

FILED
Court of Appeals
Division III
State of Washington
5/11/2018 1:49 PM

NO. 35626-4-III

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

FRANCISCO SORIANO,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES,

Respondent.

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

ROBERT W. FERGUSON
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
Office Id. No. 91022
Labor and Industries Division
7141 Cleanwater Drive SW
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7715

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES.....	2
	1. An unappealed decision of the Department is final and binding for the issues it decided. The Department issued a November 2014 order that set aside an order closing Soriano’s claim and that kept the claim open for authorized treatment and benefits. The November 2014 order did not state that the Director would grant Soriano benefits. Did res judicata prevent the Director from denying Soriano benefits in October 2015?.....	2
	2. To preserve an issue for appeal a party in an industrial insurance case must raise the issue both in a petition for review to the Board and on appeal at superior court. Soriano did not argue in his petition or at superior court that the Director abused his discretion in rendering the October 2015 decision. Did Soriano waive his arguments about the merits of the Director’s discretionary decision?	2
	3. The court reviews decisions to deny disability benefits on claims that have been closed for more than seven years for abuse of discretion. A party can only show abuse of discretion based on the information available to the decision-maker. Soriano’s claim has been closed for more than seven years. Soriano did not show what information was available to the Director when he denied him benefits. Did Soriano establish abuse of discretion?	2
III.	STATEMENT OF THE CASE	3
	A. Overview of Worker’s Compensation System	3
	B. Soriano’s Claim Was Closed in 1981 and Reopened in 2013.....	4

C.	The Board Affirmed the Director’s Decision To Deny Soriano’s Request for Disability Benefits.....	5
D.	The Superior Court Affirmed the Board.....	7
IV.	STANDARD OF REVIEW.....	8
V.	ARGUMENT	9
A.	Because the Director Did Not Issue Any Order That Authorized Disability Benefits, Soriano’s Res Judicata Argument Fails.....	9
1.	The October 2014 order did not authorize disability benefits	9
2.	The Director did not issue the October 2014 order so he could not have exercised his discretion in the order.....	13
B.	Soriano Waived the Other Arguments He Tries to Raise on Appeal by Not Raising Them Below	14
C.	Even if the Court Considers the Argument, Soriano Has Not Shown the Director Abused His Discretion.....	16
D.	Soriano Should Not Receive Attorney’s Fees	21
VI.	CONCLUSION	22

TABLE OF AUTHORITIES

Cases

<i>Allan v. Dep't of Labor & Indus.</i> , 66 Wn. App. 415, 832 P.2d 489 (1992).....	15
<i>Arlen Long</i> , No. 94 2539, 1996 WL 153585 (Wash. Bd. Indus. Ins. App. Jan. 17, 1996).....	3
<i>Buecking v. Buecking</i> , 179 Wn.2d 438, 316 P.3d 999 (2013).....	14
<i>Cascade Valley Hosp. v. Stach</i> , 152 Wn. App. 502, 215 P.3d 1043 (2009).....	4, 9, 10, 20, 21
<i>City of Bellevue v. Raum</i> , 171 Wn. App. 124, 286 P.3d 695 (2012).....	17
<i>Energy Northwest v. Hartje</i> , 148 Wn. App. 454, 199 P.3d 1043 (2009).....	11
<i>ITT Rayonier v. Dalman</i> , 122 Wn.2d 801, 863 P.2d 64 (1993).....	16, 17, 18, 20, 21
<i>Jones v. City of Olympia</i> , 171 Wn. App. 614, 287 P.3d 687 (2012).....	9
<i>Kingery v. Dep't of Labor & Indus.</i> , 132 Wn.2d 162, 937 P.2d 565 (1997).....	10
<i>Kustura v. Dep't. of Labor & Indus.</i> , 142 Wn. App. 655, 175 P.3d 1117, <i>aff'd on other grounds</i> , 169 Wn.2d 81 (2010).....	21
<i>Leuluaialii v. Dep't of Labor & Indus.</i> , 169 Wn. App. 672, 279 P.3d 515 (2012).....	15
<i>Malang v. Dep't of Labor & Indus.</i> , 139 Wn. App. 677, 162 P.3d 450 (2007).....	8

