

NO. 42357-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ELIU E. SANTOS,

Appellant,

v.

UNITED PARCEL SERVICE, INC. &
DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondents.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT M. MCKENNA
Attorney General

SARAH L. MARTIN
Assistant Attorney General
WSBA No. 37068
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

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COURT OF APPEALS
DIVISION II

PM 4-4-12

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF THE ISSUES	2
	1. Courts lack subject matter jurisdiction only when they venture to decide a type of controversy (<i>i.e.</i> , general category of cases) outside their authority. Did the Board have subject matter jurisdiction to issue an order on agreement of parties when it has statutory authority to hear all appeals from Department orders in workers' compensation cases?	2
	2. Even if the Board's order is void, is Mr. Santos bound by the parties' settlement agreement and the Department order implementing that agreement when he voluntarily entered into the settlement while represented by counsel and the Department order was not appealed by any party?.....	2
	3. Under the doctrines of invited error and collateral estoppel, should Mr. Santos be precluded from arguing that the Board's order is void when he asked for the specific relief he now complains of and final judgments cannot be attacked in a collateral proceeding?.....	2
III.	COUNTERSTATEMENT OF THE CASE	3
IV.	STANDARD OF REVIEW.....	6
V.	ARGUMENT	7
	A. Mr. Santos Is Bound By The November 22, 2005 Order On Agreement Of Parties Because The Board Had Subject Matter Jurisdiction To Issue It	7
	1. The Board's jurisdiction is appellate, and its scope of review is determined by the Department order on appeal as limited by the notice of appeal.....	7

2.	The Board does not lack subject matter jurisdiction when it makes a legal error such as exceeding the proper scope of its review.....	10
3.	The Board did not lack personal or subject matter jurisdiction when it entered the November 22, 2005 order, so that order is not void but is final and binding on the parties	14
B.	Even If Mr. Santos Is Not Bound By The Board’s Order, He Is Bound By The Settlement Agreement And The Department Order Effectuating That Agreement	21
C.	The Doctrines Of Invited Error And Collateral Estoppel Should Preclude Mr. Santos’ Argument	23
D.	The Department Should Not Have To Pay Attorney Fees.....	26
VI.	CONCLUSION	27

TABLE OF AUTHORITIES

Cases

<i>Brakus v. Dep't of Labor & Indus.</i> , 48 Wn.2d 218, 292 P.2d 865 (1956).....	9, 20
<i>Callihan v. Dep't of Labor & Indus.</i> , 10 Wn. App. 153, 516 P.2d 1073 (1973).....	8
<i>Cole v. Harveyland, LLC</i> , 163 Wn. App. 199, 258 P.3d 70 (2011).....	13
<i>Cowlitz Stud Co. v. Clevenger</i> , 157 Wn.2d 569, 141 P.3d 1 (2006).....	7
<i>Crosby v. Spokane County</i> , 137 Wn.2d 296, 971 P.2d 32 (1999).....	6
<i>Dep't of Labor & Indus. v. Allen</i> , 100 Wn. App. 526, 997 P.2d 977 (2000).....	6
<i>Dep't of Licensing v. Cannon</i> , 147 Wn.2d 41, 57 P.3d 627 (2002).....	21
<i>Dougherty v. Dep't of Labor & Indus.</i> , 150 Wn.2d 310, 76 P.3d 1183 (2003).....	passim
<i>Floyd v. Dep't of Labor & Indus.</i> , 44 Wn.2d 560, 269 P.2d 563 (1954).....	8
<i>Hadley v. Cowan</i> , 60 Wn. App. 433, 804 P.2d 1271 (1991).....	21
<i>Hanquet v. Dep't of Labor & Indus.</i> , 75 Wn. App. 657, 879 P.2d 326 (1994).....	20
<i>Hartt v. Hartt</i> , 121 R.I. 220, 397 A.2d 518 (1979).....	20

<i>In re Agnes Levings</i> , BIIA Dec., 99 13954, 2000 WL 1725307 (2000).....	22, 23
<i>In re Harijs Mindenbergs</i> , Dckt. No. 48,426, 1977 WL 182022 (Nov. 2, 1977).....	23
<i>In re Major</i> , 71 Wn. App. 531, 859 P.2d 1262 (1993).....	13
<i>In re Orena Houle</i> , BIIA Dec., 00 11628, 2001 WL 395827 (2001).....	17, 18, 20
<i>In re Phillips' Estate</i> , 46 Wn.2d 1, 278 P.2d 627 (1955).....	22
<i>Jenkins v. Weyerhaeuser Co.</i> , 143 Wn. App. 246, 177 P.3d 180 (2008).....	26
<i>Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.</i> , 121 Wn.2d 776, 854 P.2d 611 (1993).....	8
<i>Karlen v. Dep't of Labor & Indus.</i> , 41 Wn.2d 301, 249 P.2d 364 (1952).....	8
<i>Kingery v. Dep't of Labor & Indus.</i> , 132 Wn.2d 162, 937 P.2d 565 (1997).....	11
<i>Le Bire v. Dep't of Labor & Indus.</i> , 14 Wn.2d 128, 418 P.2d 308 (1942).....	21
<i>Lenk v. Dep't of Labor & Indus.</i> , 3 Wn. App. 977, 478 P.2d 761 (1970).....	9, 19, 20
<i>Magee v. Rite Aid</i> , __ P.3d __, 2012 WL 119944 (Jan. 17, 2012).....	passim
<i>Marley v. Dep't of Labor & Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994).....	passim
<i>O'Keefe v. Dep't of Labor & Indus.</i> , 126 Wn. App. 760, 109 P.3d 484 (2005).....	17, 18

