

65043-2

65043-2

NO. 65043-2

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

MARLENE SANDLAND,

Appellant,

v.

SAFEWAY STORES, INC.,

Respondent.

BRIEF OF RESPONDENT
SAFEWAY STORES, INC.

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I. INTRODUCTION

Respondent Safeway, Inc. submits this brief in response to the Opening Brief of Appellant Marlene Sandland. Ms. Sandland appeals from the Superior Court's February 4, 2010 Findings of Fact, Conclusions of Law and Order, which affirmed a Decision and Order of the Board of Industrial Insurance Appeals ("Board"), denying Ms. Sandland's applications to reopen two worker's compensation claims on account of aggravation.

Ms. Sandland's claims are for a respiratory injury and an injury to her right foot; both occurred in 1978. Ms. Sandland asserts that she never received the Department's orders which closed her two workers' compensation claims. She contends that the Department never properly closed the claims with final closing orders, and that subsequent adjudication by the Department of her aggravation or reopening applications were void for lack of subject matter jurisdiction.

Ms. Sandland's brief includes an extensive discussion of a Proposed Decision and Order from an Industrial Appeals Judge dated December 4, 2008. Safeway wishes to emphasize that the **only** Board decision on which the Superior Court based its judgment is the **Decision and Order of April 1, 2009**. All of the Appellant's discussion of the

Proposed Decision and Order by a single hearing judge is an apparent attempt to distract the court from the Board's Decision and Order of April 1, 2009, and should be disregarded.

The Superior Court and the Board properly relied on *Marley v. Dept. of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994) and the Board's Significant Decision, *In re Jorge C. Perez-Rodriguez*, BIIA Dec. 06 18718 (2008) and rejected Ms. Sandland's jurisdiction argument. The Superior Court correctly held that the Department had jurisdiction to issue its orders in 1984 and 1989, which denied Ms. Sandland's applications to reopen the foot claim and the respiratory claim. The Court also correctly held that Ms. Sandland did not timely protest those orders, so the closing orders became final and res judicata.

The Superior Court and Board found that Ms. Sandland never received the Department's July 29, 1983 order that closed the foot claim, and therefore that order did not become final. However, when Ms. Sandland applied to reopen the claim, the Department issued an order on November 20, 1984, that denied the reopening application and declared that the claim remained closed. Ms. Sandland received the Department's November 20, 1984 order, but did not timely appeal. The Superior Court correctly found that the closing order therefore became res judicata that the foot claim was closed November 20, 1984.

The Superior Court and Board found that Ms. Sandland failed to prove that she did not receive the May 22, 1978 order that closed the foot claim, and therefore the order became final and binding; Ms. Sandland appeals from that finding. Even if this Court were to decide that Ms. Sandland did not receive the 1978 closing order, she failed to timely appeal from the Department's May 19, 1989 order, which held that the claim remained closed. Therefore, the May 19, 1989 order became a final closing order as a matter of law.

The Superior Court properly concluded that the doctrine of res judicata precluded Ms. Sandland from asserting that the Board did not have jurisdiction to consider whether her claims should be reopened.

II. COUNTERSTATEMENT OF THE ISSUES

A. Does substantial evidence support the Board's findings that Ms. Sandland received the Department's May 22, 1978 order closing her respiratory claim, and the November 20, 1984 order closing her foot claim? Even if the Department failed to communicate the May 22, 1978 order closing Sandland's respiratory injury claim, was this an error of law that became res judicata when she failed to timely appeal or protest the Department's 1989 denial?

B. Did the Board have subject matter jurisdiction over the Appellant's claims, so that it had the power to issue the orders which closed those claims?

C. Does the principle of res judicata require the Court to affirm the Board's closing orders of May 22, 1978 and November 20, 1984, because Sandland failed to timely appeal those orders?

E. Is there substantial evidence to support the Board's finding that between May 19, 1989 and December 19, 2003, no condition proximately caused by the inhalation injury worsened?

III. STATEMENT OF THE CASE

Ms. Sandland appeals from the Superior Court's Findings of Fact, Conclusions of Law and Order issued on February 4, 2010, which affirmed the Board's April 1, 2009 Decision and Order. The Board's Decision affirmed several earlier orders by the Department and Board, which denied a number of Ms. Sandland's applications to reopen her claims for worker's compensation benefits.

The parties stipulated, before the Board, that the history for both claims is correct for jurisdictional purposes. Certified Appeal Board Record ("BR") 160-164, Board's Jurisdictional History.

Ms. Sandland asserts that the Superior Court and Board erred by concluding that she received the Department's order of May 22, 1978 which closed her respiratory claim. She also asserts that the Court and Board erred by concluding that she received the Department's November 20, 1984 order, which affirmed denial of her application to reopen the foot claim, and declared that the foot claim remained closed. AB 29-33. Ms. Sandland asserts that, as a result, the Department, Board, and Superior Court lacked

jurisdiction to adjudicate her applications to reopen the claims, or her applications for benefits due to aggravation. AB 33-35.

