

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	6
A. SUPERIOR COURT ERRED IN CONCLUDING THAT SINCE GLENDA SINGLETARY DID NOT PREVIOUSLY SEEK BENEFITS FOR THE TIME POST CLOSING ORDER TO JUNE 2003 AND SINCE THE CLOSING ORDER WAS NOT COMMUNICATED TO HER, GLENDA SINGLETARY WOULD STILL BE ENTITLED TO SEEK BENEFITS FROM THAT TIME UNTIL THE TIME WHEN THE CLAIM WAS REOPEN	6
B. SUPERIOR COURT ERRED IN CONCLUDING THAT GLENDA SINGLETARY SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE FROM JUNE 26, 2002 TO JUNE 12, 2003	7
C. ECONOMIC EXPENSE AND JUDICIAL ECONOMY COULD HAVE BEEN PRESERVED HAD THE BOARD OF INDUSTRIAL INSURANCE APPEALS GRANTED GLENDA SINGLETARY'S MULTIPLE REQUESTS FOR INTERLOCUTORY REVIEW AND PROVIDED SUBSTANTIVE RESPONSES THERETO	8

III.	ISSUES	9
IV.	STATEMENT OF THE CASE	9
	A. FACTUAL AND PROCEDURAL HISTORY	9
	1. <u>Claim number W-280241</u>	9
	2. <u>Procedure before the Board</u>	10
	3. <u>Superior Court Action:</u>	15
V.	ARGUMENT	17
	A. STANDARD OF REVIEW	19
	B. THE ACT WAS CREATED TO PROTECT AND PROVIDE BENEFITS FOR INJURED WORKERS AND THEIR BENEFICIARIES	21
	C. A CLOSING ORDER MUST BE COMMUNICATED TO ALL INTERESTED PARTIES TO BE FINAL AND BINDING	22
	D. BECAUSE HER CLAIM REAMAINS OPEN DUE TO NON-COMMUNICATION OF THE JUNE 26, 2002 CLOSING ORDER THE DEPARTMENT AND SELF-INSURED EMPLOYER LACKED SUBJECT MATTER JURISDICTION TO DETERMINE AGGRAVATION OR ADJUDICATE GLENDA SINGLETARY REOPENING APPLICATION	24

1. A valid first terminal date is condition pre-requisite to adjudicating aggravation or reopening.	24
2. A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate.	27
3. The Board could have reduced costs and delay in benefits to Glenda Singletary and could have preserved judicial and fiscal economy by granting requests for interlocutory review and providing the parties with substantive responses to those requests.	30
E. NON-COMMUNICATION OF THE ORIGINAL CLOSING ORDER TO GLENDA SINGLETARY IS LIKE A WARPED PIECE OF DECK, IT MUST BE PROPERLY REPAIRD OR THE ENTIRE DECK WILL REMAIN DEFECTIVE	31
VI. CONCLUSION	33

TABLE OF AUTHORITIES

	<u>Pages</u>
A. Table of Cases	
Washington Cases	
<i>Marley v. Department of Labor and Industries</i> , 125 Wn.2d 533, 886 P.2d 189, (1994)	27, 28, 29,
<i>Reid v. Department of Labor and Industries</i> , 1 Wn.2d 430, 96 P.2d 492 (1939)	25
<i>Shufeldt v. Department of Labor and Industries</i> , 57 Wash.2d 758, 359 P.2d 495 (1961).	20
<i>Rogers v. Department of Labor and Industries</i> , 151 Wash.App. 174, 210 P.3d 355 (2009).	20
<i>Brown v. State Dept. of Health, Dental Disciplinary Bd.</i> , 94 Wash.App. 7, 972 P.2d 101 (1999)	21
<i>Mt. Baker Roofing, Inc. v. Washington State Dep. of Labor & Industries</i> , 146 Wash.App. 429, 191 P.3d 65 (2008)	20
<i>McIndoe v. Department of Labor ad Industries of State of Wash.</i> , 100 Wash.App. 64, 995 P.ed 616 (2000)	20
<i>Wilber v. Department of Labor and Industries</i> , 61 Wn.2d 439, 446 (1963)	21
<i>Hastings v. Department of Labor and Industries</i> , 24 Wn.2d 1	21
<i>Nelson v. Department of Labor and Industries</i> , 9 Wn.2d 621	21
<i>Hilding v. Department of Labor and Industries</i> , 162 Wash. 168	21