<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	6
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999).....	6
<i>Schoeman v. N.Y. Life Ins. Co.</i> , 106 Wn.2d 855, 726 P.2d 1 (1986).....	21, 22
<i>Shafer v. Dep't of Labor & Indus.</i> , 140 Wn. App. 1, 159 P.3d 473 (2007).....	14, 16, 17
<i>Singletary v. Manor Healthcare Corp.</i> , ___ Wn. App. ___, 271 P.3d 356, 360 (2012).....	passim
<i>Sprint Spectrum, LP v. Dep't of Revenue</i> , 156 Wn. App. 949, 964 (2010).....	13
<i>State v. Barnes</i> , 146 Wn.2d 74, 43 P.3d 490 (2002).....	11
<i>State v. Elliott</i> , 114 Wn.2d 6, 785 P.2d 440 (1990).....	21
<i>State v. Franks</i> , 105 Wn. App. 950, 22 P.3d 269 (2001).....	11
<i>Stoll v. Gottlieb</i> , 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 (1938).....	24
<i>W. Nat'l Assurance Co. v Hecker</i> , 43 Wn. App. 816, 719 P.2d 954 (1986).....	23
<i>Woodard v. Dep't of Labor & Indus.</i> , 188 Wash. 93, 61 P.2d 1003 (1936).....	9

Rules

RAP 2.5(a).....	25
-----------------	----

Statutes

RCW 51.04.010	7
RCW 51.52.050(2)(a)	15
RCW 51.52.050	8
RCW 51.52.060	8
RCW 51.52.100	9
RCW 51.52.115	6, 9
RCW 51.52.130	26
RCW 51.52.130(1).....	26
RCW 51.52.140	6
RCW 51.52.160	17

Other Authorities

Ivan C. Rutledge, <i>A New Tribunal in Washington</i> , 26 Wash. L. Rev. & St. B. J. 196 (1951)	9
Note, <i>The Value of the Distinction Between Direct and Collateral Attacks on Judgment</i> , 66 Yale L. J. 526 (1957).....	24
Restatement (Second) of Judgments (1982)	10, 14, 20, 24
Robert J. Martineau, <i>Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse</i> , 1988 BYU L. Rev. 1 (1988)	11, 12, 20, 24

I. INTRODUCTION

This is an appeal under the Industrial Insurance Act, Title 51 RCW. The worker, Eliu Santos, appeals a superior court judgment incorporating a six-person jury verdict finding that the Board of Industrial Insurance Appeals (Board) and Department of Labor Industries (Department) correctly found that his industrial injury had not objectively worsened since his claim was closed in 2005, so his claim should not be re-opened.

On appeal to this Court, Mr. Santos asserts that his claim was never closed in 2005 and, therefore, it was premature for the Department, the Board, and the jury to decide whether it should have been re-opened in 2007. His theory assumes that the Board's 2005 order closing his claim was void because the Board lacked subject matter jurisdiction to issue the order, which was allegedly beyond the proper scope of its review. The 2005 Board order was based on a settlement agreement by all the parties.

Mr. Santos' argument must fail because this Court and the Supreme Court have held numerous times that subject matter jurisdiction refers to the broad type of controversy over which a tribunal has authority, and the Department and Board have broad subject matter jurisdiction over all aspects of workers' compensation claims and appeals. More specifically, this Court recently held that the Board does not lose subject

matter jurisdiction by deciding an issue outside the scope of its authority to review Department actions. *Magee v. Rite Aid*, __ P.3d __, 2012 WL 119944 (Jan. 17, 2012) (published by order of March 26, 2012). Moreover, Mr. Santos does not explain why he is not bound by the parties' settlement agreement and the Department order implementing that agreement. Mr. Santos' arguments should also be rejected because he invited any error by requesting the relief he now complains of and collateral attacks on final judgments are strongly disfavored. The superior court judgment should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Courts lack subject matter jurisdiction only when they venture to decide a type of controversy (*i.e.*, general category of cases) outside their authority. Did the Board have subject matter jurisdiction to issue an order on agreement of parties when it has statutory authority to hear all appeals from Department orders in workers' compensation cases?
2. Even if the Board's order is void, is Mr. Santos bound by the parties' settlement agreement and the Department order implementing that agreement when he voluntarily entered into the settlement while represented by counsel and the Department order was not appealed by any party?
3. Under the doctrines of invited error and collateral estoppel, should Mr. Santos be precluded from arguing that the Board's order is void when he asked for the specific relief he now complains of and final judgments cannot be attacked in a collateral proceeding?¹

¹ The Department is not taking a position on the other issues Mr. Santos raised in his brief.

III. COUNTERSTATEMENT OF THE CASE

Eliu Santos injured his low back while working for United Parcel Service, Inc. (UPS) in November 2003. BR 32 (FOF 1, 2).² The Department allowed his claim and ordered the self-insured employer to pay for benefits. BR 32 (FOF 1), 50 (jurisdictional history).

