

65043-2

65043-2

No. 65043-2-I

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

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MARLENE SANDLAND,

Appellant,

v.

SAFEWAY STORES, INC.,

Respondant,

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COURT OF APPEALS  
STATE OF WASHINGTON  
CLERK

APPELLANT'S OPENING BRIEF

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## **I. INTRODUCTION**

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

Marlene Sandland was born April 25, 1939. In 1978 she worked for Safeway Stores at an ice cream packaging facility. At that time, she was a thirty-eight year old, single mother, caring for her teenage children. She was proud to be hired by Safeway Stores, Inc. on June 16, 1975; she had finally obtained a good union job in which she could support her family and be a productive member of society. She was a dedicated and hard worker.

On March 29, 1978 she was exposed to an ammonia leak during the course of her employment with Safeway Stores and suffered a respiratory condition requiring medical treatment. An Industrial Insurance claim was filed, allowed and was assigned claim number S-257891. Shortly thereafter she returned to work. Then, on April 10, 1978 while unpacking a large cage of half-gallon containers of ice cream, the cage fell onto her right foot trapping her foot between the heavy cage and the floor. This injury also required medical treatment.

Another Industrial Insurance claim was filed, was allowed and was assigned claim number S-259216.

Since then Ms. Sandland has continued to struggle with the personal and legal repercussions of these two claims. As an injured worker, she falls under the umbrella of the Industrial Insurance Act (Act) and should be protected by it. The Board of Industrial Insurance Appeals (Board) and the Courts have long held that the Act is remedial in nature and should be liberally construed in favor of injured workers; to benefit the injured worker. But in Ms. Sandland's case, the Act has not afforded her protection and it has not been read in her favor.

There is no question that her claims have been adjudicated over the years by the Department of Labor and Industries (Department) and the Self Insured Employer (SIE), here Safeway Stores. However, both claims have jurisdictional flaws. These flaws should have been identified and properly corrected by the Department, the State Agency charged with administering claims under the Act, *or* the SIE, as the case may be. Unfortunately it was not until litigation before the Board commenced in the mid 2000s that these jurisdictional flaws began to be recognized. Since being formally identified, Ms. Sandland and her representatives have continued to doggedly pursue these jurisdictional

issues, but her attempts to right these jurisdictional wrongs have been met with obstinate resistance.

There is a procedure that must be followed to properly install decking. Similarly, there is a proper procedure for administering industrial insurance claims. If that procedure is not properly followed, the claim may warp and jurisdiction to further adjudicate certain issues is lost. When a deck warps because it was not properly installed, it cannot be repaired by simply nailing down bent boards. Ms. Sandland's claims are both warped because of the jurisdictional flaws that exist. The Department, the Board, and even Superior Court have tried to repair these jurisdictional imperfections using terms like error of law and res judicata, by broadening the scope of the Department's adjudicative powers, and by reading cases not as a whole but only for those portions that support their ultimate conclusions. The result is to allow improper repairs to warped claims at the expense of injured workers and to the sole benefit of the Department and SIE's.

This must not be tolerated. These claims must be remanded to the Department, not to the Board or Superior Court, for thorough repairs. The Department must correct the imperfections by returning to the site of the initial procedural flaw. The Department must correct

that flaw using the proper procedure, thereby reinstating the Department's own adjudicative authority to further and properly administer Ms. Sandland's claims.

## II. ASSIGNMENTS OF ERROR

### A. SUPERIOR COURT AND THE BOARD ERRED IN CONCLUDING THAT THE MAY 22, 1978 ORDER WAS COMMUNICATED TO CLAIMANT BECAUSE THIS FINDING IS SUPPORTED BY INSUBSTANTIAL EVIDENCE.

1. The Court erred in entering Finding of Fact number 1.1 insofar as it finds that by order dated May 22, 1978 the Department closed Ms. Sandland's claim (S-257891).
2. The Court erred in entering Finding of Fact number 1.2 insofar as it finds Ms. Sandland filed a reopening application under claim no. S-257981 on January 31, 1989.
3. The Court erred in entering Finding of Fact number 1.12 insofar as it finds that a preponderance of the evidence supports the conclusion that the May 22, 1978 closing order was communicated to Ms. Sandland.

B. SUPERIOR COURT, THE BOARD AND THE DEPARTMENT ALL ERRED IN CONCLUDING THEY HAD SUBJECT MATTER JURISDICTION TO ADJUDICATE REOPENING APPLICATION(S) BECAUSE THEY ERRONEOUSLY INTERPRETED AND APPLIED THE LAW.

1. The Court erred in affirming the Board's finding that it had subject matter jurisdiction.
2. The Court erred in affirming the Department's orders adjudicating reopening application(s) in the absence of valid claim closure establishing first terminal dates in each claim.
3. The Court erred in entering Finding of Fact number 1.4 insofar as it finds that by order dated July 29, 1983 the Department closed claim S-259216.
4. The Court erred in entering Finding of Fact number 1.5 insofar as it finds Ms. Sandland filed an application to reopen her claim on December 13, 1984.
5. The Court erred in entering Finding of Fact number 1.6 insofar as it finds Ms. Sandland filed a second application to reopen her claim on January 31, 1989.

6. The Court erred in entering Finding of Fact number 1.13 insofar as it finds that despite having never communicated the July 29, 1983 closing, no jurisdictional defect exists because it was res judicata that Ms. Sandland's claim was closed as of November 20, 1984 when she did not protest or appeal the Department's November 20, 1984 order denying her application to reopen and declaring that her claim should remain closed.
7. The Court erred in entering Conclusion of Law 2.1 insofar as it concludes the Court has subject matter jurisdiction.
8. The Court erred in entering Conclusion of Law 2.2 insofar as it concludes that the Department's adjudication of Ms. Sandland's reopening application was an error of law despite there being no final first terminal date because the July 29, 1983 closing order never became final since it was never communicated.
9. The Court erred in entering Conclusion of Law 2.2 insofar as it concludes the doctrine of res judicata precludes Ms. Sandland from asserting the Board lacked subject matter jurisdiction to consider whether her claim should be reopened.

10. The Court erred in entering Conclusion of Law 2.2 insofar as it concludes the issue of whether a final and binding closing order was communicated to Ms. Sandland was subsumed within the Department's November 20, 1984 order denying her reopening application and declaring her claim should remain closed.
11. The Court erred in entering Conclusion of Law 2.3 insofar as it concludes Ms. Sandland's reopening application was not timely within the meaning of the seven year rule of RCW 51.32.160 whether the first closing date is July 29, 1983 or November 20, 1984.
12. The Court erred in entering Conclusion of Law 2.4 insofar as it concludes it is unnecessary to determine whether the May 22, 1978 order was communicated to Ms. Sandland as the doctrine of res judicata operates to preclude her from asserting the Board lacks jurisdiction to consider her reopening application and that the issue of whether the closing order was communicated to Ms. Sandland was subsumed within the Department's May 18, 1989 order denying her reopening application and declaring the claim should remain closed.

13. The Court erred in entering Conclusion of Law 2.5 insofar as it concludes that Ms. Sandland's reopening application was not timely within the meaning of the seven year rule of RCW 51.32.160 whether the first closing date is May 22, 1978 or May 19, 1989.
14. The Court erred in entering Conclusion of Law 2.6 insofar as it concludes that the Board's April 1, 2009 Decision and Order which determined that it had jurisdiction to hear and decide whether Ms. Sandland's workers' compensation claims should be reopened is correct and is affirmed.
15. The Court erred in entering Conclusion of Law 2.7 insofar as it concludes the Board's April 1, 2009 Decision and Order which determined that Ms. Sandland's workers' compensation claims should not be reopened is correct and is affirmed.

C. SUPERIOR COURT AND THE BOARD ERRED IN ENTERING FINDINGS OF FACT AND CONCLUSIONS OF LAW ADJUDICATING MS. SANDLAND'S REOPENING APPLICATION(S) SINCE THAT CONTROVERSY IS EXTRANEIOUS TO THE JURISDICTIONAL ISSUES RAISED ON APPEAL.

1. The Court erred in entering Finding of Fact numbers 1.2, 1.3, 1.5, and 1.6 insofar as these include findings

regarding subsequent adjudication of Ms. Sandland's claims and reopening application(s) when issues relating to the merits of the claims and reopening were not raised under appeal to Superior Court.

2. The Court erred in entering Finding of Fact number 1.14 insofar as it finds a preponderance of the evidence supports the Board's findings regarding subsequent adjudication of substantive issues in Ms. Sandland's claim which were not raised under appeal.
3. The Court erred in entering Conclusion of Law 2.3 and 2.5 insofar as they conclude that a "seven year rule" precludes reopening of both claims under RCW 51.32.160; this rule is neither applicable in Ms. Sandland's claims nor was this issue formally raised as an issue under appeal.
4. The Court erred in entering Conclusion of Law 2.7 insofar as it concludes the Board's determination that Ms. Sandland's workers' compensation claims should not be reopened when adjudication of the reopening application(s) was not raised under appeal.

D. THE DEPARTMENT ERRONEOUSLY ADJUDICATED THE REOPENING APPLICATION(S) BECAUSE IT LACKED SUBJECT MATTER JURISDICTION TO ADJUDICATE AGGRAVATION IN THE ABSENCE OF FINAL CLOSURE IN EACH CLAIM.

1. The Department had no authority to adjudicate Ms. Sandland's application(s) to reopen her claim because there was no valid first terminal date in claim no. S-257891 since no substantial evidence proves that a May 22, 1978 closing order addressed to Ms. Sandland ever existed or was communicated to her or her representative.
2. The Department had no authority to adjudicate Ms. Sandland's application(s) to reopen her claim because there was no valid first terminal date in claim no. S-259216 since both the Board and Superior Court agree, no substantial evidence proves the July 29, 1983 closing order was communicated to Ms. Sandland.

E. THE BOARD ERRONEOUSLY INTERPRETED AND APPLIED THE LAW WHEN IT CONCLUDED THAT IT HAD SUBJECT MATTER JURISDICTION AND PROCEEDED TO ADJUDICATE THE REOPENING APPLICATION(S) IN THE ABSENCE OF FINAL CLOSURE IN EACH CLAIM.

1. The Board erred in entering Conclusion of Law number 1 insofar as it concludes the Board had jurisdiction over the subject matter of the consolidated appeals.
2. As identified above, Superior Court found and concluded a preponderance of the evidence supported and thereby affirmed the Board's April 1, 2009 Decision and Order. With respect to claim no. S-257891, the Board erred in entering Findings of Fact numbers 1, 2, 3, 4, 15, 16 and 17 and Conclusions of Law numbers 2, 4, 6, and 8 for the same reasons stated in the above assignments of error.
3. As identified above, Superior Court found and concluded that a preponderance of the evidence supported and thereby affirmed Board's April 1, 2009 Decision and Order. With respect to claim no. S-259216, the Board erred in entering Findings of Fact numbers 8, 10, 11, 12, 15, 16 and 18 and Conclusions of Law numbers 5, 7, and

9 for the same reasons stated in the above assignments of error.

### **III. ISSUES**

- A. Whether the Superior Court and the Board erred in concluding a preponderance of the evidence supports a finding that the May 22, 1978 order was communicated to Ms. Sandland?
- B. Whether the Superior Court, the Board and the Department erred when they each concluded they had subject matter jurisdiction to hear and decide whether Ms. Sandland's claim(s) should be reopened?
  - 1. Whether the Department lacked subject matter jurisdiction to adjudicate Ms. Sandland's reopening application(s) when the claim(s) had no final and binding closure establishing a valid first terminal date?
  - 2. Whether the Board and Superior Court erred in concluding the Department's adjudication of Ms. Sandland's application(s) to reopen her claim(s) is an error of law rather than analyzing whether the Department had subject matter jurisdiction to adjudicate reopening when the

claim(s) had no final and binding closure establishing a valid first terminal date?

3. Whether the Board and Superior Court erred in concluding Ms. Sandland is barred by the doctrine of res judicata from raising the issue of whether a final and binding closing order was communicated to her because that issue was subsumed within the Department's order(s) denying her reopening application(s)?

#### **IV. STATEMENT OF THE CASE**

##### **A. FACTUAL AND PROCEDURAL HISTORY**

###### **1. Respiratory Claim History (S-257891):**

On **March 29, 1978**, Marlene A. Sandland was exposed to an ammonia leak when she was working as an ice cream packager for Safeway Stores, Inc. A copy of her initial accident report was admitted as Exhibit 8 at the Board level and is contained in the "EXHIBIT(S)" section (herein after "CABR Exhibit") of the Certified Appeal Board Record (herein after "CABR"). (CABR Exhibit No. 8 – Appendix Attachment 1). She was transported from work to the hospital and an industrial injury/occupational exposure claim was filed and was assigned **claim**

**number S-257891.** The jurisdictional facts for this claim as prepared by the Board are located in the CABR at page. 113 (Appendix Attachment 2).

On **May 22, 1978** the Department issued an order that both allowed and closed the respiratory claim (S-257891). (CABR Exhibit No. 6 - Appendix Attachment 3). The only copy of this order ever produced is addressed to the employer's representative, Scott Wezel Services. A Department employee, Sherry Torres testified that a copy of this order addressed to Ms. Sandland is not contained in the Department file. (Testimony of Sherry Torres at pp. 48-50 - Appendix Attachment No. 4). While the application is somewhat unclear, it appears that in January 1989, Ms. Sandland may have attempted to file an application to reopen her respiratory claim (S-257891). (CABR Exhibit No. 9 - Appendix Attachment 5). There are references to other reopening applications but none of those applications were admitted as exhibits at the Board level during the jurisdictional proceedings. On December 13, 2002 the Department issued an order informing Ms. Sandland that her claim could not be reopened because an aggravation application had not been filed within the seven year time limitation following the closure of her claim. (CABR at p. 113 – Appendix Attachment No. 2). She filed a protest and request for reconsideration which eventually became an appeal to the

Board. This appeal was assigned Board docket number 04 11466. (CABR at p. 114 – Appendix Attachment No. 2).

2. Right Foot Claim History (S-259216):

Following her March 1978 exposure she returned to work and on **April 10, 1978** suffered an industrial injury when a cage of ice cream fell on her right foot pinning her foot between the cage and the floor. A claim was filed for this injury and was assigned **claim number S-259216** for the **right foot injury**. The jurisdictional facts for this claim as prepared by the Board are located in the CABR at page 160. (Appendix Attachment No. 6).

On May 15, 1978 the Department issued an order allowing Ms. Sandland's right foot claim (S-259216). (Appendix Attachment No. 6). Shortly thereafter, she retained the services of attorney Scott East to represent her on this claim. (Appendix Attachment No. 6). On November 4, 1982 the Department issued an order closing the right foot claim (S-259216). (CABR Exhibit No. 2 – Appendix Attachment No. 7) Attorney East filed a protest and request for reconsideration of the November 4, 1982 order by a letter dated December 29, 1982 on Ms. Sandland's behalf. (CABR Exhibit No. 3 – Appendix Attachment No. 8). On January 27, 1983, the Department issued an order holding the “**11-5-82**” order in abeyance pending reconsideration. (CABR Exhibit No. 1 -

Appendix Attachment No.9). On July 29, 1983 it appears that the Department attempted to issue an order affirming the provisions of the “11-5-82” order. (CABR Exhibit No. 5 - Appendix Attachment No. 10). This order, however, could not be located in the Department’s microfiche file, which further explains why this order was not originally included in the jurisdictional history for this claim as prepared by the Board. (Testimony of Gail Griswold at pp. 20-21 and 33 and CABR at p. 161 - Appendix Attachment No. 11 and Appendix Attachment No. 6). Eventually, after the Department’s July 21, 2004 denial of Ms. Sandland’s May 13, 2004 aggravation application, she filed a notice of appeal with the Board, which was assigned Board docket number 04 21580. (Appendix Attachment No. 6).

### 3. Procedure before the Board:

Marlene A. Sandland’s appeals under both claims were assigned different docket numbers as is reflected above but were eventually consolidated for litigation purposes. Initially the matters were assigned to Industrial Appeals Judge (IAJ) Goodwin. In October 2005 the matters were reassigned to IAJ Hendrickson. (CABR at p. 442). By that time, Ms. Karen Ljunggren became involved on Ms. Sandland’s behalf and on February 8, 2007, IAJ Crossland issued a proposed decision and order addressing both claims and both docket numbers. (CABR at pp. 208-219).

In this proposed decision and order, IAJ Crossland affirmed the Department orders under appeal. Thereafter, Karen Ljunggren filed a petition for review of IAJ Crossland's proposed decision and order. (CABR at pp. 233-241).

On July 20, 2007 the Board issued an order vacating IAJ Crossland's proposed decision and order and remanding the appeal for further proceedings. (CABR at pp. 312-320 - Appendix Attachment No. 12). Just prior to the Board's July 20, 2007 order, Ms. Sandland retained the services of the Law Offices of David B. Vail and Jennifer Cross-Euteneier and Associates to represent her in these matter. (CABR at p. 309 - Appendix Attachment No. 13). In the July 11, 2007 notice, Ms. Sandland's attorney specifically placed the Board and interested parties on notice of outstanding jurisdictional matters requiring attention. (Appendix Attachment No. 13)

Following the Board's remand, the parties had an opportunity to present briefing as to which issues were felt appropriate to address on remand. (*See e.g.* CABR at pp. 332-336 and 355-359). On November 28, 2007, IAJ Jaffe issued an interlocutory order establishing litigation schedule. (CABR at pp. 363-365). According to this order the issue(s) presented were "whether Department orders dated May 22, 1978 and July 29, 1983 were communicated to the claimant". (CABR at p. 363).

Following the issuance of this interlocutory litigation order, hearings were held and perpetuation depositions were taken regarding these communication issues. Only the Self Insured Employer, Safeway Stores, Inc. and Ms. Sandland participated in this litigation. The Department had no legal representative present at any jurisdictional hearings or depositions before the Board. Ms. Sandland testified as part of her case in chief as did Gail Griswold, a Department worker's compensation unit supervisor; Sherry Torres, a Department office support supervisor two; and Scott East, one of Ms. Sandland's prior attorneys. For its case, the Employer called Carol Widell, Safeway manger of worker's compensation claims; Richard Blumberg, one of Ms. Sandland's prior attorneys; and Jerald Pearson, also one of Ms. Sandland's prior attorney.

4. The Board's Proposed Decision and Order:

At the conclusion of this testimony, on December 4, 2008, IAJ Jaffe issued a proposed decision and order in which he dismissed both appeals. (CABR at pp. 71-79 - Appendix Attachment No. 14). He dismissed the appeal of respiratory claim (S-257891; docket no. 04 11466) because the closing order dated May 22, 1978 was never received by Ms. Sandland and therefore concluded that the Board did not have jurisdiction over the subject matter of the appeal and remanded the matter to the Department

for further action to complete administrative adjudication of the claim including, but not limited to, addressing Ms. Sandland's protest to the May 22, 1978 order. (Appendix Attachment No. 14). He dismissed the appeal to the right foot claim (S-259216; docket no. 04 21580) because the Department order dated July 29, 1983 was mailed to an incomplete address for her attorney of record and neither the claimant nor her prior attorneys received the July 28, 1983 order from the Department. (Appendix Attachment No. 14). IAJ Jaffe concluded that the Board's only jurisdiction over this claim was to dismiss the appeal and remand it to the Department. He remanded the matter to the Department with the suggestion to either communicate the July 29, 1983 order to Ms. Sandland and her representative or to issue a further determinative order in this matter without prejudice to any party to file further appeal. (Appendix Attachment No. 14).

While not in complete disagreement with IAJ Jaffe's proposed decision and order, Ms. Sandland, by and through her attorney of record, filed a petition for review. (CABR at pp. 34-47). In that petition for review, she requested that the Board grant review in order to *correct* the findings of fact and conclusions of law and to *remand* these matters to the Department. (CABR at p. 34). The SIE also filed a petition for review. (CABR at pp. 49-65). The SIE argued that the Board should grant review

because a preponderance of the evidence established communication of the orders in question and requested that the Board retain jurisdiction. (CABR at p. 49 and 65).

5. The Board's Decision and Order:

The Board granted review and on April 1, 2009 issued a decision and order in which it affirmed the Department orders in both claims under appeal. (CABR at pp. 2-18 - Appendix Attachment No. 15). In so doing, the Board found that Ms. Sandland failed to prove that the Department did not serve her with a copy of the May 22, 1978 order as required by RCW 51.52.050. As a result, the Board concluded it was appropriate for the Department to adjudicate her reopening application under the respiratory claim (S-257891). (Appendix Attachment No. 15). Under the right foot claim, the Board agreed with IAJ Jaffe that the July 29, 1983 order was not communicated to Ms. Sandland or her representative and therefore never became final. (Appendix Attachment No. 15). However, the Board concluded that because MS. Sandland failed to protest the November 20, 1984 order denying her application to reopen her claim the November 20, 1984 order became a final closing order by operation of law within sixty days of its communication. (Appendix Attachment No. 15). In support of this ruling the Board cited numerous cases and Significant Board Decisions, the most pertinent of which include: *Marley v. Department of*

*Labor and Industries*, 125 Wn.2d 533, 886 P.2d 189, (1994), *Reid v. Department of Labor and Industries*, 1 Wn.2d 430, 96 P.2d 492 (1939), and *In re Perez-Rodriguez*, Dckt. No. 06 18718 (February 13, 2008). (Appendix Attachment No. 15).

6. Superior Court Action:

Because she disagreed with the Board's decision and order, Ms. Sandland appealed this matter to Superior Court. Initially Ms. Sandland requested a jury trial but this matter was eventually converted into a bench trial. At Superior Court, for the first time the Attorney General's office made an appearance and submitted briefing on behalf of the Department. Briefing was submitted by all parties and reviewed by the Court prior to oral argument. The Court heard oral argument and ultimately ruled that a preponderance of the evidence supported the Board's conclusion regarding communication of the May 22, 1978 order and affirmed the Board's decision regarding the Department's adjudication of Ms. Sandland's reopening application(s). (Clerk's Papers at pp. 80-85 - Appendix Attachment No. 16).

## **V. ARGUMENT**

The true jurisdictional issues under these consolidated claims have been convoluted and muddled by multitudes of red herring arguments

distracting from the true issues, and failing to clearly, concisely or precisely identify the real issues under appeal.

At its most concise, the issue raised by Ms. Sandland is simple and singular: **Whether the Department and subsequently the Board or Superior Court had subject matter jurisdiction to adjudicate her reopening application(s)?**

Ms. Sandland argues that they did not. The argument is logical: **First**, in order for a closing order to become final and binding, it must be communicated to the interested parties. This is due process at its most fundamental. Substantial evidence supports the conclusion that the May 22, 1978 order simultaneously opening and closing her claim was not communicated, so there is no valid first closure or terminal date in her respiratory claim (S-257891). Similarly, there is no valid first terminal date in the right foot claim (S-257891) given that the Board and Superior Court agree the July 29, 1983 order affirming closure of that claim was not communicated to Ms. Sandland or her representative.