<i>Clauson v. Department of Labor and Industries,</i> 130 Wn. 2d 580 (1996)	21
<i>Porter v. Department of Labor & Indus.,</i> 44 Wn.2d 798, 271 P.2d 429, (1954)	23
<i>Nafus v. Department of Labor & Indus.,</i> 142 Wash. 48, 251 P. 877 (1927)	22, 23
<i>Farrow v. Department of Labor & Indus.,</i> 179 Wash. 453, 38 P. 2d 240 (1934)	23

B. Significant Board Decisions

<i>In re Daniel Bazan,</i> Dekt. No. 92 5953 (March 8, 1994)	23
<i>In re Betty Wilson,</i> Dekt. Nos. 02 21517 & 03 12511 (June 15, 2004)	24, 25, 26
<i>In re Santos Alonzo,</i> Dekt. Nos. 56 833 & 56 833A (December 9, 1981)	13, 30
<i>In re Thomas E. Hansen,</i> Dekt. No. 94 1283 (July 9, 1996)	14

C. Statutes

Wash. Rev. Code 51.32.160	26
Wash. Rev. Code 51.52.050	22
Wash. Rev. Code 51.52.120	34

I. INTRODUCTION

Comes now the appellant, Glenda Singletary, 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.

Glenda Singletary is an injured worker. On July 23, 2001, she filed an application for benefits with the Washington State Department of Labor and industries indicating she sustained a right shoulder injury on June 16, 2001 during the course of her employment with Manor Healthcare Corporation. Manor Healthcare Corporation is a self-insured employer. Glenda Singletary's claim was allowed and she was provided with benefits as an injured worker under the Industrial Insurance Act. An order generated on June 26, 2002 ended payment of time-loss compensation benefits to Glenda Singletary and closed her claim. **The facts surrounding communication of this June 26, 2002 order, and the rights and proper procedures flowing therefrom comprise the issues that have fueled the present course of litigation and appeal – this is a jurisdictional issue.**

On June 20, 2003, Glenda Singletary filed an application to reopen her claim. That request was granted and she was provided with

benefits as an injured worker under the Industrial Insurance Act. On July 29, 2005 the Department issued an order closing Glenda Singletary's claim. After Glenda Singletary protested and requested reconsideration, the Department issued an order affirming its July 29, 2005 closing order on December 29, 2005.

A notice of appeal was filed with the Board of Industrial Insurance Appeals on February 24, 2006. A docket number was assigned to the matter and litigation commenced. Glenda Singletary was initially represented by David B. Vail of the Law Offices of David B. Vail and Jennifer Cross-Eutenieier and Associates. The self-insured employer, Manor Healthcare undertook to defend the closing order and neither the Department of Labor and Industries nor their legal representatives participated in litigation before the Board of Industrial Insurance Appeals. Manor Healthcare was represented by Bradley Garber of the Law Offices of Wallace, Klor & Mann.

During a September 25, 2006 discovery deposition of Glenda Singletary it became apparent that she never received the **June 26, 2002** closing order. Glenda Singletary reviewed her personal records and discovered she had no copy of that order. Because this issued needed to be addressed, a jurisdictional hearing was held November 9, 2006 at which time Glenda Singletary presented evidence on the issue

of whether the **June 26, 2002 closing order was communicated to her**. While the Industrial Appeals Judge concluded that the order had been communicated, the Board of Industrial Insurance Appeals ultimately overturned that decision upon Glenda Singletary's petition for review. Glenda Singletary also decided to proceed with an appeal on the jurisdictional issue and notified the Board of Industrial Insurance Appeals of her intention not to present evidence on the merits until such time as jurisdiction had been finally established. However, despite its determination regarding non-communication of the closing order, the Board of Industrial Insurance Appeals concluded that Glenda Singletary should have presented evidence regarding the merits of her claim on December 6, 2006, the date hearings on that matter were set. Because she did not present evidence on the merits pending resolution of the **jurisdictional issue**, the Board of Industrial Insurance Appeals dismissed Glenda Singletary's appeal for failure to present evidence.