On April 8, 2005, as a result of a dispute about Mr. Santos' ability to work, the Department ordered UPS to pay him time loss compensation, which is a wage replacement benefit. BR 32 (FOF 1), 50, 66. UPS appealed that order to the Board. BR 32 (FOF 1), 50. All three parties—Mr. Santos, UPS, and the Department—were represented by counsel for the Board appeal. BR 64. Mr. Santos was represented by his current attorney. *Id.*

The three represented parties reached an agreement to resolve UPS' appeal of the April 8, 2005 time loss order. As it typically does in such situations, the Board on November 22, 2005 issued an order on agreement of parties (BR 63), incorporating the report of proceeding outlining the details of the settlement, as discussed in a conference call with the Judge and the parties (BR 64-65). In short, the parties agreed to resolve the appeal by terminating time loss compensation, closing the

² The record before the Board is paginated separately from the Clerk's Papers. Citations to the Board record will be by the abbreviation "BR" and either the large page number in the lower right corner or the hearing transcript ("Tr.") page number.

claim, and paying a permanent partial disability award. BR 64-65. Soon thereafter, the Department issued a ministerial order closing the claim and directing UPS to pay benefits as dictated in the settlement agreement and reflected in the Board's order. BR 51, 62.

Mr. Santos' claim remained closed until May 2007, when he applied to have his claim re-opened. BR 32 (FOF 1), 51. The Department denied his application, finding that his condition had not objectively worsened since claim closure. BR 32 (FOF 1), 51. After unsuccessfully protesting that order, Mr. Santos appealed to the Board. BR 38-39.

In the Board proceeding, Mr. Santos moved to remand the matter to the Department because he alleged the Board lacked jurisdiction over the issues. BR 57. Mr. Santos argued that the Board "exceeded its jurisdiction" when it issued the November 22, 2005 order on agreement of parties. BR 60; *see also* BR 70-71. Thus, he contended, the claim had never been closed, and the Department should determine his entitlement to benefits in the open claim. BR 60-61, 70-71.

The Board judge issued an order finding that it had jurisdiction over the appeal and denying Mr. Santos' motion. BR 110. Mr. Santos filed an interlocutory appeal on this issue (BR 112), which the Board denied (BR 134). In its order denying interlocutory review, the Board conceded that it had exceeded its authority in entering the November 22,

2005 order on agreement of parties. BR 134. It concluded, however, that the error was one of scope of review, not of jurisdiction. BR 136.

Mr. Santos and UPS proceeded to a hearing on the merits of his appeal. The Department did not participate in the Board litigation. *See* BR Tr. 5/5/08 at 1-2. After hearing the evidence, the Board judge issued a proposed decision and order, concluding that Mr. Santos' industrial injury had not objectively worsened since the claim was closed, and affirming the Department order on appeal. BR 28-33.

Mr. Santos filed a petition for review. BR 4-23. Among other things, he reiterated his argument that the Board lacked jurisdiction over the appeal. BR 11-16. The Board denied his petition for review, incorporating the proposed decision and order as its final order. BR 3.

Mr. Santos appealed to Pierce County Superior Court. CP 1-4. The Department also did not participate during the superior court proceedings. *See* RP 5/10/11 at 1. There is no evidence in the record before this Court that Mr. Santos raised his argument that the Board lacked jurisdiction to the superior court. A jury trial was held, and the jury rendered a verdict in favor of UPS, finding that the Board's finding was correct and Mr. Santos' industrial injury had not objectively worsened. CP 234. The superior court issued its judgment affirming the Board's order. CP 235-37. Mr. Santos appealed to this Court. CP 240-41.

IV. STANDARD OF REVIEW

The Board's decision is presumed to be correct, and the party challenging the Board's decision in superior court must convince the factfinder from a fair preponderance of credible evidence that the Board's findings are incorrect. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); RCW 51.52.115.

The Court of Appeals reviews the superior court's decision as it does in "other civil cases." RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009). This Court reviews the superior court's conclusions under the error of law standard, determining the law independently and applying it to the facts as found by the agency. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000). Subject matter jurisdiction is an issue of law this Court reviews de novo. *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

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V. ARGUMENT

A. Mr. Santos Is Bound By The November 22, 2005 Order On Agreement Of Parties Because The Board Had Subject Matter Jurisdiction To Issue It

1. The Board's jurisdiction is appellate, and its scope of review is determined by the Department order on appeal as limited by the notice of appeal

This case involves two overarching concepts—(1) the Board's authority to consider particular issues on appeal from Department orders (referred to as its "scope of review"), and (2) the Board's subject matter jurisdiction. Contrary to Mr. Santos' claims (*see* App. Br. 16), these concepts are related but not synonymous. They will be discussed in turn.

The Industrial Insurance Act is the product of a compromise between employers and workers through which employers accepted limited liability for claims that might not have been compensable under the common law, and workers forfeited common law remedies in favor of sure and certain relief. RCW 51.04.010; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572, 141 P.3d 1 (2006). Accordingly, the Act abolished the superior courts' original jurisdiction over workplace injuries and provided that civil actions may proceed only as provided in the statute. RCW 51.04.010; *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003).

The Department possesses original jurisdiction over workers' compensation cases. *Dougherty*, 150 Wn.2d at 314. Parties may appeal final Department orders to the Board, a quasi-judicial agency that is separate from the Department and was created to review Department orders. *Floyd v. Dep't of Labor & Indus.*, 44 Wn.2d 560, 574-75, 269 P.2d 563 (1954); *see also Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 781, 854 P.2d 611 (1993) (Department is a front-line agency that administers claims in an ex parte manner; the Board is a quasi-judicial agency that conducts evidentiary hearings on appeal from Department decisions). The Board replaced the Department's internal joint board in 1949 as an independent agency to conduct a full and complete hearing, consider evidence, and making "findings of fact and an order." *Karlen v. Dep't of Labor & Indus.*, 41 Wn.2d 301, 304, 249 P.2d 364 (1952).