**Second**, a final and binding closure establishing a valid first terminal date is a condition precedent to adjudicating aggravation under a reopening application. If claim closure is not finalized then the claim remains open and there is no basis for adjudicating reopening of the non-closed claim. As a result, until there is a valid closure and first terminal

date, the Department lacks authority to adjudicate aggravation or a reopening application.

**Third**, a tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate. As the agency charged with administering the Act the Department is granted broad authority to adjudicate claims but it does not extend to areas over which it has no subject matter jurisdiction. If a claim lacks a valid closure and first terminal date, the Department attempts to decide a type of controversy over which it has no authority when it adjudicates reopening. Simply put, the Department lacks subject matter jurisdiction to adjudicate aggravation or reopening when a claim remains open as a result of a non-communicated closing order.

**Finally**, a non-communicated closing order and resulting non-final first terminal date cannot be corrected by subsequent adjudication. Any subsequent adjudication by the Department of aggravation or reopening is not merely an error of law; it is void for lack of subject matter jurisdiction. No tribunal or Court from the Board to the Supreme Court can artificially re-establish subject matter jurisdiction by operation of law. The only way subject matter jurisdiction can be re-established is for the claims to be remanded to the Department to communicate the closing orders to establish first terminal dates or take further adjudicative action on the open

claims. Only there can the Department exercise its original jurisdiction to adjudicate the claim as is proper under the law and given the facts.

A. STANDARD OF REVIEW.

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

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

The Department is charged with administration of the Workers' Compensation Act, so the Court of Appeals accords substantial weight to the Department's interpretation of the Act but the Court of Appeals may

nonetheless substitute its judgment for the Department's because its review of the Act is de novo. *McIndoe v. Department of Labor and Industries of State of Wash.*, 100 Wash.App. 64, 995 P.2d 616 (2000), review granted 141 Wash.2d 1025, 11 P.3d 826, affirmed 144 Wash.2d 252, 26 P.3d 903.

The Court of Appeals may reverse an administrative order if it: (1) is based on an error of law; (2) is unsupported by substantial evidence; (3) is arbitrary or capricious; (4) violates the constitution; (5) is beyond statutory authority; or (6) when the agency employs improper procedure. *Brown v. State, Dept. of Health, Dental Disciplinary Bd.*, 94 Wash.App. 7, 972 P.2d 101 (1999), reconsideration denied, review denied 138 Wash.2d 1010, 989 P.2d 1136.

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

The Act was established to protect and provide benefits for injured workers, not the Department or SIE's. It must be emphasized that it has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Department of Labor and Industries*, 61 Wn.2d 439, 446 (1963); *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1; *Nelson v. Department*

*of Labor and Industries*, 9, Wn.2d 621; and *Hilding v. Department of Labor and Industries*, 162 Wash. 168. Furthermore, as noted by the Washington Supreme Court in *Clauson v. Department of Labor and Industries*, 130 Wn. 2d 580 (1996) it is mandated that **any doubt** as to the meaning of the workers' compensation law be resolved in favor of the worker. *Id.*, at 586.

Ms. Sandland has not been afforded the full protection of the Act. The Board and Superior Court did not read the Act and the law flowing there-from in a light most favorable to Ms. Sandland, most especially when they concluded that the Department's adjudication of her aggravation/reopening application claim without the condition precedent being met was merely legal error, remedied by subsequent orders resulting in Ms. Sandland being precluded by the doctrine of res judicata from raising the issue of subject matter jurisdiction.

IAJ Jaffe initially concluded that the Board lacked subject matter jurisdiction. (Appendix Attachment No. 14). Ms. Sandland submitted a petition for review for the limited purpose of drawing attention to some irregularities in the findings and conclusions. But, the Board and Superior Court extended beyond this limited request for review and essentially reversed the entirety of IAJ Jaffe's proposed decision and order. (Appendix Attachment No. 15 and Appendix Attachment No. 16).

C. A CLOSING ORDER MUST BE COMMUNICATED TO ALL INTERESTED PARTIES TO BE FINAL AND BINDING.

Under RCW 51.52.050, “[w]henver the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer or other person affected thereby, with a copy thereof by mail, which shall be addressed as shown by the records of the Department.” Wash. Rev. Code §51.52.050 (2006). An order is not communicated until it is received, and mere notice of the existence of an order does not constitute communication of that order., review granted 142 Wash.2d 1001, , reversed 143 Wash.2d 422; *In re Daniel Bazan*, Dckt. No. 92 5953 (March 8, 1994). According to significant Board decision *In re Bazan*, an order is not final until it is communicated, and the claim remains “open, as a result of the non-communicated order to the claimant.” *In re Bazan*, Dckt. No. 92 5953 (March 8, 1994).

“Communication” of an order has generally been interpreted to mean receipt by the aggrieved party. *Porter v. Department of Labor & Indus.*, 44 Wn.2d 798, 271 P.2d 429, (1954). If the recipient is competent, receipt of an order, not the reading of it, results in communication as contemplated by the statute. *Nafus v. Department of Labor & Indus.*, 142 Wash. 48, 251 P. 877 (1927). However the Courts have recognized the difficulty an office which handles a large amount of correspondence faces

when trying to prove that something was mailed, so that office may prove mailing by showing an office custom with respect to mailing and compliance with the custom in a specific instance. *Farrow v. Department of Labor & Indus.*, 179 Wash. 453, 38 P. 2d 240 (1934).

Before an order can be considered, valid, existing and properly communicated, it must be (1) contained in the Department file, (2) promptly served on the worker by mail, and (3) addressed as shown by the records of the department *or* the Department must show that it had a mailing custom and that the custom was actually followed in the case at hand. Without these elements being satisfied there is no valid order and no presumption that the worker has received the order arises.

1. There is no substantial evidence supporting the conclusion that the May 22, 1978 order addressed to Ms. Sandland exists, that the Department's mailing custom was followed and that it was mailed to her, or that it was received by her.

- a. Substantial evidence defined:

“Substantial evidence” is not a mere scintilla of evidence. *Omeitt v. Dept. of Labor & Indust.*, 21 Wn.2d 684, 686, 152 P.2d 973 (1944). Rather, evidence is substantial only if it is of a character to convince an *unprejudiced, thinking mind* of the truth of the fact to which the evidence is directed. *Omeitt*, 21 Wn.2d at 686 (emphasis added). There is no substantial evidence contained in the record to support a finding that the a

May 22, 1978 order addressed to Ms. Sandland ever existed. Beyond that, even if it did exist, this order was never communicated to Ms. Sandland or any of her representatives under the law as set forth above.

- b. There is no substantial evidence proving by a preponderance of the evidence that a May 22, 1978 order addressed to Ms. Sandland ever existed:

Under the law set forth above, a May 22, 1978 order addressed to Ms. Sandland at her last known address shown by the records of the Department does not exist. No one produced either the order or even a copy of the May 22, 1978 order addressed to Ms. Sandland. The only copy of an order with that date was addressed to the employer's representative alone. A Department employee who reviewed the file testified that no copy of the order addressed to Ms. Sandland is contained in the Department file. (Appendix Attachment No. 4). This fails to satisfy the elements for existence of a properly communicated order under RCW 51.52.050. Nothing in the record proves an order addressed to Marlene A. Sandland or her representative dated May 22, 1978 existed, nothing proves that with respect to a May 22, 1978 order addressed to Ms. Sandland or her representative the Department's mailing custom was actually followed, and nothing in the record proves on a more probable than not basis that Ms. Sandland received a May 22, 1978 order addressed to her in

the course of the mail. Certainly, there arises no presumption she ever received it.

- c. If it existed, there is no substantial evidence proving by a preponderance of the evidence that a May 22, 1978 order was ever communicated to Ms. Sandland:

In its decision and order the Board states that the extent of the evidence supporting Ms. Sandland's contention she did not receive the May 22, 1978 order is that the only order copied into the Department's microfiche was the one addressed to the employer's representative, and Ms. Sandland testified she didn't recall receiving an order like the May 22, 1978 postcard order. (Appendix Attachment No. 15).

In support of its conclusion that the May 22, 1978 order was communicated to Ms. Sandland, the Board stated that there is no evidence in the record that Ms. Sandland took any action consistent with not having received the May 22, 1978 order. (Appendix Attachment No. 15). This begs the question, what action should an individual take when she does not receive a piece of paper she did not know is being mailed to her?

Additionally, the Board notes that the employer's representative received the order. Not too ironically, the only copy of the May 22, 1978 order in existence is addressed to the employer's representative.

(Appendix Attachment No. 15). This is not substantial evidence proving by a preponderance of the evidence that Ms. Sandland received the order.

Finally the SIE argued Ms. Sandland must have known of the closing order because of her subsequent attempts to file reopening applications. The Board also referenced this argument when it stated that when she filed an application to reopen on January 31, 1989, above her signature “78” is given as the answer to the question “When was your claim closed?” (Appendix Attachment No. 5 and Appendix Attachment No. 15). Again, this is not not substantial evidence proving by a preponderance of the evidence that Ms. Sandland received the order. Mere notice of the existence of an order is not sufficient. *Ochoa v. Department of Labor & Industries*, 100 Wash.app 878 (2000), review granted 142 Wash.2d 1001, reversed 143 Wash.2d 422;

The Board agreed with IAJ Jaffe that the evidence is insufficient to establish a presumption of receipt but the Board felt that in the absence of some corroboration that she did not receive the order and in the presence of reasonable inferences to the contrary, Ms. Sandland did not prove by a preponderance that the order was not communicated. (Appendix Attachment No. 15). Not only is there insufficient evidence to support the conclusion that a May 22, 1978 order was communicated to Ms. Sandland, but the Board mis-applied the law and its decision borders on being

arbitrary and capricious since it appears to have been made without regard for the facts and circumstances in Ms. Sandland's Case. *A.W.R. Const., Inc. v. Washington State Dept. of Labor & Industries* 152 Wash.App. 479, 217 P.3d 349 (2009), review denied 168 Wash.2d 1016, 227 P.3d 295.

The Board cites highly circumstantial evidence to support its conclusion. Absent any testimony showing that the May 22, 1978 order addressed to Ms. Sandland is contained in the Department file, that the Department promptly served it on her by mail according to its custom of the time, or that she actually received it, the preponderance of evidence supports a finding that the May 22, 1978 order, if it existed, was not communicated to Ms. Sandland. Voluminous records were kept regarding these claims files, yet no one can produce a copy of the order addressed to Marlene A. Sandland. As a result, there is simply no evidence beyond mere speculation and conjecture to support the Board and Superior Court's finding that the May 22, 1978 order was communicated to Ms. Sandland.

2. The July 29, 1983 order was not communicated to Ms. Sandland or her representative.

IAJ Jaffe, the Board and Superior court all agree that the July 29, 1983 closing order was not communicated to Ms. Sandland or her representative and that as a result the Department erred when it acted on her application to reopen her claim when the closing order had not become

final and binding under RCW 51.52.050. Ms. Sandland agrees that this order was never communicated to her or her representative and that as a result closing had not become final at the time she filed her application to reopen her claim. It must be noted that (1) the July 29, 1983 order is not contained in the Department file, (2) The July 29, 1983 order affirms a November 5, 1982 order which has never been shown to exist, (3) and the July 29, 1983 order was addressed to Attorney Pearson but was sent to an incorrect address. There is no evidentiary basis for concluding the July 29, 1983 order was ever communicated to Ms. Sandland. As such, the Board and Superior Court were correct in concluding that this order was never communicated to her.

D. THE DEPARTMENT LACKED SUBJECT MATTER JURISDICTION TO DETERMINE AGGRAVATION OR ADJUDICATE MS. SANDLAND'S REOPENING APPLICATION(S).

1. A valid first terminal date is condition pre-requisite to adjudicating aggravation or reopening.

The date a closing order becomes final becomes the first terminal date in a claim and is the date upon which the remainder of claim administration operates. *In re Betty Wilson*, Dckt. Nos. 02 21517 & 03 12511 (June 15, 2004). All orders issued by the Department contain language advising a claimant of her rights to protest or appeal that order.

This language is on all of the orders admitted into evidence in this case: a claimant has sixty days (60) to protest or appeal claim closure. However, in order to do so, the closing order **must be communicated** to the claimant so that the claimant can **see** this language **and act** upon it if appropriate. Until the order (with the protest/appeal language printed on the order) is communicated, that claimant is not adequately apprised of her due process rights to protest or appeal the order. *In re Betty Wilson*, Dckt. Nos. 02 21517 & 03 12511 (June 15, 2004).

It is a condition pre-requisite to the reopening of a claim for additional compensation by reason of aggravation of disability that there be a determination as to the disability and the rate of compensation to be awarded thereof; and the further condition since that determination. Until there has been a final determination as to the amount of the award to which a claimant is entitled, there cannot be entertained a claim for aggravation as the standard by which to determine the award for aggravation, diminution or termination of disability is the difference between original award and the amount to which the individual would be entitled because of the subsequent condition. *Reid v. Department of Labor and Industries*, 1 Wn.2d 430, 495-496, 96 P.2d 492 (1939). Denial of reopening of a claim is governed by RCW 51.32.160, which states:

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

Until a final determination of the claimant's condition at the first terminal date (T1) is made, it is premature to adjudicate an application to reopen the claim for aggravation occurring subsequent to T1. *In re Betty Wilson*, Dckt. Nos. 02 21517 & 03 12511 (June 15, 2004). Citing *Reid* the Board held that until that final determination is made with respect to T1, "there cannot be entertained a claim for aggravation". *In re Betty Wilson*, Dckt. Nos. 02 21517 & 03 12511 (June 15, 2004). Accordingly, until such time as there is a final closing, or a valid first terminal date, the reopening statute is inoperable. Because the pre-requisite condition of a valid first terminal date is absent, the Department has no authority to adjudicate reopening, neither does the Board or any other court.

2. A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate.

The Court in *Marley* distinguished erroneous Departmental action that amounted to an error of law from a failure of jurisdiction. In *Marley*, a widow of a deceased injured worker sought to have a Department order denying her benefits declared void because the Department failed to calculate a lump-sum settlement correctly. The Court held that the Department's mis-calculation constitutes an error of law, not a failure of jurisdiction because the Department did have authority to calculate the settlement. *Marley v. Department of Labor and Industries*, 125 Wn.2d 533, 886 P.2d 189, (1994). An un-appealed final order from the Department precludes the parties from rearguing the same claim. Failure to appeal an order, even one containing a clear error of law, converts the order into a final adjudication, precluding any re-argument of the same claim. *Id.* at 538.

The central issue in *Marly* is identified as "what must a claimant show to establish that an order from the Department was void when entered?" *Id.* Looking to the Restatement Second of Judgments the Court held that lack of personal or subject matter jurisdiction voids a tribunal's orders. *Id.* It was determined that a tribunal has subject matter

jurisdiction and a judgment may properly be rendered against a party only if the Court has authority to adjudicate the type of controversy involved in the action. *Id.* at 539. Courts do not lose subject matter jurisdiction merely by interpreting the law erroneously. Subject matter jurisdiction is lost when a tribunal attempts to decide a type of controversy over which it has no authority to adjudicate. *Id.* A lack of subject matter jurisdiction implies that an agency has no authority to decide the claim at all, let alone order a particular kind of relief. *Id.*

In *Marley* where the Department had authority under the Act to determine whether the widow was living in a state of abandonment, the Department's mistake was an error of law, not a failure of jurisdiction because the Department did not attempt to decide a type of controversy over which it had no authority. *Id.* at 543. But the Court in *Marley* is clear that failure of jurisdiction occurs when a tribunal attempts to decide a type of controversy over which it has no authority. *Id.* at 538-544.

3. The Board and Superior Court both erroneously interpreted and applied the law from *Wilson*, *Reid*, and *Marley* in *In Re Perez-Rodriguez* and to Ms. Sandland's claims.

In its decision and order, the Board cites to *Reid*, *Marley* and significant Board decisions *In re Betty Wilson* and *In re Perez-Rodriguez*. The Board noted that in both *Prez-Rodrogiez* and in Ms. Sandland's

claims, the Department adjudicated and denied subsequent applications to reopen without final closing orders as required by *Reid*. The Board applied *Perez-Rodriguez* to Ms. Sandland's claim because the Board felt that the facts in both are "indistinguishable" and in *Perez-Rodriguez* the Board concluded that the Department had subject matter jurisdiction to issue orders denying the reopening application and keeping the claim closed because the fact that these order contravened *Reid* was an error of law under *Marley* that could have been raised through filing a protest or appeal to the denial of reopening. (Appendix Attachment No. 15). Because both Mr. Perez-Rodriguez and Ms. Sandland failed to protest the Department's denial of reopening the Board concluded the orders denying reopening were entitled to res judicata effect and became closing orders by operation of law. (Appendix Attachment No. 15). In so doing, the Board erroneously interpreted and applied the law.

- a. The *Reid* decision does not stand for the proposition that adjudicating reopening prior to valid closure is an error of law:

In *Reid* the respondent appeared to have two appeals, one appeal to the sufficiency of award for permanent partial disability and the other to denial of aggravation of the condition which previously existed. The Department made a motion to dismiss the first appeal to facilitate a

determination in the second. The Court held that the lower court did not abuse its discretion in refusing to dismiss the first appeal because a determination as to the extent of prior disability is a condition prerequisite to the reopening of a claim for additional compensation. *Reid v. Department of Labor and Industries*, 1 Wn.2d 430, 436-438, 96 P.2d 492 (1939).

At no point does the Court state that attempts made by the Department to adjudicate reopening prior to a final determination regarding closing constitutes an error of law. *Id.* Quite to the contrary, the Court states that until final disposition is made with respect to the extent of permanent partial disability there is no basis for a claim for aggravation and there can be no showing of a change in the respondent's condition until that question is finally determined. The Board itself restated the ruling in *Reid, In re Betty Wilson*, Dckt. Nos. 02 21517 & 03 12511 (June 15, 2004) previously referenced above:

The oft-cited holding in *Reid* is that, until a final determination of the claimant's condition at the first terminal date (T1) is made, it is premature to adjudicate an application to reopen the claim for aggravation occurring subsequent to T1. To properly explain the full extent of our decision here, it is important to note the general procedural history in *Reid*. Mr. Reid had appealed two orders of the Department's joint board to superior court. One order closed the claim with permanent partial impairment. The other order of the joint board denied the claimant's request for a rehearing on the claimant's argument that his injury had become aggravated. *Reid*

held that, as a matter of law, no claim of aggravation could be shown where the prerequisite determination of the claimant's condition at T1 has not yet been made. The appeal to the joint board's denial of a rehearing on the aggravation claim was dismissed because the claimant could not possibly state a prima facie case for aggravation without a final T1 order as the comparison point for subsequent worsening.

*Reid* did not approach the analysis as a question of jurisdiction. In fact, the word "jurisdiction" does not appear anywhere in the court's discussion. The court focused solely on the absence of a "condition prerequisite to the reopening of the claim." Until that final determination is made, "there cannot be entertained a claim for aggravation . . .". *Reid*, at 435-436.

Again, no assertion is made that attempts to adjudicate reopening without a valid T1 is error of law. The Court in *Reid* is clear: **until a final determination is made, until a valid T1 is established, the Department cannot entertain a claim for aggravation.**

- b. *Reid* and *Marley* must be read in their entireties and must be read together:

In its decision and order, the Board seems to suggest that the condition pre-requisite to adjudicating aggravation or a reopening application under *Reid* is somehow negated by *Marley* if a claimant fails to protest or appeal an order denying reopening despite the fact that closure has not been communicated and there is no valid first terminal date or T1. (Appendix Attachment No. 15). The Board concludes that adjudicating reopening absent a first terminal date or T1 is merely an error of law and that under *Marley* the injured worker is obligated to appeal the

Department's adjudication of reopening or that denial of reopening will be construed as a valid claim closure and will be afforded res judicata effect as such. (Appendix Attachment No. 15). Neither the Board nor Superior Court cites any authority outside of significant Board decision *In re Perez-Rodriguez* to support this conclusion. This rationale is erroneous. *Reid* and *Marley* must be read together and each must be read in their entireties, not merely for those portions that support the Board or Court's ultimate conclusion.

Under *Reid* and *In re Betty Wilson* the Department has no authority to decide aggravation or an application to reopen a claim when claim closure is not final thus divesting the claim of a valid first terminal date or T1. Under *Marley* a tribunal lacks subject matter jurisdiction when it attempts to decide a controversy over which it has no authority to adjudicate. With no valid closure or first terminal date the Department lacks authority to adjudicate reopening; the claim is not closed so there is absolutely no basis or authority for determining the appropriateness of reopening an already open claim. To do so is not merely an error of law. Under *Marley*, any determination regarding reopening absent a final closing is void for lack of subject matter jurisdiction. The Department, and subsequently the Board and higher courts have no subject matter

jurisdiction to decide whether an injured worker's claim should be reopened if it has never been closed to begin with.

- c. *In re Perez-Rodriguez* is an erroneous application of the law and must be corrected to prevent continued misapplication of the law and irreparable harm to injured workers:

As noted above, in Ms. Sandland's case the Board cited significant Board decision *In re Perez-Rodriguez* to support the Board's conclusion that even though there may be no final closing order as required by *Reid*, the fact that denial of reopening contravened *Reid* is an error of law that should have been raised by the injured workers by filing a protest or appeal. Since the injured workers failed to do so the Department's determination that the claims should not be reopened and should remain closed are entitled to res judicata effect and became closing orders by operation of law. (Appendix Attachment No. 15).

The Department has no authority to adjudicate reopening when there is no final closing order. Any attempts to do so are not mere error of law; under *Marley* adjudicating reopening absent final closure is done without subject matter jurisdiction and this cannot be remedied by operation of law. As such the Board's ruling *In re Perez-Rodriguez* is erroneous, it should not be applied in Ms. Sandland's claims, and it must be corrected to prevent the erroneous application of this ruling from

robbing injured worker's of their due process right to have orders properly communicated, to have their claims properly adjudicated and to be afforded all of the protections under the Act.

E. MS. SANDLAND'S CLAIMS HAVE BECOME WARPED DECKING, REPAIRABLE ONLY BY CORRECTING IMPROPER PROCEDURE.

In order to properly install decking, proper procedure must be followed and in order to properly administer the claims of injured workers, the Department must also follow proper procedures. One of those procedures requires the Department to properly communicate determinative orders to injured workers. In Ms. Sandland's claims, substantial evidence supports the conclusion that both the May 22, 1978 and July 29, 1983 orders were never properly communicated to Ms. Sandland or her representative.

If decking is improperly installed it will likely warp. Warped boards cannot be repaired by simply nailing them down. Similarly, if the Department improperly adjudicates injured workers' claims, those claims are flawed. Neither the Department nor the Board or higher courts can repair those flaws by labeling them legal error, applying res judicata and making them valid "by operation of law".

