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NO. 65043-2

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

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MARLENE SANDLAND,

Appellant,

v.

SAFEWAY STORES, INC.,

Respondent.

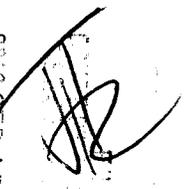
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**BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND  
INDUSTRIES**

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## I. INTRODUCTION

This is a workers' compensation aggravation case governed by Washington's Industrial Insurance Act, RCW Title 51. Marlene A. Sandland appeals from superior court findings of fact, conclusions of law, and judgment that affirmed an order of the Board of Industrial Insurance Appeals (Board), and which in turn affirmed orders of the Department of Labor and Industries (Department) denying Sandland's applications to reopen two workers' compensation claims on account of aggravation.

Sandland asserts that she never received the initial closing orders in her two workers' compensation claims. Therefore, she contends, the two claims were never properly closed by a final and binding Department order so that neither the Department nor the Board had "subject matter jurisdiction" to determine whether her two claims should be reopened on account of a worsening (aggravation) of her work-related conditions under RCW 51.32.160. Rather she contends that her claims should be remanded to the Department with direction to determine what benefits Sandland may be eligible for from May 22, 1978 forward in Claim No. S257891 (a respiratory injury), and from July 29, 1983 forward in Claim No. S256216 (a right foot injury), as though neither claim was ever closed.

The superior court, and the Board, properly relied on *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994), and the

Board's Significant Decision *In re Jorge C. Perez-Rodriguez*, BIIA Dec., 06 18718 2008 WL 1770918 (2008), to reject Sandland's "jurisdiction" argument. The superior court and Board held that Sandland was precluded from arguing that her claims were never properly closed because she failed to appeal subsequent Department orders denying her applications to reopen her claims, and declaring that the claims should "remain closed." Regardless of whether the claims had originally been properly closed by the Department's communication of the initial closing orders to Sandland, this was not a jurisdictional defect. Sandland's failure to timely appeal subsequent Department orders, even ones containing an error, renders those subsequent orders final and res judicata as to the issues they encompassed – here the closed status of Sandland's claims.

In the respiratory claim the superior court and the Board found that the Department's July 29, 1983 closing order did not become final because Sandland never received it. When Sandland applied to reopen this claim, however, the Department denied reopening by order dated November 20, 1984 and mistakenly declared that Sandland's claim *remains closed*. Sandland received and did not appeal the Department's November 20, 1984 order. The superior court and the Board properly held that it therefore became res judicata that her respiratory claim was closed as of November 20, 1984.

In the right foot claim the superior court and the Board found that Sandland failed to prove that she never received the May 22, 1978 closing order. That order did become final and binding. Sandland challenges that finding. Even if this Court were to conclude, however, that Sandland *did not* receive the May 22, 1978 closing order, when Sandland failed to appeal a subsequent May 19, 1989 Department order declaring that the claim *remains closed*, the May 19, 1989 order became a final closing order as a matter of law. The superior court correctly ruled that the doctrine of res judicata precludes Sandland from raising the issue of final claim closure here.

## II. COUNTERSTATEMENT OF THE ISSUES<sup>1</sup>

- A. Subject matter jurisdiction refers to the power to decide a general category of controversy. Even if Sandland did not receive the Department's orders initially closing her claims, did the Department have subject matter jurisdiction to decide her later applications to reopen these claims?
- B. Res judicata applies to all matters encompassed in an unappealed Department order. Does res judicata preclude Sandland from challenging the initial claim closures, when she received, but failed to timely appeal, the Department's later orders that denied her reopening applications and stated that her claims would remain closed?

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<sup>1</sup> Sandland's Appellant's Opening Brief (AB), Part II, lists many assignments of error. AB 4-12. But her issue statements and her arguments posit and argue only that the superior court erred (1) in upholding the Department's and the Board's authority (which Sandland calls subject matter jurisdiction) to adjudicate Sandland's reopening applications in her two claims (*see* AB 22), and (2) in finding that she received the Department's initial closing order in her respiratory claim (AB 29-32).

- C. Does substantial evidence support the superior court's Finding of Fact No. 1.12 that Sandland received the Department's May 22, 1978 initial order closing her respiratory claim?

### III. COUNTERSTATEMENT OF THE CASE

This case involves Sandland's two separate workers' compensation claims, filed, allowed, and closed two to three decades ago. At the Board, she stipulated to the claims history for both claims.<sup>2</sup> Certified Appeals Board Record (BR) 113-114, 160-162; TR 4/22/04 at 7; TR 6/1/06 at 6-7.<sup>3</sup>

#### A. Department Claim Adjudication up to Sandland's Appeal to the Board

##### 1. Claim No. S257891 – Respiratory Claim

Sandland filed a claim for workers' compensation benefits for respiratory complaints following her exposure to an ammonia leak on March 29, 1978 while working for Safeway. BR Exhibit 8, TR 7/11/08 at 11-16. Her claim was allowed, and closed, with medical treatment benefits only, by Department order issued May 22, 1978. BR 113; BR Exhibit 6; FF 1.1. Sandland challenges the finding that she received this May 22, 1978 closing order. FF 1.12.

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<sup>2</sup> The documents found at BR 113-114 and 160-162 are the Board's summaries (historical facts) of the Department's orders and Sandland's protests and appeals of those orders, including Sandland's applications to reopen her claims (claims history). The parties stipulated that the summaries are accurate as corrected. TR 4/22/04 at 7 and 6/1/06 at 6-7; BR 341-344.

<sup>3</sup> This brief refers to the Certified Appeal Board Record (BR) by its page numbers, because the record is not separately paginated in the clerk's papers. Board hearing and deposition transcripts in the Board record are referred to as "TR" followed by the date of the proceeding and the page number in the transcript.