Ms. Sandland asks this Court to reverse the Superior Court's February 4, 2010 Findings of Fact, Conclusions of Law and Order, the Board's April 1, 2009 Decision and Order, and to remand the matter 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." AB 44-45.

A. Respiratory Claim: Department proceedings

Ms. Sandland worked as an employee of Respondent Safeway Stores, Inc. in the ice-cream manufacturing facility. On March 29, 1978, she suffered from a respiratory exposure to an ammonia leak at work, and was given medical treatment. BR 16, Finding of Fact No. 13.

The Department allowed Ms. Sandland's application for benefits and then closed the claim on May 22, 1978, with medical treatment benefits only. BR 15, FF 1; Exhibit 6; CP 80-81, FF 1.1. Ms. Sandland challenges the finding that she received the May 28, 1978 closing order. She asserts that as a result, there is no valid first closure or terminal date for the respiratory claim. AB 22.

On January 31, 1989, more than ten years after the respiratory claim was closed, Ms. Sandland filed an application to reopen the claim. The Department denied the application on May 19, 1989 and declared that the claim remained closed. Ms. Sandland “contemporaneously” received, but did not protest or appeal, the May 19, 1989 order. BR 15, FF 3; CP 81, FF 1.2.

On December 5, 2002---more than twelve years later---Ms. Sandland filed a second application to reopen the respiratory claim. CP 81, FF 1.3. The Department issued an order on December 13, 2002 which denied the application on the ground that it was not received within seven years, the time set by law for injuries that were not eye injuries.

Ms. Sandland filed a timely protest. The Department affirmed, in an order issued December 19, 2003. BR 15, FF 4; CP 81, FF 1.3. In a letter to the Department which timely appealed that order, Ms. Sandland stated that the respiratory claim “was closed on May 22, 1978, just two months after my exposure injury.” BR 87.

Ms. Sandland timely appealed to the Board, and the respiratory appeal was consolidated with the foot appeal. CP 81, FF 1.8.

B. Foot claim: Department proceedings.

Ms. Sandland suffered a foot injury on April 10, 1978 while working at Safeway, when a pallet of ice cream slipped and fell on her right foot. The Department allowed Ms. Sandland's claim. CP 81, FF 1.4; BR 15, FF 5.

On December 4, 1978, the Department closed the claim, with medical treatment and time-loss compensation benefits, but without an award for permanent partial disability. *Id.* Thereafter, Ms. Sandland filed a series of appeals and protests. Ultimately, the Department issued an order on July 29, 1983, that closed the foot claim. BR 160-161 and Exhibits 1-5; CP 81, FF 1.4. The order was mailed to an incomplete address for Ms. Sandland's attorney, Jerald Pearson. Neither Mr. Pearson nor Sandland, nor her subsequent attorney, Richard Blumberg, received the 1983 order from the Department. BR 16, FF 9.

Ms. Sandland thereafter filed an application in 1984 to reopen the foot claim. The Department issued an order on February 29, 1984, that denied the application to reopen. BR 160-161; CP 81, FF 1.5. Ms. Sandland timely protested, and the Department affirmed the denial by order entered on November 20,

1984. Ms. Sandland received, but did not protest or appeal, the November 20, 1984 closing order. BR 16, FF 10; CP 81, FF 1.5.

Ms. Sandland filed another application to reopen the foot claim in 1989. The Department denied the application on February 10, 1989, and declared that the claim “will remain closed.” CP 81, FF 1.6. Ms. Sandland received, but did not protest or appeal, the 1989 closing order. *Id.*

More than 14 years later, in 2004, Ms. Sandland filed a third application to reopen her foot claim. CP 81, FF 1.7. The Department issued an order in 2004 which denied the application. Ms. Sandland timely appealed to the Board, which consolidated the foot injury claim with the respiratory claim, and heard testimony. CP 81, FF 1.7.

C. Proceedings Before the Board.

The Board’s April 1, 2009 Decision and Order affirmed the Department’s closing orders that denied reopening of both claims. BR 15, FF 2; BR 16, FF 10. The Board held that there was no aggravation of Sandland’s injuries within the meaning of RCW 51.32.160. BR 18, Conclusions of Law 6-7.

The Board found that the closing order of May 22, 1978 was properly served on Ms. Sandland, and that she filed no protest or appeal. BR 15, FF 2.

The Board also held that the Department failed to serve Ms. Sandland with the July 29, 1983 order which closed the foot claim, at her last known address, as required by RCW 51.52.060 and that Ms. Sandland never received the order. BR 12, lines 13-14.

Although the 1983 closing order was not final, Ms. Sandland filed an application to reopen in 1984. The Department denied the application and ordered that the claim remained closed. Ms. Sandland protested, and the Department issued an order on November 20, 1984, that affirmed the denial to reopen the claim. Ms. Sandland did not protest or appeal the November 20, 1984 order. CP 81, FF 1.5.

