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June 11, 2015  
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Division I  
State of Washington

NO. 72646-3-I

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

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LORENZO THOMAS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

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**DEPARTMENT OF LABOR & INDUSTRIES  
BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Out of a concern for finality, if a party fails to appeal a Department of Labor and Industries' order, the order is final and binding, even if it is incorrect. In that vein, this Court held that when the claimant fails to protest or appeal a Department order reopening a workers' compensation claim, it is res judicata that the claim had been closed before the reopening order. *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 271 P.3d 356 (2012). It is immaterial whether the Department communicated the closing order to the claimant or whether the decisions were incorrect.

While the parties dispute that Lorenzo Thomas received the Department's 1996 order first closing his claim, there is no dispute that he received the 2002 reopening order and that he did not appeal that order. Following *Singletary*, the 2002 reopening order is res judicata that Thomas's claim had closed before 2002. When Thomas reopened his claim in 2012, the Department correctly decided that he would only receive medical treatment, as reopening was more than seven years from the first closing date.

The superior court correctly granted summary judgment. This Court should reject Thomas's request to disagree with *Singletary* based on notice and due process arguments. This Court should affirm.

## II. ISSUES

- A. Is Thomas precluded from challenging a 1996 closure order after the Department already reopened and closed his claim since then?
- B. Did the superior court properly affirm the Department's order that Thomas would be entitled only to medical treatment, where the Department received the reopening application more than seven years after it had been closed?

## III. STATEMENT OF THE CASE

### A. **The Department First Closed Thomas's Industrial Injury Claim in 1996**

Thomas suffered an industrial injury and filed an application for benefits in 1995. BR 56-59.<sup>1</sup> The Department allowed the claim and paid benefits. BR 60. On December 18, 1996, the Department closed the claim, awarding Thomas a Category 2 permanent lumbosacral impairment. BR 29, 61. There is a factual dispute whether Thomas received the order and check. BR 57, 80. The check was cashed. BR 56-57, 61.

### B. **The Department Reopened His Claim in 2002, After Thomas Verified that His Claim Had Closed in 1996**

In 2001, Thomas applied to reopen his claim. BR 62. In his reopening application, Thomas verified that his claim closed in December 1996. BR 62. He attested that the information was correct. BR 62.

On February 28, 2002, the Department reopened the claim and again paid benefits. BR 29, 63. Thomas did not protest or appeal that

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<sup>1</sup>"BR" refers to the Board's certified appeal board record.

decision. BR 57. On March 24, 2006, apparently at Thomas's request, the Department closed the claim, awarding a Category 4, permanent dorso-lumbar and/or lumbosacral impairment. BR 64-67. Thomas did not appeal that closing order.

**C. In 2012, Thomas Again Applied to Reopen His Claim, Which the Department Granted for Medical Treatment Only**

In November 2012, Thomas filed another reopening application.<sup>2</sup>

BR 71-72. The Department reopened the claim, but for medical treatment only. BR 73. The Department explained that the reopening application was not received within seven years of the first claim closure. BR 73.

**D. Both the Board of Industrial Insurance Appeals and the Superior Court Ruled That It Was Res Judicata That the Claim Was Closed Before 2002**

Thomas appealed to the Board of Industrial Insurance Appeals, contending that he should not be limited to medical treatment only. BR 16, 25. On the Department's motion for summary judgment, the industrial appeals judge issued a proposed decision and order affirming the Department's order. BR 16-21. The industrial appeals judge ruled that because Thomas did not appeal the Department's 2002 order reopening the claim, it was res judicata that his claim first closed sometime before the reopening order. BR 21. Since the reopening order is res judicata, it

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<sup>2</sup>In September 2006, Thomas again tried to reopen his claim, but the Department denied his application. BR 68-70.

does not matter whether the Department communicated its December 18, 1996 closing order to Thomas. BR 21. The three-member Board denied Thomas's petition for review and adopted the proposed decision and order as the Board's decision and order. BR 2.