The only way to repair the warped decking is to pull up all the improperly installed decking and re-install it using proper procedures. The only way to repair the flaws in Ms. Sandland's claims is to remand them to the Department so that it can exercise its original jurisdiction to properly communicate closing orders in both claims or adjudicate the open claims. Only once this remedy is effectuated will the Department or any other tribunal have subject matter jurisdiction to further adjudicate claims, especially with respect to determining aggravation. No aggravation or reopening analysis can be done where claims remain open.

## **VI. CONCLUSION**

In conclusion, Superior Court, the Board and the Department all lacked subject matter jurisdiction to adjudicate aggravation or reopening applications in Ms. Sandland's claims because those claims have never been validly closed and thereby remain open.

The conclusion that the May 22, 1978 order was communicated to Ms. Sandland is based on a mere scintilla of evidence, if even that. Furthermore, the Board and Superior Court erroneously interpreted and applied the law to Ms. Sandland's case. As a result, the Board's decision and order must be **reversed**, the Superior Court's findings of fact and conclusions of law and order must be **reversed** and this matter must be

remanded to the Department to exercise its original jurisdiction to properly administer Ms. Sandland's currently open claims as is appropriate under the law and facts. A remand to either the Board or Superior Court for further findings of fact would serve no useful purpose as this is truly a question of law which must be decided expeditiously, especially taking into consideration Ms. Sandland's age and deteriorating health. Ms. Sandland also respectfully requests that fees and costs be awarded under RCW 51.52.120.

Dated this 9 day of July, 2010.

Respectfully submitted,

VAIL-CROSS & ASSOCIATES

By:   
TARA WAYNE RECK  
WSBA# 37815  
Attorney for Appellant

# APPENDIX

# ATTACHMENT NO. 1

(THIS IS NOT A CLAIM NUMBER) FIRM NUMBER <b>A 382974</b>		* 700,145		CLASS 8485	217	CLAIM NUMBER
NAME OF INJURED EMPLOYEE FIRST MIDDLE LAST <b>MARLENE SANDLAND</b>			NAME OF SELF INSURED EMPLOYER * <b>Safeway Stores, Incorporated</b>			
MAILING ADDRESS <b>7812 - 170th Pl. N.E.</b>			ADDRESS <b>e/o Scott Wetzel Services, Inc.</b>			
CITY STATE ZIP CODE <b>REDMOND WASH. 98052</b>			CITY STATE ZIP CODE <b>Seattle, WA 98188</b>			
SOCIAL SECURITY NUMBER	EMPLOYER'S TELEPHONE NO. 455-6474	EMPLOYEE'S TELEPHONE NO. 885-9835	EMPLOYEE'S JOB TITLE WHEN INJURED ICE CREAM PACKER	SEX F	DATE OF BIRTH 11-29-39	HEIGHT WEIGHT 5'3" 125
EMPLOYEE EMPLOYED IN WHICH DEPARTMENT? CONSTRUCTION OPERATION REPAIR ON LAUNCHING BOAT		ADDRESS OR LOCATION, INCLUDING COUNTY, WHERE ACCIDENT OCCURRED 1483-124th Ave. N.E.				STORE OR UNIT #
DATE LAST WORKED 3-29-78	DATE RETURNED TO WORK 3-29-78	WAS EMPLOYEE ENGAGED IN THE REGULAR COURSE OF HIS EMPLOYMENT WHEN INJURED? YES NO		SHIFT HOURS Day	LOCATION/DEPT. 80-8485	(1) CAUSE 42
ENTER EMPLOYEE'S RATE OF PAY (IND OVERTIME) \$ 8.5812 PER HOUR DAY WEEK MONTH	CHECK APPROPRIATE CIRCLE HOUR DAY WEEK MONTH	AVERAGE WAGE PER DAY IF PREWORK \$	HOW MANY DAYS/HOURS PER WEEK IS EMPLOYEE EMPLOYED? 40	NAME SCHEDULED DAYS OFF SAT. & SUN.		(2) CORP SYS #
DESCRIBE ACCIDENT FULLY, STATING IF EMPLOYEE FELL OR WAS STRUCK, IF MACHINERY WAS INVOLVED, NAME MACHINERY AND DESCRIBE ITS FUNCTION, WAS EMPLOYEE LIFTING, PULLING, PUSHING OR CARRYING? FALLS SHOULD BE DESCRIBED AS INDOORS OR OUTDOORS AND LAST OBJECT STRUCK SHOULD BE NAMED. NAME CHEMICAL INVOLVED, IF APPROPRIATE.					DATE HIRED 6-15-75	
Body Part Injured: EMPLOYEE INHALED AMMONIA DUE TO LEAK NEAR HER WORKING AREA.					respiratory prob-	
					RECEIVED	
					MAR 30 1978	
FULL NAME OF WIFE OR HUSBAND AT TIME OF INJURY		IF DIVORCED, GIVE FINAL DECREE DATE		IF DIVORCED AND YOU HAVE PRIOR CHILDREN SUBMIT A COPY OF THE COURT ORDER SHOWING LEGAL CUSTODIAN OF SUCH CHILDREN. ALSO GIVE PRESENT ADDRESS OF SUCH CUSTODIAN.		
GIVE NAME AND BIRTH DATES OF YOUR CHILDREN UNDER 18 SUPPORTED BY YOU						
NAME	RELATIONSHIP	AGE	NAME	RELATIONSHIP	AGE	
Rosalme	Daughter	14				
I DECLARE THAT THE FOREGOING STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.			SIGNATURE OF EMPLOYEE OR BENEFICIARY <i>Marlene Sandland</i>		DATE 3-29-78	
STATE WHERE ACCIDENT OCCURRED	EMPLOYER'S PREMISES	JOB SITE	OTHER	WAS THIS ACCIDENT CAUSED BY SOMEONE NOT EMPLOYED BY YOU?	YES NO	IF YES, ATTACH EXPLANATION
						3-29-78
ACCEPT		DENY		INDUSTRIAL INJURY		OCCUPATIONAL DISEASE
WE		THIS CLAIM AS AN				
IS MEDICAL CONDITION STATIONARY?	YES NO	IS THERE PERMANENT IMPAIRMENT?	YES NO	UNDETERMINED	IS FINAL DETERMINATION REQUESTED?	YES NO
I DECLARE THAT THE FOREGOING STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.						
EMPLOYER Safeway Stores, Incorporated			SIGNATURE <i>Anneth M. Daniel</i>		DATE 3-29-78	
NAME & ADDRESS OF ATTENDING PHYSICIAN					PAYEE ACCOUNT NO. (FOR DEPT. USE ONLY)	

EMPLOYER'S AND EMPLOYEE'S REPORT

INSTRUCTIONS

- EMPLOYER** - COMPLETE "EMPLOYER'S & EMPLOYEE'S REPORT" SECTION AT BOTTOM OF THIS FORM. DETACH THIS BOTTOM SECTION FROM PAGES 1 AND 2 PLUS THE CARBONS. MAIL THE BOTTOM SECTION OF PAGE 2 TO THE DEPARTMENT OF LABOR & INDUSTRIES, OLYMPIA, WASHINGTON 98504. KEEP THE BOTTOM SECTION OF PAGE 2 FOR YOUR FILES. SEND BALANCE OF FORM INTACT TO THE PHYSICIAN.
- PHYSICIAN** - COMPLETE THE "PHYSICIAN'S REPORT" SECTION. MAIL PAGE 1 TO THE DEPARTMENT OF LABOR & INDUSTRIES, OLYMPIA, WASHINGTON 98504 AND PAGE 2 TO THE SELF INSURED EMPLOYER NAMED ABOVE. KEEP ALL OF PAGE 3 FOR YOUR FILES.
- ATTENTION MEDICAL VENDOR** - SEND ALL BILLINGS FOR SERVICES OR MEDICAL SUPPLIES TO SELF INSURED EMPLOYER NAMED ABOVE.

**SELF INSURER**

REPORT OF ACCIDENT AND CLAIM FOR BENEFITS  
WORKMAN'S COMPENSATION ACT  
STATE OF WASHINGTON

400-2038-9977-8485-123-3093-78

Board of Industrial Insurance Appeals  
In re: SANDLAND  
Docket No. 0411466  
Exhibit No. 8  
 2/11/08 Date  ADM.  REG.

24/11

# ATTACHMENT NO. 2

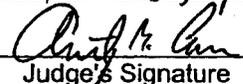
**JURISDICTIONAL HISTORY**

Please review the Jurisdictional History and note any errors or additions. This is a summary of Department actions relevant to this appeal. The summary may not include every action taken by the Department. At the initial conference you will be asked to stipulate to the correctness of these facts for the purposes of establishing the Board's jurisdiction to hear the case and determine the issues to be resolved.

IN RE: MARLENE A. SANDLAND

CLAIM NO: S-257891

DOCKET NO: 04 11466

Jurisdictional Stipulation	
I certify under penalty of perjury under the laws of the State of Washington that the parties have agreed to include this history in the Board record for jurisdictional purposes only.	
<input checked="" type="checkbox"/> As Amended	<i>12/5/108</i>
Dated <u>4/22/04</u> at <u>Olympia</u>	<i>- Sandland</i> <i>- Bauer</i>
	
Judge's Signature	
<b>FOR BOARD USE ONLY</b>	

IFP	DATE DOC/ ACTION	DOCUMENT NAME	ACTION/RESULT
1	3-30-78	AB	DOI 3-29-78 respiratory/exposure – Safeway Stores Inc.
	5-22-78	SIO	Allow & close for medical treatment only.
	1-31-89	AA	<i>- p r+r (SIO - 5/22/78) g</i>
	2-10-89	DO	On 7-31-89, DLI received AA. Record shows condition caused by injury has not worsened since closure. AA denied and claim remains closed. (DET)
	5-19-89	DO	You are not eligible for benefits because we did not receive your application within time limitation set by law (10 years for eye injuries and 7 years for others). Since there is no evidence condition has worsened, benefits are denied and claim remains closed. AA denied.
	12-5-02	AA	
3	12-13-02	DO	DLI received your AA on 12-5-02. You are not eligible for benefits because we did not receive your application within time limitation set by law (10 years for eye injuries and 7 years for others). Since there is no evidence condition has worsened, benefits are denied and claim remains closed. AA denied.

MARLENE A. SANDLAND

04 11466

PAGE 2

3	2-4-03	P & RR	Clmt (pro se) DO 12-13-02
	3-19-03	DO	DO 12-13-02 is held in abeyance.
	12-19-03	DO	DO 12-13-02 is affirmed. (Appealable Only)
	2-17-04	NA (04 11466)	Claimant (pro se) DO 12-19-03
	3-1-04	BD OGA(04 11466)	DO 12-19-03

3/1/04\*dj

# ATTACHMENT NO. 3

STATE OF WASHINGTON  
DEPARTMENT OF LABOR & INDUSTRIES  
OLYMPIA, WASHINGTON 98504



FIRST CLASS MAIL  
U. S. POSTAGE  
PAID 1 00  
PERMIT NO.  
317

EMPLOYEE NAME  
**SANDLAND MARLENE**

CLAIM NO. <b>5257891</b>	EMPLOYER ACCOUNT NO. <b>700,145-00</b>	
DATE INJURED <b>03-29-78</b>	DATE NOTICE SENT <b>05-22-78</b>	CLASS <b>21-2</b>

EMPLOYER  
**SAFEMAY STORES, INC.  
SCOTT WEZEL SERVICES  
320 ANDOVER PK.E., STE. 120  
P.O. BOX C-88759  
SEATTLE, WA 98188**

SEE REVERSE SIDE FOR EXPLANATION



Board of  
Industrial Insurance Appeals

In re: SANDLAND

Docket No. 0411465

Exhibit No. 6

ADM. 05/08 Date  REJ.

TO BE IN WINDOW EXCEPT WHEN ANNOTATING

7-1-89

IN AND BEFORE THE  
SUPERVISOR OF INDUSTRIAL INSURANCE  
DEPARTMENT OF LABOR AND INDUSTRIES  
STATE OF WASHINGTON  
OLYMPIA, WASHINGTON 98504

ORDER ALLOWING AND CLOSING CLAIM FOR MEDICAL TREATMENT ONLY

WHEREAS, the Supervisor of Industrial Insurance has determined that this claim is allowable and that there has been no compensable time loss or permanent disability; the Department does therefore accept responsibility for medical treatment rendered for the condition covered by this claim and the claim is hereby closed



CHARLES F. MURPHY  
SUPERVISOR OF INDUSTRIAL INSURANCE

ANY PROTEST OR REQUEST FOR RECONSIDERATION OF THIS ORDER MUST BE MADE IN WRITING TO THE DEPARTMENT OF LABOR AND INDUSTRIES IN OLYMPIA WITHIN 60 DAYS. A FURTHER APPEALABLE ORDER WILL FOLLOW SUCH A REQUEST. ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL INSURANCE APPEALS, OLYMPIA, WITHIN 60 DAYS FROM THE DATE THIS ORDER IS COMMUNICATED TO THE PARTIES, OR THE SAME SHALL BECOME FINAL

MAR 21 1989

# ATTACHMENT NO. 4

1 Q. So would I be correct that the open files are the ones that  
2 were filmed?

3 A. Yes.

4 Q. Okay, I'm going to move on and talk a little bit more about  
5 the specifics of why you're here.

6 Have you had an opportunity to inspect the microfiche  
7 claim file for Claim No. S-257891, which is an exposure claim  
8 with a date of injury March 29, 1978, for claimant Marlene  
9 Sandland?

10 A. Yes. I had to make sure that's the one I looked at.

11 Q. When you reviewed that file, did you happen to see an order  
12 dated May 22, 1978?

13 A. Yes.

14 MS. RECK: I'm going to pause for just a moment. Can we go  
15 off the record?

16 JUDGE JAFFE: Off the record.

17 [DISCUSSION OFF THE RECORD]

18 JUDGE JAFFE: Back on the record, please.

19 [EXHIBIT NO. 6 MARKED FOR IDENTIFICATION]

20 I've marked as Exhibit No. 6 a two-page document, a  
21 Department self-insured order in Claim No. S-257891, a  
22 mailing data of May 22, 1978, and I'm handing it to Ms.  
23 Torres.

24 Q. (By Ms. Reck) You've just been handed a copy of what's been  
25 marked as Exhibit 6. Do you recognize this?

26 A. Yes.

1 Q. How is it that you recognize it?  
2 A. I used to work with them.  
3 Q. Have you seen it before?  
4 A. This particular one?  
5 Q. Or any image of that.  
6 A. Yes.  
7 Q. Where have you seen it before?  
8 A. It was on the microfiche that I looked at for S-257891.  
9 Q. Okay. And could you describe briefly what that is that you're  
10 looking at it.  
11 A. It's a treatment-only closing order.  
12 Q. Is this a type of order that you would have been familiar with  
13 mailing in your capacity in the mail room at L&I?  
14 A. Yes.  
15 Q. And is this a copy of a document that's kept in the normal  
16 course of business the way that you described in terms of  
17 being mailed out and kept on paper and then filmed through the  
18 Department?  
19 A. Yes.  
20 MS. RECK: At this time the claimant moves to admit Exhibit  
21 No. 6.  
22 JUDGE JAFFE: Mr. Hall?  
23 MR. HALL: No objection.  
24 JUDGE JAFFE: Exhibit No. 6 is admitted.  
25 [EXHIBIT NO. 6 FOR IDENTIFICATION ADMITTED]  
26 Q. (By Ms. Reck) In looking at this particular order, who is it

1 addressed to?

2 A. Safeway Stores at Scott Wetzel Services.

3 Q. In your review of the file, the microfiche file, did you see  
4 any other copies of this order mailed with an address to  
5 anybody other than Safeway, Scott Wetzel?

6 A. No.

7 Q. And this order, just for clarity's sake, this exhibit is two  
8 pages. In its original form before it was put on film, how  
9 would this have looked?

10 A. The front would be the part with the seal on it, and the back  
11 of the postcard would be the language part, the closing order  
12 language part.

13 Q. So then would it have looked something like maybe a postcard?

14 A. Yes, it was a postcard.

15 Q. Okay. Do you happen to recall from reviewing the Department  
16 file whether there was any record that this -- strike that.

17 From your review of the file, do you happen to recall  
18 what the claimant's physician's address was at that point in  
19 time?

20 A. No. I didn't look for that.

21 Q. Do you happen to know whether there was in the file?

22 A. There would have been, because there was an accident report  
23 just before this and it had the claimant information on it.

24 MS. RECK: Okay, I don't have any further questions.

25 JUDGE JAFFE: Mr. Hall?

26 MS. RECK: Actually, can I take that back? I'm sorry.

# ATTACHMENT NO. 5

In re: SAND ND

Docket No. 04 466

Exhibit No. 9

ADM. 2/11/89 Date REJ.

5257891

Dept. of Labor & Industries  
Claims Section HC-242  
General Administration Bldg  
Olympia, WA 98504-4401



### APPLICATION TO REOPEN CLAIM DUE TO WORSENING CONDITION

5-259210  
CLAIM NUMBER:  
~~XXXXXXXXXX~~

**WORKER:** If your medical condition has worsened and your claim for industrial insurance benefits has been closed for more than 60 days, you may use this form to apply for reopening. Do not use it if your present condition was caused by a new injury or accident. Please make sure to write your claim number in the box above.

Name (first, middle, last) <i>Marlene A. Sandlund</i>		Phone No.	Social Security No.
Home Address (Number and Street) <i>16240 NE. 14<sup>th</sup> ST, C-18</i>		Mailing Address (if different from home address) <i>Same</i>	
City <i>Belleme, Wash.</i>	State <i>WA</i>	ZIP Code <i>98008</i>	City <i>Same</i>
Date of original injury <i>3/29/78</i>	Part(s) of your body affected by the injury <i>Brain, lungs, central nervous system, stomach</i>	When was your claim closed? <i>1/78</i>	When, after that date, did your condition worsen? <i>1/89</i>
Full name of the doctor treating you when your claim was closed		Did your condition worsen due to another injury either on or off the job? <i>memory loss - migraine headache, mental confusion, memory lapses - mind racing, insomnia - mental trauma, fatigue, mental &amp; physical</i>	
Are you working? If not, Why? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO <i>Unable to work</i> Quit Retired Laid Off		YES <input type="checkbox"/> NO <input type="checkbox"/>	
Present or last employer		If you are not employed, when did you last work? <i>6/1/78</i>	
Signature <i>Marlene A. Sandlund</i>		Today's Date <i>Jan. 24, 89</i>	

**DOCTOR:** Please complete this form and send it to the Department of Labor and Industries on the same day you see the patient. It will enable us to determine if the current medical condition is due to a worsening of a previous work-related injury. We will pay for the office call and diagnostic studies necessary to complete this form. However, payment for other services will depend on approval of the reopening request. Also, we will consider payment of time-loss benefits and medical treatment costs for no more than 60 days prior to our receipt of the form. You may expedite our service to you and your patient by ensuring that all questions in both sections are answered completely. When you have finished, please fold it so the mailer appears on the outside, attach a stamp and mail it.

Please describe your patient's current signs and symptoms  
*Interrupted sleep. Preoccupation - having cognitive defects (w/ concentration + memory) secondary to ammonia inhalation. Chronic pain syndrome from back injury + elbow injury.*

Within the last 60 days, what was the first date you saw the patient for these symptoms?  
*1/25/89* Are these signs and symptoms due to the natural progression of a non-industrial condition or pre-existing disease? circle one YES NO

Are they the result of the patient's previous injury or occupational disease? (Please refer to shaded area in worker's section.) circle one YES NO please explain  
*They have worsened underlying personality pathology - (hysterical traits) + a tendency to somatize anxiety.*

List your objective findings and explain how they substantiate a worsening of the patient's previous condition  
*Labile affect. Somatizations - anger. Mood is moderately depressed.*

Diagnosis *Adjustment reaction to anxiety + depression* check correct box Acute  Chronic

List your specific recommendations for treatment  
*II mixed personality disorder III S/P on job injuries in 1978.*

Recommendations: *continue physio and continue therapy for support*

If the patient is not working, is it due to a worsening of the previous condition? circle one (YES) NO please explain  
*Apparently was previously not as depressed.*

Doctor's name *Andrea Cochran, M.D.*

Billing address *2711 E. Madison*

City *Seattle* State *WA* ZIP code *98112*

Signature *Andrea Cochran MD* Today's Date *1/25/89*

L&I Provider number *927-50*

L&I Use Only RECEIVED #2  
*Jan 31 1989*

L&I CONTROL MAILROOM

5-22-78-1-700145 3/10



ATTACHMENT NO. 6

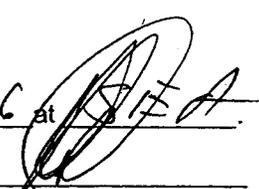
### JURISDICTIONAL HISTORY

Please review the Jurisdictional History and note any errors or additions. This is a summary of Department actions relevant to this appeal. The summary may not include every action taken by the Department. At the initial conference you will be asked to stipulate to the correctness of these facts for the purposes of establishing the Board's jurisdiction to hear the case and determine the issues to be resolved.