The Board's jurisdiction is provided by statute; the Board hears appeals from final Department orders appealed within 60 days of communication of the order. RCW 51.52.050, .060; *Callihan v. Dep't of Labor & Indus.*, 10 Wn. App. 153, 155-56, 516 P.2d 1073 (1973). But although the Board's role is appellate, the Board hearing is "not a review" in the sense that "the matter comes on for hearing completely de novo." Ivan C. Rutledge, *A New Tribunal in Washington*, 26 Wash. L. Rev. & St.

B. J. 196, 205 (1951);³ *see also* RCW 51.52.100 (hearings before the Board are “de novo” based on witness testimony). Similarly, appeals from the Board to superior court are de novo, but they are based on the record presented at the Board. RCW 51.52.115

Because the Board’s and the superior court’s review is appellate in nature, they cannot consider issues unless the Department has first determined them. *Lenk v. Dep’t of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). The issues the Board may properly consider on appeal are determined by the Department order on appeal (*Woodard v. Dep’t of Labor & Indus.*, 188 Wash. 93, 95, 61 P.2d 1003 (1936)), as limited by the notice of appeal (*Brakus v. Dep’t of Labor & Indus.*, 48 Wn.2d 218, 219-20, 292 P.2d 865 (1956)). *Lenk*, 3 Wn. App. at 982. This is often referred to as the Board’s “scope of review.” *Id.*

Although the Board’s authority to consider issues on appeal is limited to issues the Department already considered, the scope of the Board’s review is not an issue of subject matter jurisdiction. As will be discussed in the next section, the two concepts are distinct.

³ This volume of the Washington Law Review (entitled the “Washington Law Review and State Bar Journal” from Volume 11 (1936) through Volume 36 (1961)), is not available on Westlaw. It is available to the public from Hein Online’s website at http://heinonline.org/HOL/Page?handle=hein.journals/washlr26&div=25&g_sent=1&collection=journals (last visited April 2, 2012).

2. The Board does not lack subject matter jurisdiction when it makes a legal error such as exceeding the proper scope of its review

The Board's unappealed November 22, 2005 order in this case became final and binding on the parties unless it was void when entered. *See Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-38, 886 P.2d 189 (1994). A valid judgment requires both personal jurisdiction and subject matter jurisdiction. *Id.* at 538 (citing Restatement (Second) of Judgments §§ 1, 11 (1982)). Orders are void when entered only if the Department, Board, or court lacked either personal or subject matter jurisdiction. *Id.* at 539; *Singletary v. Manor Healthcare Corp.*, ___ Wn. App. ___, 271 P.3d 356, 360 (2012) (published opinion); *Magee v. Rite Aid*, ___ P.3d ___, 2012 WL 119944, at *6 (Jan. 17, 2012) (published by order of March 26, 2012).⁴ In this case, Mr. Santos contends that the order was void because the Board lacked subject matter jurisdiction. App. Br. 15-19.

Subject matter jurisdiction refers to the "type of controversy" the court or agency has authority to adjudicate, not whether the agency has authority to take a particular action. *Marley*, 125 Wn.2d at 539. A

⁴ This Court published its opinions in *Singletary* and *Magee* after Mr. Santos filed his Brief of Appellant in this appeal. The worker filed a motion for reconsideration in *Singletary* on March 19, 2012. The Court issued its opinion in *Magee* on January 17, 2012, and published it by order dated March 26, 2012. For the reasons discussed throughout this brief, these two cases are largely dispositive of the jurisdictional issue presented in this appeal.

tribunal lacks subject matter jurisdiction only if it ventures to decide a type of controversy outside of its authority. *Id.* Courts do not lose subject matter jurisdiction by making a legal error. *Id.*; *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 170, 937 P.2d 565 (1997) (plurality opinion).

“Type of controversy” is interpreted broadly. It means the “general category” of cases a tribunal has the authority to adjudicate. *Dougherty*, 150 Wn.2d at 317; *Singletary*, 271 P.3d at 360; *Magee*, 2012 WL 119944, at *7. Type of controversy does *not* depend on the facts of a particular case. *Dougherty*, 150 Wn.2d at 317 (citing Robert J. Martineau, *Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse*, 1988 BYU L. Rev. 1, 26-27 (1988); *State v. Franks*, 105 Wn. App. 950, 22 P.3d 269 (2001)); *Singletary*, 271 P.3d at 360; *Magee*, 2012 WL 119944, at *7; *see also Marley*, 125 Wn.2d at 539 (“A lack of subject matter jurisdiction implies that an agency has no authority to decide the claim at all, let alone order a particular kind of relief.”). It refers to the nature of the case and the general kind of relief being sought. *Dougherty*, 150 Wn.2d at 317 (citing *State v. Barnes*, 146 Wn.2d 74, 85, 43 P.3d 490 (2002)).