The Board held that Appellant's 2004 application to reopen the foot claim was not timely, because it was filed more than seven years after the first closing order, issued on July 1, 1985, became final. There was no evidence of aggravation of the foot injury between February 10, 1989 and July 21, 2004 within the meaning of RCW 51.32.160. BR 18, Conclusions of Law 6, 7.

In summary, the Board found that any earlier errors in the issuance of orders by the Department were errors of law and that Ms. Sandland's failure to appeal in 1984 and 1989 cured any error of law contained in the prior adjudications.

D. Superior Court Proceedings

Ms. Sandland appealed the Board's April 1, 2009 decision to King County Superior Court, where the case was tried before the Hon. Laura Gene Middaugh on January 22, 2010, on the Board record. Trial Tr., pp. 1-35.

The Superior Court issued its Findings of Fact, Conclusions of Law and Order on February 4, 2010, that affirmed the Board's Decision and Order in its entirety. CP 80-85.

IV. ARGUMENT

A. THE SUPERIOR COURT'S JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

RCW 51.52.110 provides that superior court review of a determination by the Board of Industrial Appeals is de novo and that the party seeking review bears the burden of showing that the Board's decision was improper. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174 , 179, 210 P.3d 355 (2009). The Board's decision is prima facie correct,

and a party attacking the decision must support its challenge by a preponderance of the evidence. On review, the superior court may substitute its own findings and decision for the Board's only if it finds "from a fair preponderance of credible evidence, that the Board's findings and decision are incorrect." *Id.* at 180, *citing Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

In appeals of the superior court's decision to the Court of Appeals, by contrast, the Court of Appeals reviews whether substantial evidence supports the trial court's factual findings and then reviews, *de novo*, whether the trial court's conclusions of law flow from the findings. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. at 180 (2009).

Ms. Sandland challenges the Superior Court's Finding of Fact 1.1 (that the Department closed her respiratory claim by the May 22, 1978 order); 1.2 (that she filed an application on January 31, 1989 to reopen the claim); and 1.12 (that she received, but did not protest or appeal, the May 22, 1978 closing order). AB 4. However, the Board's Jurisdictional

History shows that Ms. Sandland stipulated that the Department closed her respiratory claim by the order of May 22, 1978. BR 113, item 2.¹

RCW 51.52.140, which governs appellate review of Industrial Insurance Act (IIA) cases, reads in part, "[a]ppeal shall lie from the judgment of the superior court as in other civil cases." Therefore, the Court of Appeals is limited to determining whether the trial court's factual findings are supported by substantial evidence and whether they support the trial court's legal conclusions. *Garrett Freightlines v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 339, 725 P.2d 463 (1986).

A party seeking to reverse a trial court's finding of fact must meet a difficult standard. A reviewing court is constitutionally limited to determining whether there is "substantial evidence" to support the trial court's findings. *Id.*, 45 Wn.App. at 339-340. "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 82, 701 P.2d 1114 (1985).

¹ The Jurisdictional History contains a "Jurisdictional Stipulation" on the top right, signed by the Industrial Appeals Judge signed, certifying that the parties agreed to include the history in the Board record. BR 113.

**B. MS. SANDLAND SHOULD BE HELD TO STRICT PROOF OF
HER RIGHT TO RECEIVE BENEFITS UNDER
THE ACT.**

Ms. Sandland cites the Act's policy statement that it is remedial in nature and that the beneficial purpose of the Act should be liberally construed in favor of beneficiaries. AB 25. However, she has failed to note that claimants are "held to strict proof of their right to receive benefits provided by the act." *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 12, 163 P.2d 142 (1945).

Ms. Sandland also cites *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996), which quotes the policy statement of RCW 51.12.010 that "[a]ll doubts as to the meaning of the Act are to be resolved in favor of the injured worker." AB 26. Ms. Sandland has omitted the next sentence of *Clauson*, in which the Supreme Court said, "The right to workers' compensation benefits is statutory, and a court will look to the provisions of the Act to determine whether a particular worker is entitled to compensation." *Id.*, 130 Wn.2d at 584.

In this case, the Superior Court looked to the provisions of the Act. It correctly determined that Ms. Sandland is not entitled to further compensation, because she failed to timely appeal after the Department

closed her claims. There are no “doubts as to the meaning of the Act,” to be resolved in favor of the injured worker.

Ms. Sandland asserts that she has not been afforded the full protection of the Act,² but in fact, the record shows that the Department and Board went to great lengths to afford the Act’s protections to her. The Department and Board have entertained Ms. Sandland’s multiple requests to reopen the claim and appeals for 32 years, beginning when the Department closed the respiratory claim in 1978.

Ms. Sandland has failed to meet her burden of proof, and both the Board and Superior Court correctly held that she is not entitled to further benefits.