<i>Matthews v. Dep't of Labor & Indus.</i> , 171 Wn. App. 477, 288 P.3d 630 (2012).....	3
<i>Robert Dorr, Jr.</i> , No. 07 23982, 2009 WL 1504200 (Wash. Bd. Indus. Ins. App. Jan. 6, 2009).....	19, 20
<i>Robinson v. Dep't of Labor & Indus.</i> , 181 Wn. App. 415, 326 P.3d 744 (2014).....	16
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	8
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999).....	8
<i>Sacred Heart Med. Ctr. v. Knapp</i> , 172 Wn. App. 26, 288 P.3d 675 (2012).....	21
<i>Weyerhaeuser Co. v. Tri</i> , 117 Wn.2d 128, 814 P.2d 629 (1991).....	9

Statutes

RCW 51.32.130	21
RCW 51.32.160	1, 3, 4, 9, 13, 17
RCW 51.32.160(1)(a)	9
RCW 51.36.010	3, 10
RCW 51.52.050	16, 18, 20
RCW 51.52.104	14, 15
RCW 51.52.110	6
RCW 51.52.115	6, 8
RCW 51.52.130	21

RCW 51.52.140 8

Rules

RAP 2.5(a) 14

I. INTRODUCTION

An unappealed Department order is res judicata about the issues it decided but has no res judicata effect about issues that it did not decide. The Department reopened Francisco Soriano's claim for medical benefits only in September 2013. Soriano's claim had been closed for more than seven years before the Department reopened it, and, in such cases, RCW 51.32.160 limits the worker to medical benefits only unless the Director decides on a discretionary basis to grant the worker additional relief. The Department sought to close Soriano's claim in May 2014, but then decided in October 2014 that the claim should "remain[] open" for "authorized" treatment and benefits. Ultimately, the Director of the Department decided that Soriano would only receive medical relief and would not receive disability benefits.

Contrary to Soriano's argument, the October 2014 order merely kept Soriano's claim open, it did not determine that he should receive both disability benefits and medical treatment. Since the October 2014 order did not grant Soriano disability benefits, the finality of that order did not prevent the Director from deciding that Soriano should only receive medical relief.

Soriano also tries to raise an issue he abandoned at the Board and superior court: he seeks to challenge the merits of the Director's

discretionary decision to deny him disability benefits. But he waived that argument below and cannot raise it here. And in any event, Soriano did not meet his burden of proving that the Director failed to consider properly the record before making a decision and Soriano cannot establish an abuse of discretion without this evidence.

The Board and the superior court properly affirmed the Director's decision to grant Soriano medical relief only and this Court should affirm.

II. ISSUES

1. An unappealed decision of the Department is final and binding for the issues it decided. The Department issued a November 2014 order that set aside an order closing Soriano's claim and that kept the claim open for authorized treatment and benefits. The November 2014 order did not state that the Director would grant Soriano benefits. Did *res judicata* prevent the Director from denying Soriano benefits in October 2015?
2. To preserve an issue for appeal a party in an industrial insurance case must raise the issue both in a petition for review to the Board and on appeal at superior court. Soriano did not argue in his petition or at superior court that the Director abused his discretion in rendering the October 2015 decision. Did Soriano waive his arguments about the merits of the Director's discretionary decision?
3. The court reviews decisions to deny disability benefits on claims that have been closed for more than seven years for abuse of discretion. A party can only show abuse of discretion based on the information available to the decision-maker. Soriano's claim has been closed for more than seven years. Soriano did not show what information was available to the Director when he denied him benefits. Did Soriano establish abuse of discretion?