IN RE: MARLENE A. SANDLAND

CLAIM NO: S-259216

DOCKET NO: 04 21580

Jurisdictional Stipulation	
I certify that the parties have agreed to include this history in the Board record for jurisdictional purposes only.	
<input checked="" type="checkbox"/> As Amended	
Dated <u>6/01/00</u>	at <u>SEA</u>
 _____ Judge's Signature	
<b>FOR BOARD USE ONLY</b>	

MFP	DATE DOC/ ACTION	DOCUMENT NAME	ACTION/RESULT
Mf1	05/02/78	AB	DOI 4/10/78 - <sup>right</sup> <del>Left</del> Foot - Safeway, Inc. (Rec'd by SIE on 4/11/78)
	05/15/78	DO	This claim for the industrial injury that occurred on 4/10/78 while working for Safeway, Inc. is allowed. The claimant is entitled to receive medical treatment and other benefits as appropriate under the industrial insurance laws. (DET)
Mf2	12/04/78	DO	TLC terminated as paid to 7/4/78, inclusive and claim closed without further award for TLC or PPD. The SIE cannot accept responsibility of payment of medical services or treatment after the date of this order.
	12/26/78	PRR	Claimant (East-Atty) DO 12/4/78
	04/27/79	DO	DO 12/4/78 is held in abeyance.
	05/08/79	DO	DO 12/4/78 has been determined to be correct and is affirmed. (APPEALABLE ONLY)
Mf3	<u>7/9/79</u>	NA (54,845)	Claimant (East-Atty) DO 5/8/79
	07/31/79	BD OGA (54,845)	DO 5/8/79

Mf8	01/04/80	BD OAP (54,845)	Order on Agreement of Parties
Mf4	01/18/80	BD OAP (54,845)	Corrected Order on Agreement of Parties
Mf7	01/29/80	DO	In accordance with the decision of the BIIA dated 1/18/80, the following action is taken: DO's 12/4/78 and 5/8/79 are set aside and held for naught. Claim is to remain open for treatment and the SIE is to pay claimant TLC from 9/8/78 and 5/8/79 and to take such further action as necessary.
Mf3	11/04/82	DO	TLC benefits are terminated as paid to 10/22/82 inclusive and the claim is closed without further award for TLC or PPD. The SIE cannot accept responsibility for payment of medical services or treatment after the date of this order. Claim closed.
	12/30/82	PRR	Claimant (East-Atty) DO 11/4/82
	01/27/83	DO	DO 11/4/82(sic) is held in abeyance.
	7/27/83	DO	<i>Advised to 11/04/82 DO closed the claim</i>
Mf9	01/13/84	AA	
	02/29/84	DO	The Department received an application to reopen this claim. The medical record shows the conditions caused by the injury have not worsened since the final claim closure. The application to reopen your claim is denied and the claim will remain closed.
	03/09/84	PRR	Claimant (Blumberg-Atty) DO 2/29/84
	03/29/84	DO	DO 2/29/84 is held in abeyance.
Mf 10	11/20/84	DO	DO 2/29/84 has been determined to be correct and is affirmed. (APPEALABLE ONLY)
Mf 11	05/18/87	AA	
	06/22/87	DO	The Department received an application to reopen this claim. The medical record shows the conditions caused by the injury have not worsened since the final claim closure. The application to reopen your claim is denied and the claim will remain closed.
	08/10/87	PRR	Claimant (Adams, D.O.) DO 6/22/87
	08/12/87	PRR	Claimant (pro se) DO 6/22/87

	08/21/87	DO	DO 6/22/87 is held in abeyance.
Mf 12	11/12/87	DO	It is ORDERED that your right to further compensation be SUSPENDED effective 11/12/87 for failure to submit to a medical examination. This action is taken in accordance with RCW 51.32.110 which states in part as follows: "...or, if any injured worker shall persist in unsanitary or injurious practices which tend to imperil or retard his recovery, or shall refuse to submit to such medical or surgical treatment as is reasonably essential to his recovery, the Department with notice to the worker may suspend any further action on any claim of such worker..."
	11/23/87	PRR	Claimant (pro se) DO 11/12/87
	12/30/87	DO	DO 11/12/87 has been determined to be correct and is affirmed. (APPEALABLE ONLY)
	01/31/89	AA	
	02/10/89	DO	The Department received an application to reopen this claim. The medical record shows the conditions caused by the injury have not objectively worsened since the final claim closure. The application to reopen your claim is denied and the claim will remain closed.
	3/1/88 - J	NA (88 0804)	Claimant (pro se) DO 12/30/87
	03/17/88	BD OGA (88 0804)	(T) DO 12/30/87
	10/05/88	PD&O (88 0804)	Proposed Decision and Order
	11/07/88	BD O (88 0804)	Order Adopting Proposed Decision and Order
	07/07/03	PRR	Claimant (Sharpe Law Firm) Any adverse orders to claimant
	05/13/04	AA	
Mf 13	07/21/04	DO	The Department received an application to reopen this claim. The Department did not receive your application within the time limits permitted by law. The medical record shows the conditions caused by the injury have not worsened since the final claim closure. The application to reopen your claim is denied.

MARLENE A. SANDLAND  
04 21580  
PAGE 4

09/17/04	NA (04 21580)	Claimant (pro se) DO 7/21/04
10/20/04	BD O (04 21580)	Order extending time to act on appeal an additional 10 days.
10/29/04	BD OGA (04 21580)	DO 7/21/04

10/29/04-clt

## INDUSTRIAL INSURANCE AND CRIME VICTIM ABBREVIATION CODES

(T)	Subject to Proof of Timeliness
a/o/a	at or above
AA	Aggravation Application
AB	Application for Benefits
AP	Attending Physician
BD O	Board Order
BD OGA	Board Order Granting Appeal
BD ODA	Board Order Denying Appeal or Dismissing Appeal
BIIA	Board of Industrial Insurance Appeals
CLMT	Claimant
DET	Determinative
DIF	Department Imaging Fiche
DLI	Department of Labor and Industries
DO	Department Order
DOI	Date of Injury
EAR	Employability Assessment Report
II	Industrial Injury
Ind Ins	Industrial Insurance
INT	Interlocutory
LEP	Loss of Earning Power
MFP	Microfiche Page
NA	Notice of Appeal
OD	Occupational Disease
OAP	Order on Agreement of Parties
P & RR	Protest & Request for Reconsideration
PD & O	Proposed Decision and Order
PFR	Petition for Review
PPD	Permanent Partial Disability
R	Reassume
SIE	Self-Insured Employer
SIO	Self-Insured Employer Order
TLC	Time-loss Compensation

# ATTACHMENT NO. 7

PHY MORRIS NANCY G RD  
801 BROADWAY SUITE 916  
SEATTLE, WA 98122

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
OLYMPIA, WA. 98504

SELF INSURED

EMP SAFEWAY STORES, INC.  
SCOTT WETZEL SERVICES  
P O BOX C89759  
SEATTLE, WA 98188

CLAIM NUMBER : S259216 TYPE : TC  
CHECK DIGIT : 9 ADJ : 59  
MAILING DATE : 11-04-82 UNIT : 5  
INJURY DATE : 04-10-78

CMT MARLENE SANDLAND  
2 JOHNSON AND EAST ATTY'S  
506 SEATTLE TRUST BLDG  
SEATTLE, WA 98104

SERVICE LOCATION: SEATTLE  
EMPLOYER ACCT NO: 700,145-00-6 CLASS: 21-2

ORDER AND NOTICE

\*\*\*\*\*  
\* THE CLAIMANT NAMED HEREIN HAS FILED A CLAIM FOR WORKERS' COMPENSATION \*  
\* BENEFITS WITH THE SELF-INSURED EMPLOYER NAMED HEREIN. THE DEPARTMENT \*  
\* OF LABOR AND INDUSTRIES HAS BEEN REQUESTED TO ISSUE A DETERMINATIVE \*  
\* ORDER. THE DEPARTMENT'S ORDER IS SET FORTH AT THE BOTTOM OF THIS PAGE. \*  
\* ANY PROTEST OR REQUEST FOR RECONSIDERATION ON THIS ORDER MUST BE MADE \*  
\* IN WRITING TO THE DEPARTMENT OF LABOR AND INDUSTRIES IN OLYMPIA WITHIN \*  
\* 60 DAYS. A FURTHER APPEALABLE ORDER WILL FOLLOW SUCH A REQUEST. ANY \*  
\* APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL INSURANCE \*  
\* APPEALS, OLYMPIA, WITHIN 60 DAYS FROM THE DATE THIS ORDER IS COMMUNICATED \*  
\* TO THE PARTIES, OR THE SAME SHALL BECOME FINAL. \*  
\*\*\*\*\*

COMPENSATION IN THIS CLAIM IS TERMINATED AS PAID TO 10-22-82 INCLUSIVE AND THE CLAIM IS CLOSED WITHOUT FURTHER AWARD FOR TIME LOSS OR FOR PERMANENT PARTIAL DISABILITY. THE SELF INSURED EMPLOYER CANNOT ACCEPT RESPONSIBILITY FOR PAYMENT OF MEDICAL SERVICES OR TREATMENT RENDERED SUBSEQUENT TO THE RECEIPT OF THIS ORDER.

THIS CLAIM IS HEREBY CLOSED.

SUPERVISOR OF INDUSTRIAL INSURANCE

BY HELEN A LOUGHEED ADJUDICATOR

Board of Industrial Insurance Appeals  
In re: SANDLAND  
Docket No. 0411466  
Exhibit No. 2  
 ADM. Date 5/5/08  REJ.

FILE COPY

FILED

# ATTACHMENT NO. 8

LAW OFFICES OF  
C. SCOTT EAST, INC. P. S.  
506 SEATTLE TRUST BUILDING  
BELLVIEW WASHINGTON 98104

December 29, 1982

Department of Labor and Industries  
Division of Industrial Insurance  
General Administration Building  
Olympia, WA 98504

Re: Claimant: Marlene Sandland  
Claim No.: S259216

Gentlemen:

By this letter Claimant hereby requests reconsideration of the Order and Notice with a mailing date at Olympia of November 4, 1982, and received by these offices on behalf of the Claimant November 5, 1982. The purpose of this request is to allow time for retrieval of additional medical information which has come to light as the result of the Claimant's consulting with Dr. Engel and I understand that further diagnostic workup has resulted in the finding of a bulging disc as a result of ultra-sound diagnostic techniques. Also, I understand that a CT scan has been conducted. In light of these findings, the Claimant is currently undergoing treatment consisting of therapy three times per week including traction with other modalities to be decided upon in the future. When we have received additional charts and reports with regard to the above we will be happy to provided the Department with the same. In the meantime, we would request that the Claim be reopened for the indicated treatment or alternatively that the Order of November 4, 1982 be held in abeyance pending our providing the additional information referred to above.

If you wish to discuss the above or any aspect of the claim with the undersigned, please feel free to contact us at your convenience.

RECEIVED  
DEC 30 1982  
DEPT. OF LAB.  
MANAGER

Board of  
Industrial Insurance Appeals  
In re: ~~G. Sandland~~ Sandland  
Docket No. 0411461  
Exhibit No. 3  
 ADM. 5/5/08 Date  REJ.

FILMED  
2-19-83 MIO D 0790



# ATTACHMENT NO. 9

IN AND BEFORE THE  
SUPERVISOR OF INDUSTRIAL INSURANCE, DEPARTMENT OF LABOR AND INDUSTRIES

STATE OF WASHINGTON  
**ORDER AND NOTICE (SELF INSURING EMPLOYER)**

THE CLAIMANT NAMED HEREIN HAS FILED A CLAIM FOR WORKMAN'S COMPENSATION BENEFITS WITH THE SELF-INSURED EMPLOYER NAMED HEREIN. THE DEPARTMENT OF LABOR AND INDUSTRIES HAS BEEN REQUESTED TO ISSUE A DETERMINATIVE ORDER. THE DEPARTMENT'S ORDER IS SET FORTH AS THE BOTTOM OF THIS PAGE. ANY PROTEST OR REQUEST FOR RECONSIDERATION OF THIS ORDER MUST BE MADE IN WRITING TO THE DEPARTMENT OF LABOR AND INDUSTRIES IN OLYMPIA WITHIN 60 DAYS. A FURTHER APPEALABLE ORDER WILL FOLLOW SUCH A REQUEST. ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL INSURANCE APPEALS, OLYMPIA, WITHIN 60 DAYS FROM THE DATE THIS ORDER IS COMMUNICATED TO THE PARTIES, OR THE SAME SHALL BECOME FINAL.

BRANCH OFFICE	CLAIM NUMBER	CLASS	PRIM NUMBER	APP-CIT	DATE INJURED	DATE AT OLYMPIA
SIA	5259216	21-2	700, 145-00-6		4-10-78	1-27-83

SELF INSURING  
EMPLOYER

Safeway Stores, Inc.  
Scott Netzel Services, Inc.  
P.O. Box C68759  
Seattle, WA 98188

ATTENDING  
PHYSICIAN

Overlake Memorial Hospital  
1035-115th Ave. NE  
Bellevue, WA 98004

CLAIMANT

Marlene Sandland  
Johnson & East, Attys  
506 Seattle Trust Bldg.  
Seattle, WA 98004

WHEREAS, this claim was closed by Order and Notice dated 11-5-82 and

WHEREAS, there has been a timely request for reconsideration;

The Order and Notice dated 11-5-82 is hereby held in abeyance pending reconsideration and the entering of a further Order.

Board of  
Industrial Insurance Appeals

In re: SANDLAND  
Docket No. 0411465  
Exhibit No. 1  
 ADM. 5/5/08  REJ.  
Date

Claimant - White  
Employer - Green  
Doctor - Cyan  
Branch - Pink  
Office - Goldendred

SUPERVISOR OF INDUSTRIAL INSURANCE

Mrs. Hermal Todd  
By Claims Consultant

# ATTACHMENT NO. 10

IN AND BEFORE THE  
**SUPERVISOR OF INDUSTRIAL INSURANCE, DEPARTMENT OF LABOR AND INDUSTRIES**  
**STATE OF WASHINGTON**

*CF*

**ORDER AND NOTICE (SELF INSURING EMPLOYER)**

THE CLAIMANT NAMED HEREIN HAS FILED A CLAIM FOR WORKMAN'S COMPENSATION BENEFITS WITH THE SELF-INSURED EMPLOYER NAMED HEREIN. THE DEPARTMENT OF LABOR AND INDUSTRIES HAS BEEN REQUESTED TO ISSUE A DETERMINATIVE ORDER. THE DEPARTMENT'S ORDER IS SET FORTH AS THE BOTTOM OF THIS PAGE. ANY PROTEST OR REQUEST FOR RECONSIDERATION OF THIS ORDER MUST BE MADE BY MAILING TO THE DEPARTMENT OF LABOR AND INDUSTRIES, DEPT. OF L & I, WITHIN 60 DAYS. A FURTHER APPEALABLE ORDER WILL BE ISSUED UPON SUCH REQUEST. ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL INSURANCE APPEALS, OLYMPIA, WITHIN 60 DAYS FROM THE DATE THIS ORDER IS COMMUNICATED TO THE PARTIES, OR THE SAME SHALL BECOME FINAL.

BRANCH OFFICE	CLAIM NUMBER	CLASS	FIRM NUMBER	APP-CRT	DATE INJURED	DATE AT OLYMPIA
SEA	S259216	21-2	700, 145-00-6		4-10-78	7-29-83

Safeway Stores, Inc.  
 § Scott Wetzel Services, Inc.  
 P.O. Box C88759  
 Seattle, WA 98188

Overland Memorial Hospital  
 1035 116th Ave. NE  
 Bellevue, WA 98004

MAILED  
 JUL 29 1983  
 DEPT. OF L & I

Marlene Sandland  
 § Gerald D. Pearson, Atty  
 750-112th Ne  
 Suite B-210  
 Bellevue, WA 98004

WHEREAS, this claim was closed by Order and Notice dated 11-5-82 and a request for reconsideration has been made, and

WHEREAS, a review of the evidence discloses no error or injustice in the Order entered;

THEREFORE IT IS ORDERED that self-insurance does hereby adhere to the provisions of the aforesaid Order and Notice and that the claim shall remain closed pursuant thereto.

**RECEIVED**  
 JUL - 3 1983  
**SWS INC.-SEATTLE**

Board of Industrial Insurance Appeals  
 In re: SANDLAND  
 Docket No. 0411466  
 Exhibit No. 5  
 Date 7/18/83  REJ.  
 ADM.

SUPERVISOR OF INDUSTRIAL INSURANCE

By Mrs. Hermi Todd  
 Claims Consultant

*Elem*  
*cc: SS*  
*Cal*

# ATTACHMENT NO. 11

1 locate an order dated July 29, 1983?

2 A. I didn't bring my list of the ones I was looking for, but  
3 there was a fourth order that I was looking for in the file  
4 and I believe it was that date. And, no, I didn't.

5 Q. Okay. Is there anything that would refresh your recollection  
6 as to whether or not that was the order?

7 MR. HALL: Well, she's answered that she didn't. I don't know  
8 that there's been any showing that she needs to have her  
9 recollection refreshed. She just said she didn't. She  
10 answered the question.

11 JUDGE JAFFE: Sustained.

12 Q. (By Ms. Reck) Based on your review of the file, you earlier  
13 testified that Exhibit No. 1 is an abeyance order, and you  
14 previously testified that usually there's a further order that  
15 follows that. Based on your review of the record, did you  
16 find a further order that followed that abeyance order?

17 MR. HALL: It's repetitious.

18 A. And I didn't specifically look for it.

19 JUDGE JAFFE: Excuse me. I'm sorry, what was your answer?

20 THE WITNESS: Oh, I said I didn't specifically look for -- I  
21 mean, disregarding dates, I didn't specifically look for  
22 an order that followed or addressed this abeyance order.

23 JUDGE JAFFE: The objection is overruled.

24 Q. (By Ms. Reck) Now, did you have an opportunity to review the  
25 file for information regarding the claimant's address around  
26 the time that these various orders were issued? And I'm

1 speaking specifically between November of 1982 and August of  
2 1983.

3 A. Yes.

4 Q. Did you find any evidence in the Department file that the  
5 claimant notified the Department of a change of address to an  
6 attorney named Jerald D. Pearson?

7 A. No.

8 Q. Did you find any evidence in the file that Mr. Pearson  
9 provided the Department with any written release or  
10 authorization to inspect the claimant's file?

11 A. No.

12 Q. Did you find any evidence in the file from Mr. Pearson that he  
13 provided the Department with any type of authorization for him  
14 to act as the claimant's representative?

15 A. No.

16 Q. Typically, in your expertise and in your experience as a  
17 Department employee, are all orders that are issued by the  
18 Department included in the microfiche or in the claim file?

19 MR. HALL: Well, I'm going to object to that. Lack of  
20 foundation. Overbroad. For a couple of reasons.

21 Number one, she testified that she was not in self-  
22 insurance at the time, 1983. I believe she indicated  
23 that she came to self -- well, she worked in the State  
24 Fund section actually until 1989, and so unless she has  
25 personal knowledge and can testify that she's done some  
26 sort of a review of claim files to determine whether the

1 A. Yes.

2 Q. And has a Bellevue address?

3 A. Yes.

4 Q. Issued by the same Department employee that issued the January  
5 27, 1983, order, correct?

6 A. Yes, correct.

7 Q. And like Exhibit No. 4, the second copy, it also as a mail  
8 stamp from the Department of Labor and Industries?

9 A. Yes.

10 Q. And I'm assuming, based upon your responses to Ms. Reck, that  
11 this was the order that you couldn't locate, correct?

12 A. This is the date of the order that I couldn't locate.

13 Q. All right. Once again, we know or based upon your statement  
14 that some time in 1994 and 1995 the then paper archives from  
15 the Department were copied to be stored on microfiche?

16 A. I didn't catch the first part, I'm sorry.

17 Q. Well, if I go back to your remarks where I talked about how  
18 documents were handled, the filming for microfiche -- remember  
19 all that?

20 A. (Witness nods head affirmatively) Uh-huh.

21 Q. So if we look back, I think you told me, and correct me if I'm  
22 wrong, that you think that that process for the self-insured  
23 paper files occurred in 1994 and 1995, or so?

24 A. Around that time period, yes.

25 Q. It was a big job?

26 A. It was, yes.

# ATTACHMENT NO. 12

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: MARLENE A. SANDLAND ) DOCKET NOS. 04 11466 & 04 21580  
2 )  
3 CLAIM NOS. S-257891 & S-259216 ) ORDER VACATING PROPOSED DECISION  
4 ) AND ORDER AND REMANDING THE  
5 ) APPEAL FOR FURTHER PROCEEDINGS

6 APPEARANCES:

7 Claimant, Marlene A. Sandland, by  
8 Karen Ljunggren, Lay Representative, and  
9 David B. Vail & Jennifer Cross-Euteneier and Associates, PLLC, per  
Tara Jayne Reck

10 Self-Insured Employer, Safeway Stores, Inc., by  
11 Thomas G. Hall & Associates, per  
12 Thomas G. Hall

13 **Docket No. 04 11466:** The claimant, Marlene A. Sandland, filed an appeal with the  
14 Board of Industrial Insurance Appeals on February 17, 2004, from an order of the Department of  
15 Labor and Industries dated December 19, 2003, in which the Department affirmed its order dated  
16 December 13, 2002. In the December 13, 2002 order, the Department determined that the  
17 claimant was not eligible for disability benefits because the application to reopen was not received  
18 within the time limitation set by law (ten years for eye injuries, seven years for all other injuries) and  
19 denied medical benefits because there was no evidence the condition covered by the claim had  
20 worsened. **APPEAL REMANDED FOR FURTHER PROCEEDINGS.**

21 **Docket No. 04 21580:** The claimant, Marlene A. Sandland, filed an appeal with the  
22 Board of Industrial Insurance Appeals on September 17, 2004, from an order of the Department of  
23 Labor and Industries dated July 21, 2004. In this order, the Department determined that the  
24 claimant was not eligible for disability benefits because the application to reopen was not received  
25 within the time limitation set by law (ten years for eye injuries, seven years for all other injuries) and  
26 denied medical benefits because there was no evidence the condition covered by the claim had  
27 worsened. **APPEAL REMANDED FOR FURTHER PROCEEDINGS.**

28 **PRELIMINARY MATTERS**

29 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
30 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order  
31 issued on February 8, 2007. The industrial appeals judge affirmed the Department orders dated  
32 December 19, 2003 and July 21, 2004.

1 In a September 11, 2006 letter, Ms. Sandland's lay representative noted that  
2 Calhoun Dickinson, the current business member of the Board, previously represented Safeway  
3 Stores, Inc., (Safeway) in the claims that are at issue here. These appeals first came before the  
4 three-member Board on April 24, 2007, when the claimant filed her Petition for Review. On May 8,  
5 2007, Mr. Dickinson issued a Notice of Recusal, disqualifying himself from any participation in  
6 either appeal.

7 Safeway filed a Reply to Petition for Review on May 23, 2007. In response to the claimant's  
8 contention that she was denied an adequate opportunity to present evidence, the self-insured  
9 employer catalogued the numerous efforts undertaken by the industrial appeals judge to explain the  
10 process and to afford Ms. Sandland every opportunity to provide the requisite evidence in support  
11 of her appeals. We agree with that assessment and find no merit in the claimant's argument that  
12 she should be allowed to present additional evidence regarding the question of whether her  
13 industrially related conditions have worsened.

14 The self-insured employer also objected to any consideration of the thirteen documents that  
15 the claimant attached to her Petition for Review, based on hearsay, relevance, materiality,  
16 prejudice, and lack of proper authentication. We have not considered any of the documents as  
17 substantive evidence. However, we have considered the following documents as offers of proof  
18 regarding whether the July 29, 1983 closing order in Claim No. S-259216, Docket No. 04 21580,  
19 was communicated to Ms. Sandland pursuant to RCW 51.52.050: an August 14, 1978 letter from  
20 attorney C. Scott East; a December 16, 1983 letter from attorney Richard P. Blumberg; a June 6,  
21 1983 letter from attorney Jerald Pearson; a July 5, 1983 letter from Mr. Pearson; and a  
22 September 7, 1983 letter from the Washington State Bar Association.

23 Finally, on July 12, 2007, Tara Jayne Reck entered her appearance on the claimant's behalf  
24 and requested that a conference be scheduled to discuss several matters, including the Board's  
25 jurisdiction. Because we are remanding these appeals for further proceedings, we have declined to  
26 schedule a conference.

### 27 **DECISION**

28 In these consolidated appeals, the claimant is seeking reopening, based on the contention  
29 that she has a mental condition related to the industrial injuries of March 29, 1978 (ammonia  
30 exposure) and April 10, 1978 (right foot injury), and that her mental condition has worsened. The  
31 Department determined that these were "over-seven" aggravation cases, that is, that both  
32 applications to reopen were filed after the seven-year time limit established by RCW 51.32.160. In

1 an over-seven case, the worker may obtain medical benefits if the application to reopen is granted;  
2 but, absent an exercise of the director's discretion, the worker may not receive additional disability  
3 benefits. *Walmer v. Department of Labor & Indus.*, 78 Wn. App. 162 (1995). The parties  
4 proceeded to hearing based on the assumption that both claims were in fact over-seven  
5 aggravation cases.