C. THE DEPARTMENT, BOARD AND COURT HAD JURISDICTION TO ADJUDICATE MS. SANDLAND’S REOPENING CLAIMS.

Ms. Sandland asserts that the Department issued no orders that actually closed her claims, and that as a result, it lacked subject matter jurisdiction to determine aggravation, or to adjudicate her applications to reopen the claims. AB 33-35. She asserts that the Department failed to communicate the May 22,

² AB 26

1978 and July 29, 1983 closing orders to her that closed the respiratory and foot claims, so there was no valid first closure or terminal date in either claim. AB 22.

Contrary to Ms. Sandland's assertions, the Board and Superior Court found, based on a preponderance of the evidence, that the Department communicated the May 22, 1978 order that closed the respiratory claim, and that she filed no protest or appeal. CP 82, FF 1.12. The Court affirmed the Board's finding that, although Ms. Sandland did not receive the July 29, 1983 order closing the foot claim, there was no jurisdictional defect, because it was res judicata that her claim was closed on November 20, 1984, and that she did not appeal from that order. CP 82, FF 1.3.

The Court also held that the issue of whether Ms. Sandland received the 1978 order closing the respiratory claim was "subsumed" within the Department's May 19, 1989 order that denied her application to reopen the respiratory claim, and declared that the claim should remain closed, thereby confirming the Department's jurisdiction to issue the order. CP 83, FF 2.4.

1. The Legislature Has Granted Broad Authority to the Department to Decide Claims For Worker's Compensation.

Ms. Sandland is mistaken in her interpretation of Washington law governing jurisdiction. The Superior Court correctly held that the Board had jurisdiction over the parties and subject matter of Ms. Sandland's consolidated appeals. CP 83, FF 2.1.

The critical concept in determining whether a court has subject matter jurisdiction is the "type of controversy." *Marley v. Dep't. of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Id.*, citing Robert J. Martineau, *Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse*, 1988 BYU L. Rev. 1, 28.

"The Legislature has granted the Department broad authority to decide claims for workers' compensation," under RCW 51.04.020, which lists the Director's powers and duties. *Marley*, 125 Wn.2d at 539-540. "Sixty years ago we concluded that the Department has "original and exclusive jurisdiction, in all cases where claims are presented, to determine the mixed question of law and fact as to whether a compensable

injury has occurred." *Id.*, citing *Abraham v. Dep't. of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934).

Ms. Marley had applied for worker's compensation benefits after her husband died on the job; the Department held that husband had abandoned her as defined by RCW 51.08.020, and issued an order denying benefits. Ms. Marley did not appeal within the required 60 days. *Marley*, 125 Wn.2d at 536. Four years later, the Department denied Ms. Marley's request for reconsideration of the order.

On appeal, Mrs. Marley argued that the Department had erroneously interpreted the law, so its denial was void. The Supreme Court disagreed. Because the Department had subject matter jurisdiction over Mrs. Marley's claim, its order denying benefits was not void. Mrs. Marley had shown, at best, that the Department made an erroneous decision. Her failure to timely appeal the Department's order transformed it into a final adjudication, which was valid and binding. *Marley*, 125 Wn.2d at 543-544.

The *Marley* Court adopted the definition of subject matter jurisdiction set forth by Section 11 of the *Restatement (Second) of Judgments* (1982). The Court explained, " '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' (*Italics* ours.) We italicize the

phrase ‘type of controversy’ to emphasize its importance. A court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order.” *Marley*, 125 Wn.2d at 539, citing *Restatement (Second) of Judgments*, §11.

2. Errors in Adjudication Don’t Deprive the Department of Jurisdiction over Worker’s Compensation Claims, Nor the Board of Authority to Review Those Decisions.

The application of the *Marley* test demonstrates that the Department, Board, and Superior Court had jurisdiction over Ms. Sandland’s claims, because they had authority to adjudicate the *type of controversy* involved in this action (whether she was entitled to further worker’s compensation benefits under the Industrial Insurance Act).

Ms. Sandland asserts that the Board erred by adjudicating her applications to reopen the claims in the absence of valid orders closing the claims, and that these errors deprived the Board of jurisdiction. AB 5.

This contention is in error, like the claimant’s contention in *Marley*. The Department had jurisdiction to close Ms. Sandland’s claims because it has the authority to adjudicate claims for worker’s compensation benefits and reopening applications under the Industrial Insurance Act.

Even if the Department made mistakes in administering Ms. Sandland’s claims, such mistakes were errors of law and did not deprive it

of jurisdiction. “ ‘Obviously the power to decide includes the power to decide wrong, and an erroneous decision is as binding as one that is correct until set aside or corrected in a manner provided by law.’” *Marley*, 125 Wn.2d at 543, citing *Freeman on Judgments*, 5th Ed., section 357, p. 744.