Glenda Singletary appealed this decision to Pierce County Superior Court. There the self-insured employer filed a motion for summary judgment to which Ms. Singletary filed a cross motion for summary judgment. After reviewing the briefing and hearing oral argument, on November 14, 2008, the Honorable Judge Steiner entered an order

concluding that the **June 26, 2002 closing order had not been communicated**, reversing the Board of Industrial Insurance Appeals' decision and order, and remanding the matter to the Department level so that the **June 26, 2002 closing order could be communicated** and so that such other action as is appropriate under the law and facts could be taken at the department level. Upon the self-insured employer's request for reconsideration, on May 5, 2010, the Honorable Judge Steiner issued a new order holding that it was error that the Board of Industrial Insurance Appeals treated Glenda Singletary as if she had received the **June 26, 2002 closing order** and that since she did not previously seek benefits for the time post-closing order to June 2003 and since the closing order was not properly communicated to her, Glenda Singletary would still be entitled to seek benefits from that time until the time when the claim was reopened, and that Glenda Singletary should have been allowed to present evidence from June 26, 2002 to June 12, 2003 when realistically she was not. To that extent, Judge Steiner reversed the decision and order of the Board of Industrial Insurance Appeals.

There is no question that Glenda Singletary's claims have been adjudicated over the years by the Department of Labor and Industries (Department) and the Self Insured Employer (SIE), here Manor healthcare. However, the issue surrounding communication of the

June 26, 2002 closing order constitutes a flaw in the jurisdictional procedure of her claim. Unfortunately it was not until litigation before the Board of Industrial Appeals commenced in 2006 that this flaw truly came to light. However, since that time, Glenda Singletary and her representatives have continued to doggedly pursue the issue so that it can be remedied and claim administration can proceed properly under the law, absent any defects.

The proper procedure must be followed to accurately install decking just as the proper procedure must be followed to accurately administer industrial insurance claims. If the 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, the bent boards must be properly replaced or they will continue to cause defective decking. Currently, Glenda Singletary's claim is warped because the **June 26, 2002 order initially closing her claim and establishing a valid first terminal date** was never properly communicated to her. This flaw cannot be correct simply by allowing her to present evidence of benefits she thinks she may be entitled to. The only way to accurately repair this flaw is to remand the matter to the Department level so that the first closing order can be properly

communicated to Glenda Singletary. Without taking this simple corrective measure, Glenda Singletary's claim will continue to be warped and this issue will continue as an ongoing defect throughout future claim administration.

This must not stand. This matter must be remanded to the Department, not to the Board or Superior Court, for this simple yet thorough repair: so that the **June 26, 2002 order can be communicated.** By returning to the site of the initial procedural flaw, it can be easily corrected through proper communication, thereby reinstating the Department's own adjudicative authority to further and properly administer Glenda Singletary's claim.

II. ASSIGNMENTS OF ERROR

A. SUPERIOR COURT ERRED IN CONCLUDING THAT SINCE GLENDA SINGLETARY DID NOT PREVIOUSLY SEEK BENEFITS FOR THE TIME POST CLOSING ORDER TO JUNE 2003 AND SINCE THE CLOSING ORDER WAS NOT COMMUNICATED TO HER, GLENDA SINGLETARY WOULD STILL BE ENTITLED TO SEEK BENEFITS FROM THAT TIME UNTIL THE TIME WHEN THE CLAIM WAS REOPENED.

1. There is no question and no dispute that the June 26, 2002 closing order has not been properly communicated to Glenda Singletary.

2. A valid first terminal date is a condition precedent to later adjudication of the claim including but not limited to assessment of a reopening application. Reopening a claim which has not yet been validly closed is unnecessary since the claim remains open until such time as the closing order is communicated and becomes final.
3. The Court erred in concluding that Glenda Singletary should present evidence of entitlement to benefits post-closing order to the time when the claim was reopened because that closing order has yet to be properly communicated to her.
4. This matter should be remanded to the Department level for communication of the closing order and/or further adjudication of the claim under the law and facts.

B. SUPERIOR COURT ERRED IN CONCLUDING THAT GLENDA SINGLETARY SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE FROM JUNE 26, 2002 TO JUNE 12, 2003.

1. The Department of Labor and Industries and/or Self-Insured Employer, as the case may be, retains original jurisdiction to adjudicate claims. Neither the Board of Industrial Insurance Appeals nor any higher courts may

rule on issues relating to the merits of a claim which have not been previously passed upon by the Department of Labor and Industries and/or Self-Insured Employer. Neither the Department of Labor and Industries and/or Self-Insured Employer have had an opportunity to adjudicate Glenda Singletary's entitlement to benefits from June 26, 2002 to the time of her reopening application.