III. STATEMENT OF THE CASE

A. Overview of Worker's Compensation System

When a worker is injured, the Department provides medical benefits seeking to return the worker to the worker's pre-injury status. RCW 51.36.010. Once a worker has received proper and necessary medical treatment for an injury and has reached maximum medical improvement, the Department closes the injured worker's claim.

A worker can apply to reopen a closed claim. RCW 51.32.160. If the Department fails to deny an application to reopen a claim within 90 days of receiving one, the request to reopen the claim is "deemed granted" and the claim is reopened by operation of law. RCW 51.32.160. Although the claim reopening is "deemed granted," this only reopens the claim and does not establish what benefits the Department will provide the worker. *See Arlen Long*, No. 94 2539, 1996 WL 153585 (Wash. Bd. Indus. Ins. App. Jan. 17, 1996) (explaining that a worker still has burden of proving entitlement to benefits after the Department reopens a claim on a "deemed granted" basis¹).

When a worker applies to reopen a claim more than seven years after the *first* order closing the claim became final, the worker may only

¹ Decisions of the Board do not bind the appellate courts but courts consider them to be persuasive authority. *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 490 n.13, 288 P.3d 630 (2012).

receive medical treatment upon reopening, unless the Director finds the worker eligible for disability benefits as well. RCW 51.32.160. Workers' compensation parlance calls these claims "over seven" claims. *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502, 504, 215 P.3d 1043 (2009). The Director's decision on an over-seven claim is discretionary and the court reviews it only for abuse of discretion. *Stach*, 152 Wn. App. at 512.

B. Soriano's Claim Was Closed in 1981 and Reopened in 2013

Soriano had a workplace injury to his right hand and arm in 1980. CP 41, 51. The Department closed his claim in 1981 with a permanent partial disability award. CP 47.

Soriano reopened his claim in 1988. CP 48. The Department closed his claim with an increased permanent partial disability award in 2001. CP 48.

Soriano again applied to reopen his claim in September 2013. CP 48. His reopening request was "deemed granted" because the Department did not deny it within 90 days of receiving it. CP 48. The Department reopened his claim effective September 2013 for medical benefits only, advising Soriano that he could not receive disability benefits unless the Director exercised discretion to grant them because the Department reopened Soriano's claim more than seven years after the first order that closed it became final. CP 48.

In May 2014, the Department issued an order that closed Soriano's claim. CP 48.

In July 2014, Soriano requested reconsideration of the May 2014 order. CP 48. In August 2014, the Department affirmed its May 2014 decision. CP 49. In response to another request for reconsideration from Soriano, the Department then issued an order on October 2014 that set aside the May 2014 closing order and that stated that, "The claim remains open for authorized treatment and benefits." CP 49, 55.

In October 2015, the Director of the Department issued a letter to Soriano informing him that the Director had decided to find him ineligible for disability benefits. CP 49. The Department issued an order in November 2015 that memorialized the Director's decision to deny Soriano's request for disability benefits. CP 49.

Soriano appealed the October 2015 letter and the November 2015 order to the Board. CP 49.

C. The Board Affirmed the Director's Decision To Deny Soriano's Request for Disability Benefits

Soriano and the Department agreed to try the case based on stipulated facts. *See* CP 47-57. The stipulation includes the orders that the Department had issued to close and reopen Soriano's claim, applications Soriano had filed to reopen his claim, and the requests for reconsideration

of some Department decisions. *See* CP 47-57. The stipulation did not address what substantive information was available to the Director when the Director decided to deny Soriano's request for accident fund benefits. *See* CP 47-57.

The Department filed a brief with the Board that included a declaration and a copy of a memorandum provided to the Director recommending that he deny Soriano's request for accident fund benefits. CP 70-71, 74-78. The Board judge declined to consider the memorandum because the parties did not include it in their stipulation and the judge did not admit it as an exhibit.² CP 21-22.