Thomas appealed to King County Superior Court. CP 1. The superior court granted the Department's motion for summary judgment, ruling that regardless of whether the 1996 order was communicated to Thomas, it became final and binding when Thomas failed to protest or appeal the February 2002 order reopening his claim. CP 25-26. The 2012 reopening application was more than seven years after the first order closing the claim, so the Department correctly limited its reopening to medical treatment only. CP 26. Thomas appeals. CP 28.

#### IV. STANDARD OF REVIEW

In workers' compensation cases, this Court applies its ordinary standards of review of the superior court's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140.<sup>3</sup> The Court thus reviews summary judgment decision de novo. *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 292, 253 P.3d 430, *review denied*, 172 Wn.2d 1008 (2011). Thomas is incorrect in arguing

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<sup>3</sup>The Washington Administrative Procedure Act, RCW 34.05, does not apply to workers' compensation cases under RCW Title 51. RCW 34.05.030(2)(a), (b); *see Rogers*, 151 Wn. App. at 180.

that this Court reviews the Board's decision. Br. of App. at 9. In any event, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). To defeat summary judgment, a party may not rely on self-serving speculation or conjecture. CR 56(e); *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009).

## V. ARGUMENT

When the Department issued the 2002 reopening order, and Thomas did not appeal that decision, it necessarily determined that his initial claim had been closed before that date. It is immaterial whether the Department communicated the 1996 closing order to Thomas. Since more than seven years had passed between the first closure date and the 2012 reopening, the Department correctly limited its reopening to medical treatment only. Thomas's arguments fail.

### A. **Following This Court's Decision in *Singletary*, the 2002 Reopening Order Is Res Judicata**

This Court's decision in *Singletary* disposes of Thomas's appeal. There, the Court held that if the Department issues an order reopening a claim and the claimant does not appeal that order, the finding that the

claim was closed becomes final and binding under RCW 51.52.050(1). *Singletary*, 166 Wn. App. at 782 n.4, 784. It does not matter whether the first closure order was legally correct or whether the order was communicated to the claimant. *Id.* The claimant cannot claim that all action on the claim after the first closing order was void if the reopening order communicates that the claim was initially closed. *Id.* at 784-85.

As Thomas concedes, the facts in *Singletary* are identical to those presented here. Br. of App. at 14. There, the claimant did not receive the first closure order, but she filed a reopening application noting the first closing date. *Singletary*, 166 Wn. App. at 778. The Department reopened the claim, and the claimant did not appeal that order. *Id.* When the Department closed the claim two years later, the claimant appealed, arguing that the Department lacked jurisdiction because the first closing order had never been communicated to her. *Id.* at 779-80.

Following a long line of case law on finality, this Court held that although the Department's order on the reopening application was legally erroneous because the first closing order was not communicated, and thus not final, the Department had jurisdiction to enter the reopening order. *Id.* at 782-84; *see, e.g., Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 170, 937 P.2d 565 (1997) (plurality opinion) (legal errors in unappealed orders do not render the orders void); *Marley v. Dep't of Labor & Indus.*,

125 Wn.2d 533, 542-43, 886 P.2d 189 (1994) (even if Department enters a legally incorrect order, that order becomes final and binding on all parties if they do not appeal it within the specified time).<sup>4</sup> Since the claimant did not appeal the reopening order, it became final and binding. *Singletary*, 166 Wn. App. at 784. This means that the reopening order “is res judicata that her claim was closed sometime before the [reopening order.]” *Id.* The Court held that it did not matter whether the first closing order had been communicated to the claimant: “it is immaterial whether [the self-insured employer] communicated its 2002 closing order to Singletary.” *Id.*

Here, like in *Singletary*, it is not relevant whether the 1996 closing order was communicated to Thomas. Like in *Singletary*, Thomas filed a reopening application that noted the earlier claim closure. BR 62. Like in *Singletary*, the Department granted that application and reopened Thomas’s claim. BR 29, 63. And like in *Singletary*, Thomas did not appeal that reopening order. BR 57.