6 However, there is a substantial factual question regarding whether the July 29, 1983 closing  
7 order in Claim No. S-259216 (right foot injury) was served on Ms. Sandland "by mail, which shall be  
8 addressed to such person at his or her last known address as shown by the records of the  
9 department." RCW 51.52.050. If that order was not properly served, then it never became final.  
10 *Shafer v. Department of Labor & Indus.*, 159 P.3d 473 (2007). In that event, it would be premature  
11 to address the aggravation question in Claim No. S-259216. Instead, Ms. Sandland would still be  
12 entitled to challenge the July 29, 1983 order directly. In order to resolve this question, we are  
13 remanding these appeals to the hearing process for further proceedings.

14 In reaching this disposition, we have considered the following: Ms. Sandland was exposed  
15 to ammonia during the course of her employment with Safeway on March 29, 1978 (Claim  
16 No. S-257891, Docket No. 04 11466). The claim was allowed and closed on May 22, 1978, with  
17 medical benefits only. On January 31, 1989, Ms. Sandland filed her first application to reopen,  
18 which was denied on May 19, 1989. She filed her second application to reopen on December 5,  
19 2002, and it was ultimately denied on December 19, 2003. Because the application to reopen was  
20 filed more than seven years after the May 22, 1978 claim closure became final, this is an  
21 over-seven aggravation case. The issue is whether Ms. Sandland's condition, related to the  
22 March 29, 1978 ammonia exposure, worsened between May 19, 1989 and December 19, 2003,  
23 requiring further treatment.

24 The appeal in Claim No. S-259216, Docket No. 04 21580, involves an April 10, 1978 right  
25 foot injury during the course of employment with Safeway. The claim was initially closed on  
26 December 4, 1978, but that order was timely protested and an appeal followed.<sup>1</sup> An Order on  
27 Agreement of Parties was issued on January 18, 1980, in which the Board directed that the claim  
28 should remain open. The claim was later closed on November 4, 1982. On December 30, 1982,  
29 the claimant filed a protest and the Department held that order in abeyance on January 27, 1983.  
30

31  
32  

---

<sup>1</sup> On remand, the Jurisdictional History in Claim No. S-259216, Docket No. 04 21580, should be corrected by adding  
language to the effect that this appeal was filed on July 9, 1979. That information appears in the microfiche of the  
Department file, in the Order on Agreement of Parties that resolved that appeal.

1 However, no subsequent Department order responding to the December 30, 1982 protest was  
2 listed in the Jurisdictional History prepared by the Board staff.

3 At a March 21, 2006 conference, Assistant Chief Industrial Appeals Judge Mark Jaffe  
4 highlighted this problem for the parties, saying that if the Department had never entered a further  
5 closure order, the Board would not have jurisdiction over the appeal in Docket No. 04 21580. He  
6 directed the parties to address this issue with the hearing judge. 3/21/06 Tr. at 2-3.

7 The hearing judge then scheduled a conference for May 1, 2006. On that date,  
8 Karen Ljunggren, Ms. Sandland's lay representative, filed a request for a continuance, arguing that,  
9 "in accordance with *Alonzo*,<sup>2</sup> the Board does not properly have jurisdiction over the second (foot)  
10 injury S-259216 because no final appealable order has been issued by the Department in response  
11 to the 11/4/82 [*sic*] abeyance. And (2) that since it is likely that satisfactory administrative  
12 adjudication of this claim would preclude the need to pursue the first injury (exposure) claim, it  
13 would be prudent to delay all further proceedings before the Board until the Department renders a  
14 decision."

15 The hearing judge rescheduled the conference to June 1, 2006. On May 23, 2006,  
16 Ms. Ljunggren again filed a letter, wondering if the conference was necessary. She repeated what  
17 she had said in her May 1, 2006 filing and added: "I am not familiar with the procedures involved,  
18 whether the Board decides it does not have jurisdiction and remands to DLI or whether the  
19 Department realizes it still has jurisdiction and recalls the case from the Board. But we respectfully  
20 request a quick determination of jurisdiction be made so that the time and effort this conference  
21 would require will not be misplaced."

22 The June 1, 2006 conference was then held and Thomas G. Hall, Safeway's attorney,  
23 handed the industrial appeals judge a copy of a July 29, 1983 Department order. The judge asked  
24 if that order appeared in the Department file and Mr. Hall indicated that he was providing the  
25 employer's copy. We have reviewed the microfiche of the Department file under the authority of *In*  
26 *re Mildred Holzerland*, BIIA Dec., 15,729 (1965) and have determined that it does not contain the  
27 July 29, 1983 order or any other order addressing Ms. Sandland's December 30, 1982 protest, with  
28 the exception of the January 27, 1983 abeyance order.

29 The employer's copy of the July 29, 1983 order was supposed to remain with the file (6/1/06  
30 Tr. at 6), but we have been unable to locate it. From the discussion at the June 1, 2006  
31 conference, we surmise that the Department adhered to the provisions of the November 4, 1982

---

<sup>2</sup> Ms. Ljunggren was apparently referring to *In re Santos Alonzo*, BIIA Dec. 56,833 (1981).

1 order and that the July 29, 1983 order indicated on its face that it was being mailed to  
2 Ms. Sandland, in care of an attorney identified as "Mr. Pearson." 6/1/06 Tr. at 4-5.

3 The industrial appeals judge asked Ms. Sandland if she was represented by Mr. Pearson in  
4 1983. She replied that the name sounded familiar and then said "I don't believe this was my  
5 attorney." 6/1/06 Tr. at 5. She also answered "no" when asked if she recognized the order. 6/1/06  
6 Tr. at 5. Ms. Ljunggren then pointed out that the protest to the November 4, 1982 order had been  
7 filed by an attorney named East and that Dr. Halliday's July 21, 1983 medical record indicated that  
8 Ms. Sandland was going to see an attorney named Blumberg that day. 6/1/06 Tr. at 5-6.  
9 Apparently the claimant later told Dr. Halliday she did not believe she could work with  
10 Mr. Blumberg. 6/1/06 Tr. at 6. Ms. Ljunggren advised the industrial appeals judge that she did not  
11 have a clear record that Mr. Pearson was Ms. Sandland's attorney and that there was confusion  
12 over who might have been her attorney at that time. An off-the-record discussion then ensued,  
13 after which the following exchange occurred:

14 We've had a brief off-the-record discussion regarding my proposed  
15 amendment to the Jurisdictional Facts under Docket No. 04 21580, the right foot  
claim.

16 I am going to, based upon the Department order, a copy of which will  
17 remain in the file, dated July 29, 1983, make a pen and ink addition to the  
18 Jurisdictional Facts that would read as follows:

19 On the date of 7/29/83, Department order was issued that adhered to the  
20 November 4, 1982, Department order that closed the claim.

21 With that amendment, I take it the parties will stipulate that the Board does  
22 have jurisdiction over this timely appeal.

23 Mr. Hall, will you so stipulate?

24 MR. HALL: Yes. I would agree.

25 MS. LJUNGGREN: Yes. I would agree.

26 [Jurisdictional History Stipulation]

27 All right. I will mark it as amended dated this first day of June, in Seattle.  
28 I'm signing off the Board does have jurisdiction.

29 6/1/06 Tr. at 6-7.

30 Thus, the parties "stipulated" that the Board had jurisdiction, but did not resolve the  
31 underlying question of whether the July 29, 1983 order was ever communicated to Ms. Sandland as  
32 required by RCW 51.52.050. The question of whether we have jurisdiction to hear an appeal is a

1 legal matter, to be determined by the Board, not the parties. We are not bound by the parties'  
2 stipulation regarding a legal matter. *Rusan's, Inc. v. State*, 78 Wn. 2d 601, 606-607 (1970).

3 Moreover, Ms. Ljunggren continued to raise concerns regarding the July 29, 1983 order. On  
4 June 7, 2006, she filed a letter saying:

5 we have new information surrounding the 7/29/83 closing order which was  
6 discussed last Thursday. I present [attached] two documents Marlene discovered  
7 over the weekend. The first is a letter from Mr. Pearson, and clarifies that he was  
8 not her attorney at that time; . . . The second letter is from Mr. Blumberg, whose  
9 name figured prominently in last week's conference, also surrounding the 7/29/83  
10 order. It appears Mr. Blumberg was seriously hampered in handling this case by  
several factors, not the least of which was errors on the part of Mssrs. Pearson and  
Schleer, but also by problems with the Department's records.

11 Attached to Ms. Ljunggren's June 7, 2006 filing were a July 5, 1983 letter from attorney  
12 Jerald D. Pearson to attorney Jorgen Schleer and a December 16, 1983 letter from attorney  
13 Richard P. Blumberg to Ms. Sandland. These letters were also attached to the claimant's Petition  
14 for Review. In the June 5, 1983 letter, Mr. Pearson confirmed his decision to refer the claimant  
15 back to Mr. Schleer for representation in her workers' compensation claim. In the December 16,  
16 1983 letter, Mr. Blumberg advised Ms. Sandland that he had received "what was purported to be  
17 copies of your entire claim file" from the Department on August 30, 1983. According to  
18 Mr. Blumberg:

19 The last order contained in those records was dated January 27, 1983, holding a  
20 closing order dated November 4, 1982 in abeyance. In other words, based on that  
21 order, your claim was not closed. What the Department did not send us was an  
22 order dated July 29, 1983, closing your claim. That order, which I enclose, was  
23 sent to Jerald O. Pearson, the attorney you retained before seeing us. The  
24 Department did not send it to us when it sent us the rest of your claim file. I  
25 assume you have not seen this order inasmuch as you were under the impression  
26 that your claim was open. Apparently Mr. Pearson never protested or appealed  
27 that order and never advised us that an order was entered closing your case.

28 As is our practice, we had requested your records from Safeway also. They  
29 never responded. After we received the records from the Department we then  
30 re-requested your records from Safeway's claims management firm, Scott Wetzel,  
31 who sent us a copy of the order.

32 Because your attorney who received the order did not appeal or advise you  
or us that an order was entered that needed to be appealed, your claim is now  
closed. It can, however, be reopened if you can show that your condition has  
worsened since the claim was closed on July 29, 1983. You should consult Dr.  
Halliday about filing a claim for aggravation.



1 an order was mailed, properly addressed to the claimant's last known address as indicated by the  
2 Department file, and with sufficient postage. *In re Edward Morgan*, BIIA Dec., 09,667 (1959); *In re*  
3 *David Herring*, BIIA Dec., 57,831 (1981).

4 As we have already noted, the July 29, 1983 order does not appear in the Department file.  
5 There is also no evidence in the current record that the Department ever mailed the July 29, 1983  
6 order to Ms. Sandland's "last known address as shown by the records of the department."  
7 RCW 51.52.050. With respect to that question, we have reviewed the Department file to ascertain  
8 whether any attorneys ever advised the Department that they were representing Ms. Sandland and  
9 whether Ms. Sandland ever filed any change of address notices, asking the Department to send  
10 correspondence to an attorney. The following information is contained in the Department file.

11 On July 19, 1978, the law firm of Johnson and East notified the Department that it was  
12 representing Ms. Sandland and the claimant also filed a change of address to that firm's address.  
13 Johnson and East was the law firm that filed the December 29, 1982 protest to the November 4,  
14 1982 closing order and the January 27, 1983 abeyance order was sent to Mr. East. Thereafter,  
15 there is no indication that Ms. Sandland ever changed her address to that of Mr. Pearson, the  
16 attorney to whom the July 29, 1983 order was purportedly mailed. However, on August 15, 1983,  
17 Mr. Pearson filed a notice of withdrawal with the Department, dated August 12, 1983. On  
18 August 22, 1983, the Department received an authorization from Ms. Sandland to change her  
19 address to that of the law firm Mrak and Blumberg.

20 Thus, the microfiche of the Department file is ambiguous with respect to the question of  
21 whether Mr. Pearson's address was Ms. Sandland's "last known address as shown by the records  
22 of the department" as of July 29, 1983. RCW 51.52.050. In light of the importance of this and other  
23 questions surrounding the July 29, 1983 order, both parties should be afforded an opportunity to  
24 present evidence regarding whether that order was served on Ms. Sandland in the manner required  
25 by RCW 51.52.050 and whether that order has become final. At a minimum, the order itself should  
26 be made a part of the record.

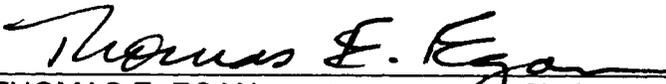
27 The February 8, 2007 Proposed Decision and Order is therefore vacated. These appeals  
28 are remanded to the hearings process pursuant to WAC 263-12-145(4), for further proceedings as  
29 indicated by this order. The parties are advised that this order is not a final Decision and Order of  
30 the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the  
31 industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on  
32 Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as

1 to each contested issue of fact and law, based upon the entire record, and consistent with this  
2 order. Any party aggrieved by the Proposed Decision and Order may petition the Board for review  
3 of the Proposed Decision and Order, pursuant to RCW 51.52.104.

4 It is so **ORDERED**.

5 Dated: July 20, 2007.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

7  
8   
9 THOMAS E. EGAN Chairperson

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12 FRANK E. FENNERTY, JR. Member  
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CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

MARLENE A SANDLAND  
16240 NE 14TH ST. NO. C-18  
BELLEVUE, WA 98008-2835

CL1

CA1

TARA J RECK, ATTY  
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ASSOC  
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SAFEWAY STORES INC  
PO BOX 85001  
BELLEVUE, WA 98015-8501

EA1

THOMAS G HALL, ATTY  
THOMAS G HALL & ASSOCIATES  
PO BOX 33990  
SEATTLE, WA 98133-0990

Dated at Olympia, Washington 7/20/2007  
BOARD OF INDUSTRIAL INSURANCE APPEALS

By:   
DAVID E. THREEDY  
Executive Secretary

In re: MARLENE A SANDLAND  
Docket No. 04 11466 04 21580

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# ATTACHMENT NO. 13

**LAW OFFICES OF  
DAVID B. VAIL & JENNIFER CROSS-EUTENEIER  
AND ASSOCIATES, PLLC**

DAVID B. VAIL  
JENNIFER M. CROSS -EUTENEIER  
COREY ENDRES  
MARY REEVES  
MICHELE DURBIN, SR. PARALEGAL  
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GROUP ID: 338  
LOCATION ID: 341

BETH BRANDT, PARALEGAL  
TONJA HOLCOMB, PARALEGAL  
SARA THOMPSON, PARALEGAL  
TRISH ANDREWS, PARALEGAL  
CHRISTINA MILLETTE, PARALEGAL  
PAIGE BRADY, PARALEGAL  
JENNIFER ADELFFIO, PARALEGAL

July 11, 2007

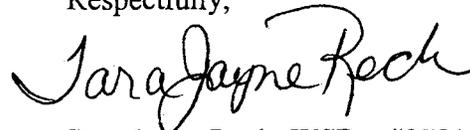
Board of Industrial Insurance Appeals  
Attn: David Threedy  
P.O. Box 42401  
Olympia, WA 98504-2401

To Whom It May Concern --

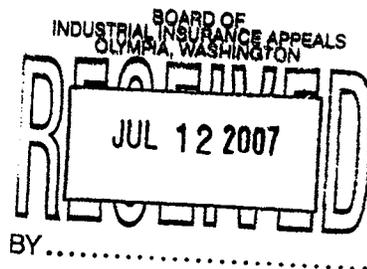
This letter is to inform you that as of July 10, 2007, claimant Marlene A. Sandland has retained the services of the Law Offices of David B. Vail and Jennifer Cross-Euteneier and Associates. Ms. Sandland retained our services because her assistant, Karen Ljunggren is no longer willing *or* able to serve in any capacity as Ms. Sandland's assistant or lay representative.

The purpose of this letter is to inform the Board of Industrial Insurance Appeals that, after reviewing the file provided by Ms. Ljunggren, several unresolved issues including, but not limited to, the Board's jurisdiction over this matter are outstanding and should be addressed. As a result, the claimant respectfully requests that a conference be set immediately to discuss these matters.

Respectfully,



Tara Jayne Reck, WSBA #37815  
Associate Attorney with the Law  
Offices of David B. Vail and  
Jennifer Cross-Euteneier and  
Associates



Tacoma: (253) 383-8770

Seattle: (253) 874-2546

Olympia: (360) 943-8098

Facsimile: (253) 383-8774

Toll Free: 1-877-544-3412

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# ATTACHMENT NO. 14

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: MARLENE A. SANDLAND ) DOCKET NOS. 04 11466 & 04 21580  
2 CLAIM NOS. S-257891 & S-259216 ) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Mark Jaffe  
4

5 APPEARANCES:

6 Claimant, Marlene A. Sandland, by  
7 David B. Vail & Jennifer Cross-Euteneier & Assoc, per  
8 Tara J. Reck

9 Self-Insured Employer, Safeway Stores, Inc., by  
10 Thomas G. Hall & Associates, per  
11 Thomas G. Hall

12 In Docket No. 04 11466, the claimant, Marlene A. Sandland, filed an appeal with the Board  
13 of Industrial Insurance Appeals on February 17, 2004, from an order of the Department of Labor  
14 and Industries dated December 19, 2003. In this order, the Department affirmed a Department  
15 order dated December 13, 2002. That order denied the claimant's application to reopen the claim.  
16 The appeal is **DISMISSED**.

17 In Docket No. 04 21580, the claimant, Marlene A. Sandland, filed an appeal with the Board  
18 of Industrial Insurance Appeals on September 17, 2004, from an order of the Department of Labor  
19 and Industries dated July 21, 2004. In this order, the Department denied the claimant's application  
20 to reopen the claim. The appeal is **DISMISSED**.

21 **PROCEDURAL AND EVIDENTIARY MATTERS**

22 In Docket No. 04 11466, the parties agreed to include the Jurisdictional History in the  
23 Board's record on April 22, 2004. I have amended the jurisdictional history and have added that the  
24 application to reopen the claim, filed on January 31, 1989, was a protest to the May 22, 1978 self-  
25 insured closing order. Based on this finding the Board does not have jurisdiction to hear the appeal  
26 and it is dismissed and the claim remanded to the Department to issue a further appealable order.

27 In Docket No. 04 21580, the parties agreed to include the Jurisdictional History in the  
28 Board's record on June 1, 2006. I have amended the history by adding July 9, 1979 as the date of  
29 the filing of the notice of appeal in Docket No. 54,845 as ordered by the Board in its order  
30 remanding these appeals to the hearing process. I also added March 1, 1988 as the date of the  
31 filing of the notice of appeal in Docket No. 88 0804 based on my review of the Proposed Decision  
32 and Order in that appeal. Based on the evidence presented by the parties I find that the Board

1 does not have jurisdiction to hear this appeal and it is dismissed and the claim remanded to the  
2 Department to communicate the July 29, 1983 order to Ms. Sandland.

3 These appeals were originally filed from Department orders that denied requests to reopen  
4 Ms. Sandland's claims. They were assigned to Industrial Appeals Judge David Crossland. He held  
5 hearings and issued a Proposed Decision and Order on February 8, 2007 affirming both orders.  
6 Ms. Sandland filed a petition for review and raised a jurisdictional issue. She alleged that she never  
7 received the Department order dated July 29, 1983 that affirmed a closing order in Claim  
8 No. S-259216. The Board reviewed the record and issued an order vacating the Proposed  
9 Decision and Order and remanding the appeal for further proceedings, specifically to receive further  
10 evidence about the receipt of the July 29, 1983 order.

11 The appeals were transferred to me. Ms. Sandland raised another jurisdictional issue after  
12 the remand. She alleged that she never received the May 22, 1978 self-insured closing order in  
13 Claim No. S-257891. The self-insured employer asserted that the Board remand was only to  
14 resolve the jurisdictional issue in Claim No. S-259216 and that I did not have jurisdiction to hear the  
15 other issue. The parties briefed the issue and I deferred a final decision but allowed the parties to  
16 present evidence concerning both claims. After a review of the record I find that the question of the  
17 communication of closing orders in both claims is before me and this order encompasses both  
18 claims. I believe the issue of the Board's jurisdiction can be raised at any time. If the Board wanted  
19 to limit the remand it could have deconsolidated the appeals but it chose to remand them together.

20 The deposition of Richard Blumberg, taken on August 1, 2008, is published pursuant to  
21 WAC 263-12-117(2). There were no objections or motions. Exhibit No. 11 is admitted.

22 The deposition of Jerald Pearson, taken on September 3, 2008, is published pursuant to  
23 WAC 263-12-117(2). There were no objections or motions. Exhibit No. 7 is admitted.

24  
25 **ISSUES**

- 26 1. Whether the self-insured closing order issued on May 22, 1978 in Claim  
27 No. S-257891 was communicated to the claimant.  
28 2. Whether the July 29, 1983 order that adhered to a prior closing order in  
29 Claim No. S-259216 was communicated to the claimant.  
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1 **DECISION**

2 Ms. Sandland sustained two industrial injuries within one month of each other during the  
3 course of her employment with Safeway Stores. Each claim was allowed and closed without  
4 awards for permanent partial disability. She has filed multiple applications to reopen each claim  
5 and each has been denied. These appeals are from denials in each claim.

6 **Claim No. S-257891/Docket No. 04 11466**

7 This claim was filed on March 30, 1978 alleging that she sustained an industrial injury on  
8 March 29, 1978 when Ms. Sandland was exposed to ammonia at her work station at a Safeway  
9 store. The claim was allowed and a self-insured order was issued on May 22, 1978 closing the  
10 claim. Exhibit Nos. 6 and 7. The next action on the claim was an application to reopen her claim  
11 which was denied. Another application to reopen was filed on December 5, 2002 that was denied.  
12 Ms. Sandland protested that order on February 4, 2003 and the order was held in abeyance. The  
13 Department affirmed the denial order on December 19, 2003 and Ms. Sandland filed this appeal.

14 Ms. Sandland now alleges that she never received the May 22, 1978 closing order. She  
15 testified that she does not recall ever seeing the self-insured order. Exhibit No. 6 is addressed to  
16 Safeway Stores. Sherry Torres, a Department employee was asked if there were any copies of this  
17 order in the Department microfiche that were addressed to anyone else and she stated there were  
18 none. May 5, 2008 Tr. at 50.

19 RCW 51.52.50 requires that a Department order be directed to the affected person "by mail,  
20 which shall be addressed to such person at his or her last known address as shown by the records  
21 of the Department" and the order must be communicated. *In re Kevin G. Cissell*, Dckt. No. 96 2639  
22 (January 21, 1998).

23 The first step in establishing communication is to serve the worker of the decision and order  
24 by mail to the last known address of that person "as shown by the records of the Department."  
25 RCW 51.2.050. "Communication" of an order has generally been interpreted to mean receipt by  
26 the aggrieved party. *Porter v. Department of Labor & Indus.*, 44 Wn.2d 798 (1954). If the recipient  
27 is competent, receipt of an order, not the reading of it results in "communication" as contemplated  
28 by the statute. *Nafus v. Department of Labor & Indus.*, 142 Wash. 48 (1927).