Similarly, any errors by the Department would not void the orders which denied Ms. Sandland’s applications to reopen the claims. The Department communicated its closing orders of May 22, 1978 and November 20, 1984 to Ms. Sandland, and those orders became final and binding because she failed to appeal within the statutory 60 days.

The Department has broad subject matter jurisdiction to decide all claims for workers compensation benefits. *Kingery v. Dep’t. of Labor & Indus.*, 132 Wn.2d 162, 170, 937 P.2d 565 (1997), *citing Marley*, 125 Wn.2d at 539.

The critical concept in determining whether a court has subject matter jurisdiction is the type of controversy. If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction. *Sprint Spectrum, LP v. Dep’t of Revenue*, 156 Wn. App. 949, 965, 235 P.3d 849 (2010), concurring opinion by Becker, J.

This Court has rejected the same argument as Ms. Sandland presents, in *Shafer v. Dep't of Labor & Indus.*, 140 Wn. App. 1, 159 P.3d 473 (2007) and *Sprint Spectrum, supra*.

In *Shafer*, the claimant was injured on the job and received medical benefits. Claimant applied to reopen the claim after she received a closing order; the Department denied her application and she appealed. The claimant argued that the Board lacked jurisdiction over her application to reopen, because her doctor never received a copy of the closing order.

The Court of Appeals held that jurisdiction was not the issue, but that the appeal was timely, because Ms. Shafer had 60 days in which to appeal after the doctor received a copy of the closing order, and he had not received one. Therefore, her appeal was timely.

“A determination to close a claim or to deny an application to reopen a claim falls squarely within the Department's authority to decide claims for workers' compensation and the BIIA's authority to review Department actions. The Department had jurisdiction over the claim, and the BIIA had jurisdiction to review its decisions.” *Shafer*, 140 Wn.App. at 6, *citing Marley*, 125 Wn.2d at 539-540. Again, the appeal filed by Ms. Shafer was found to be timely.

As the *Marley* court explained, “[a]s the Restatement warns, classifying an error of law as a ‘jurisdictional’ issue transforms it into one

that may be raised belatedly, and thus permits its assertion by a litigant who failed to raise it at an earlier stage in the litigation. The classification of a matter as one of jurisdiction is thus a pathway of escape from the rigors of the rules of res judicata. By the same token it opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d at 541, citing *Restatement (Second) of Judgments* 12, cmt. b (1982). If Appellant's assertions are accepted, the entire claim closure process of the Industrial Insurance Act would likely be thrown into chaos. Both *Marley* and *Perez-Rodriguez*, BIIA Dec. 06-18718 (2008) clearly recognized that possibility in rejecting the same argument presented by Appellant here.

3. *Perez-Rodriguez* Confirms That Jurisdiction Is Proper.

The facts of *In re Jorge Perez-Rodriguez*, BIIA Dec. 06 18718 (2008) are virtually identical with the facts of this case, and the decision supports the Superior Court's conclusion that Ms. Sandland's claims remain closed. The Board's interpretation of workers' compensation law is not binding, but it is entitled to "great deference." *Weyerhaeuser v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

The Department closed Mr. Perez-Rodriguez' claim in 1995, and he timely appealed. The Department then placed the closing order in abeyance and never affirmed it. The Claimant subsequently filed applications to reopen, which the Department denied in 1997. The Department then issued an order in 1998 affirming the denial to reopen the claim.

The claimant did not protest or appeal the 1998 order denying reopening and, therefore, it became final. *Perez-Rodriguez* at 7. Eight years later, in 2006, Mr. Perez-Rodriguez filed another application to reopen the claim, which the Department again denied. He appealed to the Board.

The Board dismissed the appeal on the ground that Mr. Perez-Rodriguez had failed present a *prima facie* case showing aggravation. The Board held that the Department had jurisdiction to issue the 1997 and 1998 orders which denied the claimant's reopening application. The Department's issuance of those orders was erroneous as a matter of law because the claim had not yet been closed, but Mr. Perez Rodriguez' failure to timely protest or appeal the 1998 order rendered it final and binding. *Perez* at 13.

The circumstances and holding of *Perez* apply squarely to this case. In fact, the Board held that the facts of Ms. Sandland's foot injury

claim (No. S-259216) “are indistinguishable from the facts in *Perez-Rodriguez*.” BR 13, lines 23-24. The Board pointed out that, just like the 1996 closing order in *Perez-Rodriguez*, the July 29, 1983 order that closed in Ms. Sandland’s foot injury claim never became final. In this case, as in *Perez-Rodriguez*, the Department denied a subsequent application to reopen, even though there was no final closing order, as required by *Reid v. Department of Labor & Indus.*, 1 Wn.2d 430, 437-438 (1939). BR 13, lines 25-27. In this case, the Department made an error of law by acting on Ms. Sandland’s application to reopen her foot claim when the 1983 order closing her claim had not become final under RCW 51.52.050. However, the Department’s entered its order of November 20, 1984 that denied reopening of the claim. Ms. Sandland failed to timely appeal. CP 83, FF 2.2. Therefore, the November 20, 1984 order became final.