For example, all superior courts in this state have precisely the same subject matter jurisdiction because they all have the same authority to adjudicate the same general categories of cases. *Dougherty*, 150 Wn.2d

at 317. For that reason, it does not make sense to talk about a tribunal's subject matter jurisdiction based on what procedural requirements may not have been met in a particular case. *See id.*

All errors other than hearing the wrong type of controversy “go to something other than subject matter jurisdiction.” *Marley*, 125 Wn.2d at 539 (quoting Martineau, 1988 BYU L. Rev. at 28); *Dougherty*, 150 Wn.2d at 316. For example, issuing an order the tribunal does not have the authority to issue is not a defect in subject matter jurisdiction. *Singletary*, 271 P.3d at 360-61; *Magee*, 2012 WL 119944, at *8-9; *see also* Martineau, 1988 BYU L. Rev. at 29 (“When a court in a case over which it has subject matter jurisdiction grants relief for which it has no express authority, . . . it is a defect in the court’s authority to perform a particular act. It is not one of subject matter jurisdiction.”).⁵

Despite these principles, parties have continued to confuse the issues of subject matter jurisdiction and a court’s authority to take a particular action. In *Marley*, the Supreme Court emphasized that subject matter jurisdiction is often incorrectly confused with authority to enter a given order:

A court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order.

⁵ This law review article was cited favorably in *Marley*, 125 Wn.2d at 539; *Dougherty*, 150 Wn.2d at 316, 317; and *Magee*, 2012 WL 119944, at *7.

“The term ‘subject matter jurisdiction’ is often confused with a court’s ‘authority’ to rule in a particular manner. This has led to improvident and inconsistent use of the term.

....

“... Courts do not lose subject matter jurisdiction merely by interpreting the law erroneously. If the phrase is to maintain its rightfully sweeping definition, it must not be reduced to signifying that a court has acted without error.”

Marley, 125 Wn.2d at 539 (quoting *In re Major*, 71 Wn. App. 531, 534-35, 859 P.2d 1262 (1993)).

The Supreme Court again noted this confusion in *Dougherty*. There, the Court stated that by “intertwining procedural requirements with jurisdictional principles,” courts have “blurred” issues of venue and jurisdiction and “transformed” procedural elements into jurisdictional requirements. 150 Wn.2d at 315. And more recently, the Court of Appeals recognized the invasiveness of this error:

Despite these cautionary rulings, the terminology of subject matter jurisdiction continues to pop up outside its boundaries like a jurisprudential form of tansy ragwort.

Cole v. Harveyland, LLC, 163 Wn. App. 199, 208, 258 P.3d 70 (2011); see also *Sprint Spectrum, LP v. Dep’t of Revenue*, 156 Wn. App. 949, 964 (2010) (Becker, J., concurring) (noting that the contra authorities are “outdated and harmful”), *review denied* 170 Wn.2d 1023, 245 P.3d 774 (2011).

Incorrectly classifying an error of law as a jurisdictional issue becomes a “pathway of escape from the rigors of the rules of res judicata.” *Marley*, 125 Wn.2d at 541 (quoting Restatement (Second) of Judgments § 12, cmt. b (1982)). It could result in abuse and “a huge waste of judicial resources” because the error might allow parties to raise issues after final judgment. *Dougherty*, 150 Wn.2d at 319.

In short, a court does not lack subject matter jurisdiction simply because it issues a legally erroneous order. A court acts within its subject matter jurisdiction if it has authority to hear the broad “type of controversy” in question.

3. The Board did not lack personal or subject matter jurisdiction when it entered the November 22, 2005 order, so that order is not void but is final and binding on the parties

The Department has broad subject matter jurisdiction to adjudicate all workers’ compensation claims. *Marley*, 125 Wn.2d at 542; *Shafer v. Dep’t of Labor & Indus.*, 140 Wn. App. 1, 7, 159 P.3d 473 (2007), *affirmed on other grounds*, 166 Wn.2d 710, 213 P.3d 591 (2009); *Singletary*, 271 P.3d at 361. Likewise, the Board has broad subject matter jurisdiction to review Department actions in workers’ compensation claims. *Shafer*, 140 Wn. App. at 7; *Singletary*, 271 P.3d at 361; *Magee*, 2012 WL 119944, at *7.

In this case, as in *Marley*, Mr. Santos is attempting to create a “pathway of escape” from the final order entered in this case by mislabeling the Board’s error a “jurisdictional” one. *See Marley*, 125 Wn.2d at 541. But similar to *Shafer*, *Dougherty*, *Singletary*, and *Magee*, the Board did not lack subject matter jurisdiction to review a timely appeal from a Department order. Assuming for the sake of argument that the Board acted outside the proper scope of its review by approving the parties’ settlement regarding issues not listed in the Department order on appeal, that does not mean the Board lacked subject matter jurisdiction. *See Magee*, 2012 WL 119944, at *8-9.

To the contrary, the Board’s subject matter jurisdiction is “broad,” (*Singletary*, 271 P.3d at 361) consisting of review of “any” Department action or decision that aggrieves a worker, employer, or other person (RCW 51.52.050(2)(a)). *See Magee*, 2012 WL 119944, at *7 (Board has authority to review the record, enter findings and conclusions, and issue a final order in workers’ compensation appeals from Department orders).⁶ Here, Mr. Santos timely appealed the April 8, 2005 Department order, so the Board had subject matter jurisdiction to hear the appeal. The fact that

⁶ Mr. Santos seems to concede that the Board has jurisdiction over this “type of controversy” when he defines the Board’s jurisdiction as follows: “The jurisdiction of the Board of Industrial Insurance Appeals extends to appeals arising under the Industrial Insurance Act (Title 51 RCW).” App. Br. 15.

the Board may have lacked authority to issue an order addressing issues other than time loss compensation in the appeal does not convert the error into a jurisdictional one.

