

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *[Signature]*

DEPUTY

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,

Respondant,

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. ADDITIONAL ARGUMENTS

Comes now the appellant, Charles Loomis, Plaintiff below, by and through his attorney of record, Karla E. Rood of the Law Offices of David B. Vail and Jennifer Cross-Euteneier & Associates, and hereby offers this Reply Brief in support of his appeal.

A. THE DEPARTMENT'S ISSUANCE OF THE SEPTEMBER 22, 1975 ORDER AND ITS FAILURE TO CONSIDER THE OCTOBER 22, 1982 INTEROFFICE MEMORANDA A REQUEST FOR RECONSIDERATION WAS ERRONEOUS.

i. THE SEPTEMBER 22, 1975 ORDER WAS ERRONEOUS.

The September 22, 1975 Department of Labor and Industries (Department) Order to reopen Mr. Loomis' claim was erroneous as the reopening application should have been treated as a protest and request for reconsideration of the closing order issued on May 5, 1975. In *In re Charles Weighall*, BIIA Dec., 29-863 (1970), the Board of Industrial Insurance Appeals (Board) held that "the claimant complied with the Department's admonition in its closing order of June 29, 1967, that 'Any request for Departmental reconsideration of this order must be made within sixty days. A further appealable order will follow such request,' by filing a document [the application to reopen claim] with the Department of Labor and Industries." *In re Charles Weighall*, BIIA Dec., 29-863 at 6

(1970). Just as in *Weighall*, the closing order issued on May 5, 1975 stated that “Any protest or request for reconsideration of the order must be made in writing to the Department of Labor and Industries in Olympia within 60 days. A further appealable order will follow such a request.” CABR Ex. B. Mr. Loomis, just as Charles Weighall, filed a document with the Department of Labor and Industries within 60 days of the order closing his claim, thus Mr. Loomis, just as Charles Weighall, was entitled to have the Department issue a further appealable order regarding the closure of his claim.

Treating a reopening application as a protest and request for reconsideration is common sense. While there are different standards that must be met in order to reopen a claim (i.e. a claimant must prove that his condition has objectively worsened), at its core a reopening application alleges that further action needs to take place under the claim, either in the form of further treatment, or an increased permanent partial disability award.¹ A protest and request for reconsideration of a closing order alleges the same thing—that further action needs to take place under the claim. That is particularly obvious in this case, where the physician’s

¹ The Washington Pattern Jury Instructions illustrate this point. WPI 155.11 reads in pertinent part, “‘Aggravation’ means a worsening of a condition caused by the [industrial injury][occupational disease]that results in [an increase in permanent disability][a need for treatment]. WPI 155.11, second paragraph.

report portion of Mr. Loomis' June 26, 1975 application to reopen claim contains treatment recommendations, specifically laminagrams, a corset, and potentially physical therapy. CABR Ex. D.

Finally, the statements made by Thomas J. Miskovsky, M.D., the physician who filed Mr. Loomis' reopening application, indicate that he was not alleging that Mr. Loomis' condition had worsened, which is the basis for reopening a claim.² Instead, Dr. Miskovsky specifically stated that Mr. Loomis' condition seemed to have improved. CABR Ex. D. Thus circumstantial evidence indicates that Dr. Miskovsky was not alleging that Mr. Loomis' condition had worsened or been aggravated, rather that there was further treatment that Mr. Loomis required. Given these factors, Mr. Loomis' application to reopen his claim should have been considered a protest and request for reconsideration of the closing order issued May 5, 1975.

The Respondent alleges that by not appealing the September 22, 1975 reopening order Mr. Loomis was acknowledging that he intended to reopen his claim, rather than protest the May 5, 1975 closing order.

² In considering a reopening application, the Department considers whether a claimant's previously accepted conditions have worsened either temporarily or permanently during the time from when an order affirming closure of a claim was issued and the time the Department denied the reopening application. See *In re Junior Wheelock*, BIIA Dec., 86 4128 (1987).

Respondent's Brief at 19. This argument ignores the fact that at the time Mr. Loomis was not aggrieved by the order reopening his claim as it afforded him the relief he was seeking—the ability to obtain further treatment under his claim. He had no way of knowing the procedural error that had been committed by the Department, nor was he aware of the implications of the procedural defect to his claim. Further, appealing this order at the time would have been considered a trifle pursuant to the de minimis doctrine and would have created an unnecessary burden on the claimant, the Department and the court.

ii. THE FAILURE TO CONSIDER THE OCTOBER 22, 1982 INTEROFFICE MEMORANDA A REQUEST FOR RECONSIDERATION WAS ERRONEOUS.

The October 22, 1982 memo was an indication that the claim was not ready for closure and that further action needed to occur at that time. Bud Davidson, Pharmacy Consultant for the Department, indicated that Mr. Loomis had been on Darvocet N 100 since 1979 and stated that Mr. Loomis seemed to be dependent on it. CABR Ex. K. This indicates that Mr. Loomis was requiring some form of treatment to manage his pain; it is unlikely that simply ceasing the narcotic medication would not impact his ability to function. This memo showcased the necessity for the Department to perform further investigation into Mr. Loomis' claim and

condition, particularly as it related to any permanent partial disability he may have been entitled to as a result of his industrial injury.