More than a decade later, Sandland applied to reopen the respiratory claim on January 24, 1989. BR Exhibit 9, TR 7/11/08 16-20. Sandland alleged that she had developed a psychological impairment proximately caused by her work exposure. BR 113; BR Exhibit 9; TR 7/11/08 at 16-20; FF 1.2. The Department issued an order on May 19, 1989 denying Sandland's application and declaring that the claim "remains closed." BR 113; FF 1.2. Sandland received, but did not protest or appeal, that order. BR 113; FF 1.2.

Another decade had passed when Sandland again applied to reopen her respiratory claim on December 5, 2002. BR 113; FF 1.3. The Department issued an order denying reopening on December 13, 2002 and, following Sandland's timely protest, affirmed the order by order issued December 19, 2003. BR 104-105, 103; FF 1.3. Sandland timely appealed the Department's December 19, 2003 order to the Board stating that her claim "was closed on May 22, 1978, just two months after my exposure injury," with no mention of not receiving that closing order. BR 87; BR 114; FF 1.3.

## **2. Claim No. S259216 – Right Foot Claim**

Sandland filed a second claim for workers' compensation benefits for a right foot injury on April 10, 1978. Her claim was allowed and benefits paid. BR 160; FF1.4. The Department first issued an order

closing her right foot claim on December 4, 1978. BR 160. Following a series of protests and appeals Sandland's right foot claim was finally closed by a Department order issued July 28, 1983. BR 160-161 and Exhibits 1-5; FF 1.4.

Sandland applied to reopen her right foot claim on January 10, 1984, alleging, as she did on her respiratory claim (see above), that she had developed a psychological impairment proximately caused by her right foot injury. BR Exhibit 12; FF 1.5. The Department issued an order on February 29, 1984 denying her application to reopen and declaring that the claim "will remain closed." BR 160-161; FF 1.5. Sandland timely protested and the Department affirmed its denial by order issued November 20, 1984. BR 160-161; FF 1.5. Sandland received, but did not protest or appeal, that order. BR 161; FF 1.5.

Sandland applied to reopen her right foot claim a second time on January 31, 1989. BR 160-161. The Department issued an order on February 10, 1989 denying her application to reopen and again declaring that the claim "will remain closed." BR 162; FF 1.6. She received, but did not protest or appeal, this order. BR 162; FF 1.6.

More than a decade later, Sandland filed a third application to reopen her right foot claim on May 13, 2004. BR 160-162; FF 1.7. The

Department again denied reopening by order issued July 21, 2004. BR 160-162; FF 1.7. Sandland timely appealed. BR 160-162; FF 1.7.

**B. Proceedings at the Board Through the First Board Hearing and February 8, 2007 Proposed Decision and Order**

At the Board Sandland once again sought acceptance of a psychological impairment and treatment as the focus of her contention of worsening. Even if she were to make her case for worsening, and hence reopening, her relief would be limited under RCW 51.32.160(1)(a). Because her claims had been closed more than seven years prior to her reopening applications, she would not automatically be eligible to receive time loss compensation or permanent disability benefits. *Cascade Valley Hosp. Dist. v. Stach*, 152 Wn. App. 502, 508-510, 215 P.3d 1043 (2009) (on over-seven-years reopening, compensation benefits are paid only if Director exercises discretion to authorize such benefits). Sandland's two appeals were consolidated for hearing. A lengthy hearing process ensued.

An Industrial Appeals Judge (IAJ) issued a Proposed Decision and Order on February 8, 2007 concluding that Sandland's psychological impairment was "a long standing [sic] personality disorder that was neither proximately caused nor aggravated" by either of her industrial injuries, and affirming both the Department's December 19, 2003 order

and its July 21, 2004 order denying reopening in both claims. BR 208-220.

**C. Proceedings at the Board Through the Second Board Hearing and December 8, 2008 Proposed Decision and Order**

Sandland filed a timely petition for review of the February 8, 2007 Proposed Decision and Order and the Board granted review. BR 233-241, 290. While review was pending Sandland, for the first time, asserted that the Board lacked subject matter jurisdiction over her appeals. BR 309.

Sandland asserted that neither of her claims had ever been finally closed because she did not receive either the May 22, 1978 closing order in her respiratory claim, or the July 28, 1983 closing order in her right foot claim. Therefore, she contended, the Board was required to return the matter to the Department and Safeway to determine her eligibility for further benefits as though her claims had never closed.

Voiding the prior closures would mean that these would not be aggravation cases. Voiding the closures would eliminate the RCW 51.32.160(1)(a) seven-year limitation period for reopening applications, as noted above, and the limitation on further payment of time loss and permanent disability benefits except as may be authorized by the Director in the exercise of his or her discretion. *See generally Cascade Valley*, 152

Wn. App. at 508-510. Voiding the prior closures would mean eligibility for all benefits going back decades.

The Board, *sua sponte*, issued an order on July 20, 2007 remanding the matter for further Board proceedings on the “jurisdictional” issue. BR 337-345. Additional hearings were held. An IAJ issued a Proposed Decision and Order on December 4, 2008 which found that Sandland did not receive the initial closing orders. BR 78. The IAJ agreed with Sandland that because these orders were never communicated to her, the claim closures never became final, and the Board lacked jurisdiction over her reopening applications. BR 78-79. The IAJ recommended a remand to the Department to adjudicate Sandland’s claims. BR 78-79. Both Safeway and Sandland timely petitioned for review of the December 4, 2008 Proposed Decision and Order.<sup>4</sup> BR 34-48, 49-57.

**D. Proceedings at the Board Following the December 4, 2008 Proposed Decision and Order**

The Board, after review, issued a decision affirming the Department’s denials of Sandland’s reopening applications in both claims. BR 2-18. As for Sandland’s respiratory claim, the Board found she received the May 22, 1978 closing order but failed to timely appeal it. BR

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<sup>4</sup> Although the IAJ essentially agreed with Sandland’s argument, she sought the Board’s review “merely to draw attention to some irregularities in the findings and conclusions that should be addressed in a decision and order” of the Board. BR 39.