In *Singletary*, this Court applied these principles and held that the Department did not lack subject matter jurisdiction to re-open a claim that had not been properly closed. 271 P.3d at 361. The legally incorrect re-opening order became final and binding when it was not appealed because the Department's had broad subject matter jurisdiction over workers' compensation claims. *Id.* And in *Dougherty*, the Supreme Court held that all of the state superior courts have the same subject matter jurisdiction over workers' compensation appeals, and filing in the wrong venue is not a jurisdictional defect. 150 Wn.2d at 317-20.

While *Singletary* and *Dougherty* addressed the Department's and superior courts' broad subject matter jurisdiction over workers' compensation claims and appeals, respectively, *Shafer* and *Magee* addressed the Board's jurisdiction. In *Shafer*, the worker, like Mr. Santos, argued that the Board lacked jurisdiction to consider her appeal from the Department's denial of her application to re-open her claim because the claim had never been properly closed. 140 Wn. App. at 6. The court held that the Board did not lack subject matter jurisdiction. Rather, the determination "to close a claim or to deny an application to reopen a claim

falls squarely within the Department's authority to decide claims for workers' compensation and the [Board's] authority to review Department actions." 140 Wn. App. at 6-7 (emphasis added).⁷

Similarly in *Magee*, Division One of this Court recently held that when the Board exceeds its scope of review by addressing issues outside of the Department order on appeal, that error is not a jurisdictional one. 2012 WL 119944, at *8-9. Rather, the Board has subject matter jurisdiction over appeals from Department orders in workers' compensation cases (*Id.* at *7), and parties are bound by Board orders which exceeded the proper scope of issues on appeal if those orders are not appealed. *Id.* at *9.

Magee cited with approval a Board decision which held that it does not lack subject matter jurisdiction to issue an order that is outside of the scope of its review over Department orders. See *In re Orena Houle*, BIIA Dec., 00 11628, 2001 WL 395827 (2001), cited with approval in *Magee*, 2012 WL 119944, at *8.⁸ In that significant decision, the Board defined

⁷ The court went on to hold that, as a matter of statutory interpretation (140 Wn. App. at 7), closing orders do not become final if they are not communicated to all required parties. 140 Wn. App. at 11.

⁸ The Board designates significant decisions pursuant to RCW 51.52.160 and publishes them on its website, <http://www.bia.wa.gov/>. They are also available on Westlaw in the WAWC-ADMIN database and from the Westlaw citation provided herein. Although Board decisions are not binding on this Court, they are entitled to deference. *O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005).

its subject matter jurisdiction as over “all matters relating to industrial insurance as well as other select controversies as may be specified by the Legislature.” 2001 WL 395827, at *3. Scope of review limits the issues that the Board should consider on appeal, but when the Board exceeds that scope, it is an error of law and not a jurisdictional defect. *Id.* Thus, a Board order that exceeds the Board’s scope of review becomes final and binding when not appealed, and cannot be later deemed void for lack of jurisdiction based on this legal error. *Id.*

Because the Board’s decision in *Houle* is consistent with the Supreme Court’s decisions in *Marley* and *Dougherty*, as well as the other decisions cited in this brief, this Court should give it deference. *See O’Keefe v. Dep’t of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005) (Board’s significant decisions entitled to deference); *see also Magee*, 2012 WL 119944, at *8-9 (giving the *Houle* decision deference and adopting its reasoning and conclusion).

Magee controls the outcome of this case. In *Magee*, like in this case, the worker attempted to escape the finality of an unappealed Board order by arguing that the Board lacked subject matter jurisdiction to decide the issue addressed in the order because the issue was outside the scope of its review. 2012 WL 119944, at *6. *Magee* rejected that argument, holding that the Board does not lack subject matter jurisdiction

when it exceeds its scope of review. *Id.* at *8-9. That holding forecloses Mr. Santos' argument in this case.

Mr. Santos argues the Board lacked subject matter jurisdiction because it decided an issue beyond those addressed in the Department order that was being appealed. App. Br. 16-17. To decide whether the Board exceeded the proper scope of review requires comparing the issues in the Department order on appeal, as limited by the issues raised in the notice of appeal, with the particular relief the Board granted in its order. *Lenk*, 3 Wn. App. at 982. But *Marley*, *Dougherty*, *Shafer*, *Singletary*, and *Magee* all make clear that the “type of controversy” a court has subject matter jurisdiction to decide is not based on the particular facts in a case. See discussion *supra* pp. 10-12. Thus, exceeding the scope of review in a specific case is not a jurisdictional defect because it is not relevant to the broad “type of controversy” the Board can consider. *Marley*, 125 Wn.2d at 539; *Dougherty*, 150 Wn.2d at 316; *Magee*, 2012 WL 119944, at *8 n.6 (“we believe *Marley* supports the conclusion that the scope of review is not jurisdictional, per se”).