The Board judge issued a proposed decision and order that affirmed the Director's decision to deny disability benefits to Soriano on his over-seven claim. CP 19-24. The Board judge found (in finding of fact number 4) that the Director had exercised his discretion and had decided that Soriano should receive medical benefits only on his over-seven claim,

² Soriano suggests that even though the Board judge rejected the memorandum as an exhibit she somehow based her decision on that document. AB 13. This record does not support this suggestion: the judge neither admitted the exhibit nor based her decision on it. *See* CP 21-22. Soriano also complains that the Board should not have transmitted the rejected exhibit to superior court as part of its certified record. AB 13. RCW 51.52.110 requires the Board to transmit all of its exhibits to the superior court and the statute does not distinguish between rejected and admitted exhibits. Furthermore, it would not make sense for the Board to transmit only the admitted exhibits because the superior court can revisit the Board's evidentiary rulings on appeal and the court might decide to admit a document that the Board rejected. *See* RCW 51.52.115 (providing for a de novo review based on the Board's record).

and that the Director conveyed this decision to Soriano through a letter in October 2015 and that this was followed up with an order on November 2015. CP 24. The Board judge also found (in finding of fact number 5) that Soriano had presented no evidence of the “factual information” before the Director when the Director decided to limit Soriano’s claim to medical benefits only. CP 24.

Soriano petitioned for review, arguing that the Department’s October 2014 order rendered it res judicata that he could have disability benefits on his over-seven claim. CP 11-14. Soriano did not assign error to finding of fact number 4. *See* CP 11-14. Soriano assigned error to finding of fact number 5, arguing that by offering the October 2014 order he had provided “evidence” that showed that the Director erred when he found Soriano eligible for medical benefits only. CP 12. Soriano did not argue in his petition for review that the Director failed to consider properly the available evidence before denying disability benefits. *See* CP 11-14.

The Board denied Soriano’s petition and adopted the proposed decision as its own decision and order. CP 9.

D. The Superior Court Affirmed the Board

Soriano appealed the Board’s decision to superior court. CP 2. Soriano filed a trial brief that argued that the October 2014 order was final and binding and that the res judicata effect of this order precluded the

Director from finding him eligible for medical benefits only in November 2015. CP 98-104. Soriano did not argue that the Director abused his discretion by failing to consider properly the information in the claim file before rendering a decision, nor did he offer any other theory, aside from the res judicata effect of the October 2014 order, about why the Director's decision was wrong. *See* CP 98-104.

The superior court affirmed the Board and the Department. CP 115-18. Soriano appealed. CP 119-24.

IV. STANDARD OF REVIEW

At superior court, the court reviews the Board's decision de novo but does so based solely on the record developed at the Board. RCW 51.52.115. In an appeal from a superior court's decision to this Court, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). The appellate court does not review the Board decision and the Administrative Procedure Act does not apply. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

The court reviews the superior court decision to see if substantial evidence supports the findings, and if the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Although the court reviews questions of law de novo, it

defers to the Board's and Department's interpretations of the Industrial Insurance Act. *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012); *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

V. ARGUMENT

A. **Because the Director Did Not Issue Any Order That Authorized Disability Benefits, Soriano's Res Judicata Argument Fails**

1. **The October 2014 order did not authorize disability benefits**

The Director acted within his authority when he denied Soriano's request for disability benefits and none of the Department's earlier decisions prevented the Director from making that decision. In an "over seven" case, a worker may receive for medical treatment upon reopening and the Director may determine, on a purely discretionary basis, to grant a worker disability benefits. RCW 51.32.160; *Stach*, 152 Wn. App. at 512.

RCW 51.32.160(1)(a) provides:

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.

Because the decision to grant or deny disability benefits on an over-seven claim is discretionary, the Director's decisions in such cases are reviewed only for abuse of discretion. *Stach*, 152 Wn. App. at 512.