29 The court in *Farrow v. Department of Labor & Indus.*, 179 Wash. 453 (1934) recognized that  
30 an office that handles a large amount of correspondence presents problems when trying to prove  
31 that something was mailed. The Department obviously falls within the definition of this type of  
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1 "office." *Farrow* held that proof of mailing may be made by "showing (a) an office custom with  
2 respect to mailing; and (b) compliance with the custom in the specific instance." *Farrow* at 455.

3 In this case the employer has the huge problem of trying to show that something was mailed  
4 by the Department in 1978. Ms. Torres has been a Department employee since 1966 but she had  
5 nothing to do with Ms. Sandland's claim. All she can testify to is the office practice at the time, not  
6 that the practice was followed when the order was allegedly mailed. The further problem is that no  
7 one can find the order with Ms. Sandland's address. The only order in the Department's file was  
8 addressed to Safeway, the employer through Scott Wetzel its third party administrator. May 5,  
9 2008 Tr. at 50. The employer is unable to show that the order was mailed so there is no  
10 presumption of communication. Ms. Sandland cannot recall ever seeing the order.

11 Exhibit No. 9 is an application filed by Ms. Sandland to reopen one of these claims. It is  
12 obviously a request to reopen Claim No. S-257891 but someone appears to have attempted to  
13 change the claim number to her other claim. She alleges worsening of her condition caused by the  
14 ammonia exposure. In the section that requests when her claim was last closed someone entered  
15 1978. I have no idea where she received that information. There is nothing in the record that  
16 indicates the information was based on her receipt of the order. It just as easily could have been  
17 provided by her doctor but this is just conjecture.

18 Based on this record I find that the self-insured employer's order closing this claim issued on  
19 May 22, 1978 was never communicated to Ms. Sandland. I also find that the application to reopen  
20 her claim, Exhibit No. 9 can be considered a timely protest of that order. The order contained  
21 language that if a protest was filed a further appealable order would follow. Based on this fact the  
22 claim must be remanded to the Department to issue a further appealable order. *In re Ronald*  
23 *Leibfried*, BIIA Dec., 88 2274 (1990); *In re Santos Alonzo*, BIIA Dec., 56,833 (1981).

24  
25 **Claim No. S-259216/Docket No. 04 21580**

26 This claim presents different problems concerning communication of a Department closing  
27 order. Ms. Sandland filed an application for benefits with Safeway on April 11, 1978 alleging that  
28 she sustained an industrial injury during the course of her employment on April 10, 1978. On this  
29 date she was unloading frozen half gallon containers of ice cream from a pallet onto a table when  
30 the pallet slipped crushing her foot. Her claim was allowed in a Department order issued on  
31 May 15, 1978. The Department attempted to close the claim on December 4, 1978 but Ms.  
32 Sandland, through attorney Scott East, protested the order.

1 The order was affirmed and an appeal was filed with the Board. The Board issued an  
2 agreed order that allowed the claim to remain open for treatment and the payment of time loss  
3 compensation. The claim was closed on November 4, 1982, Exhibit No. 2, and Mr. East filed a  
4 timely protest, Exhibit No. 3, and the order was held in abeyance. An order was issued on July 29,  
5 1983, Exhibit No. 5, that adhered to the closing order. Ms. Sandland then filed four applications to  
6 reopen her claim which were denied. This appeal was filed from the last denial that was issued on  
7 July 21, 2004.

8 This is the appeal that first raised the issue of a closing order that was allegedly not  
9 communicated to Ms. Sandland. The order in question was issued on July 29, 1983. Exhibit No. 5.  
10 The order was addressed to Jerald Pearson, who had filed a notice of representation and change of  
11 address with Scott Wetzel on May 24, 1983. Exhibit No. 13. Mr. Pearson had no independent  
12 recollection of receiving the order. He no longer kept files from 1983 so he was unable to find  
13 Ms. Sandland's file. He testified to his office procedure and that in the usual course of his business  
14 he would have sent the order to Ms. Sandland. He had no independent recollection of mailing the  
15 order to her and no one from his office testified that they mailed it to her. The problem with this  
16 order is that the address is incorrect. His address at the time was 1750-112<sup>th</sup> NE in Bellevue,  
17 Washington. The order was mailed to 750-12<sup>th</sup> NE. There is no way to tell if this order ever made it  
18 to his office.

19 Ms. Sandland was later represented by Richard Blumberg. He sent in his notice of change  
20 of address and authorization to review the file to Scott Wetzel on August 3, 1983. He received a  
21 copy of her file from the Department but it did not contain the July 29, 1983 order in the file. He first  
22 received it from Scott Wetzel in December 1983. Exhibit No. 14. He then sent it to Ms. Sandland  
23 and recommended she file an application to reopen her claim. Exhibit No. 11. She filed the  
24 application on January 13, 1984.

25 There is no indication that the Department ever communicated this order to either  
26 Ms. Sandland or any of her attorneys. There is no testimony of office procedure at that time by the  
27 person who actually mailed the order. For some reason this order was not even in the Department  
28 file after it was issued in 1983. This is only one of the problems with the communication of the  
29 order. The incorrect address, the fact that no one can remember if the order was received or  
30 forwarded to Ms. Sandland and the lack of testimony of anyone who actually issued the order to  
31 confirm that the Department's usual mailing procedure was followed leads me to conclude that  
32 under these facts there was not proper communication.

1 I do not think that *Leibfried* applies in this case because the Department crossed out the  
2 language promising the issuance of a further order if there was a protest so even if the ensuing  
3 application to reopen can be construed as a protest it would not necessitate a remand to the  
4 Department. *In re Donzella Gammon*, BIIA Dec., 70,041 (1985). However, another Board  
5 significant decision does suggest that the claim should be remanded.

6 *In re Daniel Bazan*, BIIA Dec., 92 5953 (1994) is a case where the claimant alleged that he  
7 never received a Department closing order. The only issue litigated by the claimant was  
8 communication of the order. The Industrial Appeals Judge held a hearing to determine if the notice  
9 of appeal from the order was timely. After finding that it was he scheduled a hearing on the  
10 substantive issues. The claimant did not present any evidence and the judge dismissed the appeal.  
11 The Board granted review and found that once it was established that the Department order was  
12 not communicated the claim had to be remanded to the Department to communicate the order in  
13 question or reissue the order.

14 The Board found that RCW 51.52.050 required the Department to serve a copy of the order  
15 on the injured worker. Since the Department "failed" in its statutory duty the order "never achieved  
16 operable power over Mr. Bazan as it never became final." The Board found that it only had  
17 jurisdiction to dismiss the appeal and remand the matter to the Department.

18 In a later case, *In re Carmel D. Smith*, BIIA Dec., 95 1795 & 95 2197 (1996) the Board had a  
19 similar situation. The Industrial Appeals Judge, citing *Bazan*, found that Ms. Smith had not received  
20 an order denying the reopening of her claim. He remanded the claim to the Department to either  
21 reissue the order or issue a new order. The Board held that this was not required if a party who is  
22 aggrieved by the order stipulates to a communication date or to "constructive" communication and  
23 wants to proceed on the merits. The Board did not remand the appeal to the hearing process to  
24 inquire if the parties wanted to proceed because the order had protest language and Ms. Smith's  
25 claim was dismissed and remanded pursuant to *In re Santos Alonzo*, BIIA Dec., 56,833 (1981).

26 In this appeal I sent a letter to the parties on November 4, 2008 citing *In re Steven Brown*,  
27 Dckt. No. 95 1638 (August 2, 1996) and requested that they notify me if they want to stipulate to a  
28 communication date or "constructive" communication in Ms. Sandland's case. Neither attorney  
29 responded to the letter. Based on this I must dismiss this appeal and remand the claim to the  
30 Department to either reissue the order or issue a new order.

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**FINDINGS OF FACT**

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2 1. In **Claim No. S-257891/Docket No. 04 11466**, the claimant, Marlene  
3 Sandland filed an application for benefits on March 30, 1978 alleging  
4 that she sustained an industrial injury on March 29, 1978 during the  
5 course of her employment with Safeway Stores, Inc. The claim was  
6 allowed and closed for medical treatment only by a self-insured order  
dated May 22, 1978. This order was never communicated to  
Ms. Sandland.

7 The claimant filed an application to reopen her claim on January 31,  
8 1989 with the Department. The Department issued an order denying  
the application on February 10, 1989.

9 Ms. Sandland filed an application to reopen her claim on December 5,  
10 2002 with the Department. The Department issued an order denying  
11 the application on December 13, 2002. The claimant filed a protest from  
12 this order on February 4, 2003. The order was held in abeyance and  
13 was affirmed on December 19, 2003. The claimant filed a notice of  
14 appeal from this order with the Board of Industrial Insurance Appeals on  
February 17, 2004. The Board issued an order granting the appeal,  
assigning it Docket No. 04 11466 and agreeing to hear the appeal.

15 2. In **Claim No. S-259216/Docket No. 04 21580**, the claimant Marlene  
16 Sandland filed an application for benefits with the self-insured employer  
17 on April 11, 1978 alleging that she sustained an industrial injury during  
the course of her employment with Safeway, Inc. on April 10, 1978. The  
claim was allowed and benefits were paid.

18 The Department issued an order closing the claim on December 4,  
19 1978. The claimant filed a protest from this order on December 26,  
20 1978 and the order was held in abeyance. The Department issued an  
21 order affirming the order on May 8, 1979. The claimant filed a notice of  
22 appeal from this order with the Board of Industrial Insurance Appeals on  
23 July 9, 1979. The Board granted the appeal on July 31, 1979, assigned  
24 it Docket No. 54,845 and agreed to hear the appeal. The Board issued  
25 a corrected order on agreement of the parties on January 18, 1980 that  
26 set aside and held for naught the orders dated December 4, 1978 and  
May 8, 1979 and ordered the claim to remain open for treatment and  
ordered the self-insured employer to pay time loss compensation and  
take such further action as was necessary.

27 The Department issued an order on November 4, 1982 that closed the  
28 claim. The claimant protested this order on December 30, 1982 and the  
29 Department held the order in abeyance on January 27, 1983. The  
30 Department issued an order on July 29, 1983 that adhered to the  
November 4, 1982 order. This order was never communicated to  
Ms. Sandland or her representative.

1 The claimant filed an application to reopen her claim on January 13,  
2 1984 that the Department denied on February 29, 1984. She protested  
3 this order on March 9, 1984 and the order was held in abeyance on  
4 March 29, 1984. The Department affirmed the order on November 20,  
5 1984.

6 The claimant filed an application to reopen her claim on May 18, 1987  
7 that the Department denied on June 22, 1987. The claimant protested  
8 this order on August 10, 1987 and the order was held in abeyance on  
9 August 21, 1987 and the Department affirmed the order on  
10 December 30, 1987. Ms. Sandland filed a notice of appeal from this  
11 order with the Board on March 1, 1988. The Board issued an order on  
12 March 17, 1998 granting the appeal subject to proof of timeliness,  
13 assigning it Docket No. 88 0804 and agreeing to hear the appeal. The  
14 Board issued a Proposed Decision and Order on October 5, 1988  
15 dismissing the appeal and the order was adopted by the Board on  
16 November 7, 1988.

17 The claimant filed an application to reopen her claim on May 13, 2004  
18 that the Department denied on July 21, 2004. The claimant filed a  
19 notice of appeal with the Board from this order on September 17, 2004.  
20 The Board extended the time to act on the appeal on October 20, 2004  
21 and issued an order granting the appeal on October 29, 2004, assigning  
22 it Docket No. 04 21580 and agreeing to hear the appeal.

- 23 3. In **Claim No. S-257891/Docket No. 04 11466**, the self-insured closing  
24 order dated May 22, 1978 was never received by Ms. Sandland. The  
25 order was not communicated to her until sometime after her filing her  
26 application to reopen her claim which was received by the Department  
27 of Labor and Industries on January 31, 1989.
- 28 4. The Department did not consider the protest to the Department order of  
29 May 22, 1978 and did not issue a subsequent order addressing issues  
30 raised by the protest after reconsideration of the order.
- 31 5. In **Claim No. S-259216/Docket No. 04 21580**, the Department order  
32 dated July 29, 1983 was mailed to an incomplete address for her  
attorney of record, Jerald Pearson. Neither Mr. Pearson nor Ms.  
Sandland, nor her subsequent attorney Richard Blumberg ever received  
the July 29, 1983 from the Department.

### CONCLUSIONS OF LAW

1. In **Claim No. S-257891/Docket No. 04 11466**, the Board of Industrial  
Insurance Appeals does not have jurisdiction over the subject matter of  
this appeal because the Department has not issued a final appealable  
order in this claim.

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2. In **Claim No. S-259215/Docket No. 04 21580**, the Board of Industrial Insurance Appeals has only that jurisdiction over the parties and the subject matter of this appeal, which allows the Board to dismiss the appeal and remand the matter to the Department. The appeal from the Department's failure to communicate the July 29, 1983 order is timely.
  3. In **Claim No. S-257891/Docket No. 0411466**, the January 31, 1989 application to reopen constitutes a timely protest to the self-insured order of May 22, 1978 within the meaning of RCW 51.52.050.
  4. By terms of the self-insured order dated May 22, 1978, the receipt of Ms. Sandland's timely protest obligated the Department to issue a further appealable order under RCW 51.52.050 and RCW 51.52.060. *In re Santos Alonzo*, BIIA Dec., 56,833 (1981)
  5. In **Claim No. S-259216/Docket No. 04 21580**, the Department order dated July 29, 1983 was never communicated to Ms. Sandland pursuant to RCW 51.52.050. The order is not operable against Ms. Sandland and she is not chargeable with the knowledge of the contents of that order and has no standing to appeal from such order as she is not aggrieved by it.
  6. In **Claim No. S-257891/Docket No. 04 11466**, by the terms of the self-insured order dated May 22, 1978, **Docket No. 04 11466** is dismissed. This claim is remanded to the Department of Labor and Industries for further action to complete administrative adjudication of this claim that includes, but is not limited to, addressing Ms. Sandland's protest to the Department order of May 22, 1978.
  7. In **Claim No. S-259216/Docket No. 04 21580**, this appeal is dismissed and the matter remanded to the Department of Labor and Industries with the suggestion to either communicate the Department order dated July 29, 1983 to Ms. Sandland and her representative or to issue a further determinative order in this matter without prejudice to any party to file a further appeal.

23 DEC 04 2008

24 DATED: \_\_\_\_\_

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Mark Jaffe  
Industrial Appeals Judge  
Board of Industrial Insurance Appeals

# ATTACHMENT NO. 15

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: MARLENE A. SANDLAND ) DOCKET NOS. 04 11466 & 04 21580  
2 )  
3 CLAIM NOS. S-257891 & S-259216 ) DECISION AND ORDER

4 APPEARANCES:

5 Claimant, Marlene A. Sandland, by  
6 David B. Vail & Jennifer Cross-Euteneier & Associates, per  
7 Tara J. Reck

8 Self-Insured Employer, Safeway Stores, Inc., by  
9 Thomas G. Hall & Associates, per  
10 Thomas G. Hall

11 **Docket No. 04 11466:** The claimant, Marlene A. Sandland, filed an appeal, with the  
12 Board of Industrial Insurance Appeals on February 17, 2004, from an order of the Department of  
13 Labor and Industries dated December 19, 2003, in which the Department affirmed a December 13,  
14 2002 order. In this order, the Department determined that the claimant was not eligible for disability  
15 benefits because the application to reopen was not received within the time limitation set by law  
16 (10 years for eye injuries, 7 years for all other injuries), and denied medical benefits because there  
17 was no evidence the condition covered by the claim had worsened. The Department order is  
18 **AFFIRMED.**

19 **Docket No. 04 21580:** The claimant, Marlene A. Sandland, filed an appeal, with the  
20 Board of Industrial Insurance Appeals on September 17, 2004, from an order of the Department of  
21 Labor and Industries dated July 21, 2004. In this order, the Department determined that the  
22 claimant was not eligible for disability benefits because the application to reopen was not received  
23 within the time limitation set by law (10 years for eye injuries, 7 years for all other injuries), and  
24 denied medical benefits because there was no evidence the condition covered by the claim had  
25 worsened. The Department order is **AFFIRMED.**

26 ISSUES

27 **Claim No. S-257891/Docket No. 04 11466:**

- 28 1. Has the claimant proved by a preponderance of the evidence that the  
29 May 22, 1978 allowance/closing order was not served on her as  
30 required by RCW 51.52.050? No.
- 31 2. Did the claimant develop any mental condition as a proximate result of  
32 the March 29, 1978 industrial injury between May 19, 1989, and  
December 19, 2003, or did any mental condition proximately caused by

1 the March 29, 1978 industrial injury worsen between those two dates,  
2 entitling her to further medical treatment under the "over seven"  
3 provisions of RCW 51.32.160? No.

4 **Claim No. S-259216/Docket No. 04 21580:**

- 5 1. Has the claimant proved by a preponderance of the evidence that the  
6 July 29, 1983 closing order was not served on her as required by  
7 RCW 51.52.050? Yes.
- 8 2. Did the July 28, 1983 closing order become final? No.
- 9 3. Did the Department have jurisdiction to issue the November 20, 1984  
10 order, in which it denied the application to reopen filed on January 13,  
11 1984? Yes. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533  
12 (1994); *In re Jorge C. Perez-Rodriguez*, Dckt. No. 06 18718  
13 (February 13, 2008).
- 14 4. Was it erroneous as a matter of law for the Department to address the  
15 January 13, 1984 application to reopen in the November 20, 1984 order,  
16 in the absence of a final closing order? Yes. *Reid v. Department of*  
17 *Labor & Indus.*, 1 Wn.2d 430, 437-438 (1939).
- 18 5. Should the November 20, 1984 order be given res judicata effect and  
19 treated as a final closing order by operation of law, because the claimant  
20 failed to file a protest or appeal under RCW 51.52.050 and 51.52.060?  
21 Yes. *Marley*; *Perez-Rodriguez*.
- 22 6. Under *Reid*, was it appropriate for the Department to adjudicate the  
23 subsequent application to reopen filed on May 13, 2004, which is the  
24 subject of the current appeal? Yes.
- 25 7. Did the claimant develop any mental condition as a proximate result of  
26 the April 10, 1978 industrial injury between February 10, 1989, and  
27 July 21, 2004, or did any mental condition proximately caused by the  
28 April 10, 1978 industrial injury worsen between those two dates, entitling  
29 her to further medical treatment under the "over seven" provisions of  
30 RCW 51.32.160? No.

31 **OVERVIEW AND PRELIMINARY MATTERS**

32 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
and decision on Petitions for Review filed by the claimant and the self-insured employer to a  
Proposed Decision and Order issued on December 4, 2008. The industrial appeals judge  
dismissed the appeal in Claim No. S-257891/Docket No. 04 11466, and remanded the matter to the  
Department to complete administrative adjudication of the claim, including, but not limited to,  
addressing Ms. Sandland's protest to the May 22, 1978 Department order. The industrial appeals  
judge also dismissed the appeal in Claim No. S-259216/Docket No. 04 21580, and remanded the  
matter to the Department with the suggestion to either communicate the July 29, 1983 order to  
Ms. Sandland and her representative, or to issue a further determinative order without prejudice to

1 any party filing a further appeal. All contested issues are addressed in this order. The Board has  
2 reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was  
3 committed. The rulings are affirmed.

4 These consolidated appeals have been before us previously. Claim No. S-257891/Docket  
5 No. 04 11466, involves a March 29, 1978 exposure to ammonia. Claim No. S-259216/Docket  
6 No. 04 21580, involves an April 10, 1978 right foot injury. The claim for the ammonia exposure was  
7 allowed and closed by the Department in its May 22, 1978 order. The claim for the right foot injury  
8 was closed by the Department in its July 29, 1983 order. The current appeals are from Department  
9 orders in which it denied subsequent applications to reopen.

10 In the prior February 8, 2007 Proposed Decision and Order, both orders were affirmed.  
11 However, on July 20, 2007, we vacated the first Proposed Decision and Order and remanded for a  
12 determination of whether the July 29, 1983 closing order in Claim No. S-259216 had been properly  
13 served on Ms. Sandland. At the time of the prior hearings and the filing of the first Petition for  
14 Review, the claimant had a lay representative, Karen S. Ljunggren. During the pendency of the first  
15 Petition for Review, an attorney, Tara J. Reck, entered her appearance on Ms. Sandland's behalf.

3 On remand, the claimant raised a new issue. She contended for the first time that she had  
17 not received the May 22, 1978 closing order in Claim No. S-257891. The industrial appeals judge  
18 considered that question jurisdictional, and determined it could be raised at any time. As a result,  
19 he did not limit Ms. Sandland to the issue raised in her prior Petition for Review and discussed in  
20 our July 20, 2007 remand order. He permitted Ms. Sandland to litigate the new question of whether  
21 she had received the May 22, 1978 closing order in Claim No. S-257891. 12/4/08 Proposed  
22 Decision and Order, at 2.

23 The industrial appeals judge determined that neither of the closing orders had been  
24 communicated to Ms. Sandland, dismissed both appeals, and remanded to the Department for  
25 further action. We agree that the Department did not serve Ms. Sandland with a copy of the  
26 July 29, 1983 order in Claim No. S-259216, as required by RCW 51.52.050. However, thereafter,  
27 the claimant filed an application to reopen on January 13, 1984, which the Department denied on  
28 November 20, 1984. The Department had jurisdiction to issue that order. *Marley v. Department of*  
29 *Labor & Indus.*, 125 Wn.2d 533 (1994); *In re Jorge C. Perez-Rodriguez*, Dckt. No. 06 18718  
30 (February 13, 2008). Ms. Sandland failed to protest or appeal the November 20, 1984 order. We  
32 therefore accord that order res judicata effect and treat it as the initial closing order, by operation of  
law. *Perez-Rodriguez; In re Matthew Izatt*, Dckt. No. 07 18284 (December 2, 2008). As a result,

1 under *Reid v. Department of Labor & Indus.*, 1 Wn.2d 430, 437-438 (1939), it was appropriate for  
2 the Department to adjudicate the subsequent applications to reopen filed on May 18, 1987,  
3 January 31, 1989, and May 13, 2004. The denial of the last application is the subject of the current  
4 appeal in Docket No. 04 21580. The issue before us in that appeal is whether the claimant's  
5 condition, proximately caused by the April 10, 1978 industrial injury to her right foot, worsened  
6 between February 10, 1989, and July 21, 2004, entitling her to further medical treatment under the  
7 "over seven" provisions of RCW 51.32.160. We conclude that Ms. Sandland has failed to prove  
8 worsening and affirm the Department's July 21, 2004 denial of her application to reopen.