15, 17. The Board concluded that the order thus became final, not subject to challenge. BR 8-11, 15, 17.

The Board found that Sandland did not receive the July 28, 1983 order closing her right foot claim. BR 10-12, 16. However, citing the Supreme Court's *Marley* decision, the Board concluded that the Department and the Board had subject matter jurisdiction over her later reopening application and her appeal from the denial thereof, respectively. BR 12-14. The Board reasoned that any error in the Department's adjudicating her reopening application without *final* claim closure was an error of law, not a jurisdictional defect. BR 13-14. Because Sandland failed to timely appeal the order denying her reopening application, the claim closure addressed in the denial order became *res judicata*. BR 13-15. Finally, as to the substantive merits of Sandland's reopening applications on appeal, the Board upheld the Department's denials of reopening, finding that she had no mental health condition proximately caused or aggravated by either of her industrial injuries. BR 17-18. Sandland appealed to King County Superior Court.

#### **E. Superior Court Proceedings**

At superior court Sandland did not challenge the Board's determinations that she did not have a mental health condition proximately caused or aggravated by either of her industrial injuries, and that the

medical and lay evidence supported denial of reopening of her claims. CP 35. Sandland challenged only (1) the Board's rejection of her subject matter jurisdiction argument and (2) the Board's finding that she did receive the Department's initial May 22, 1978 closing order in her right foot claim. CP 35.

After a de novo review of the Board record, the superior court entered findings of fact and conclusions of law affirming the Board's Decision and Order, in its entirety. CP 43. This appeal followed.

#### **IV. STANDARD OF REVIEW**

Superior court review of a Board of Industrial Insurance Appeals decision is de novo, but must be based on the evidence presented to the Board. RCW 51.52.115; *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998). The Board's findings and decisions are prima facie correct. RCW 51.52.115; *Romo*, 92 Wn. App. at 353. Sandland had the burden of proving otherwise. RCW 51.52.115; *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987).

This Court's review of the superior court decision is under the ordinary review standard for civil appeals. RCW 51.52.140. Review here is thus limited to examination of the record to determine whether substantial evidence supports the superior court's findings of fact, made after its de novo review, and whether the superior court's conclusions of

law flow from the findings. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180-181, 210 P.3d 355 (2009).<sup>5</sup> Sandland's assignments of error to the Board's and the Department's actions are thus irrelevant in this appeal.

Sandland challenges, as not supported by substantial evidence, findings of fact 1.1 (that the Department closed her respiratory claim by an order of May 22, 1978) and 1.12 (that she received but did not protest or appeal this order). AB 4 (assignments of error 1, 3). But she stipulated that the Department closed her respiratory claim on May 22, 1978. BR 113; *see* Note 2. In any event, this Court must uphold these findings if the evidence, viewed in the light most favorable to the Department (as the prevailing party at the superior court), is sufficient to persuade a fair-minded person of the truth of the declared premises. *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 340, 725 P.2d 463 (1986) (citations omitted).

Sandland also assigns error to the superior court's findings about the *unappealed* Department orders that denied her reopening applications

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<sup>5</sup> Sandland, citing cases decided under the Administrative Procedure Act, Ch. 34.05 RCW (AB 25, 32), and a case decided under the Washington Industrial Safety and Health Act, Ch. 49.17 RCW (AB 24), asserts that the standard of review is that under the APA. Neither the APA, nor the WISHA, standard of review applies in workers' compensation appeals. RCW 51.52.140; *Rogers*, 151 Wn. App. at 180-181. Also, neither WISHA nor the WISHA decision Sandland cites supports her irrelevant suggestion that review in a WISHA case is under an arbitrary and capricious standard of review.

in both her claims (FF 2.2, 1.5, 1.6). AB 8-9 (assignments of error C1). These findings relate to the court's conclusions that res judicata applied to these unappealed orders. CL 2.2, 2.4. Sandland does not, however, challenge the sufficiency of the evidence for these findings. Instead, she challenges them on the *sole*, legal, ground that they are "extraneous to the jurisdictional issues raised on appeal." AB 8. This is consistent with her theory that "the Department lacks subject matter jurisdiction to adjudicate aggravation or reopening" if the initial closing orders were not communicated to her. AB 23. The unchallenged facts in these findings "are verities on appeal." *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733 n.6, 57 P.3d 611 (2002).<sup>6</sup>

This case ultimately turns on the questions of subject matter jurisdiction and res judicata. Review of the superior court decision on these issues is de novo. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003) (jurisdiction); *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005) (res judicata).

## V. ARGUMENT

### A. Sandland Improperly Characterizes Procedural Attributes of Claim Adjudication as Jurisdictional Requirements

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<sup>6</sup> These findings are also based on the claims history to which Sandland stipulated. BR 113-114 (respiratory claim), 160-163 (right foot claim).

Sandland claims, in her “simple and singular” argument at “its most concise,” that the Department lacked subject matter jurisdiction to adjudicate her applications to reopen her respiratory and right foot claims, because the orders that initially closed these claims were not properly communicated to her and thus never became final. AB 22. She analogizes the Department’s subsequent orders denying her reopening applications to futile attempts to repair improperly installed “bent boards.” AB 3, 43-44. She is incorrect, and her bent boards analogy inapposite.

**1. The Department Has Broad Subject Matter Jurisdiction to Decide All Controversies Arising under the Industrial Insurance Act**

The question here is not whether the Department had “jurisdiction” to issue the orders denying reopening of the claims. The critical inquiry in determining whether an entity has subject matter jurisdiction is “What is the type of controversy?” the entity is called upon to resolve.