The Court also held that it was not necessary to determine whether Ms. Sandland received the May 22, 1978 order which closed her respiratory claim, because she received, but did not appeal from the May 19, 1989 order that denied her application to reopen. CP 81, FF 1.2

4. *Reid* and *Wilson* do not support Ms. Sandland’s position.

Ms. Sandland discusses *Reid v. Dept. of Labor and Industries*, 1 Wn.2d 430, 96 P.2d 492 (1939) and Significant Board Decision *In re Betty*

Wilson, Docket No. 02 21517 (2004), but it is difficult to understand what she is saying about both decisions. AB 37-42.

Neither *Reid* nor *Wilson* supports Ms. Sandland's position, because both claimants timely appealed the Department's closing orders. In contrast, Ms. Sandland did not timely appeal.

In *Reid*, the Department closed Mr. Reid's claim with an award of permanent partial disability, and he timely appealed. *Id.*, 1 Wn.2d at 433. Before the Department had decided that appeal, Mr. Reid applied to reopen the same claim for aggravation. *Id.* at 435. The Court affirmed the closing and dismissed the aggravation appeal, on the ground that until the Department had disposed of Mr. Reid's first appeal from the order awarding him permanent partial disability, there was no basis for a claim for aggravation of disability. *Reid*, 1 Wn.2d at 437-438.

Ms. Sandland also cites *Betty Wilson* for the proposition that, "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." AB 34. This is not an accurate description of the *Wilson*. The opinion does not even mention due process issues. Instead, the Board held that the Department could not logically adjudicate the claimant's permanent partial disability, because it had not

yet determined the proximate cause of claimant's medical condition.

Wilson at 8.

Wilson is clearly distinguishable from this case because Ms. Wilson timely appealed each order entered by the department, thereby timely preserving her right to contend that some or all of the orders were erroneous. *See Wilson* at 7-8, Findings of Fact.

In summary, neither *Reid* or *Wilson* offer the support that Appellant alleges. In both cases the Claimant adequately preserved their appeals rights to contest supposed mistakes in the Department's action in a timely way. Here, Ms. Sandland failed to do so.

D. THE DEPARTMENT'S CLOSING ORDERS OF MAY 19, 1989 (RESPIRATORY) AND NOVEMBER 20, 1984 (FOOT) ARE RES JUDICATA, BECAUSE MS. SANDLAND DID NOT TIMELY APPEAL.

Under the doctrine of res judicata, or claim preclusion, "a prior judgment will bar litigation of a subsequent claim if the prior judgment has a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made." *City of Arlington v.*

Cent. Puget Sound Growth Mgmt. Hearings Bd., 164 Wn.2d 768, 791, 193 P.3d 1077 (2008), *citations and quotation marks omitted*.

When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel. “Collateral estoppel, or issue preclusion, requires (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.” *Id.*, 164 Wn.2d at 792, *citations omitted*.

The party asserting the defense of res judicata bears the burden of proof. Res judicata is the rule, not the exception. *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). Safeway asserts the defense of res judicata, and therefore bears the burden of proof.

The Superior Court affirmed the Board’s findings that Ms. Sandland received the May 22, 1978 and November 20, 1984 orders that closed her respiratory and foot injury claims, and that she did not timely appeal. CP 82, FF 1.12; CP 82, FF 1.13. The Court’s determination should be given preclusive effect in this appeal, because all four elements for the application of res judicata are satisfied, as explained below.

The first element, that the prior judgment “bears a concurrence of identity with the subsequent action in subject matter,” is satisfied. The Department’s closing of Ms. Sandland’s two injury claims, No. S-257891 (the respiratory injury) and No. S-259216 (the foot injury) “bears a concurrence of identity” with this proceeding, in which Ms. Sandland appeals from the Board’s denial of her application to reopen the claims.

The second element, cause of action, is the same. Washington courts have broadly viewed a workers’ compensation claim as one cause of action for purposes of res judicata, regardless of whether the claim is for initial benefits or further benefits in a reopening application. *See, for example, Dinnis v. Dep’t of Labor & Indus.*, 67 Wn.2d 654, 657, 409 P.2d 477 (1965), and *White v. Dep’t of Labor & Indus.*, 48 Wn.2d 413, 414-415, 293 P.2d 764, *petition for reh. den.* (1956).

The third element, persons and parties, is the same. In each proceeding, the parties are Ms. Sandland, Safeway, and the Department.

The fourth element, the quality of the persons for or against whom the claim is made, is the same. “Because the parties are identical, the quality of the persons is also identical.” *Pederson v. Potter*, 103 Wn. App. 62, 73, 103 Wn. App. 62 (2000).