Following *Singletary*, since Thomas did not appeal the 2002 order reopening his claim, it is res judicata that his claim closed sometime

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<sup>4</sup>The Board has similarly dealt with analogous issues in *In re Jorge C. Perez-Rodriguez*, No. 06 18718, 2008 WL 1770918 (Wash. Bd. Indus. Ins. App. Feb. 13, 2008). There, the Board decided that the Department retains subject matter jurisdiction to adjudicate a reopening application even if it makes an error of law by adjudicating a reopening application on a claim for which there is no final closing order. *Id.* at \*1. The Board concluded that the unappealed orders relating to the reopening application were not void when entered and became final and binding on the parties, precluding the parties from relitigating them. *Id.* at \*1-2. Although not binding, the Board decision is persuasive authority. *Singletary*, 166 Wn. App. at 784 n.7.

before the 2002 reopening order. *Singletary*, 166 Wn. App. at 784. As it is res judicata that Thomas's claim was closed sometime before the 2002 reopening order, it is immaterial whether the Department communicated the 1996 closing order to Thomas. *Id.* Since he did not appeal the reopening order, he cannot now claim that all action on his claim after 1996 was void. *Id.* at 785. The Court should follow *Singletary* and affirm the summary judgment decision.

RCW 51.32.160 allows the Department to reopen a claim that was closed seven years ago for medical treatment only, with the Department retaining the discretion to provide further benefits. The 2002 reopening order makes clear that Thomas's claim had closed sometime before February 28, 2002. Since the 2012 reopening application was filed more than seven years from February 28, 2002, the Department correctly reopened the claim for medical treatment only. RCW 51.32.160. The Court should affirm.

**B. The Department Complied With Due Process Requirements by Providing Notice That It Was Reopening Thomas's Claim, Which Is Notice That It Was Closed**

Contrary to Thomas's arguments, no due process violation exists here. Although Thomas ultimately asks this Court to not follow *Singletary*, recognizing its controlling authority, he tries to distinguish *Singletary* by arguing that the *Singletary* Court did not address notice and due process

arguments. Br. of App. at 14-15 (“We ask this Court to not follow Division II . . .”). But as Thomas concedes, the *Singletary* Court explained that communication (and thus notice) of the initial closing order is immaterial once the Department provides notice of the reopening order and no appeal or protest occurs. *Singletary*, 166 Wn. App. at 784; Br. of App. at 15 (“But under the *Singletary* regime, notice is not necessary. It is ‘immaterial’ whether [the initial] closing orders are communicated”). The Court should reject Thomas’s attempt to distinguish *Singletary*.

Regardless, the Court should reject Thomas’s attempt to couch this case as a violation of due process for lack of notice. Due process requires notice that is reasonably calculated under all the circumstances to tell interested parties that there is an action pending and that affords them an opportunity to present their objections. *Kustura v. Dep’t of Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (2008).<sup>5</sup> While the Department disputes that the 1996 closing order was not communicated to Thomas or that the purported failure to communicate the order amounts to a due process violation, it is immaterial whether the Department communicated

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<sup>5</sup> Note that “due process does not require actual notice” rather, it requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Dellen Wood Prods., Inc. v. Dep’t of Labor & Indus.*, 179 Wn. App. 601, 627, 319 P.3d 847, review denied, 180 Wn.2d 1023 (2014). Even though due process does not require actual notice, here it was provided by the 2002 reopening order that plainly provided that the Department was reopening the claim.

the 1996 closing order to Thomas. Any potential or theoretical notice violation was obviated when the Department communicated the 2002 reopening order and Thomas did not appeal that order. When the reopening order became final and binding, it became res judicata that Thomas's claim had closed sometime before 2002, even if such conclusion was erroneous. *Singletary*, 166 Wn. App. at 784-85. Since the final and binding 2002 reopening order cleared up any problem with the earlier closing order and provided Thomas with notice about the status of his claim, the Court need not engage in a due process analysis under *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

Thomas's implied argument that the 2002 reopening order did not put him on notice that there had been a prior claim closure makes no sense. *See* Br. of App. at 14. The 2002 order stated that it was reopening the claim, "This claim is reopened effective 05/11/2001 for authorized medical treatment and benefits as appropriate under the industrial insurance laws." BR 63. In order for a claim to be reopened, it must have been closed, otherwise the term "reopened" would be meaningless. This would be consistent with Thomas's reopening application, which recognized that the claim had closed in December 1996. The reopening order thus put Thomas on notice that the Department had determined that his claim had been closed but was now reopened.