2. Glenda Singletary must first be given an opportunity to exercise her protest and/or appeal rights from the June 26, 2002 which do not expire until sixty (60) days from the date the order is properly communicated to her.
3. It is contrary to the purpose and policy behind the Industrial Insurance Act and is a waste of fiscal resources both for Glenda Singletary and the court system to require presentation of evidence of entitlement to benefits when a first closing order has not been communicated nor has become final and binding.

C. ECONOMIC EXPENSE AND JUDICIAL ECONOMY COULD HAVE BEEN PRESERVED HAD THE BOARD OF INDUSTRIAL INSURANCE APPEALS GRANTED GLENDA SINGLETARY'S MULTIPLE REQUESTS FOR INTERLOCUTORY REVIEW AND PROVIDED SUBSTANTIVE RESPONSES THERETO.

III. ISSUES

- A. Whether Superior Court or the Board of Industrial Insurance Appeals can require an injured worker to present evidence supporting entitlement to benefits under the Industrial Insurance Act once it has been indisputably determined that the first closing order has not been communicated to the claimant?
- B. Whether the Board of Industrial Insurance Appeals is obligated to provide parties with substantive responses to interlocutory appeals in order to preserve fiscal and judicial economy?

IV. STATEMENT OF THE CASE

A. FACTUAL AND PROCEDURAL HISTORY

1. Claim number W-280241:

In 2001 Glenda Singletary was working for Manor Healthcare Corporation. She filed an application for industrial insurance benefits on July 23, 2001 alleging she had sustained a right shoulder injury during the course of her employment on June 16, 2001. (Clerks Papers – herein after “CP” at p. 23). Her claim was allowed and she was provided with benefits under the Industrial Insurance Act (hereinafter “Act”). On June 26, 2002

the Department of Labor and Industries (herein after “Department”) issued an order ending time-loss compensation benefits and closing her claim. (CP at p. 23). It is undisputed that this order was never properly communicated to Glenda Singletary. (*see* CP at pp. 23-24, 58, and 107). When Glenda Singletary sought medical attention in 2003, she was informed for the first time by her doctor that her claim had been closed and a reopening application was filed. (Certified Appeal Board Record, hereinafter “CABR” - 11/9/2006 testimony of Glenda Singletary page 9 line 49 - page 10 line 5) The claim was reopened effective June 12, 2003. (CP at p. 23). On July 29, 2005 the Department issued an order again closing the claim. (CP at p. 23). Glenda Singeltary filed a protest and request for reconsideration of the July 29, 2005 order with the sixty (60) day protest/appeal period set forth in the order. (CP at p. 23). The Department then affirmed closure on December 29, 2005. (CP at p. 23),

2. Procedure before the Board:

On February 24, 2006 Glenda Singletary filed a “notice of appeal” with the Board of Industrial Insurance Appeals (hereinafter “Board”) to the December 29, 2005 affirmance of the July 29, 2005 order closing her claim. The Board granted her appeal on April 3, 2006 and assigned it docket number 06 12195. (CP at p. 23). Counsel for the self-insured

employer took Glenda Singletary's deposition as part of the discovery process on September 25, 2006. (CABR p. 186). During that deposition, it became apparent to her counsel that Glenda Singletary may not have received the original **June 26, 2002 order** closing her claim. (CABR at p. 213). The June 26, 2002 closing order was sent to Ms. *Glenda* Singletary at *118th* Avenue S. but *Glenda* Singletary actually resided and received her mail at *18th* Avenue S. (CABR at p. 35).

The Board was immediately notified and a jurisdictional hearing was set for November 9, 2006. (CABR - Transcripts of November 9, 2006 Hearing). In the meantime, because the jurisdictional hearing was scheduled a mere month before hearings on the merits were set to begin, Glenda Singletary filed a motion to strike the hearing dates on October 24, 2006. (CABR at p. 213). This motion was denied. (CABR at p. 35). She then requested that the Board grant Interlocutory Review of this denial pursuant to WAC 263-12-115(6)(a). On November 6, 2006 the Board issued an order stating only that "after careful consideration of the claimant's motion and declaration, review of Industrial Appeals Judge (hereinafter "IAJ") Duras's October 30, 2006 order is denied." (CABR at p. 266). That order denied Glenda Singletary's motion to strike the hearing dates for litigation on the merits of the claim.

At the jurisdictional hearing testimony was presented from both Glenda Singletary and Lorrie Sheehan, a worker's compensation claim adjuster with Crawford & Company. Glenda testified that she never resided at nor received mail at the address listed on the June 26, 2002 closing order. She further testified that she learned of claim closure from her doctor on June 30, 2003 when she presented for pain and a reopening application was filed as noted above. (CABR at p. 35). Lorrie Sheehan testified that the June 26, 2002 closing order was sent to the incorrect 118th Avenue South Address rather than to the address on file for Glenda J. Singletary, which was on 18th Avenue South. (CABR at pp. 35-36).