The doctrine of claim preclusion (or res judicata), applies to a final judgment by the Department as it would to an unappealed order of a trial

court. An order or judgment of the department resting upon a finding, or findings, of fact becomes a complete and final adjudication, binding upon both the department and the claimant unless such action is set aside upon appeal or is vacated for fraud or something of like nature. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994), citing, *inter alia*, Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 *Wash. L. Rev.* 805, 825-26 (1985) (common example of binding agency decisions are Department's determinations of workers' compensation claims).

Here, the doctrine of res judicata means that Ms. Sandland has to live with her failure to appeal the 1978 order (respiratory claim), the 1984 order (foot claim), and the 1989 order (respiratory claim), and the legal effect that the failure to appeal imposes. As noted earlier, both *Marley* and the *Restatement of Judgments* identified the rigors of the rules of res judicata and why it is important to apply that doctrine where applicable. The Appellant seeks the pathway of escape from the application of res judicata specifically rejected by *Marley* for obvious reasons – it relieves her of the responsibility and consequences of her failure to timely appeal the Department's actions when it denied reopening of her claim.

Ms. Sandland asserts that “the Board and Superior Court both erroneously interpreted and applied the law from *Wilson*, *Reid*, *Marley* and *Perez-Rodriguez* to her claims.” AB 37. In any case, *Wilson* supports the Court’s decision that it has jurisdiction over this appeal, and that the Board had jurisdiction to hear and decide Ms. Sandland’s applications to reopen her claims. As discussed above, it is respectfully submitted that *Reid* is also consistent with this view. In both cases the claimant’s timely preserved their rights to timely review.

The fact that the Department’s 1998 closing order in *Perez-Rodriguez* contravened *Reid* was an error of law that Mr. Perez-Rodriguez could have challenged, by filing a protest or appeal. He failed to do so. As a result, the January 12, 1998 order was entitled to res judicata effect and became a closing order by operation of law. If Ms. Sandland had timely appealed as the claimants did in *Wilson* and *Reid*, we wouldn’t be here.

The same analysis as that expressed in *Perez-Rodriguez*, *Reid* and *Marley* applies to the events in Ms. Sandland’s foot claim. Even though

the July 29, 1983 closing order was not final, Ms. Sandland filed an application on January 13, 1984 to reopen it. The Department denied that application and declared that the claim remained closed. She protested the order on March 9, 1984, and the Department affirmed it on November 20, 1984. The Appellant did not protest or appeal the November 20, 1984 order. BR 14.

Under *Reid*, the Department committed an error of law in addressing the Ms. Sandland's 1984 application to reopen, in the absence of a final closing order. However, under *Marley*, the Department had jurisdiction to issue the series of orders denying that application. As the Board pointed out, "If Ms. Sandland disagreed with the November 20, 1984 order, she should have filed an appeal and raised the Reid issue at that time. She failed to do so. Thus, as with the January 12, 1998 order in *Perez-Rodriguez*, the November 20, 1984 order became a closing order by operation of law and is entitled to res judicata effect." BR 14.

The Superior Court and the Board found that the November 20, 1984 (foot claim) closing order should be given res judicata effect and treated as a final closing order by operation of law, under *Marley* and *Perez-Rodriguez*, because Ms. Sandland did not file a protest or appeal.

E. MS. SANDLAND RECEIVED THE DEPARTMENT'S 1989 AND 1984 CLOSING ORDERS, YET FAILED TO TIMELY APPEAL, SO THE ORDERS BECAME RES JUDICATA.

Ms. Sandland contests findings 1.1 and 1.12 that she received, but did not protest or appeal from, the May 22, 1978 order that closed her respiratory claim. AB 4, 22, 28-32. Safeway submits that substantial evidence supports findings 1.1 and 1.12. Furthermore, Ms. Sandland filed an application to reopen the respiratory claim in 1989. The Department issued an order on May 19, 1989 which denied the application and declared that the claim remained closed. CP 81, FF 1.2 The Court correctly held that it is not necessary to determine, as a factual matter, whether Ms. Sandland did or did not receive the 1978 order, because she failed to appeal the May 19, 1989 order. CP 83, Conclusion of Law 2.4.

1. Substantial evidence supports the Court's findings that Ms. Sandland received the 1978 closing order.

It is uncontested that the Department issued an order on May 22, 1978, allowing and closing the respiratory claim for medical treatment only. BR 113, stipulated Jurisdictional History; TR 4/22/04 at 7; TR 6/1/06 at 6-7.

The Board heard the testimony of Department employees Gail Griswold and Sherry Torres, concerning the Department's procedures for mailing closing orders, and the procedure in Appellant's case. The May 22, 1978 order was a postcard used only for medical only claims, in which the Department both allowed and closed the claim, with no indemnity benefits. BR 9; Ex. 6. Ms. Torres testified that four postcards would have been created at the same time; one for the employer, one for the medical provider, one for the claimant, and one for the file. The only one copied onto the Department microfiche, when the hard copy file was transferred to microfilm some time after December 1994, was the one addressed to the employer's third party administrator, Scott Wetzel. BR 9.

