated to act on Mr. Davidson’s protest and issue a further and final appealable order in light of the October 22, 1982 protest. As of yet, the Department has not acted upon the protest to the October 6, 1982 closing order, which divests the Board and this Court of jurisdiction over the merits of the present appeal (abuse of discretion) because the Department has yet to exercise its original jurisdiction to act upon Mr. Davidson’s protest to claim closure. As a result, this matter must be *remanded* to the Department level with direction to act upon the June 26, 1975 protest of the May 5, 1975 closing order and October 22, 1982 protest of the October 6, 1982 closing order and issue further and final determinative orders.

D. THE DIRECTOR ABUSED HIS DISCRETION BY DENYING MR. LOOMIS DISABILITY BENEFITS IN 2006.

1. Abuse of discretion standard.

According to the court in *Walmer v. Department of Labor and Industries*, 78 Wash. App. 162 (1995), the discretion of the Director is not unfettered and it must comply with the Department's rules. The Court observed:

Walmer's second argument is that RCW 51.32.160 allows such broad discretion to the Director that "over-seven" claimants are without guidance in determining whether their claims for other benefits will be allowed. He cites no authority for this "as applied" challenge. Moreover, as we have noted, the Director has no such unfettered discretion. Walmer has not shown that the Director has ever exercised discretion in an arbitrary manner. Walmer also has not demonstrated that the Director has ever exercised discretion to sua sponte readjust nonmedical compensation in an "over-seven" claim for aggravation.

Rather, Walmer appears to argue the Director is without direction to the point that any exercise of discretion is per se arbitrary. RCW 51.32.160 provides, however, that the Director may readjust compensation upon his own motion "in accordance with the rules in this section". Thus, the Director must comply with the rules provided under RCW Title 51 in determining the eligibility of a claimant.

Walmer's third argument undergirds his second. He asserts the "statute purports to give the Director **discretion** to grant or deny disability compensation to 'over-seven' claimants based on evidence which would **require** such benefits" in "under-seven"

claims. The statute, however, reads “the director may . . . at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules in this section”. RCW 51.32.160. The discretion given the Director is to sua sponte readjust the rate of compensation in accordance with the rules, not to “grant or deny disability compensation” arbitrarily. (Emphasis added).

Thus, as the *Walmer* Court’s interpretation shows, the Department must follow its own guidelines. According to the Court in *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971):

[D]iscretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. [citation omitted] Where the decision or order . . . is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).
(Citations omitted.).

There is an abuse of discretion when the reasons for the discretionary decision are not stated. *In re Armando Flores*, BIIA Dec., 87 3913 (1989) citing, *State v. Hampton*, 107 Wn.2d 403, 728 P.2d 1049 (1986). Administrative action is not arbitrary or capricious if there are grounds for two or more reasonable opinions, and the agency reached its decision honestly and with due consideration of the relevant

circumstances. *Ritter v. Board of Commissioners*, 96 Wn.2d 503, 515, 637 P.2d 940 (1981).

Accordingly, to establish abuse of discretion by the Director, the claimant need only show any of the following:

- (1) The reasons for the determination are not stated;
- (2) The agency did not give due consideration of the relevant circumstances; OR
- (3) That the discretionary determination was either:
 - a) manifestly unreasonable,
 - b) exercised on untenable grounds, or
 - c) exercised for untenable reasons.

2. The Director abused his discretion by failing to consider the outstanding protests and by exercising his discretion inconsistently.

Here the Director's decision not to provide disability benefits in 2006 constitutes abuse of discretion for two reasons. First, as stated above, there are glaring discrepancies that have tainted the administration of Mr. Loomis's claim which have been repeatedly overlooked by the Department. The Director also failed to give due consideration to relevant circumstances by not taking into consideration the fact that the June 26, 1975 reopening application should have been treated as a protest of the May 5, 1975 closing order and that the Department has not yet acted upon

that protest. As a result, because there is no valid first terminal date in Mr. Loomis's claim, the Director may not exercise discretion based upon the "over seven" status of Mr. Loomis's. Without a *valid first terminal date*, the seven years has not yet started to run. Similarly, the Department has not yet acted upon the October 22, 1982 interoffice protest of the October 6, 1982 closing order and the Director abused his discretion by failing to take this into consideration when making his decision in the present appeal.

Secondly, the Director's present decision *not* to reopen Mr. Loomis's claim for disability benefits constitutes abuse of discretion because it is inconsistent with the decision the Director made in 1992 to allow disability benefits despite the fact that the Department felt Mr. Loomis's claim was in "over seven" status at that time. The Director's current decision is both arbitrary and capricious because it is wholly inconsistent with the decision made in 1992. Mr. Loomis's life circumstances did not change between 1992 and 2006. Mr. Loomis was not working in 1992, just as he was not working in 2006 and continues to be unable to work.

Because the Director failed to consider the relevant flaws in the administration of Mr. Loomis's claim and has inconsistently exercised his

discretion, the Directors decision in the present appeal constitutes abuse of discretion and should be *reversed*.

VI. ATTORNEY FEES AND COSTS

Mr. Loomis requests attorney fees and costs if he prevails. RCW 51.52.120 reads, in relevant part:

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

If this court reverses the Superior Court decision, then it is sustaining the workers' right to relief and accordingly attorney fees must be granted to Mr. Loomis.

VII. CONCLUSION

In conclusion, Superior Court and the Board lacked jurisdictional authority over the merits of Mr. Loomis's claims because original jurisdiction lies with the Department. The Department has not yet exercised its original jurisdiction (1) to act upon the June 26, 1975 protest

of the May 5, 1975 closing order and issue a further and final determinative order. (2) then to act upon the October 22, 1982 protest of the October 6, 1982 closing order, and (3) to then finally issue further and final determinative order(s). until the Department has exercised this original jurisdiction, the Board and higher Courts lack jurisdiction. Accordingly, Mr. Loomis respectfully prays that Superior Court affirmance of the Board's affirmance of the Department's May 12, 2006 order be reversed. Finally, attorney fees and costs should be awarded under RCW 51.52.120.

Dated this 30 day of August, 2011.

Respectfully submitted,
VAIL-CROSS & ASSOCIATES

By: Tara Jayne Reck
TARA JAYNE RECK
WSBA# 37815
Attorney for Appellant

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Dated this ____ day of August, 2011.

Respectfully submitted,
VAIL-CROSS & ASSOCIATES

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Attorney for Appellant

COURT APPEALS
DIVISION II

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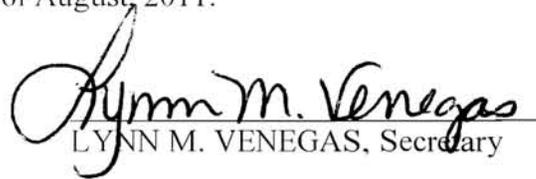
BY _____

DEPUTY

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 31st day of August, 2011, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Steve Vinyard
Assistant Attorney General
P.O. Box 40121
Olympia, WA 98504-0121

DATED this 31st day of August, 2011.


LYNN M. VENEGAS, Secretary