9 With respect to Claim No. S-257891, the claimant has failed to prove the Department did not  
10 serve her with a copy of the May 22, 1978 order, as required by RCW 51.52.050. That order was  
11 therefore a final closing order and it was appropriate, under *Reid*, for the Department to adjudicate  
12 the subsequent application to reopen filed on December 5, 2002, which is the subject of the current  
13 appeal in Docket No. 04 11466. The issue before us in that appeal is whether the claimant's  
14 condition, proximately caused by the March 29, 1978 ammonia exposure, worsened between  
15 May 19, 1989, and December 19, 2003, entitling Ms. Sandland to further medical treatment under  
16 the "over seven" provisions of RCW 51.32.160. We conclude that she has failed to prove  
17 worsening and affirm the Department's December 19, 2003 denial of her application to reopen.

18 **"Over seven" provisions of RCW 51.32.160:** In the prior February 8, 2007 Proposed  
19 Decision and Order, the industrial appeals judge mistakenly used the last previous Department  
20 orders, that is, the first terminal date orders, for purposes of determining whether each of these  
21 cases is an "over seven" case under RCW 51.32.160. Before the 1988 amendments to  
22 RCW 51.32.160, a claimant had seven years "after the establishment or termination of . . .  
23 compensation" to file an application to reopen. However, the 1988 amendments changed that and  
24 apply retrospectively. *Campos v. Department of Labor & Indus.*, 75 Wn. App. 379 (1994), rev.  
25 denied, 126 Wn.2d 1004 (1995). Under the newer language, Ms. Sandland had seven years from  
26 the date the first claim closure became final to file her application to reopen in each claim. *In re*  
27 *John Simon*, Dckt. No. 05 19649 (January 17, 2007).

28 Here, the July 29, 1983 closing order never became final. However, the claimant did not  
29 protest or appeal the November 20, 1984 denial of the January 13, 1984 application to reopen.  
30 Thus, the November 20, 1984 order became a final closing order by operation of law within 60 days  
31 of its communication. Under RCW 51.32.160(1)(c), first closing orders issued between July 1,  
32 1981, and July 1, 1985, are "deemed issued on July 1, 1985." Therefore, at the very latest, the first

1 closing order in Claim No. S-259216 is deemed issued on July 1, 1985. The application to reopen  
2 was not filed until May 13, 2004, well beyond the seven-year time limit.

3 Likewise, in Claim No. S-257891, the first closing order was issued on May 22, 1978, and  
4 became final within 60 days of its communication. The application to reopen at issue here was not  
5 filed until December 5, 2002, more than seven years after that claim closure became final.

6 **February 10, 1989 order:** The stipulated Jurisdictional Histories in Claim Nos. S-257891  
7 and S-259216 both refer to a February 10, 1989 order. We have reviewed the Department files  
8 under the authority of *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965). The claimant filed an  
9 application to reopen on January 31, 1989, referencing both claim numbers. Exhibit No. 9. On  
10 February 10, 1989, the Department issued an order in Claim No. S-259216, with respect to the  
11 April 10, 1978 industrial injury, in which it provided as follows:

12 On 1/31/89 we received your application to reopen your claim. The evidence shows  
13 that the condition caused by the injury covered under this claim has not objectively  
14 worsened since your last claim closure but does indicate an unrelated medical  
15 condition, for which the self-insured employer is not responsible under this claim.  
THEREFORE, your application to reopen is denied.

16 In Claim No. S-257891, the Department issued an order on May 19, 1989, in which it  
17 referenced the March 29, 1978 industrial injury, and provided as follows:

18 We received your application to reopen on 01/31/89. You are not eligible for  
19 disability benefits because we did not receive your application within the time  
20 limitations set by law (10 years for eye injuries, 7 years for all other injuries). Since  
21 there is no evidence the condition covered by your claim has worsened, medical  
benefits are denied, and the claim will remain closed. THEREFORE, your  
application is denied.

22 Based on our review of these Department orders, it is apparent that the February 10, 1989  
23 order was issued only with respect to Claim No. S-259216, and the first terminal date in  
24 Docket No. 04 21580 is February 10, 1989. Contrary to the stipulated Jurisdictional History in  
25 Claim No. S-257891, no February 10, 1989 order was issued with respect to that claim. Instead,  
26 the Department responded to the January 31, 1989 application to reopen by its May 19, 1989 order.  
27 Therefore, the first terminal date in Docket No. 04 11466 is May 19, 1989.

28 **May 22, 1978 order is not a self-insured employer's closing order:** The Jurisdictional  
29 History in Claim No. S-257891 mischaracterizes the May 22, 1978 order as an "SIO" (self-insured  
30 employer order) and, in the December 4, 2008 Proposed Decision and Order, the industrial appeals  
judge referred to that order as a "a self-insured order." Proposed Decision and Order, at 3, 7, 9.

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1 The May 22, 1978 order is a Department order. Exhibit No. 1. Self-insured employers did not have  
2 the authority to close claims in 1978 under RCW 51.32.055.

3 **Ms. Sandland's social security number:** Pursuant to GR 31(e), we have redacted the  
4 claimant's social security number from Exhibit Nos. 8, 9, and 12, and from the claimant's testimony  
5 at 7/11/08 Tr. 13.

6 **Jurisdictional History in Claim No. S-259216:** Pursuant to ER 201, we take judicial notice  
7 that the sixtieth day following May 8, 1979 fell on Saturday, July 7, 1979, and that July 9, 1979,  
8 when the claimant's Notice of Appeal in Docket No. 54,845 was received, was a Monday. Thus,  
9 there is no question that the appeal was timely pursuant to RCW 51.52.060. *In re Robert Chandler*,  
10 BIIA Dec. No. 69,784 (1986).

11 **Issues raised in Petitions for Review:** The self-insured employer's Petition for Review  
12 was received on January 14, 2009, the claimant's on January 22, 2009. The claimant filed a  
13 Response to Petition for Review on February 18, 2009. According to the self-insured employer, the  
14 claimant has failed to prove that the May 22, 1978 and July 29, 1983 orders were not  
15 communicated to her as required by RCW 51.52.050. The claimant agrees with the determination  
16 that neither order was communicated, but argues that the industrial appeals judge should have  
17 limited himself to dismissing both appeals, rather than directing or suggesting what further action  
18 the Department should take. As explained below, we are affirming both Department orders under  
19 appeal, rather than dismissing either appeal. Therefore, we need not decide the extent to which the  
20 Department may be directed or encouraged to take particular action when an appeal is dismissed.

21 The claimant also raises a number of other issues. She points out that, in the July 29, 1983  
22 order in Claim No. S-259216, the Department adhered to an "11-5-82" order, not the November 4,  
23 1982 order. Exhibit No. 1. The claimant therefore argues that the Department never responded to  
24 her December 30, 1982 protest of the November 4, 1982 order. That is, she claims the July 29,  
25 1983 order cannot be considered a response because it adheres to a November 5, 1982 order. We  
26 disagree.

27 The claimant presented the testimony of Leslie Griswold, a Department employee, who  
28 reviewed the Department file at the claimant's request. Ms. Griswold testified that the Department  
29 file does not contain a November 5, 1982 order. 5/5/08 Tr. at 17-19, 40-44. Thus, the reference to  
30 a nonexistent November 5, 1982 order was a clerical error. The claimant's attorney fails to mention  
31 that the industrial appeals judge corrected that clerical error on June 1, 2006, and amended the  
32 stipulated Jurisdictional History accordingly, without any complaint from the

1 claimant. 6/1/06 Tr. at 4. That correction was entirely appropriate under *Callihan v. Department of*  
2 *Labor & Indus.*, 10 Wn.App. 153 (1973); *In re Geraldine Gallant*, BIIA Dec., 03 16903 (2004). In  
3 light of that amendment, there is no merit to the claimant's contention that the Department never  
4 responded to her December 30, 1982 protest of the November 4, 1982 order. The July 29, 1983  
5 order constitutes that response.

6 The claimant also asserts that in Finding of Fact No. 2 the industrial appeals judge used the  
7 wrong date for the filing of the application for benefits in Claim No. S-259216. We disagree. The  
8 industrial appeals judge correctly determined that the claim was filed with the self-insured employer  
9 on April 11, 1978, based on the stipulated Jurisdictional History.

10 In addition, the claimant challenges Finding of Fact No. 5, which reads as follows:

11 In **Claim No. S-259216/Docket No. 04 21580**, the Department order dated July 29,  
12 1983 was mailed to an incomplete address for her attorney of record,  
13 Jerald Pearson. Neither Mr. Pearson nor Ms. Sandland, nor her subsequent  
attorney Richard Blumberg ever received the July 29, 1983 from the Department.

14 12/4/08 Proposed Decision and Order, at 8.

15 According to the claimant, there is no evidence that the July 29, 1983 order was mailed to attorney  
16 Jerald Pearson. She also contends that the finding should contain a stronger statement, that is,  
17 that neither the claimant nor any representative for her ever received the July 29, 1983 order from  
18 the Department. We disagree.

19 In that finding, the industrial appeals judge correctly refers to the possible recipients who  
20 testified--Ms. Sandland, Mr. Pearson, and Richard Blumberg--rather than making the global  
21 statement the claimant seeks. In addition, there is circumstantial evidence that the order was  
22 mailed on July 29, 1983. It is so stamped and, according to Sherry Torres, a Department  
23 employee, when a document is stamped as mailed by the Department that increases her  
24 confidence that it was in fact mailed. 5/5/08 Tr. at 58. Ms. Torres's testimony is not sufficient to  
25 raise a presumption of receipt by Mr. Pearson under *Farrow v. Department of Labor & Indus.*,  
26 179 Wash. 453 (1934). However, coupled with the testimony of Carol A. Widell that the self-insured  
27 employer's third party administrator (TPA) received the order, there is sufficient circumstantial  
28 evidence to find that the Department mailed the order to all of the addressees, including Jerald  
29 Pearson.

### 30 DECISION

31 **Witnesses with respect to whether the May 22, 1978 and July 29, 1983 orders were**  
32 **served on the claimant:** The claimant presented her own testimony as well as that of

1 Leslie Griswold, a Department employee; Sherry Torres, a Department employee; and C. Scott  
2 East, the attorney who represented her prior to attorney Jerald Pearson. The self-insured employer  
3 presented the testimony of Mr. Pearson, who filed a Notice of Representation with Scott Wetzel, the  
4 employer's TPA, on May 27, 1983 (Exhibit No. 13); Attorney Richard Blumberg, whose notice of  
5 representation was dated August 3, 1983 (Exhibit No. 10); and Carol A. Widell, Safeway's manager  
6 for workers' compensation claims, Seattle Division.

7       **Communication of Department orders:** The threshold question is whether the May 22,  
8 1978 closing order in Claim No. S-257891 (ammonia exposure) and the July 29, 1983 closing order  
9 in Claim No. S-259216 (right foot injury) were served on Ms. Sandland "by mail, which shall be  
10 addressed to such person at his or her last known address as shown by the records of the  
11 department." RCW 51.52.050. If those orders were not properly served, then neither became final.  
12 *Shafer v. Department of Labor & Indus.*, 159 P.3d 473 (2007), rev. granted, 163 Wn.2d 1052  
13 (July 9, 2008). The Board has long required strict compliance with the procedure set forth in  
14 RCW 51.52.050 to establish that an order has been communicated. *In re Larry Lunyou*, BIIA Dec.,  
15 87 0638 (1988); *In re Elmer Doney*, BIIA Dec., 86 2762 (1987); and *In re Mollie McMillon*, BIIA  
16 Dec., 22,173 (1966). A rebuttable presumption of receipt can be established by evidence that an  
17 order was mailed, properly addressed to the party's last known address as indicated by the  
18 Department file, and with sufficient postage. *Farrow v. Department of Labor & Indus.*,  
19 179 Wash. 453 (1934); *In re Edward Morgan*, BIIA Dec. 09,667 (1959); *In re David Herring*, BIIA  
20 Dec. 57,831 (1981).

21       **Claim No. S-257891:**

22       The order at issue in Claim No. S-257891 was dated May 22, 1978, and was a postcard  
23 used for medical only claims, in which the Department both allowed and closed the claim, with no  
24 indemnity benefits. Exhibit No. 6. Ms. Torres testified that there would have been four postcards  
25 created at the same time, one for the employer, one for the medical provider, one for the claimant,  
26 and one for the file. The only one copied onto the Department microfiche, when the hard copy file  
27 was transferred to microfilm some time after December 1994, was the one addressed to the  
28 employer's TPA, Scott Wetzel. 5/5/08 Tr. at 50 (postcard orders), 52-53 (postcard orders), 54-58  
29 (microfilming process).

30       Ms. Sandland testified as follows with respect to the May 22, 1978 order:

31       Q. Okay. Did you ever receive a copy of this order in the mail?

32       A. No. I don't recall ever receiving anything like this.

1 7/11/08 Tr. at 5.

2 That is the extent of the claimant's proof that she did not receive the May 22, 1978 order. That bare  
3 assertion is not persuasive for several reasons.

4 Ms. Sandland testified thirty years after-the-fact, on July 11, 2008. She freely acknowledged  
5 that she has problems with her memory and with processing information. 7/11/08 Tr. at 31-35. In  
6 addition, at the time she testified, her own personal file regarding her claims was at her attorney's  
7 office, and she had last reviewed it a few months prior to her testimony. 7/11/08 Tr. at 10.

8 The fact that the claimant is not a reliable historian is exemplified by several exchanges  
9 during Ms. Sandland's testimony. The employer's attorney questioned the claimant about  
10 Exhibit No. 11, which was submitted to the Board by Ms. Sandland's prior representative,  
11 Ms. Ljunggren, on June 7, 2006. According to Ms. Ljunggren's cover letter, "Marlene discovered  
12 [Exhibit No. 11] over the weekend." Yet even though it was apparently Ms. Sandland who found  
13 Exhibit No. 11 in her own records, she testified on July 11, 2008 that: "I am confused. I am trying  
14 to understand when I allowed her [Ms. Ljunggren] to look over my file." 7/11/08 Tr. at 25.

15 In another exchange, the employer's attorney asked Ms. Sandland to review Exhibit No. 10,  
3 as follows:

17 Q. All right. Have you finished looking at it?

18 A. Yes.

19 Q. It was kind of a long pause, wasn't it?

20 A. It is hard for me to retain information.

21 Q. And your memory is not as good as it used to be either, is it?

22 A. I have gaps.

23 7/11/08 Tr. at 22.

24 Even someone without memory problems would be hard-pressed to recall in 2008 whether she had  
25 received a particular postcard in 1978. When one adds the additional layer of the claimant's  
26 acknowledged difficulties, the bare statement that she does not recall receiving the May 22, 1978  
27 order is not persuasive.

28 Furthermore, there is little to corroborate Ms. Sandland's memory. According to Ms. Widell,  
29 Scott Wetzel received the May 22, 1978 order. 7/18/08 Tr. at 8, 14-16. Because, as Ms. Torres  
30 testified, all of the postcards would have been created and mailed at the same time, the employer's  
receipt of the order undercuts the claimant's memory that she did not receive it.

32 In addition, there is no evidence in this record that Ms. Sandland took any action consistent  
with not having received the May 22, 1978 order. To the contrary, from all that appears in the

1 record she took no further action on this claim until more than 10 years later, when she filed an  
2 application to reopen on January 31, 1989. On that application, above her signature, "78" is given  
3 as the answer to the question "When was your claim closed?" Exhibit No. 9.

4 We agree with the industrial appeals judge's assessment that the evidence was insufficient  
5 to establish a presumption that Ms. Sandland received the order in the due course of the mails  
6 under *Farrow*. However, that does not mean the trier-of-fact must accept the claimant's testimony  
7 as true, or that the trier-of-fact cannot be persuaded by reasonable inferences from other evidence.  
8 The employer makes a good point in its Petition for Review regarding the perils of relying on the  
9 testimony of an interested party, testifying many years after-the-fact that she did not receive an  
10 order. In the absence of some corroboration and in the presence of reasonable inferences to the  
11 contrary, we do not find Ms. Sandland's bare assertion persuasive. She has not proved by a  
12 preponderance of the evidence that she did not receive the May 22, 1978 order.

13 We turn, then, to the question of whether the claimant's condition, proximately caused by the  
14 March 29, 1978 industrial injury, worsened between May 19, 1989, and December 19, 2003,  
15 entitling her to further medical treatment under the "over seven" provisions of RCW 51.32.160. On  
16 that question, we adopt the analysis contained in the February 8, 2007 Proposed Decision and  
17 Order as our own and affirm the December 19, 2003 order, in which the Department denied the  
18 most recent application to reopen in Claim No. S-257891.

19 **Claim No. S-259216:**

20 The evidence regarding the Department's failure to communicate the July 29, 1983 order in  
21 Claim No. S-259216 is far more persuasive than the evidence regarding the May 22, 1978 order in  
22 Claim No. S-257891. The relevant time line in Claim No. S-259216 is as follows:

23 **November 4, 1982:** Department closing order (Exhibit No. 2).

24 **December 30, 1982:** Claimant protests November 4, 1982 order (C. Scott East,  
25 Esq.) (Exhibit No. 3).

26 **January 27, 1983:** Department holds "11-5-82" order in abeyance (Exhibit Nos. 1  
27 & 4).

28 **July 29, 1983:** Department adheres to "11-5-82" order (Exhibit No. 5).

29 The July 29, 1983 order is not contained in the Department file. 5/5/08 Tr. at 34. According  
30 to Ms. Widell, Scott Wetzel received a copy. The address for the claimant appearing on the face of  
31 the order is in care of Jerald Pearson. Ms. Griswold testified that there was nothing in the  
32 Department file indicating that Mr. Pearson represented the claimant during the period of

1 November 1982 to August 1983. 5/5/08 Tr. at 20-21. The employer's file did contain a change of  
2 address to Mr. Pearson, dated May 23, 1983. Exhibit No. 13.

3 His address at the time was 1750-112th NE in Bellevue, Washington. The address on the  
4 order was 750-112th NE, without the leading 1. Mr. Pearson has no independent recollection of  
5 whether he received the order. He did send a letter to the claimant on July 5, 1983, saying he  
6 would not represent her. Exhibit No. 7. On August 3, 1983, Ms. Sandland submitted a change of  
7 address, to the law firm of Mrak and Blumberg. Exhibit No. 10. In his testimony, Mr. Blumberg  
8 confirmed that the Department had not sent him a copy of the July 29, 1983 order when he  
9 requested a copy of the file. He did not receive the July 29, 1983 order until it was sent to him by  
10 Scott Wetzel on December 12, 1983. Exhibit Nos. 11 & 14. He sent a copy of the order to  
11 Ms. Sandland on December 16, 1983, and advised her to file an application to reopen. She did so  
12 on January 13, 1984. Based on this evidence, we agree with the industrial appeals judge's  
13 assessment that the Department failed to serve Ms. Sandland with the July 29, 1983 order at her  
14 last known address as shown by the records of the Department as required by RCW 51.52.050.

15 **What consequences should flow from the fact that neither the claimant nor her**  
16 **representative received the July 29, 1983 order from the Department?** We turn, then, to the  
17 question of what consequences should flow from the fact that neither Ms. Sandland nor her  
18 representative received the July 29, 1983 order from the Department. In our July 20, 2007 remand  
19 order, we stated that if the July 29, 1983 order was not properly served on the claimant, then it  
20 never became final and "it would be premature to address the aggravation question in Claim  
21 No. S-259216. Instead, Ms. Sandland would still be entitled to challenge the July 29, 1983 order  
22 directly." Order Vacating Proposed Decision And Order And Remanding The Appeal For Further  
23 Proceedings, at 5. That legal analysis was consistent with past practice prior to the Supreme  
24 Court's opinion in *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994). See, for  
25 example, *In re Danny Hunter*, Dckt. No. 89 1522 (August 19, 1991). However, after these appeals  
26 were remanded for further hearings, we issued the *Perez-Rodriguez* Decision and Order on  
27 February 13, 2008, analyzing the effect of *Marley* in a case with facts similar to those in Claim  
28 No. S-259216/Docket No. 04 21580.

29 In *Perez-Rodriguez*, the claimant's doctor protested an April 1, 1996 closing order and the  
30 Department never issued a responsive order. We therefore concluded that the April 1, 1996 order  
31 never became final. However, the claimant filed applications to reopen on February 3, 1997, and  
32 March 12, 1997, which the Department denied on April 30, 1997. In that order, the Department

1 also stated that the claim remained closed. The claimant protested the April 30, 1997 order on  
2 June 26, 1997, and on January 12, 1998, the Department affirmed that order. No further protest or  
3 appeal was filed and the January 12, 1998 order became final. On April 26, 2006, Mr. Perez-  
4 Rodriguez filed a second application to reopen. On July 13, 2006, the Department denied  
5 reopening and stated that the claim remained closed. The claimant protested on August 4, 2006,  
6 the Department affirmed on August 21, 2006, and the claimant appealed.

7 We described the issues raised in *Perez-Rodriguez* as follows:

8 (1) whether the claim was ever closed in 2006; (2) whether the Department had  
9 jurisdiction to issue the April 30, 1997 and January 12, 1998 orders, purportedly  
10 denying the claimant's application to reopen the claim and keeping the claim  
11 closed; and (3) what effect, if any, does the failure of the claimant to protest or  
12 appeal the January 12, 1998 order have on these proceedings, which involve the  
13 adjudication of a later (April 2006) application to reopen the claim?

14 *Perez-Rodriguez*, at 1-2.

15 We held:

16 (1) that the claim had not been closed when Mr. Perez-Rodriguez filed an  
17 application to reopen it in February 1997; (2) that the Department's adjudication of  
18 that application to reopen the claim, which culminated in the issuance of its  
19 April 30, 1997 and January 12, 1998 orders, was merely an error of law and not  
20 outside the Department's subject matter jurisdiction; (3) that the January 12, 1998  
21 order became final and binding on the parties; and (4) no facts or circumstances  
22 have been presented that would prevent the application of the doctrine of res  
23 judicata from applying to this appeal.

24 *Perez-Rodriguez*, at 3.

25 We proceeded to address the question of whether the January 23, 1992 industrial injury had  
26 worsened between January 12, 1998, and August 21, 2006, and concluded that it had not.

27 The facts in Claim No. S-259216/Docket No. 04 21580 are indistinguishable from the facts in  
28 *Perez-Rodriguez*. Just like the April 1, 1996 closing order in *Perez-Rodriguez*, the July 29, 1983  
29 closing order in Claim No. S-259216 never became final. Likewise, in both cases, the Department  
30 denied a subsequent application to reopen, even though there was no final closing order, as  
31 required by *Reid v. Department of Labor & Indus.*, 1 Wn.2d 430, 437-438 (1939). Nonetheless, in  
32 *Perez-Rodriguez*, we concluded that the Department had subject matter jurisdiction to issue its  
April 30, 1997 and January 12, 1998 orders, denying the claimant's application to reopen the claim  
and keeping the claim closed. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).  
The fact that those orders contravened *Reid* was an error of law that could have been raised by  
Mr. Perez-Rodriguez through the filing of a protest or appeal. He failed to challenge the

1 Department's determination that his claim should not be reopened and should remain closed. As a  
2 result, the January 12, 1998 order was entitled to res judicata effect and became a closing order by  
3 operation of law.