Ms. Sandland testified that she "did not recall" receiving the Department order dated May 22, 1978. Tr. 7/11/08, p. 5. The Board commented, "That is the extent of the claimant's proof that she did not receive the May 22, 1978 order." That bare assertion is not persuasive for several reasons. BR 9, line 32; BR 10, lines 2-3.

The Board observed that there was "little to corroborate Ms. Sandland's memory." BR 10, line 28. It pointed out that Department employee Ms. Torres testified that all of the postcards would have been created at the same time. The employer's receipt of the order undercut Ms. Sandland's memory that she did not receive it. BR 10.

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

“Even someone without memory problems would be hard-pressed to recall in 2008 whether she had received a particular postcard in 1978. When one adds the additional layer of the claimant’s acknowledged difficulties, the bare statement that she does not recall receiving the May 22, 1978 order is not persuasive.” BR 10.

A rebuttable presumption of receipt can be established by evidence that an order was mailed, properly addressed to the party’s last known address as indicated by the Department file, and with sufficient postage. BR 9, *citing Farrow v. Department of Labor & Indus.*, 179 Wash. 453, 455, 38 P.2d 240 (1934).

Finally, when Ms. Sandland filed the request to reopen the respiratory claim in 1989, she noted the “date of closure” of the claim as “1978.” BR Exhibit 9.

2. Ms. Sandland received the 1989 order denying her application to reopen the respiratory claim, but did not appeal.

The Court found that Ms. Sandland “contemporaneously” received, but did not protest or appeal, the May 19, 1989 order. CP 81, FF 1.2. Ms. Sandland does not deny that she received the 1989 order, and does not deny that she failed to protest or appeal from it. Therefore, even if it is accepted that Ms. Sandland did not receive the 1978 closing order, her failure to appeal the 1989 Department Order that denied reopening, invokes the doctrine of res judicata and cures any error of law.

The Court held that Ms. Sandland’s December 5, 2002 application to reopen the respiratory 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. CP 83, Conclusion 2.5

**F. MS. SANDLAND HAS NOT PRESERVED HER
OBJECTION TO THE COURT’S FINDINGS AND
CONCLUSIONS CONCERNING HER REOPENING
APPLICATIONS.**

Ms. Sandland asserts that the Department, the Board, and the Court erred by adjudicating her aggravation applications because they were “extraneous” to the jurisdictional issues which she raises. AB i-ii, Assignments of Error C and D.

Ms. Sandland's discussion of Assignments of Error C and D seems to restate her theory that the Department and Board lacked jurisdiction to decide her claims. AB 27-28. Therefore, Assignments of Error C and D are redundant and unnecessary.

If Ms. Sandland is asserting that she had the right to limit the Superior Court's power to affirm portions of the Board's decision, such assertion should be rejected, because it is not supported with argument and authority. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992), *citing* RAP 10.3(a)(6). The *Cowiche* Court held that it would not consider assignments of error in appellants' opening brief, because they were not supported with any reference to the record nor any citation of authority. *Id.*, 118 Wn.2d at 809,

RAP 10.3(a)(6) provides that "[t]he brief of the appellant or petitioner should contain...(6) The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record."

If this Court does consider Assignments of Error C and D, it should affirm the Superior Court's conclusion that the Board correctly denied Ms. Sandland's applications to reopen her claims for aggravation. The Superior Court affirmed the Board's finding that there was no evidence of aggravation of Ms. Sandland's respiratory injury between

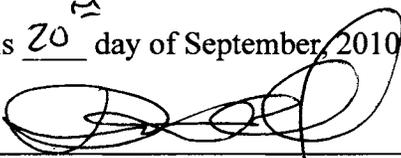
May 19, 1989 and December 19, 2003. CP 82, FF 1.14(c). The Court also affirmed the Board's finding that there was no evidence that the foot injury had not worsened between February 10, 1989 and July 21, 2004. *Id.*, FF 1.14(d).

Ms. Sandland does not assign error to the Superior Court's findings 1.14(a) and (b), and therefore they should be affirmed. The Court held that "Ms. Sandland has a mental health condition that is best described as a longstanding personality disorder that was neither proximately caused by, nor aggravated by," her respiratory and foot injury. CP 82, FF 1.14(a). The Court held that Ms. Sandland does not have a mental health condition of post-traumatic stress disorder or adjustment disorder, proximately caused by, or aggravated by the respiratory or foot injuries. *Id.*, FF 1.14(b).

V. CONCLUSION

For the reasons stated above, it is respectfully submitted that the Superior Court had jurisdiction over the parties and the subject matter of Ms. Sandland's appeals. The Superior Court's Findings of Fact, Conclusions of Law and Order, filed February 4, 2010 are based on substantial evidence and should be affirmed.

Respectfully submitted this 20th day of September, 2010.



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