If the type of controversy is within the authority of the deciding entity, then all other defects or errors go to something other than subject matter jurisdiction. *Sprint Spectrum, LP v. Dep’t of Revenue*, No. 64943-4-I slip op., 2010 WL 2805532 (¶ 49) (Wash. Ct. App. July 19, 2010) Becker, J., concurrence at \*2 (citing *Dougherty*). Subject matter jurisdiction is the power to decide the “general category” of controversy, such as eligibility for workers’ compensation benefits, “without regard to

the facts of the 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)).

The Department “has broad subject matter jurisdiction to decide all claims for workers compensation benefits,” including Sandland’s reopening applications. *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 170, 937 P.2d 565 (1997). If the Department’s initial closing orders were not communicated to her, this failure of communication only prevents finality as to *those orders*. It did not deprive the Department of its jurisdiction to adjudicate her later reopening applications. The Department “does not lack subject matter jurisdiction solely because it may lack authority to enter a given order.” *Marley*, 125 Wn.2d at 539. As our Supreme Court has repeatedly cautioned, “procedural elements” should not be confused with “jurisdictional requirements.” *Dougherty*, 150 Wn.2d at 315 (filing an appeal from a Board decision in the wrong county is a procedural, not jurisdictional, error).

Professor Martineau’s law review article on subject matter jurisdiction, repeatedly cited by our Supreme Court with approval, illustrates the distinctions between procedural errors and jurisdictional defects. *See Marley*, 125 Wn.2d at 539 (citing Martineau with approval); *Dougherty*, 150 Wn.2d at 316 (same). Professor Martineau explains that

“procedural prerequisites for initiating an action” or “filing of a claim within the statute of limitations” are not matters of subject matter jurisdiction. Martineau, 1988 BYU L. Rev. at 23-25. This is because subject matter jurisdiction “goes to the type of case the court can hear, not what a party must do to invoke the court’s authority to hear the case.” *Id.* at 23; *see also Dougherty*, 150 Wn.2d at 319 (“A party cannot confer jurisdiction; all that a party does is invoke it.”); *Sprint Spectrum, LP* at \*2, ¶ 49 (Wash. Ct. App. Jul. 19, 2010) (Becker, J., concurring) (failing to comply with the service requirement under the APA is not a jurisdictional defect).

Thus, even if “a matter may be a condition precedent to the filing of a claim, it does not thereby become a limitation on the subject matter jurisdiction of the court in which the claim is filed.” *Id.* Sandland’s suggestion that the aggravation statute – RCW 51.32.160 – somehow limits the Department’s jurisdiction is simply incorrect.

To paraphrase Judge Becker in *Sprint Spectrum*: without question, determining whether a claim should “remain closed,” is a question that the Legislature empowered the Department to resolve. Therefore, any error or defect in the Department’s adjudication – e.g., the error Sandland asserts here, that a claim cannot “remain closed” if it was never closed in the first place – goes to something other than subject matter jurisdiction. *Id.* A

mere error of fact or a mere error of law on a workers' compensation question in a Department or Board order is not a jurisdictional error; such an error makes the order voidable on direct appeal, but not void such that collateral attack will succeed against the order or overcome claim preclusion. *Marley*, 125 Wn.2d at 537-541.

As noted above, "the Department has subject matter jurisdiction to adjudicate *all claims* for worker's compensation." *Marley*, 125 Wn.2d at 542 (emphasis added). The "type of controversy" presented here – "eligibility for worker's compensation benefits" – is "within the Department's domain to decide." *Id.* at 543. Neither the Department nor the Board order is subject to jurisdictional attack. *Marley*, 125 Wn.2d at 539 (citing *Martineau*).

**2. An Error in Adjudication Does Not Deprive the Department of Jurisdiction over Workers' Compensation Claims, or the Board Its Authority to Review Department Decisions**

The "power to decide includes the power to decide wrong." *Id.* at 543 (citation omitted). Even if the Department erred in determining that Sandland's claims should remain closed in denying her reopening applications (if the claims were not properly closed in the first place), this error did not deprive the Department of its subject matter jurisdiction over her reopening applications or render the orders denying them void.

In fact, this Court has rejected the same logic presented by Sandland’s jurisdictional argument. *See Shafer v. Dep’t of Labor & Indus.*, 140 Wn. App. 1, 6-7, 159 P.3d 473 (2007), *aff’d*, 166 Wn.2d 710 (2009).

In *Shafer* the worker claimed that her attending doctor did not receive a copy of the closing order as required by the statute. *Shafer*, 140 Wn. App. at 6. Like Sandland, the worker argued that the order “never became final,” and the Department and the Board thus lacked subject matter jurisdiction over her later filed reopening application.<sup>7</sup> *Id.* Citing *Marley*, this Court rejected the worker’s argument and said, “Jurisdiction is not the issue here.” *Id.* This Court pointed out that a “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.” *Id.* at 7.

Likewise, in an analogous case, the Board determined, in a “significant decision,” that the Department’s failure to properly close a claim did not deprive it of subject matter jurisdiction over the worker’s

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<sup>7</sup> Ms. Shafer, unlike Sandland, had timely sought *direct review* at the Board of a Department determination on her reopening application (1) that her claim had been previously closed and (2) that the claim should remain closed. *Shafer*, 140 Wn. App. at 5. Ms. Shafer therefore was not foreclosed by claim preclusion. *Id.* Sandland, unlike Ms. Shafer, did not pursue her appeal rights from the Department’s orders denying her reopening applications. Sandland is foreclosed by claim preclusion here.

later reopening application. See *In re Jorge C. Perez-Rodriguez*, BIIA Dec., 06 18718, 2008 WL 1770918 (2008).<sup>8</sup> The Board's interpretation of workers' compensation law, while not binding, is entitled to "great deference." *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 127, 138, 814 P.2d 629 (1991).