The Department determined that Soriano's claim was an over-seven claim when it reopened his claim; its order advised Soriano that his claim had been opened for medical treatment only and that he could not receive disability benefits "unless and until" the Director decided to find him eligible for those benefits. CP 51-52. Soriano argues that the Department issued an order on October 2014 that granted him disability benefits because it stated that his claim "remains open for authorized treatment and benefits." CP 55; AB 7-9. Since no party appealed the October 2014 order, Soriano argues that res judicata prevented the Director from later denying his request for disability benefits. AB 7-9. But the October 2014 order did not grant Soriano disability benefits so that order's finality did not prevent the Director from deciding whether to grant disability benefits. *See* CP 55.

An unappealed decision of the Department is final and binding on all parties, including the Department, but only for the issues encompassed within the terms of the unappealed order. *See Kingery v. Dep't of Labor &*

Indus., 132 Wn.2d 162, 169, 937 P.2d 565 (1997). In other words, a final and binding Department order binds the Department to the decision it made in that order, but it does not bind the Department regarding issues that that order did not decide. *See Energy Northwest v. Hartje*, 148 Wn. App. 454, 465-66, 199 P.3d 1043 (2009) (rejecting employer's argument that an unappealed order about the worker's right to time loss during one time period was res judicata about the worker's right to time loss during a different period, because the unappealed order did not address the worker's ability to work during the later period). Since the October 2014 order did not find Soriano eligible for disability benefits, it has no res judicata effect about Soriano's right to disability benefits and it does not preclude the Director from later finding Soriano ineligible for them. *See Hartje*, 148 Wn. App. at 465-66.

The Department's October 2014 order did not address Soriano's status as a claimant with an over-seven claim or determine whether Soriano would receive disability benefits. *See* CP 55. The order stated:

The Department of Labor and Industries has canceled the closing order of 5/15/2014. The claim remains open for authorized treatment and benefits.

CP 55. The October 2014 order reversed the previous decision to close the claim and instead provided that the claim "remains open for authorized treatment and benefits." CP 55. But keeping a claim open for authorized

treatment and benefits is not the same as deciding to authorize any treatment or benefits. It simply means that the Department is keeping Soriano's claim open so that it can grant him treatment or benefits if it authorizes them.

A close review of the text of the order confirms this analysis. The key language in the order is this language: "[t]he claim remains open for authorized treatment and benefits." CP 55. The word "authorized" modifies "treatment and benefits": this shows that the order did not keep the claim open for all benefits, but only for *authorized* treatment and benefits. CP 55. In other words, the order keeps the claim open for treatment and benefits that had been authorized. As of the October 2014 order, the only treatment or benefits that had been authorized were medical treatment and benefits. CP 51-55. So the October 2014 order only kept the claim open for medical treatment and medical benefits. Nor did the October 2014 order purport to authorize any sort of treatment or benefits not already authorized, it merely kept the claim open for those things that had already been authorized. *See* CP 55.

This becomes even clearer when one places the October 2014 order in the context of the other orders that the Department issued regarding Soriano's claim. The Department's May 2014 order sought to close Soriano's claim, which would have terminated his right to medical

treatment and would prevent him from asking the Director for disability benefits. CP 53. When the Department reversed the May 2014 closing order through the October 2014 order, this meant that Soriano's claim would "remain[ed] open" for relief. CP 53, 55. But the October 2014 order granted neither medical treatment nor disability benefits to Soriano. It only kept his claim open so that relief would remain possible, assuming the Department authorized it. *See* CP 55.

2. The Director did not issue the October 2014 order so he could not have exercised his discretion in the order

Soriano's argument that the October 2014 order was a decision to grant him disability benefits also ignores that only the Director has the authority to grant a worker disability benefits on an over-seven claim. *See* AB 7-9; RCW 51.32.160. The Director did not issue the October 2014 order and the October 2014 order said nothing to suggest that the Director had found Soriano eligible for disability benefits. CP 55. It is implausible that the Department employee who issued the October 2014 order had decided to take it upon herself to decide an issue that the statute vests in the Director's authority alone. RCW 51.32.160.

The superior court and the Board properly rejected Soriano's res judicata argument and this Court should reject it as well.