4 The same analysis applies to the sequence of events in Claim No. S-259216. Even though  
5 the July 29, 1983 closing order was not final, Ms. Sandland filed an application to reopen on  
6 January 13, 1984. The Department denied that application on February 29, 1984, and declared  
7 that the claim remained closed. Ms. Sandland protested that order on March 9, 1984, and the  
8 Department affirmed on November 20, 1984. The claimant did not protest or appeal the  
9 November 20, 1984 order.

10 Under *Reid*, the Department committed an error of law in addressing the January 13, 1984  
11 application to reopen in the absence of a final closing order. At the same time, under *Marley*, the  
12 Department had jurisdiction to issue the series of orders denying that application. If Ms. Sandland  
13 disagreed with the November 20, 1984 order, she should have filed an appeal and raised the *Reid*  
14 issue at that time. She failed to do so. Thus, as with the January 12, 1998 order in *Perez-*  
15 *Rodriguez*, the November 20, 1984 order became a closing order by operation of law and is entitled  
16 to res judicata effect. Stated another way, we cannot give full force and effect to the final  
17 November 20, 1984 order as required by *Marley* and, at the same time, permit the claimant to  
18 challenge the initial July 29, 1983 closing order.

19 We turn, then, to the question of whether Ms. Sandland has shown that her condition,  
20 proximately caused by the April 10, 1978 industrial injury, worsened between February 10, 1989,  
21 and July 21, 2004, entitling her to further medical treatment under the "over seven" provisions of  
22 RCW 51.32.160. We adopt the analysis contained in the February 8, 2007 Proposed Decision and  
23 Order, and conclude that she has not. The July 21, 2004 Department order must therefore be  
24 affirmed.

25 **Limitations of *Perez-Rodriguez* analysis:** We emphasize that our analysis in *Perez-*  
26 *Rodriguez* and in Claim No. S-259216/Docket No. 04 21580 applies only to cases with similar fact  
27 patterns. It is not our intent to overrule decisions such as *In re Stephen Brown*, Dckt. No. 95 1638  
28 (August 2, 1996), in which the worker raised the issue with respect to the finality of a closing order  
29 at the very next opportunity, when the Department denied the first application to reopen filed after  
30 the closing order was issued. Indeed, the Court approved that approach in *Shafer v. Department of*  
*Labor & Indus.*, 159 P.3d 473 (2007), rev. granted, 163 Wn.2d 1052 (July 9, 2008).

1 The facts in Claim No. S-259216/Docket No. 04 21580 are significantly different. Here, there  
2 were many intervening steps. Ms. Sandland filed multiple applications to reopen and multiple  
3 subsequent orders became final. It was not until she appealed the denial of the fourth application  
4 to reopen, filed on May 13, 2004, that she raised the issue of whether the initial July 29, 1983  
5 closing order had become final. Absent some equitable basis, which has not been shown here, she  
6 has challenged the finality of the July 29, 1983 order too late under *Perez-Rodriguez* and *Marley*.

#### 7 FINDINGS OF FACT

- 8 1. **Claim No. S-257891:** The claimant, Marlene A. Sandland, filed an  
9 Application for Benefits on March 30, 1978, in which she alleged that  
10 she sustained an industrial injury (respiratory exposure) on March 29,  
11 1978, during the course of her employment with Safeway Stores, Inc.  
12 The Department allowed and closed the claim with medical treatment on  
13 May 22, 1978.
- 14 2. **Claim No. S-257891:** The May 22, 1978 closing order was served on  
15 Ms. Sandland, and she filed no protest or appeal.
- 16 3. **Claim No. S-257891:** Ms. Sandland filed an application to reopen her  
17 claim on January 31, 1989. The Department denied the application on  
18 May 19, 1989, and declared that the claim remained closed.
- 19 4. **Claim No. S-257891:** Ms. Sandland filed an application to reopen her  
20 claim on December 5, 2002. On December 13, 2002, the Department  
21 determined that the claimant was not eligible for disability benefits  
22 because the application to reopen was not received within the time  
23 limitation set by law (10 years for eye injuries, 7 years for all other  
24 injuries) and denied medical benefits because there was no evidence  
25 the condition covered by the claim had worsened. The claimant  
26 protested the December 13, 2002 order on February 4, 2003, and on  
27 December 19, 2003, the Department affirmed the December 13, 2002  
28 order. The claimant filed an appeal from the December 19, 2003 order  
29 with the Board of Industrial Insurance Appeals on February 17, 2004.  
30 On March 1, 2004, the Board granted the appeal under Docket  
31 No. 04 11466, and agreed to hear the appeal.
- 32 5. **Claim No. S-259216:** Marlene A. Sandland filed an Application for  
Benefits with the self-insured employer on April 11, 1978, in which she  
alleged that on April 10, 1978, she sustained an industrial injury to her  
right foot during the course of her employment with Safeway Stores, Inc.  
On May 15, 1978, the Department allowed the claim. On December 4,  
1978, the Department closed the claim with time-loss compensation  
benefits as paid to July 4, 1978, and without an award for permanent  
partial disability.
6. **Claim No. S-259216:** On December 26, 1978, the claimant protested  
the December 4, 1978 closing order. The Department affirmed that  
order on May 8, 1979. The claimant appealed to the Board of Industrial

1 Insurance Appeals on Monday, July 9, 1979, and the Board granted the  
2 appeal on July 31, 1979, under Docket No. 54,845. On January 18,  
3 1980, the Board issued a corrected Order on Agreement of the Parties,  
4 in which it set aside and held for naught the Department orders dated  
5 December 4, 1978 and May 8, 1979, and directed that the claim remain  
6 open.

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7. **Claim No. S-259216:** On November 4, 1982, the Department closed the claim with time-loss compensation benefits as paid to October 22, 1982, and no award for permanent partial disability.
  8. **Claim No. S-259216:** On December 30, 1982, the claimant protested the November 4, 1982 order. On July 29, 1983, the Department issued an order in which it adhered to the provisions of the November 4, 1982 order, and declared that the claim would remain closed.
  9. **Claim No. S-259216:** The July 29, 1983 Department order was mailed to an incomplete address for the claimant's attorney of record, Jerald Pearson. Neither Mr. Pearson nor Ms. Sandland, nor her subsequent attorney, Richard Blumberg, received the July 29, 1983 order from the Department.
  10. **Claim No. S-259216:** The claimant filed an application to reopen her claim on January 13, 1984. On February 29, 1984, the Department denied the application and declared that the claim remained closed. Ms. Sandland protested this order on March 9, 1984, and the Department affirmed the order on November 20, 1984. The claimant did not protest or appeal the November 20, 1984 order.
  11. **Claim No. S-259216:** The claimant filed an application to reopen her claim on January 31, 1989. On February 10, 1989, the Department denied the application and declared that the claim remained closed.
  12. **Claim No. S-259216:** On May 13, 2004, the claimant filed an application to reopen her claim. On July 21, 2004, the Department determined that the claimant was not eligible for disability benefits because the application to reopen was not received within the time limitation set by law (10 years for eye injuries, 7 years for all other injuries) and denied medical benefits because there was no evidence the condition covered by the claim had worsened. The claimant appealed the July 21, 2004 order to the Board of Industrial Insurance Appeals on September 17, 2004. On October 20, 2004, the Board extended the time to act on the appeal by ten days. On October 29, 2004, the Board granted the appeal under Docket No. 04 21580, and agreed to hear the appeal.
  13. **Claim No. S-257891:** On March 29, 1978, Ms. Sandland was exposed to an ammonia leak during the course of her employment with Safeway Stores, Inc. As a proximate result of that exposure, she suffered a respiratory condition that required medical treatment.
  14. **Claim No. S-259216:** On April 10, 1978, Ms. Sandland sustained an industrial injury to her right foot during the course of her employment

1 with Safeway Stores, Inc., when a pallet slipped onto her right foot  
2 causing a crush injury that required medical treatment.

- 3 15. Ms. Sandland has a mental health condition that is best described as a  
4 longstanding personality disorder that was neither proximately caused  
5 by nor aggravated by the March 29, 1978 exposure to ammonia or the  
6 April 10, 1978 industrial injury to her right foot.
- 7 16. Ms. Sandland does not have a mental health condition of post-traumatic  
8 stress disorder, cognitive disorder not otherwise specified, or adjustment  
9 disorder with features of anxiety and depression proximately caused by  
10 or aggravated by the March 29, 1978 exposure to ammonia or the  
11 April 10, 1978 industrial injury to her right foot.
- 12 17. **Claim No. S-257891:** Between May 19, 1989, and December 19, 2003,  
13 no condition, proximately caused by the March 29, 1978 industrial injury,  
14 worsened.
- 15 18. **Claim No. S-259216:** Between February 10, 1989, and July 21, 2004,  
16 no condition, proximately caused by the April 10, 1978 industrial injury,  
17 worsened.

#### 18 CONCLUSIONS OF LAW

- 19 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
20 parties to and the subject matter of these consolidated appeals.
- 21 2. **Claim No. S-257891:** The May 22, 1978 closing order was properly  
22 served on the claimant by the Department and became final and binding  
23 pursuant to RCW 51.52.050.
- 24 3. **Claim No. S-259216:** The July 29, 1983 Department order was not  
25 properly served on the claimant by the Department and did not become  
26 final and binding pursuant to RCW 51.52.050.
- 27 4. **Claim No. S-257891:** Ms. Sandland's application to reopen filed on  
28 December 5, 2002, was not timely filed within the provisions of  
29 RCW 51.32.160, as it was filed more than seven years after the first  
30 closing order dated May 22, 1978, became final. In the absence of a  
31 discretionary determination by the director, the claimant would only be  
32 eligible to receive medical benefits and not disability benefits if the claim  
were reopened.
5. **Claim No. S-259216:** Ms. Sandland's application to reopen filed on  
May 13, 2004, was not timely filed within the provisions of  
RCW 51.32.160, as it was filed more than seven years after the first  
closing order, deemed issued on July 1, 1985 under  
RCW 51.32.160(1)(c), became final. In the absence of a discretionary  
determination by the director, the claimant would only be eligible to  
receive medical benefits if the claim were reopened, and not disability  
benefits.



# ATTACHMENT NO. 16

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STATE OF WASHINGTON  
KING COUNTY SUPERIOR COURT

MARLENE SANDLAND,  
  
Plaintiff,  
  
v.  
  
SAFeway STORES, INC. AND  
DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,  
  
Defendants.

NO. 09-2-17198-0 SEA  
~~DEPARTMENT'S PROPOSED~~  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

This matter came on regularly before the Honorable Laura Gene Middaugh, in open court on January 22, 2010. The Plaintiff, Marlene Sandland, appeared by her counsel, Tara Jayne Reck of David B. Vail, Jennifer M. Cross-Euteneier and Associates; Defendant Safeway Stores, Inc. appeared by its counsel Thomas G. Hall. The Department of Labor and Industries (Department), appeared by its counsel, Robert M. McKenna, Attorney General, per Beverly Norwood Goetz, Senior Counsel. The Court reviewed the records and files herein, including the Certified Appeal Board Record, and briefs and memorandum of authorities submitted by counsel, and heard argument of Counsel. Therefore, being fully informed, the Court makes the following:

I. FINDINGS OF FACT

1.1 Claim No. S-257891: Marlene A. Sandland was exposed to an ammonia leak on March 29, 1978 during the course of her employment with Safeway Stores, Inc. as a result of which she sustained an industrial injury, a respiratory condition requiring medical

2-1-10 TR  
3-1-10 LW  
3-5-10 BCL

~~DEPARTMENT'S PROPOSED~~  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER

ATTORNEY GENERAL OF WASHINGTON  
LABOR & INDUSTRIES DIVISION  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 464-7740

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- 1 treatment. Ms. Sandland filed an application for workers' compensation benefits on  
 2 March 30, 1978. The claim was allowed. Ms. Sandland received medical treatment  
 3 benefits. By order dated May 22, 1978 the Department closed her claim without an  
 4 award for permanent partial disability.
- 5 1.2 Claim No. S-257891: Ms. Sandland filed an application to reopen her claim on January  
 6 31, 1989. The Department issued an order denying the application, and declaring that  
 7 the claim remained closed on May 19, 1989. Ms. Sandland contemporaneously  
 8 received, but did not protest or appeal, the May 19, 1989 order.
- 9 1.3 Claim No. S-257891: Ms. Sandland filed a second application to reopen her claim on  
 10 December 5, 2002. The Department issued an order denying her application on  
 11 December 13, 2002, from which Ms. Sandland filed a timely protest. The Department  
 12 affirmed its December 13, 2002 order by order dated December 19, 2003. Ms.  
 13 Sandland timely appealed the December 19, 2003 order to the Board of Industrial  
 14 Insurance Appeals.
- 15 1.4 Claim No. S-259216: Marlene A. Sandland sustained an injury to her right foot during  
 16 the course of her employment with Safeway Stores, Inc. on April 10, 1978. She filed  
 17 another application for workers' compensation benefits on April 11, 1978. The claim  
 18 was allowed. By order dated July 29, 1983 the Department closed the claim with time-  
 19 loss compensation benefits as paid to October 22, 1982, and without an award for  
 20 permanent partial disability.
- 21 1.5 Claim No. S-259216: Ms. Sandland filed an application to reopen her claim on January  
 22 13, 1984. The Department issued an order denying the application, and declaring that  
 23 the claim remained closed on February 29, 1984. Ms. Sandland timely protested this  
 24 order on March 9, 1984. The Department affirmed its March 9, 1984 order on  
 25 November 20, 1984. Ms. Sandland contemporaneously received, but did not protest or  
 26 appeal the November 20, 1984 order.
- 1.6 Claim No. S-259216: Ms. Sandland filed a second application to reopen her claim on  
 January 31, 1989. The Department issued an order denying the application, and  
 declaring that the claim remained closed on February 10, 1989. Ms. Sandland  
 contemporaneously received, but did not protest or appeal the February 10, 1989 order.
- 1.7 Claim No. S-259216: Ms. Sandland filed a third application to reopen her claim on  
 May 13, 2004. The Department issued an order denying her application on July 21,  
 2004. Ms. Sandland timely appealed the July 21, 2004 order to the Board of Industrial  
 Insurance Appeals. The Board granted the appeal under Docket No. 0421580, and  
 hearings were held.
- 1.8 The Board granted Ms. Sandland's appeal in Claim No. S-257891 under Docket No. 04  
 11466. The Board granted Ms. Sandland's appeal in Claim No. S-259216 under  
 Docket No. 04 21580. The two appeals were consolidated for hearing and hearings  
 were held.
- 1.9 An industrial appeals judge issued a proposed decision and order affirming both  
 Department orders, i.e. determining that Ms. Sandland had not met her burden of  
 proving that either industrial injury had objectively worsened and that Ms. Sandland

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1 was not in need of treatment for any condition proximately caused by either industrial  
2 injury.

3 1.10 Ms. Sandland filed a timely petition for review alleging, for the first time, a  
4 jurisdictional issue. Ms. Sandland contended that she never received either the  
5 Department's May 22, 1978 order closing Claim No. S-257891, or the Department's  
6 July 29, 1983 order closing Claim No. S-259216, so that neither order became final and  
7 binding. Therefore, she asserted, the Board was without jurisdiction to determine  
8 whether her application to reopen her claim should be granted. Additional hearings  
9 were held to resolve the newly-raised jurisdictional issue.

10 1.11 An industrial appeals judge issued a second proposed decision and order addressing  
11 only the jurisdictional issue raised by Ms. Sandland. Both Ms. Sandland and Safeway  
12 filed timely petitions for review addressing only the jurisdictional question.

13 1.12 Claim No. S-257891: The Board issued its Decision and Order on April 1, 2009. The  
14 Board found that there was no jurisdictional defect because a preponderance of  
15 evidence indicated that Ms. Sandland had received the May 22, 1978 closing order, and  
16 she filed no protest or appeal. A preponderance of evidence supports the Board's  
17 finding.

18 1.13 Claim No. S-259216: In its April 1, 2009 Decision and Order the Board found that  
19 although Ms. Sandland did not receive the July 29, 1983 closing order there was no  
20 jurisdictional defect because it was res judicata that Ms. Sandland's claim was closed as  
21 of November 20, 1984 when she did not appeal from the Department's November 20,  
22 1984 order denying her application to reopen and declaring that her claim should  
23 remain closed.

24 1.14 In its April 1, 2009 Decision and Order the Board further found:

25 a. Ms. Sandland has a mental health condition that is best described as a  
26 longstanding personality disorder that was neither proximately caused by, nor  
aggravated by, the March 29, 1978 exposure to ammonia or the April 10, 1978  
industrial injury to her right foot;

b. Ms. Sandland does not have a mental health condition of post-traumatic stress  
disorder, cognitive disorder not otherwise specified, or an adjustment disorder  
with features of anxiety and depression proximately caused by, or aggravated  
by, the March 29, 1978 exposure to ammonia or the April 10, 1978 industrial  
injury to her right foot;

c. Claim No. S-257891: Between May 19, 1989 and December 19, 2003 no  
condition, proximately caused by the March 29, 1978 industrial injury  
worsened; and

d. Claim No. S-259216: Between February 10, 1989 and July 21, 2004 no  
condition proximately caused by the April 10, 1978 industrial injury worsened.

A preponderance of evidence supports these findings.

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1 1.15 Ms. Sandland timely appealed the Board's April 1, 2009 Decision and Order to this  
2 Court.

3 Based upon the foregoing Findings of Fact, the Court now makes the following

4 **II. CONCLUSIONS OF LAW**

5 2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

6 2.2 Claim No. S-259216: The Department made an error of law when it acted on Ms.  
7 Sandland's application to reopen her claim when the July 29, 1983 order closing her  
8 claim had not become final and binding under RCW 51.52.050. The doctrine of res  
9 judicata operates to preclude Ms. Sandland from asserting that the Board did not have  
jurisdiction to consider whether her claim should be reopened per RCW 51.32.160.  
The issue of whether a final and binding closing order was communicated to Ms.  
Sandland was subsumed within the Department's November 20, 1984 order denying  
her application to reopen her claim and declaring that the claim should remain closed.

10 2.3 Claim No. S-259216: Ms. Sandland's May 13, 2004 application to reopen her claim  
11 was not timely filed within the meaning of the seven-year rule of RCW 51.32.160,  
whether the first closing date is July 29, 1983 or November 20, 1984.

12 2.4 Claim No. S-257891: It is not necessary to determine, as a factual matter, whether Ms.  
13 Sandland did or did not receive the May 22, 1978 order closing her claim. The doctrine  
14 of res judicata operates to preclude Ms. Sandland from asserting that the Board did not  
15 have jurisdiction to consider whether her claim should be reopened per RCW  
51.32.160. The issue of whether a final and binding closing order was communicated  
to Ms. Sandland was subsumed within the Department's May 19, 1989 order denying  
her application to reopen her claim and declaring that the claim should remain closed.

16 2.5 Claim No. S-257891: Ms. Sandland's December 5, 2002 application to reopen her  
17 claim was not timely filed within the meaning of the seven-year rule of RCW  
51.32.160, whether the first closing date is May 22, 1978 or May 19, 1989.

18 2.6 That part of the Board's April 1, 2009 Decision and Order which determined that it had  
19 jurisdiction to hear and decide whether Ms. Sandland's workers' compensation claims  
should be reopened under RCW 51.32.160 is correct and is affirmed.

20 2.7 That part of the Board's April 1, 2009 Decision and Order which determined that Ms.  
21 Sandland's workers' compensation claims should not be reopened under RCW  
51.32.160 is correct and is affirmed.

22 Based on the foregoing Findings of Fact and Conclusions of Law the Court enters  
23 judgment as follows:

24 **III. JUDGMENT**

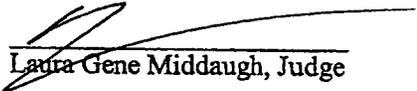
25 The April 1, 2009 Board of Industrial Insurance Appeals Decision and Order, which  
26 affirmed the Department of Labor and Industries' December 19, 2003 order in Claim No. S-

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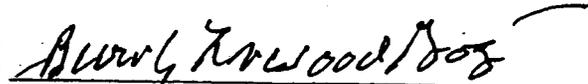
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257891, and the Department of Labor and Industries' July 21, 2004 order in Claim No. S-259216, be and the same is hereby affirmed.

DATED this 4 day of Feb., 2010.

  
Laura Gene Middaugh, Judge

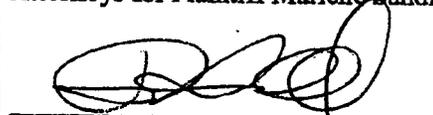
Presented by:  
ROBERT M. MCKENNA  
Attorney General

  
Beverly Norwood Goetz WSBA #8434  
Senior Counsel

Copy received,  
Approved as to form and  
notice of presentation waived:

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Tara Jayne Reck WSBA # 37815  
David B. Vail, Jennifer M. Cross-Euteneier and Associates  
Attorneys for Plaintiff Marlene Sandland

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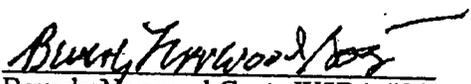
Thomas G. Hall WSBA #8708  
Attorney for Safeway Stores, Inc.

1 3.3 Safeway Stores, Inc. is awarded interest from the date of entry of this judgment as  
2 provided by RCW 4.56.110.

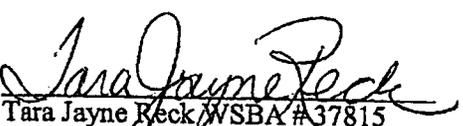
3 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.  
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5 \_\_\_\_\_  
6 Laura Gene Middaugh, Judge

6 Presented by:  
7 ROBERT M. MCKENNA  
8 Attorney General

9   
10 Beverly Norwood Goetz WSBA #8434  
11 Senior Counsel

11 Copy received,  
12 Approved as to form and  
13 notice of presentation waived:

14   
15 Tara Jayne Reck WSBA #37815  
16 David B. Yail, Jennifer M. Cross-Euteneier and Associates  
17 Attorneys for Plaintiff Marlene Sandland

18 \_\_\_\_\_  
19 Thomas G. Hall WSBA #8708  
20 Attorney for Safeway Stores, Inc.  
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**CERTIFICATE OF MAILING**

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 9th day of July, 2010, the document to which this certificate is attached, Appellant's Opening Brief, an original and one copy was placed in the U.S. Mail, postage prepaid, and addressed as follows:

Court of Appeals – Division I  
One Union Square  
600 University St.  
Seattle, WA 98101-1176

And that a copy was placed in the U.S. Mail, postage prepaid, and addressed to opposing counsel as follows:

Thomas G. Hall  
Thomas G. Hall & Associates  
P.O. Box 33990  
Seattle, WA 98133-0990

Beverly Norwood Goetz  
Assistant Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188

DATED this 9th day of July, 2010.

  
LYNN M. VENEGAS, Secretary