Subsequently, on November 16, 2006 IAJ Duras issued an interlocutory order regarding jurisdiction and copy costs in which he concluded that "it seems more likely than not that the claimant received the June 26, 2002 order that closed her claim despite the fact that it was mailed to 118th Ave. S instead of 18th Ave S. There is no indication that mail came back to Crawford and Company, there is no indicating the correct zip code was used, and Ms. Singletary filed a reopening application because her condition worsened in October 2002, at which time she indicated on the reopening application, the approximate date that her claim was closed." (CABR at p. 351).

On November 29, 2006, Glenda Singletary requested that the Board grant interlocutory review of IAJ Duras's November 16, 2006 order pursuant to WAC 263-12-115(6). On December 1, 2006 "after careful consideration of the Claimant's motion and declaration, review of Judge Duras's November 16, 2006 order" was denied. (CABR at p. 359). The Board gave no additional logic or rationale for this decision.

With the date set for presenting evidence on the merits fast approaching, on December 1, 2006 Glenda Singletary submitted a notice of intent to not present testimony until jurisdiction has been resolved to the Board. (CABR p. 364-365). In this notice, she pointed out that the jurisdictional matter was still unresolved yet hearings were scheduled to begin in a few short days. She cited significant decision *In re Santos Alonzo*, 56-833 (1981) which stated it was regrettable for the parties to go through the expense of presenting evidence on the merits only to discover later the Board lacked jurisdiction. She indicated she was not in a position to expend resources litigating the merits of her claim prior to resolution of the jurisdictional matter because "she cannot afford the potentially regrettable and unnecessary expense required to put on testimony that may be negated by lack of Board jurisdiction." (CABR at p. 365).

On December 11, 2006 IAJ Duras issued a Proposed Decision and Order dismissing Glenda Singletary's appeal from the order of the

Department dated December 29, 2005 for failure to present evidence when due. (CABR at p. 76). On January 22, 2007 Glenda filed a Petition for Review of IAJ Duras's December 11, 2006 Proposed Decision and Order with the Board of Industrial Insurance Appeals. Therein she outlined *all* of the procedural flaws in her appeal before the Board including: (a) IAJ Duras's ruling on jurisdiction relating to the June 26, 2002 closing order and communication issue, (b) the multiple denials of requests for interlocutory review, and (c) an outstanding copy fee dispute. (CABR pp. 49-69).

On March 23, 2007 the Board issued a Decision and Order in which it unequivocally concluded that "Ms. Singletary has proven that the June 26, 2002 closing order was not communicated to her." (CABR at p. 38). Despite this finding, consistent with Glenda Singletary's argument dating back to the November 2006 jurisdictional hearing, the Board cited an insignificant decision (in other words, a Board decision not designated as a significant decision), *In re Thomas E. Hansen*, Dkt. No, 94 1283 (July 9, 1996) to support its ultimate conclusion that despite the non-communication of the June 26, 2002 closing order, the Board retains jurisdiction over Glenda's appeal because a "dismissal on jurisdictional grounds with remand to the Department is not required because Ms.

Singletary's entitlement to benefits post-reopening have been addressed by the Department." (Defendant's Exhibit A at pp. 5-6).

On April 2, 2007 Glenda moved for the Board to reconsider its March 23, 2007 Decision and Order. (CABR at pp. 8-18). The Board denied this request on June 28, 2007. (CABR at pp. 1-2).

3. Superior Court Action:

The Board's decision was then appealed to the Pierce County Superior Court and was assigned to Department 10, the Honorable Judge Gary Steiner. On December 5, 2007 the self-insured employer made a motion for Summary Judgment arguing that the Board correctly dismissed Glenda Singletary's appeal for failure to submit evidence when due. (CP at p. 14). On January 28, 2008, Glenda Singletary filed a response to the motion for summary judgment and introduced a cross motion for summary judgment. (CP at p. 34). In this cross motion, Glenda Singletary re-raised the issue surrounding communication of the July 26, 2002 closing order. After hearing oral argument from both parties and after receiving a letter from Manor healthcare on May 12, 2008, on November 14, 2008, Judge Steiner entered an order reversing the Board's decision and remanding the matter to the Department level so the order could be communicated and for further action under the law and facts. (CP at pp. 53-57). Glenda Singletary was in agreement with this order and had no intent for further