Mr. Santos argues that the Board “exceeded its jurisdiction” when it issued the November 22, 2005 order on agreement of parties. App. Br. 16, 19. His choice of words illustrates the fallacy of his argument. A tribunal either has subject matter jurisdiction over a type of controversy or

it does not. Washington follows the modern trend in this area, which distinguishes “subject matter jurisdiction” from “authority to enter a given order.” *Marley*, 125 Wn.2d at 539; Restatement (Second) of Judgments § 11 cmt. e (“modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction”). As discussed above, when a tribunal issues an order outside of its authority, it makes a legal error that does not deprive it of its power to adjudicate the case. Martineau, 1988 BYU L. Rev at 29 (citing *Hartt v. Hartt*, 121 R.I. 220, 229, 397 A.2d 518 (1979) (comparing lack of jurisdiction over the subject matter to the absence of power, and a court exceeding its “jurisdiction” to the appropriate exercise of that power)).

Mr. Santos cites *Lenk*, *Hanquet*, and *Brakus* to support his argument. App. Br. 13 (citing *Lenk*, 3 Wn. App. at 982; *Hanquet v. Dep’t of Labor & Indus.*, 75 Wn. App. 657, 661-64, 879 P.2d 326 (1994); *Brakus*, 48 Wn.2d at 223). These cases discuss the Board’s scope of review, or authority to consider particular issues on appeal. They do not, however, address the Board’s jurisdiction or hold that the Board lacks jurisdiction when it improperly reaches an issue on appeal. See *Magee*, 2012 WL 119944, at *8 & n.5 (stating that *Hanquet* and *Lenk* addressed scope of review but did *not* address subject matter jurisdiction or type of controversy); *Orena Houle*, 2001 WL 395827, at *2-3 (citing *Lenk*,

Hanquet, and *Brakus* and holding that their rulings regarding scope of review do not affect subject matter jurisdiction).

Mr. Santos argues that the rule of liberal construction should be applied to his case. App. Br. 8-12. But unambiguous statutes and regulations require no construction. *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56-57, 50 P.3d 627 (2002). Mr. Santos has not identified any ambiguity in the statute requiring any construction, so this argument should not be considered. *See State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider assertions that are insufficiently argued).

B. Even If Mr. Santos Is Not Bound By The Board's Order, He Is Bound By The Settlement Agreement And The Department Order Effectuating That Agreement

Even if the November 22, 2005 Board order had a jurisdictional defect, Mr. Santos was still bound by the settlement agreement and the Department's order effectuating that agreement.

Like other final judgments, settlement agreements have res judicata effect, and parties are bound by them. *Hadley v. Cowan*, 60 Wn. App. 433, 439, 804 P.2d 1271 (1991) (citing *Le Bire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 418, 128 P.2d 308 (1942)); *see also Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 862, 726 P.2d 1 (1986) ("The need for finality when actions are settled is safeguarded by res judicata."); *In re*

Phillips' Estate, 46 Wn.2d 1, 13-14, 278 P.2d 627 (1955) (“A compromise or settlement is res judicata of all matters relating to the subject matter of the dispute.”).

Here, the parties settled Mr. Santos’ appeal from a time loss order by agreeing to address several issues and resolve Mr. Santos’ entire claim. Aside from the Board’s authority to resolve the appeal in this way, Mr. Santos has cited no authority that the parties were precluded from doing so. Even if the Board had not specified the terms of the agreement in its order on agreement of parties, Mr. Santos’ dismissal of the action pursuant to the settlement agreement would have res judicata effect, and the parties would be bound by the agreement. *See Schoeman*, 106 Wn.2d at 862.

Moreover, the parties were bound by the Department’s order on remand, which effectuated the settlement, closing Mr. Santos’ claim based on the terms of the agreement. *See* BR 51, 62. This type of order is within the Department’s broad subject matter jurisdiction to adjudicate workers’ compensation claims. *See Singletary*, 271 P.3d at 361. Mr. Santos could have appealed this order if it did not correctly reflect the settlement he had agreed to, but he did not do so. *See In re Agnes Levings*, BIIA Dec., 99 13954, 2000 WL 1725307, at *2 (2000).⁹

⁹ Mr. Santos states that parties may not appeal ministerial orders (App. Br. 3), implying that he had no recourse if he felt that the Department’s December 8, 2005 order was incorrect. But his statement is only partially correct. The Board has held that parties

For these reasons, this Court should decline to invalidate the settlement agreement of the three represented parties, which was effectuated by a binding Department order that was not appealed.

C. The Doctrines Of Invited Error And Collateral Estoppel Should Preclude Mr. Santos' Argument

Under the doctrines of invited error and collateral estoppel, this Court should reject Mr. Santos' argument that the Board should not have entered the November 22, 2005 order on agreement of parties when he asked the Board for that precise relief and when he cannot collaterally attack that final judgment.

The doctrine of invited error states, "When a party submits an issue and argues it before the court below, that party cannot complain on appeal that the trial court erred in considering and resolving that issue." *W. Nat'l Assurance Co. v Hecker*, 43 Wn. App. 816, 821, 719 P.2d 954 (1986). Because the Board's scope of review is not jurisdictional, it can be waived. *See In re Harijs Mindenbergs*, Dckt. No. 48,426, 1977 WL 182022, at *2 (Nov. 2, 1977) (scope of the Board's review can be waived);

may appeal ministerial Department orders for accuracy. *In re Agnes Levings*, BIIA Dec., 99 13954, 2000 WL 1725307, at *2 (2000) ("While a Department ministerial order that follows a Board Order on Agreement of Parties is not usually subject to appeal because it is an agreed determination, it is subject to review for accuracy."). Of course, the reason it cannot be reviewed on the merits is because it is *res judicata*—the issues have been litigated to finality upon agreement of the parties. *See id.*

Magee, 2012 WL 119944, at *8-9 (if the Board exceeds its scope of review, it is not a defect in subject matter jurisdiction).