In *Perez-Rodriguez* the Department actually failed to issue a final closing order. The Department issued an order closing the claim on November 29, 1995 which Perez-Rodriguez timely protested. In response the Department issued an order on January 23, 1996 holding the November 29, 1995 order in abeyance. Then, on April 1, 1996 the Department issued an order affirming the January 23, 1996 abeyance order. Plainly then, the Department never affirmed its November 29, 1995 closing order. Nevertheless, Perez-Rodriguez filed applications to reopen his claim which were denied by an April 30, 1997 order, exactly like the denial orders here. The Department denied reopening and declared that the claim remained closed. There was a timely protest, and the Department affirmed by order dated January 12, 1998, which order was never protested or appealed.

Some eight years later, on April 26, 2006, Perez-Rodriguez filed another application to reopen his claim. That too was denied, and on

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<sup>8</sup> The Legislature has directed the Board to designate, index and make available to the public its "Significant Decisions." RCW 51.52.160.

appeal Perez-Rodriguez made the same argument Sandland does here: the Department is without “jurisdiction” to adjudicate an application to reopen a claim under RCW 51.32.160 until there is a final closing order.

As here, the Board concluded that a final closing order is not a jurisdictional prerequisite for the Department’s later adjudication of the worker’s subsequent reopening application. *Id.* at \*6-7. Citing *Marley* and other precedent, the Board concluded that “the reopening of a workers’ compensation claim” is a “type of controversy,” over which the Department has subject matter jurisdiction. *Id.* at \*7.

Any failure of communication of the initial closing orders did not prevent finality with respect to the Department’s later issued orders denying Sandland’s reopening applications. CL 2.2, 2.4. Undisputedly, these orders stated that her claims would remain closed, and she received, but never appealed, these orders. FF 1.2, 1.5.

Perez-Rodriguez had the opportunity to appeal and address the lack of a final closing order when the Department denied his first application to reopen his claim, like Sandland here. He did not. The Board concluded that Perez-Rodriguez’s claim was first finally closed when his application to reopen was denied. Sandland has advanced no argument as to why the Board’s analysis in *Perez-Rodriguez* should not apply here.

**3. The Superior Court Properly Resolved the Jurisdictional Question Presented Here**

Sandland, in her “bent boards” metaphor, suggests that there is no cure for the initial failure of communication. Sandland, like Perez-Rodriguez, had an opportunity to appeal these orders to contest claim closure but did not. Thus, the claim closures encompassed in these orders, correct or not, became res judicata. *See Marley*, 125 Wn.2d at 538 (unappealed Department order is res judicata regardless of any error in it); *Perez-Rodriguez* at \*8 (subsequent denial of an application to reopen that becomes final is res judicata that the claim is closed as of the date of denial). The superior court properly followed established precedent in concluding that the Department had subject matter jurisdiction over Sandland’s reopening applications here, regardless of whether the initial closing orders became final. CL 2.2.

**B. The Department’s Unappealed Orders Denying Sandland’s Claim Reopening Applications Are Res Judicata and Preclude Her from Challenging the Initial Claim Closure**

Res judicata, or claim preclusion, “applies to a final judgment by the Department as it would to an unappealed order of a trial court.” *Marley*, 125 Wn.2d at 537 (footnote omitted). Res judicata “precludes the parties from rearguing the same claim.” *Marley*, 125 Wn.2d at 538.

**1. All the Necessary Elements for the Application of Res Judicata to the Department’s Orders Denying**

**Sandland's Reopening Applications and Declaring that  
the Claims Remain Closed are Present Here**

Four elements are required for the proper invocation of res judicata: 1) identity as to parties; 2) identity as to subject matter 3) a final judgment or order rendered by an entity with authority to do so; and 4) identity as to claim or cause of action. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737-738, 222 P.3d 791 (2009) (citations omitted): *see generally* Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805 (1985). All these elements are met for application of res judicata to the November 20, 1984 and May 19, 1989 reopening denial orders.

First, the parties, Sandland, Safeway, and the Department, are identical. Second, the prior November 20, 1984 and May 19, 1989 reopening denial orders and the present case (appeals from the more recent December 19, 2003 and July 21, 2004 reopening denials) involve the same subject matter – Sandland's workers' compensation claims – claim closure and applications to reopen claims. Sandland received but did not appeal the November 20, 1984 and May 19, 1989 orders. BR 113, 161; FF 1.2, 1.5. Thus, res judicata applies to these unappealed orders here.

Third, the prior action was concluded with a final order issued by the entity authorized to do so. As discussed above, the Department "has

broad subject matter jurisdiction to decide all claims for workers compensation benefits.” *Kingery*, 132 Wn.2d at 170; *Marley*, 125 Wn.2d at 542. See also *Shafer*, 140 Wn. App. at 6-7; cf. *Lenk v. Dep’t of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). A party has 60 days from the date the adverse ruling is “communicated” to it to file either a protest and request for reconsideration with the Department or an appeal with the Board. RCW 51.52.050(1), .060; *Rodriguez v. Dep’t of Labor & Indus.*, 85 Wn.2d 949, 951, 953, 540 P.2d 1359 (1975) (a decision is communicated upon receipt). The prior actions, i.e. the Department’s adjudications of her applications to reopen her claims, became final when Sandland failed to appeal either of the orders denying reopening of her claims. “If a party to a claim believes the Department erred in its decision, that party must appeal the adverse ruling.” *Marley*, 125 Wn.2d at 538.

Nor can one avoid finality simply by showing that the adjudication contained a mistake. *Abraham v. Dep’t of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934) (a mistake in a Department order on a “mixed question of law and fact as to whether a compensable injury occurred” did not justify voiding unappealed order). “The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim.” *Marley*, 125 Wn.2d at 538.

Res judicata precluded the claimant in *Marley*, who failed to timely appeal a Department order denying her claim, from later challenging the denial as containing an error of law. *Marley*, 125 Wn.2d at 537-543. As our Supreme Court has explained, “*Marley* stands for the broad proposition that where an aggrieved party has not appealed a final Department order deciding an industrial claim within the 60-day time period of RCW 51.52.050 and .060, that party is precluded from rearguing the same claim unless the order was void when entered.” *Kingery*, 132 Wn.2d at 170.