If Thomas disagreed with that conclusion, the reopening order explained that the order would become final within 60 days unless he filed an appeal:

YOUR LEGAL RIGHTS IF YOU DISAGREE WITH THIS ORDER: THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING. YOU CAN EITHER FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG[.]

BR 63 (capitalization in original). Thomas did not appeal the 2002 reopening order. The 2002 reopening order gave Thomas notice that his claim had been closed but was now reopening. He had an opportunity to appeal but chose not to do so. Thomas's notice argument fails.

Thomas's appeal boils down to a plea to have this Court disagree with *Singletary* and create a division split. See Br. of App. at 14-15. The Court should reject that request for at least two reasons. First, *Singletary* is correct. The decision follows well-settled case law holding that legal errors in unappealed orders cannot be rendered void once they become final and binding. *Singletary*, 166 Wn. App. at 782-85; see *Kingery*, 132 Wn.2d at 170; *Marley*, 125 Wn.2d at 542-43. The *Singletary* Court properly applied that case law to hold that a final and binding reopening order precludes a party from challenging the original closing order, even if

both were legally erroneous. 166 Wn. App. at 782-85. Moreover, *Singletary* does not create a due process issue, as it fundamentally rests on the premise that the notice in the reopening orders apprises workers of the fact of closure and thus becomes final and binding.

Second, *Singletary* makes practical sense. Thomas asks the Court to undo a closing order entered over 18 years ago and a reopening order entered 13 years ago. In the time since the reopening order, the Department has provided time loss compensation, treatment, and additional impairment benefits. *Singletary* recognizes the necessity of finality when an agency administers a claim. It prevents the Department and Thomas from going through the administrative headache of relitigating all previous orders entered by the Department. The Court should follow *Singletary*. Although the result in this case would favor Thomas if finality is not upheld, such a ruling would not aid the many workers and employers that rely on finality so that they are not faced with having to relitigate matters years after the Department issues an order.

**C. The Board and Superior Court Appropriately Applied Res Judicata to the 2002 Reopening Order**

The Court should reject Thomas's argument that the Board and Superior Court erroneously applied res judicata to the 2002 reopening order. Br. of App. at 16-20. Res judicata, or claim preclusion, bars "the

relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.” *Loveridge v. Fred Meyer*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (internal quotations omitted). Res judicata “applies to a final judgment by the Department as it would to an unappealed order of a trial court.” *Marley*, 125 Wn.2d at 537. Under the Industrial Insurance Act, all parties and the court are bound by the res judicata effects of prior Department orders that were not timely appealed and, therefore, became final. *Id.* at 537-38.

To invoke res judicata, there must be: (1) identity as to parties; (2) identity as to subject matter; (3) a final judgment or order rendered by an entity with authority to do so; and (4) identity as to claim or cause of action. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737-38, 222 P.3d 791 (2009). Thomas takes issue with only the fourth element, that there be identity as to claim or cause of action. Br. of App. at 16-18.

Here, there is identity of claims because a reopening order is necessarily dependent on earlier order closing the claim. In order for a claim to reopen, it must have been closed. It is for this reason that 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. *Dinnis v. Dep’t of Labor & Indus.*, 67 Wn.2d 654, 657, 409 P.2d 477 (1965) (res

judicata applied to the Department's disability determination in a closing order to preclude the worker from claiming in his reopening application that his disability as of claim closure was greater than the Department had awarded). Since the 2002 reopening order necessarily encompassed the Department's decision that his claim had been closed before, that decision, even if erroneous, is now res judicata. *Marley*, 125 Wn.2d at 538.