B. RES JUDICATA DOES NOT APPLY AS NO FINAL JUDGMENT OR ORDER HAS BEEN ENTERED IN EITHER 1975 OR 1982.

In order for a claim to be precluded under the doctrine of res judicata, a final judgment or order must have been rendered by an entity with authority to do so. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737-38, 222 P.3d 791 (2009). In this case, no final order has been entered in Mr. Loomis' case either in 1975 or 1982. Given that Mr. Loomis' application to reopen his claim should have been considered a protest, the burden rests with the Department to issue a further order either reversing the May 5, 1975 order closing his claim, or affirming it. Until a further Department order is issued, no final order or judgment has been rendered. The language on the May 5, 1975 closing order even indicates that this procedure will be followed. It specifically states that "A further appealable order will follow" a written protest or request for reconsideration. CABR Ex. B. As no such order was ever issued since the Department erroneously failed to consider the reopening application as a protest, no final order was entered in 1975. Additionally, no final order was entered in 1982, as the October 22, 1982 interoffice memo was an

indication that further action needed to take place before Mr. Loomis' claim was closed.

C. PROCEDURAL DEFECTS PREVENT THE DEPARTMENT FROM PROPERLY ADMINISTERING MR. LOOMIS' CLAIM AT THE PRESENT TIME.

There is no question that Mr. Loomis' claim has been adjudicated over the years by the Department, however, it has been improperly done. The date a closing order becomes final becomes the first terminal date in a claim and is the date upon which the remainder of claim administration operates. *In re Betty Wilson*, BIIA Dec., 02 21517 & 03 12511 (June 15, 2004). A final and binding closure establishing a valid first terminal date is a condition precedent to adjudicating aggravation under a reopening application. If claim closure is not finalized then the claim remains open and there is no basis for adjudicating reopening of the non-closed claim. Since the Department did not properly consider Mr. Loomis' reopening application as a protest and request for reconsideration of the May 5, 1975 closing order they did not issue a further order finalizing claim closure. Thus, no valid first terminal date closing Mr. Loomis' claim exists. Since no valid first terminal date exists, it is impossible for the Department to accurately adjudicate whether Mr. Loomis' condition has worsened and his claim should be reopened.

It is a condition pre-requisite to the reopening of a claim for the claim to be closed to begin with. Whether a claim should be reopened is based upon whether or not the industrially related condition(s) worsened between the time the claim was closed and the time the injured worker filed an application for the claim to be reopened. With no valid original closure date there cannot be entertained a claim for aggravation as the standard by which to determine the award for aggravation, diminution, or termination of disability, is the difference between original award and the amount to which the individual would be entitled because of the subsequent condition. *Reid v. Department of Labor and Industries*, 1 Wn.2d 430, 495-496, 96 P.2d 492 (1939). The standard for adjudicating a reopening application is contained in RCW 51.32.160, which states:

If aggravation, diminution, or termination of disability takes place, the director may, upon the application of the beneficiary, made within seven years from the date the first closing order becomes final, or at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: PROVIDED, That the director may, upon application of the worker made at any time, provide proper and necessary medical and surgical services as authorized under RCW 51.36.010. The department shall promptly mail a copy of the application to the employer at the employer's last known address as shown by the records of the department.

Until a final determination of the claimant's condition at the first terminal date/date the first closing order becomes final is made, it is

premature to adjudicate an application to reopen the claim for aggravation occurring subsequently. *In re Betty Wilson*, BIIA Dec., 02 21517 & 03 12511 (June 15, 2004). Citing *Reid* the Board held that until that final determination is made with respect to the first terminal date/original closure, "there cannot be entertained a claim for aggravation". *In re Betty Wilson*, BIIA Dec., 02 21517 & 03 12511 (June 15, 2004). Accordingly, until such time as there is a final closing, or a valid first terminal date, the reopening statute is inoperable. Because the pre-requisite condition of a valid first terminal date is absent, the Department not only has no authority to adjudicate reopening, it has no ability to accurately do so.

II. CONCLUSION

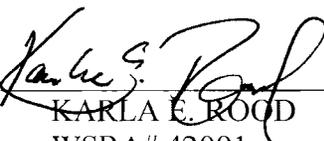
The procedural defects identified above constitute a flaw in the jurisdictional procedure of his claim. The proper procedure must be followed to accurately install decking just as the proper procedure must be followed to accurately administer industrial insurance claims. If the procedure is not properly followed, the claim may warp and jurisdiction to further adjudicate certain issues is lost. When a deck warps because it was not properly installed, it cannot be repaired by simply nailing down bent boards, the bent boards must be properly replaced or they will continue to cause defective decking. Currently, Mr. Loomis' claim is warped because he failed to properly consider his July 3, 1975 application to reopen his

claim as a protest to the May 5, 1975 closing order. This flaw cannot be corrected simply by continuing to administer his claim. The only way to accurately repair this flaw is to remand the matter to the Department level so that a further, final order can be issued. Without taking this simple corrective measure, Mr. Loomis' claim will continue to be warped and this issue will continue as an ongoing defect throughout future claim administration.

This must not stand. This matter must be remanded to the Department, not to the Board or Superior Court, for this simple yet thorough repair; so that the Department can issue a further order following addressing Mr. Loomis' July 3, 1975 reopening application as a protest and request for reconsideration. By returning to the site of the initial procedural flaw, it can be easily corrected through proper adjudication, thereby reinstating the Department's own adjudicative authority to further and properly administer Charles Loomis' claim.

Dated this 20th day of January, 2012.

Respectfully submitted,
VAIL, CROSS & ASSOCIATES

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COURT OF APPEALS
DIVISION II

CERTIFICATE OF MAILING

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SIGNED at Tacoma, Washington.

STATE OF WASHINGTON

BY _____
DEPUTY

The undersigned, under penalty of perjury pursuant to the laws of
the State of Washington, hereby certifies that on the 20th day of January,
2012, the document to which this certificate is attached, Appellant's Reply
Brief, was placed in the U.S. Mail, postage prepaid, and addressed to
Respondent's counsel as follows:

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Olympia, WA 98504-0121

DATED this 20th day of January, 2012.


LYNN M. VENEGAS, Secretary