This must be the rule, or else the doctrine of res judicata for Department orders would not be the same as the doctrine of res judicata for court decisions, contrary to *Marley*, 125 Wn.2d at 537. Because Sandland failed to exercise her right to appeal either of the orders denying reopening of her claims, the Department’s adjudications became final.

Fourth, the same claim or cause is involved in both actions. Our courts have broadly viewed a workers’ compensation claim as one cause of action for purposes of res judicata, regardless of whether the claim is for initial benefits or further benefits in a reopening application. *See, e.g., Dinnis v. Dep’t of Labor & Indus.*, 67 Wn.2d 654, 657, 409 P.2d 477 (1965) (res judicata applied to the Department’s disability determination in a closing order to preclude the worker from claiming in his reopening

application that his disability as of claim closure was greater than the Department had awarded).

The Department expressly decided that Sandland was not eligible for further benefits, i.e. her claims should remain closed. “An unappealed Department order is res judicata as to the issues encompassed within the terms of the order absent fraud in the entry of the order . . . .” *Kingery*, 132 Wn.2d at 169. The issue of whether the claims had in fact been previously closed was clearly encompassed within the terms of the November 20, 1984 and May 19, 1989 orders.

**2. An Unappealed Department Order Is Res Judicata as to All Issues Fairly Encompassed within the Order**

Res judicata bars “the relitigation of claims and issues that were litigated, or *might have been litigated*, in a prior action.” *Loveridge v. Fred Meyer*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (emphasis added; citation omitted); *Kingery*, 132 Wn.2d at 169. *See also* Trautman, 60 Wash. L. Rev. at 813-814. The validity of initial claim closure on the two claims, i.e., the issue of whether Sandland had received the initial closing orders, “might have been litigated,” if she had exercised her right to appeal the orders denying reopening.

This Court’s Division II has held that an unappealed order calculating the worker’s wage for time-loss wage replacement benefits

was res judicata and precluded his later claim that his employer-paid healthcare benefits should also be included in the calculation. *See Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 241-242, 118 P.3d 392 (2005). The worker in *Chavez* argued res judicata should not apply, because the order did not expressly exclude employer-paid healthcare, so he was not adequately apprised of a need to appeal the order. *Chavez*, 129 Wn. App. at 241. The Court rejected his argument and pointed out that such exclusion “was readily understood from the explicit statement of what *was* included in calculating” the worker’s time-loss rate. *Id.* at 242.

Here, the unappealed November 20, 1984 and May 19, 1989 orders denied reopening of Sandland’s right foot and respiratory claims, stating that her claims would remain closed. BR 113, 161; FF 1.2, 1.5. These unappealed orders necessarily encompassed the Department’s determination that her claims had been and should remain closed. These determinations are readily understandable from the orders and, even if erroneous, are now res judicata. *See Marley*, 125 Wn.2d at 538; *Kingery*, 132 Wn.2d at 169.

And in *Shafer*, where the closing order was not communicated to the worker’s attending doctor, the closing order did not become final. *See Shafer*, 140 Wn. App. at 7-11. But there the worker timely appealed the later issued order denying her reopening application and was thus not

precluded from challenging the claim closure in that later appeal. *Id.* at 5. Sandland, however, did not appeal the Department's orders denying her reopening applications. She is thus precluded from challenging claim closure now. BR 15; *Shoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986) (if there has been an opportunity to litigate the matter in a former action the party should not be permitted to relitigate it). Sandland's failure to appeal renders final the orders determining that her claims should remain closed.

### **3. Important Res Judicata Principles Underlie the Superior Court's and the Board's Decision Here**

Sandland's jurisdictional argument unintentionally underscores the importance of res judicata. She seeks to undo decades of Department orders she admittedly received and failed to appeal. She thus incorrectly invokes subject matter jurisdiction as an attempted "pathway of escape from the rigors of the rules of res judicata." *Marley*, 125 Wn.2d at 541 (quoting Restatement of Judgments § 2, cmt. b (1982)).

"Res judicata is the rule, not the exception." *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). Sandland "cannot evade her responsibility under Title 51 RCW to appeal from a Department order that aggrieved her." *Kingery*, 132 Wn.2d at 172. Allowing her to do so here would reward a party who sat on its rights.

The doctrine of res judicata is expressly designed to prevent such a result. *See, e.g.*, 18 Charles A. Wright, et al., *Federal Practice and Procedure* § 4403, at 26-27 (2d ed. 2002) (res judicata provides finality and repose in litigation).

**4. Under Res Judicata the Date of the Department's Unappealed Orders Denying Sandland's Reopening Applications Became the New "First Terminal Date" for the Aggravation Analysis**

Sandland argues that the aggravation statute (RCW 51.32.160) requires finality of initial closing orders as a "prerequisite" for the Department's authority to act on reopening applications. AB 34-35. Without this "prerequisite" she argues the statute "is inoperable" because if there is no "valid first terminal date" there is no "determination of the claimant's condition", i.e. extent of disability. AB 35. She is incorrect. The first "terminal date" in an aggravation case is not fixed at the *initial* claim closure but may change as the worker applies to reopen her claim multiple times.

In an aggravation case, the worker must show her claim related disability is "greater on the last terminal date than on the first terminal date." *E.g., Dinnis*, 67 Wn.2d at 656. The first terminal date is "the last previous closure *or denial of an application to reopen.*" *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 565, 897 P.2d 431 (1995)

(emphasis added). The second terminal date is “the date of the most recent closure *or denial* of an application to reopen a claim for aggravation.” *Grimes*, 78 Wn. App. at 561 (emphasis added). Thus, in a case where a claim is closed and the worker applies to reopen the claim, which is denied, and later again applies to reopen a claim, which is again denied, the two terminal dates are the dates the Department denies the worker’s successive reopening applications.