appeal. However, on November 24, 2008, Manor Healthcare filed a “Motion for Reconsideration and Abatement”. (CP at p. 62). Glenda Singletary responded to this motion on January 20, 2009. (CP at p. 76). On February 5, 2009 Judge Steiner sent a letter to both parties indicating his opinion had changed and directed the parties to circulate and forward a proposed order for signature by the Court conforming to the Court’s new decision. (CP at pp. 83-84). Neither party prepared such an order for some time. On February 12, 2010 Manor Healthcare filed a motion for dismissal for want of prosecution. (CP at p. 87). Despite the fact that she was not the prevailing party under the Court’s new order, Glenda Singletary was the only party to produce an order consistent with the Court’s February 5, 2009 letter. (CP at p. 93-94 and pp. 99-100). Ultimately on May 5, 2010, the court signed and entered the new order as presented by Glenda Singletary. (CP at pp. 99-100).

Glenda Singletary is the **only party to file an appeal** with this Court from that order. She does not dispute the correctness of the determination that the June 26, 2002 closing order was never communicated to her nor does she dispute that she was never given a full opportunity to present evidence of entitlement to benefits dating back to June 26, 2002. The *sole basis* of Glenda Singletary’s present appeal is to address the proper remedy given the factual situation. Glenda Singletary asserts that the

Honorable Judge Steiner was correct in his November 14, 2008 order to reverse the Board's decision and to remand this matter to the department level so the June 26, 2002 order can be properly communicated, so that she can exercise her protest/appeal rights flowing from that order and so that her claim can thereafter be properly administered absent jurisdictional flaws under the law and given the facts. Additionally, Glenda Singletary asserts that vast amounts of fiscal and judicial economy could have been preserved had the Board taken the time to properly address her multiple requests for interlocutory appeal and enacted the appropriate measures to correct this jurisdictional flaw back in 2006 when the issue was initially raised. At a minimum the Board should be required to provide parties with substantive rationale as to why interlocutory appeal is denied in similar situations.

V. ARGUMENT

The issue here is very simple, yet it has been muddled by red herring arguments and motions distracting from the true issue, and failing to clearly, concisely or precisely address and identify the proper remedy.

At its most concise, the issue raised by Glenda Singletary is simple and singular: **Whether, as an injured worker, she should be required to expend her own resources to present evidence of entitlement to**

benefits under the Act when there is no final and binding first terminal date in her claim because the first closing order was never communicated to her?

Glenda Singletary argues that this undue burden should not be placed upon her and that the appropriate remedy is for this matter to be remanded to the Department level so that the order can be properly communicated and her claim can thereafter be adjudicated absent jurisdictional defects. The argument is logical: **First**, in order for a closing order to become final and binding, it must be communicated to the interested parties. There is *no dispute* that the June 26, 2002 closing order has not been communicated to Glenda Singletary. This is due process at its most fundamental. Because that closure establishes the first terminal date in Glenda Singletary's claim and because she has protest/appeal rights that flow from communication of that order, it must be communicated.

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. Since closure of her claim was never communicated to Glenda Singletary her claim remains open as a result of the non-communication and it should never have been adjudicated under the

reopening standard. This is because 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. However this adjudicative power 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.

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 claim to be remanded to the Department to communicate the closing order. Only by doing so, can the Department restore its original jurisdiction to adjudicate the claim under the law and given the facts.

A. STANDARD OF REVIEW.

Jurisdiction of the 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 an 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 Self-insured Employer'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.

Glenda Singletary has not been afforded the full protection of the Act; in fact the Board and Superior Court have attempted to place upon her the burden of expending the costs to litigate her entitlement to benefits when jurisdiction to hear has not been established. In so doing neither the Board nor Superior Court read the Act and the law flowing from it, in a light most favorable to Glenda Singletary. The only remedy that reads the law in a light most favorable to Glenda Singletary and reduces to a minimum her suffering and economic loss is to *reverse* the Board's decision dismissing her claim, to *reverse* the Superior Court's decision that she should present evidence of entitlement to benefits dating back to 2002 and to *remand* this matter to the Department level so that the closing order can be properly communicated once and for all.

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*, Dekt. 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*, Dekt. No. 92 5953 (March 8, 1994) – *emphasis added*.

“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).