B. Soriano Waived the Other Arguments He Tries to Raise on Appeal by Not Raising Them Below

Soriano raised only one argument in his superior court briefing and in his petition for review at the Board: he argued that res judicata prevented the Director from denying his request for disability benefits because the October 2014 order was final and binding. CP 11-14, 98-104. He now argues that the Director failed to consider properly the information in the file. AB 9-14.

The appellate courts decline to consider new arguments that the appellant did not raise before a lower court unless the new issue involves a manifest error affecting a constitutional right (not claimed here). *Buecking v. Buecking*, 179 Wn.2d 438, 454-55, 316 P.3d 999 (2013); RAP 2.5(a). Soriano's superior court brief raised only one issue: res judicata. CP 98-104. Since Soriano offered no theory other than res judicata to the superior court, he cannot properly raise any other theory now.

Additionally, after the Board hearings judge issues a proposed decision and order, a party may ask the Board for review, and this petition sets the parameters on what courts may later consider. RCW 51.52.104. RCW 51.52.104 requires a party to raise an argument in a petition for review to preserve the issue for later court appeals. The statute provides:

Such petition for review shall set forth in detail the grounds therefor and *the party or parties filing the same shall be*

deemed to have waived all objections or irregularities not specifically set forth therein.

The courts recognize that a party's failure to raise an issue in a petition for review precludes the party from raising that issue before the courts. *See* RCW 51.52.104; *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012) (explaining that a party must raise an issue in a petition for review to preserve it on appeal); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992). Soriano's petition for review, like his superior court briefing, argued only that res judicata prevented the Director from denying him disability benefits. *See* CP 11-14. Soriano did not challenge the merits of the Director's decision to deny him disability benefits nor did he argue that the Director should have issued an order rather than a letter. *See* CP 11-14. Since Soriano did not raise those issues in his petition for review, the Court should not consider them now. RCW 51.52.104; *Leuluaialii*, 169 Wn. App. at 684.

Soriano may argue that he challenged the merits of the Director's decision in a Board brief that he filed before he filed his petition for review and that he therefore did not waive the issue. *See* CP 58-62. But RCW 51.52.104 expressly requires a party to raise the issue in the petition for review to avoid waiving it and Soriano's petition for review did not raise that issue. *See* CP 11-14.

C. Even if the Court Considers the Argument, Soriano Has Not Shown the Director Abused His Discretion

The Court should not consider Soriano's argument that the Director abused his discretion but, if the Court considers it, the argument fails because Soriano failed to show that would support a finding of abuse of discretion.

Soriano presented no evidence of what the Director considered when the Director denied disability benefits to him. CP 47-57. So he cannot show that the Director abused his discretion when he considered that information. Soriano had to present evidence regarding what evidence the Director considered in order to make a prima facie case that the Director abused his discretion. *See ITT Rayonier v. Dalman*, 122 Wn.2d 801, 809, 863 P.2d 64 (1993).

Robinson v. Dep't of Labor & Indus., 181 Wn. App. 415, 427, 326 P.3d 744 (2014) notes that the burden is on the claimant to demonstrate that the Department's decision was erroneous, and that this was not changed by the fact that the Industrial Insurance Act is subject to liberal construction. *See also* RCW 51.52.050 (stating that appealing party has the burden of presenting a prima facie case). This is because persons who claim rights under the Industrial Insurance Act must show "strict proof of their right to receive the benefits provided by the act."). Soriano's

reference to liberal construction is irrelevant as that standard does not apply to issues of fact and only applies to interpreting ambiguous statutes. AB 5-7; *City of Bellevue v. Raum*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012). And here, there is no ambiguity in either RCW 51.32.160 or in any other relevant statute.

At the Board, the abuse of discretion standard placed the burden on Soriano to show that the decision was arbitrary and capricious—willful and unreasoning, and made in disregard of the facts. *Dalman*, 122 Wn.2d at 809. A party can only prove abuse of discretion based on the information that was available to the decision-maker at the time that the decision-maker made that decision. *See Dalman*, 122 Wn.2d at 809-10. As *Dalman* explains, when a party who has appealed a discretionary decision of the Department fails to establish what information was before the Department when it made its decision, “it is impossible to conclude the Department abused its discretion.” *Id.* at 810.