*Energy Northwest v. Hartje* does not support Thomas's argument. 148 Wn. App. 454, 199 P.3d 1043 (2009). There, the Department closed the claim, causing Hartje to bring the reopening application. *Id.* at 459-60. The Court concluded that res judicata did not apply because the closing order covered a different time frame than the reopening application. *Id.* at 464. The Court did not address whether the reopening order was dependent on the existence of claim closure. *Id.*

Thomas's argument that fundamental fairness requires that a claimant must be clearly advised of the issue before applying res judicata ignores that he was clearly apprised that the claim was being reopened, which plainly meant that the claim had been closed prior to the reopening. Br. of App. at 19-20. Contrary to Thomas's assertions otherwise, Thomas's 2001 reopening application and the resulting 2002 reopening order both relied on the fact that the claim had been already closed (and thus needed to be reopened). BR 62-63. In his aggravation application,

Thomas noted that the claim had been closed. BR 62. There is no fundamental unfairness in holding him to his representation.

And it does not matter that the reopening order did not inform Thomas of the exact date of the first closure. Br. of App. at 17-18. By reopening the claim on February 28, 2002, it is a necessary fact that the claim had been closed sometime before that date. For purposes of this case, it does not matter whether the claim was closed in 1996 or February 27, 2002, because in any scenario, his 2012 reopening application was more than seven years from the first closing date.

But more significantly, Thomas had the opportunity to appeal that reopening order, but chose not to do so. BR 57. It is final and binding, so Thomas cannot, 13 years after the reopening order and over 18 years after the first closing order, undo every order since those orders. *See Singletary*, 166 Wn. App. at 785. The Board and superior court correctly applied res judicata and affirmed the Department. This Court should do the same.

**D. There Is No Retroactivity Problem in Applying *Singletary* Here**

Thomas's argument that *Singletary* was not controlling law at the time of his injury is wrong. While it is true that a newly enacted statute operates prospectively unless there is a contrary legislative intent to apply it retroactively, the same is not true for case law interpreting an unchanged statute. *See State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996);

*Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22, 380 P.2d 730 (1963). “[W]here a statute has been construed by the highest court of the state, the court’s construction is deemed to be what the statute has meant since its enactment.” *Moen*, 129 Wn.2d at 538.

Here, the Department, Board, and superior court relied on *Singletary*, which examined relevant case law and RCW 51.52.050(1). *See* 166 Wn. App. 782 n.4, 784. That statute requires workers to protest or appeal a Department order within 60 days of communication of the order or the order becomes final and binding. It has not been changed and it is not being applied retroactively.

In any event, *Singletary* announces no new principle of law. It relied extensively on *Marley* when discussing the fundamental principles of finality, a case decided before Thomas’s injury. 166 Wn. App. at 782-85. While the Supreme Court did not decide *Singletary*, the analysis is instructive in that the appellate court has already determined the requirements of RCW 51.52.050. That construction should apply to all cases analyzing that statute and using res judicata on reopening orders. There is no reason that *Singletary* should not apply to Thomas.

## VI. CONCLUSION

When the Department reopened Thomas’s claim in 2002 and he did not appeal, it became final and binding that Thomas’s claim had

closed before that date. It is immaterial whether the Department communicated the first closing order to Thomas. Since Thomas's 2012 reopening application is more than seven years after the first closing order (which would be before the 2002 reopening order), the Department correctly limited its reopening for medical treatment only. This Court should affirm.

RESPECTFULLY SUBMITTED this 1<sup>th</sup> day of June, 2015.

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No. 72646-3-I

**COURT OF APPEALS FOR DIVISION I  
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LORENZO THOMAS,

Appellant,

v.

DEPARTMENT OF LABOR &  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

CERTIFICATE OF  
SERVICE

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor and Industries Brief of Respondent and this Certificate of Service in the below described manner.

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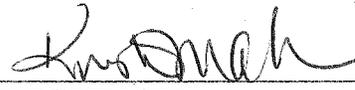
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