In summation, 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. Because Glenda Singletary testified that she never received the June 26, 2002 order and because Lorie Sheehan conformed that the order was, in fact, mailed to the incorrect address the Board and Superior Court were correct in determining that the order was not communicated and Glenda Singletary does not dispute this finding. Additionally, neither the Department nor the Self-insured Employer, Manor Healthcare have appealed that determination.

D. BECAUSE HER CLAIM REAMAINS OPEN DUE TO NON-COMMUNICATION OF THE JUNE 26, 2002 CLOSING ORDER THE DEPARTMENT AND SELF-INSURED EMPLOYER LACKED SUBJECT MATTER JURISDICTION TO DETERMINE AGGRAVATION OR ADJUDICATE GLENDA SINGLETARY'S REOPENING APPLICATION.

1. A valid first terminal date is a 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 clearly printed on the June 26, 2002 order which was admitted into evidence in this case: a claimant has sixty days (60) to protest or appeal claim closure. However, only when the injured worker receives the order does the sixty (60) day protest/appeal period begin to run. The period is tolled until the order has been properly communicated. This is because until the order (with the protest/appeal instructions printed on it) is communicated, the injured worker 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 the claim to be closed to begin with. Whether a claim should be reopened is based upon whether or not the industrially related condition(s) worsened between the time the claim was closed and the time the injured worker filed an application for the claim to be reopened. With no valid **original closure** date 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) – *emphasis added*. The standard

for adjudicating a reopening application is contained in 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. (*emphasis added*)

Until a final determination of the claimant's condition at the first terminal date/date the first closing order becomes final is made, it is premature to adjudicate an application to reopen the claim for aggravation occurring subsequently. *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 the first terminal date/original closure, "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 and/or Self-insured Employer have no

authority to adjudicate reopening and 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.

In its decision and order, the Board seems to imply that non-communication of a closing order is a mere error of law remedied by the Department/Self-insured Employer's subsequent adjudication of Glenda Singletary's claim rather than a jurisdictional flaw.

The Court in *Marley* addressed the distinction between erroneous Departmental action that amounted to an error of law and 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 was 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.* They determined 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.* Because there is been no communication of an original closing order in Glenda Singletary’s claim, her claim remains open. Therefore, before subject matter jurisdiction extends to the Board or Superior Court for presentation of evidence and determination(s) regarding any form(s) of relief as to the merits of her claim, the Department/Self-insured Employer must first exercise its original jurisdiction to administer the claim and issue determinative order(s) with

respect to her entitlement to benefits from which further pretest/appeal can be made.

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 in mis-calculating something they had jurisdiction to calculate. It was 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.

Marley clearly states 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. In Glenda Singletary's case, the Department/Self-insured Employer had no authority to adjudicate her claim for reopening because her claim was never properly closed to begin with. This over extension by the Department/Self-insured Employer cannot be remedied by subsequent action or by allowing Glenda Singletary to produce evidence before the Board of entitlement to benefits from June 2002 onward. The underlying jurisdictional flaw, non-communication of the original closing order, will continue to plague this case and taint all further adjudication unless the matter is remanded now, so that a valid and proper first terminal date can be established.

3. The Board could have reduced costs and delay in benefits to Glenda Singletary and could have preserved judicial and fiscal economy by granting requests for interlocutory review and providing the parties with substantive responses to those requests.

As already noted, because of the outstanding jurisdictional issue and fast approaching hearing dates for presentation of evidence on the merits at the Board level, Glenda Singletary made a motion to strike the hearing dates which was denied. On November 1, 2006, she filed an interlocutory review of this denial citing the policy set forth in significant Board decision *in re Santos Alonzo*, 56-833 (1981) finding it regrettable that the parties went through the expense of litigating the merits of a claim where it was later found the Board had no jurisdiction. On November 6, 2006, Assistant Chief Industrial Appeals Judge Calvin C. Jackson denied claimant's interlocutory appeal without giving specific findings or rationale to support this denial. On November 9, 2006 the jurisdictional hearing was held and on November 16, 2006, the Judge found that the Board had jurisdiction over the appeal. On December 1, 2006 the claimant filed an interlocutory appeal to review the finding that the Board had jurisdiction and the award of copy costs to the employer. This interlocutory appeal was again reviewed by Assistant Chief Industrial Appeals Judge Calvin C. Jackson and on **December 1, 2006, on the very day the review was requested**, Judge Jackson issued an order declining interlocutory review **without setting forth any specific findings or rational for this declination**. However the order did say that "**careful consideration**" had been given to claimant's motion and declaration.