Similarly, even if a court lacked subject matter jurisdiction over a particular claim, courts are reluctant to allow parties to collaterally attack judgments that were litigated to finality. *See Stoll v. Gottlieb*, 305 U.S. 165, 171-72, 59 S. Ct. 134, 83 L. Ed. 104 (1938); Martineau, 1988 BYU L. Rev at 31-34; *see generally* Note, *The Value of the Distinction Between Direct and Collateral Attacks on Judgment*, 66 Yale L. J. 526 (1957). This is because the first tribunal implicitly determined that it had subject matter jurisdiction when it entered the judgment, and another court may not second guess that final determination. *Stoll*, 305 U.S. at 172. While it is true that parties may raise subject matter jurisdiction at any point during the course of the litigation, this rule does not extend past final judgment, with limited exceptions that do not apply to this case. *See* Restatement (Second) of Judgments §§ 11 cmt. d, 12 (1982).¹⁰

In this case, Mr. Santos specifically asked the Board for the relief he now complains of. He participated in settlement negotiations with the Department and employer, and all parties were represented by counsel. Along with the other parties, he asked the Board to enter an order on

¹⁰ Our Supreme Court has cited with approval the Restatement (Second) of Judgments and adopted its definitions of “subject matter jurisdiction” and “valid judgment.” *See Marley*, 125 Wn.2d at 538-39, 541-42.

agreement of parties, effectively entering the settlement agreement into the record and dismissing the appeal. No party appealed that order, and it became a final judgment of the Board. In addition to the reasons argued in previous sections of the brief, this Court should not allow Mr. Santos to now escape the finality of that order because he invited any error and because he should not be permitted to collaterally attack the final judgment.

Mr. Santos argues that he may raise the issue of the Board's subject matter jurisdiction for the first time on appeal, even though he did not preserve the argument at the superior court trial. App. Br. 14 (citing RAP 2.5(a)). Notably, the rule he cites states that a party may raise the "lack of trial court jurisdiction" for the first time on appeal. RAP 2.5(a). Mr. Santos, however, is attempting to collaterally attack the Board's jurisdiction *in a previous appeal*, which was litigated to a final judgment. Although he also argues that the Board lacked jurisdiction in this appeal (App. Br. 19), his argument is premised on the Board's alleged lack of jurisdiction in issuing the November 22, 2005 order in the previous appeal.

RAP 2.5(a) should not be interpreted to allow collateral attacks on final judgments; "trial court jurisdiction" should be interpreted to mean whether the trial court had jurisdiction *in this case*. Given this correct

interpretation, Mr. Santos should not be permitted to collaterally attack the Board's November 22, 2005 final order, especially when he abandoned the argument at superior court.

D. The Department Should Not Have To Pay Attorney Fees

Mr. Santos seeks attorney fees under RCW 51.52.130. Relevant here, this statute allows requires the employer to pay attorney fees only if (1) the Board decision is "reversed or modified" and (2) "additional relief is granted to" the worker. RCW 51.52.130(1); *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 257, 177 P.3d 180 (2008). In cases involving a self-insured employer, the attorney fees "shall be payable directly by the self-insured employer." RCW 51.52.130(1).

In this case, assuming this Court reverses the superior court judgment (and, consequently, the Board's decision) and Mr. Santos is granted "additional relief," UPS, not the Department, would be responsible for paying attorney fees. *See* RCW 51.52.130(1).

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VI. CONCLUSION

For the foregoing reasons, the Department requests that the Court affirm the Pierce County Superior Court's judgment entered June 15, 2011, thereby sustaining the jury's verdict, which affirmed the Board's February 17, 2009 order denying petition for review.

RESPECTFULLY SUBMITTED this 4 day of April, 2012.

ROBERT M. MCKENNA
Attorney General



SARAH L. MARTIN
Assistant Attorney General
WSBA No. 37068

NO. 42357-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ELIU E. SANTOS,

Appellant,

v.

UNITED PARCEL SERVICE, INC. &
DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Defendant.

CERTIFICATE OF
SERVICE

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on April 4, 2012, she caused to be served the Brief of Respondent and this Certificate of Service in the below-described manner.

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Court Administrator/Clerk
Court of Appeals, Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

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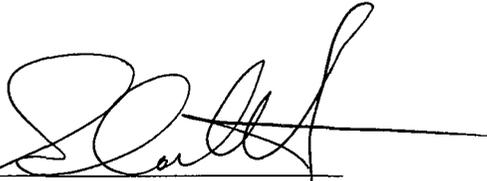
//

Copies via First Class United States Mail, Postage Prepaid to:

Jennifer Cross-Euteneier, Attorney
Law Offices of David B. Vail & Jennifer Cross-Euteneier & Assoc.
P.O. Box 5707
Tacoma, WA 98415-0707

William A. Masters, Attorney
Wallace, Klor & Mann PC
5800 Meadows Rd., Suite 220
Lake Oswego, OR 97035

Signed this 4th day of April, 2012, in Seattle, Washington by:


SHARA WUSSTIG
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6419