As the Board explained in this case, and in *Perez-Rodriguez*, when a worker applies to reopen a claim without a final closing order and does not timely appeal a later issued order denying reopening that states her “claim will remain closed,” the unappealed reopening denial order becomes res judicata and “essentially becomes a closing order by operation of law.” *Perez-Rodriguez*, 2008 WL 1770918, at \*9; BR 14. Thus, for Sandland’s respiratory claim, whether she did, or did not, receive the May 22, 1978 initial closing order, the unappealed May 19, 1989 order denying her reopening application became the new first terminal date and “res judicata as to [her] condition on that date.” *Dinnis*, 67 Wn.2d at 657. As for her right foot claim, the unappealed November 20, 1984 order denying her reopening applications became the new first terminal date. BR 162. To reopen her claims Sandland needed only to

show aggravation occurring after May 19, 1989 (respiratory claim) or November 20, 1984 (right foot claim).

*Reid v. Dep't of Labor & Indus.*, 1 Wn.2d 430, 437-438, 96 P.2d 492 (1939) does not support Sandland. In that case, the Department closed Reid's claim with a permanent partial disability award, and Reid appealed the closing order. *Reid*, 1 Wn.2d at 433. While that appeal was pending, he applied to reopen the same claim for aggravation. *Id.* at 435. The *Reid* Court affirmed the closing and dismissed the aggravation appeal, as premature, stating that the court could not determine whether his disability worsened after the claim closure, because the extent of his disability as of claim closure had not yet been finally determined – although the evidence that Reid had no permanent disability was “overwhelming.” *Id.* at 436-438.

*Reid* presented a unique circumstance. Appeals of both a closing order and a reopening denial order were joined in a single case. The court dismissed the premature aggravation appeal. Here Sandland appeals from the denials of her reopening applications, where the first terminal dates, if not fixed by the initial closing orders, were fixed by the unappealed orders denying her reopening applications by operation of res judicata, as shown above. The problem of premature closing present in *Reid* is absent here. *Reid* does not support Sandland.

Sandland, without much analysis, cites to another Board significant decision, *In re Betty Wilson*, BIIA Dec., 02 21517 & 03 12511, 2004 WL 1901021 (2004) and implies that there is a due process concern in applying res judicata when the initial closing orders were not communicated to her. AB 33-34. Due process is not implicated, however, because res judicata applied to the *undisputedly communicated* orders that denied her applications to reopen her claims, not to the initial closing orders. Further, *Wilson* does not support a contrary conclusion.

In *Wilson* the Department issued an order closing the worker's claim without any permanent partial disability award while a prior order segregating responsibility for her cervical condition as not claim related was still on appeal. *Wilson*, 2004 WL 1901021, at \*2. The Department could not logically adjudicate the worker's permanent partial disability while the segregation order remained on appeal, "because the determination of entitlement was necessarily dependent upon the eventual acceptance or segregation of the cervical condition." *Wilson*, 2004 WL 1901021, at \*5.

The Board in *Wilson* properly followed *Reid* in concluding, in the worker's direct appeal from a closing order, that the Department erred in prematurely closing her claim. *Id.* Claim closure "must await the final

resolution” of the segregation issue. *Id.* *Wilson* did not mention due process. Just as *Reid* does not support *Sandland*, neither does *Wilson*.<sup>9</sup>

**C. Liberal Construction Principles Do Not Aid Sandland Because Principles of Claim Preclusion and Jurisdiction Apply Equally to All Workers’ Compensation Litigants**

Sandland argues that this Court should liberally construe the Industrial Insurance Act to grant the relief she requests. AB 25-26. Liberal construction principles do not dictate the result she advocates here, because the principles of jurisdiction and *res judicata* apply equally to all parties, including the Department, in workers’ compensation cases and do not favor any particular party. *See Kingery*, 132 Wn.2d at 170 (unappealed decision by the Department is “final and binding on *all parties*”). It makes no sense to apply principles of law – jurisdiction or claim preclusion – one way in a certain procedural context to produce a result favoring a claimant and another way in an otherwise identical procedural context to avoid producing a result adverse to a different claimant. Such an inconsistent, purely result oriented approach has no support under liberal construction principles.

The Industrial Insurance Act is designed to provide “sure and certain relief” to injured workers. RCW 51.04.010. This goal is consistent with the principle recognizing the Department’s broad subject

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<sup>9</sup> The Board in *Wilson* also explained that *Reid* does not address “jurisdiction.” *Wilson*, 2004 WL 1901021, at \*5.

matter jurisdiction over all workers' compensation claims as well as with the principle recognizing the finality of unappealed Department orders.

**D. Substantial Evidence Supports the Finding that Sandland Received the May 22, 1978 Order Closing Her Respiratory Claim**

Sandland challenges the findings that she received, but did not protest or appeal, the May 22, 1978 order closing her respiratory claim. FF 1.1, 1.12. AB 4, 22, 28-32. The Court need not reach this 'sufficiency of the evidence' question because, as shown above, even if Sandland did not receive that closing order, her claim was still closed by operation of res judicata when the Department denied her reopening application on May 19, 1989, and she did not appeal that decision. Substantial evidence does, however, support the challenged findings.

First, it is undisputed that the Department issued an order closing her respiratory claim on May 22, 1978. BR 113; TR 4/22/04 at 7; TR 6/1/06 at 6-7. Sherry Torres, a Department employee testified about the Department's mailing custom in 1978. In 1978, when a claim involving only medical treatment benefits was closed, the Department simultaneously generated four postcards, one to the claimant, one to the employer, one to the physician and one for the Department file. TR 5/5/08 at 50, 52-55. Carol Widell, Safeway's claims manager, testified that the company did receive this postcard. TR 7/18/08 at 8, 14-16; Exhibit 6.