This case cries out for a public policy determination regarding the propriety of denying interlocutory reviews without rationale or specific findings supporting that denial when the potential damage to the parties and ultimate judicial and fiscal inefficiency clearly outweighs any interest the Board may have in moving cases along for resolution. Neither an injured worker nor any other interested party should be forced to simultaneously prepare a case on the merits when the jurisdiction of the Board or any other reviewing court has not been finally established. Interlocutory review is a perfect place to efficiently and economically address these types of procedural issues.

E. NON-COMMUNICATION OF THE ORIGINAL CLOSING ORDER TO GLENDA SINGLETARY IS LIKE A WARPED PIECE OF DECK. IT MUST BE PROPERLY REPAIRED OR THE ENTIRE DECK WILL REMAIN DEFECTIVE.

As already noted, in order to properly install decking, proper procedure must be followed and in order to properly administer the claims of injured workers, the Department/Self-insured Employers must also follow proper procedures. One of those procedures requires the proper communication of determinative orders to all interested parties. Here, **it is undisputed that the June 26, 2002 original closing order was never properly communicated to the injured worker, Glenda Singletary.**

Warped pieces of a deck cannot be repaired by simply nailing down the bent parts. A non-communicated closing order cannot be repaired by adjudicating reopening applications and forcing an injured worker to expend resources and use valuable court time and resources to prove entitlement to benefits postdating the non-communicated order.

The only way to repair the warped decking is to remove the warped pieces of decking and re-install it using proper procedures. Similarly, the only way to remove this jurisdictional flaw from this claim is to remand the claim for communication of an original closing order to Glenda Singletary. Once the Department/Self-insured Employer have an opportunity to review the claim (now that over nine years have passed since the attempted first closure), a new determinative, protectable/appealable order can be issued and properly communicated to all interested parties. If, at that point in time, Glenda Singletary disagrees with the determination made, she will, for the first time, have an opportunity to exercise her right to protest or appeal the original first closure of her claim. It is at that point only, that Glenda Singletary should be required to expend the resources to litigate her entitlement to benefits for any period of time. Accordingly this matter must be remanded to the Department level for exercise of original

jurisdiction and issuance of a final determination as to entitlement to benefits and eventual establishment of a valid first terminal date/original closure date.

VI. CONCLUSION

In conclusion, Superior Court, the Board and the Department all lacked subject matter jurisdiction to adjudicate Glenda Singletary's reopening application because of non-communication of the closing order date June 26, 2002. Because the order from Superior Court concludes that although she did not receive the June 26, 2002 closing order, Glenda Singletary should still expend the resources to litigate entitlement to benefits post June 2002, the portion relating to further adjudication must be *reversed*. This matter must be *remanded to the Department level* so that the Department/Self-Insured Employer and issue and properly communicate a determinative order regarding Glenda Singletary's entitlement to benefits and/or establishing a valid first terminal date or original closure date. From there, if it is determined necessary, Glenda Singletary (or any other interested party) can exercise her (their) protest/appeal rights from a validly communicated determinative order and litigation may commence. Without a valid first terminal date or original closure date Glenda Singletary's claim remains open. Neither the Board nor any other

court has subject matter jurisdiction to determine an injured worker's entitlement to benefits under an open claim absent another determinative order ordering or denying specific benefits under the Act.

A remand to either the Board or Superior Court would serve no useful purpose as this is truly a question of law which must be decided expeditiously. Additionally, Glenda Singletary respectfully requests that fees and costs be awarded under RCW 51.52.120.

Dated this 19th day of November, 2010.

Respectfully submitted,

VAIL-CROSS & ASSOCIATES

By: 
TARA JAYNE RECK
WSBA# 37815
Attorney for Appellant

COURT OF APPEALS
DIVISION II
NOV 19 PM 3:17
STATE OF WASHINGTON
BY _____
DEPUTY

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 19th day of November, 2010, the document to which this certificate is attached, Petition For Review, hand delivered to:

Court of Appeals- Div II
950 Broadway, Ste 300
MS TB- 06
Tacoma, WA 98402

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

Lawrence Mann
Wallace Klor & Mann PC
5800 Meadows Road- Suite 220
Lake Oswego, OR 97035

Steve Vinyard
Assistant Attorney General of the State of Washington
Labor and Industries Division
PO Box 40121
Olympia, WA 98504

DATED this 19th day of November, 2010.



KERRI A THRESHER, Legal Assistant