Here, the Director denied Soriano’s request for disability benefits because the Director determined that Soriano was not attached to the workforce when his condition worsened and Soriano therefore had no wages to replace. CP 56. In other words, the Director determined that Soriano had stopped working even before his condition became aggravated, which meant there was no connection between any

aggravation of his condition and his unemployed status. *See* CP 56.

Soriano presented no evidence about what information was available to the Director regarding Soriano's attachment to the workforce and there is thus no basis to say that the Director's determination was willful or unreasoning based on the evidence that the Director had before him. *See* CP 47-57. As *Dalman* explains, it is "impossible" to prove abuse of discretion without establishing what information was available to the Director when the Director made his or her decision. *Dalman*, 122 Wn.2d at 809-10.

The parties tried the case based only on stipulated facts, and the stipulated facts establish only that the Department issued some orders about Soriano's claim, that Soriano filed requests for reconsideration from some decisions, and that he filed some applications to reopen his claim. *See* CP 47-57. The stipulated facts provide no information about Soriano's work status before or after he applied to reopen his claim, nor do they shed any light on what information was available to the Director when the Director decided that Soriano had stopped working before his condition became aggravated. *See* CP 47-57. Soriano thus presented no evidence that would show that the Director acted in a willful and unreasoning fashion. *See* CP 47-57. And it was his burden to do so. RCW 51.52.050.

The *Robert Dorr* case cited by Soriano provides no support for Soriano's argument because the record in the *Dorr* case, unlike the record here, established what the Director considered when the Director made a discretionary decision. AB 9-12. *Robert Dorr, Jr.*, No. 07 23982, 2009 WL 1504200 (Wash. Bd. Indus. Ins. App. Jan. 6, 2009). In *Dorr*, the Director decided that the worker had voluntarily removed himself from the workforce based solely on the fact that the worker had not worked in the last ten years. *Id.* at *2 (stating, "Thus, without further analysis or consideration, the Director equated the claimant's not working with his having voluntarily removed himself from the workforce."). The Board concluded that it was an abuse of discretion to assume that any time there was a prolonged absence from employment the worker must have made a willful decision to stop working. *Id.* The Board then remanded the case to the Department with the understanding that the Director, on remand, would consider not only the worker's absence from employment but also other relevant factors, such as whether the worker had tried to find employment and whether the worker's injury had rendered the worker incapable of working. *See id.* at *3.

Here, unlike in *Dorr*, the record does not show that the Director assumed that Soriano had voluntarily stopped working based on no evidence other than the number of years since he had last worked. *See*

CP 47-57. The record shows that the Director concluded that Soriano had stopped working before his injury became aggravated but it does not establish what information the Director considered or looked at before making that determination. *See* CP 47-57. Since it was Soriano's burden to prove that the Director failed to consider the appropriate evidence before deciding to deny him disability benefits, Soriano's failure to present any evidence about what the Director considered means that Soriano cannot meet his burden and thus cannot show an abuse of discretion. *See Dalman*, 122 Wn.2d at 809-10; CP 47-57; RCW 51.52.050.³

Soriano suggests that since the record does not affirmatively establish that the Director considered all the relevant information before deciding to deny him disability benefits, Soriano proved that the Director abused his discretion. AB 11-12. But this inverts the burden of proof: Soriano, not the Department, had to establish what evidence was before