Second, Sandland took no action on her claim after May 22, 1978 until she filed an application to reopen it, which she signed on January 24, 1989 and in which she wrote (accurately) that her claim was closed in “’78.” BR Exhibit 9. In fact, in her 14-page appeal to the Board in this case, Sandland stated that her respiratory “claim was closed on May 22, 1978, just two months after [her] exposure injury,” with no indication she did not receive the closing order. BR 87. She challenged the fact of claim closure only *after* she obtained an adverse decision by the IAJ on the merits of her reopening application. BR 309. These facts are sufficient to persuade a fair-minded person that Sandland received the closing order.

This result is also consistent with *Farrow v. Dep’t of Labor & Indus.*, 179 Wash. 453, 38 P.2d 240 (1934). *Farrow* addressed a presumption that the mail proceeds in due course and is received by the person to whom it is addressed. To establish this presumption, *Farrow* requires proof of mailing custom as well as proof that the custom was actually followed. *Farrow*, 179 Wash. at 455-456. The only proof of mailing in *Farrow* was that a “letter bore a certain date, was at some time mailed, and was at some subsequent time received,” which was insufficient to create a presumption the letter was received “within any particular period.” *Farrow*, 179 Wash. at 455.

Ms. Torres's testimony about the Department's 1978 mailing custom *alone* did not create the *Farrow* presumption of mailing and receipt, because no one from the Department was able to testify as to whether the custom was actually followed 30 years after the fact. BR 10-11. This does not mean, however, that there is no evidence to otherwise show Sandland's receipt of the May 22, 1978 order. Nothing in *Farrow* or other precedent precludes a fact finder from drawing reasonable inferences about the fact of mailing and receipt in a particular case.

Unlike the circumstances in *Farrow*, where the only evidence of mailing was a notice that "bore a certain date," the record in this case shows:

- (1) the Department's specific mailing procedures;
- (2) the employer's receipt of the order consistent with those procedures;
- (3) Sandland's later inaction, together with her accurate representation that her claim was closed in 1978 when she applied to reopen the claim over 10 years later;
- (4) her acknowledgement in her 2004 appeal to the Board that the claim was closed on May 22, 1978; and
- (5) her stipulation to that fact.

These facts are sufficient for the superior court to find that the Department's mailing custom as described was actually followed and that Sandland received the May 22, 1978 order.

Sandland characterizes the above evidence of communication as "highly circumstantial." AB 32. Such labeling does not, however, make

that evidence, when viewed in the light most favorable to the Department and employer, insufficient to persuade a fair-minded person of the truth of the premise. To the contrary, “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Sandland points out that knowledge of the existence of a Department order is not sufficient to establish that a party actually received the order. AB 27, 31; *In re Daniel Bazan*, BIIA Dec., 92 5953, 1994 WL 16010283 (1994) (no evidence of communication of an order to the worker even when the worker learned of the order by word of mouth from his chiropractor). That may be true. But this does not mean a party’s awareness of the existence, content, and date of an order cannot be considered as evidence to prove the party’s receipt of the order.<sup>10</sup>

Sandland also claims that her receipt of the closing order was not proven because the Department file did not contain a copy of the May 22, 1978 order addressed to her. AB 28-29. She cites to no authority absolutely requiring maintenance and production of a copy of an order to prove its mailing and receipt. Sandland also points out that the

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<sup>10</sup> Sandland also cites *Ochoa v. Department of Labor & Industries*, 100 Wn. App. 878, 999 P.2d 633 (2000) for the same proposition,. *Ochoa* does not support this proposition, however, as it was *undisputed* that a Department order allowing a claim had not been communicated to the employer on the risk. *Ochoa*, 100 Wn. App. at 881-882.

Department file contained a copy of the postcard mailed to Safeway but no copies of the other postcards. AB 29-32. But this fact goes only to the weight of the evidence which is for the fact finder to determine, not this Court.

Finally, the liberal construction principle does not help Sandland's factual challenge here. The requirement to liberally construe the Industrial Insurance Act does not relieve a worker from the burden of proving factual claims. *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 504-505, 208 P.2d 1181 (1949).

**E. Sandland Has Not Properly Preserved Her Objection to the Superior Court's Findings and Conclusions Regarding the Merits of Her Reopening Applications**

Sandland, in Assignment of Error C, asserts that the Board and superior court erred in entering findings of fact and conclusions of law on the merits of her reopening applications. AB 8-9. She does not challenge the sufficiency of the evidence to support those findings, however, but only apparently contends that the superior court should not have reached these questions because she did not raise such questions, but only the jurisdictional issue, in her superior court appeal. AB 9.

To the extent that her Assignment of Error C merely reiterates her jurisdictional theory that these determinations on her claims are void, this assignment of error is redundant. To the extent, however, that she is

contending that an appealing party can somehow, by selective challenge, limit the superior court's power to affirm aspects of the Board's decision in a workers' compensation superior court appeal, her contention should be rejected because it is not supported by argument and authority. *See generally* RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

By not challenging the Board's findings and conclusions on the merits of her claims at the superior court, Sandland has waived these issues. RAP 2.5(a). Further, the superior court's findings and conclusions Sandland fails to properly challenge in this appeal are verities and the law of the case, respectively, and should thus be upheld. *See Willoughby*, 147 Wn.2d at 733 n.6 (unchallenged fact findings are verities); *Peters v. Dulien Steel Prods., Inc.*, 39 Wn.2d 889, 892, 239 P.2d 1055 (1952) (law of the case doctrine).

## VI. CONCLUSION

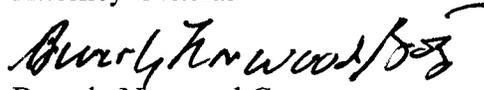
For the reasons stated above, this Court should affirm the superior court's judgment in this case. There is no "jurisdictional" flaw, and the superior court properly denied reopening of Sandland's claims.

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RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of September, 2010.

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