³ While the record does not establish precisely what information the Director considered before deciding to deny disability benefits to Soriano, the Director's letter on its face shows that the Director based his decision on something more than just the number of years that had gone by since Soriano last worked. CP 56. The Director's letter referenced that Soriano was not attached to the workforce when his injury became aggravated, strongly suggesting that the Director considered whether it was the aggravation of the worker's injury or something else that caused the worker to stop working. *See* CP 56. This distinguishes the case from *Dorr*, where the Director did not consider whether the injury had any impact on the worker's failure to secure employment. *Dorr*, 2009 WL 1504200 at *2. But in any event, it was Soriano's burden to show that the Director failed to consider properly the record before him, not the Department's burden to prove that the Director properly considered that evidence. *Dalman*, 122 Wn.2d at 809-10; *Stach*, 152 Wn. App. at 512.

the Director. *Stach*, 152 Wn. App. at 512. Since Soriano did not establish what information was available to the Director, he cannot show that the Director abused his discretion. *Dalman*, 122 Wn.2d at 809-10.

D. Soriano Should Not Receive Attorney's Fees

The superior court and the Board properly affirmed the Department's decisions and this Court should affirm. Soriano seeks attorney fees and costs under RCW 51.52.130 if he prevails. AB 14.

RCW 51.32.130 authorizes attorney fees and costs only if a worker not only prevails on appeal but also receives a payment that affects a fund that the Department manages. *Kustura v. Dep't. of Labor & Indus.*, 142 Wn. App. 655, 692, 175 P.3d 1117, *aff'd on other grounds*, 169 Wn.2d 81 (2010).

Here, even if Soriano prevails in this appeal, this would not result in the payment of benefits that would affect the accident fund. It would only make it possible for Soriano to receive disability benefits through later orders that the Department would issue on remand. *See Stach*, 152 Wn. App. at 512. Because remand is the only relief, the court can award no fees. RCW 51.52.130; *Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 29, 288 P.3d 675 (2012) (finding the prevailing party's attorney could not have fees where only relief was remand to Director).

VI. CONCLUSION

The Director denied Soriano's request for disability benefits on his claim. The October 2014 order was not a decision to grant Soriano disability benefits; it merely kept the claim open for further action and did not find him eligible for disability benefits, so res judicata does not apply to the Director's decision to deny him those benefits. Soriano waived the right to argue that the Director abused his discretion. This Court should affirm.

RESPECTFULLY SUBMITTED this 11th day of May, 2018.

ROBERT W. FERGUSON
Attorney General



STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
Office Id. No. 91022
Labor and Industries Division
7141 Cleanwater Drive SW
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7715

NO. 35626-4-III

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

FRANCISCO SORIANO,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR
AND INDUSTRIES,

Respondent.

DECLARATION OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the state of Washington, declares that on the below date, I served the Brief of Respondent, Department of Labor and Industries and this Declaration of Service in the below described manner:

E-Filing via Washington State Appellate Courts Portal:

Renee S. Townsley
Court Clerk
Court of Appeals, Division III

E-Mail via Washington State Appellate Courts Portal:

Marcus R. Henry
Smart Law Offices, P.S.
mhenry@smartlawoffices.com

DATED this 11th day of May, 2018, at Tumwater, Washington.


AUTUMN MARSHALL
Legal Assistant 3
(360) 586-7737

ATTORNEY GENERALS' OFFICE, L&I DIVISION, OLYMPIA

May 11, 2018 - 1:49 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35626-4
Appellate Court Case Title: Francisco Soriano v. Dept. of Labor & Industries
Superior Court Case Number: 16-2-01533-3

The following documents have been uploaded:

- 356264_Briefs_20180511134758D3589093_5451.pdf
This File Contains:
Briefs - Respondents
The Original File Name was RespondentBr.pdf

A copy of the uploaded files will be sent to:

- liolyce@atg.wa.gov
- mhenry@smartlawoffices.com

Comments:

Sender Name: Autumn Marshall - Email: autumnm@atg.wa.gov

Filing on Behalf of: Steve Vinyard - Email: stevev1@atg.wa.gov (Alternate Email: LIOlyCEC@atg.wa.gov)

Address:
P.O. Box 40121
Olympia, WA, 98504-0121
Phone: (360) 586-7707

Note: The Filing Id is 20180511134758D3589093