

NO. 40808-2

COURT OF APPEALS
DIVISION II

11 JUN 17 PM 2:12

STATE BY _____
BY _____
DEPUTY

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

GLEND A SINGLETARY,

Appellant,

v.

MANOR HEALTHCARE CORP., ET. AL.,

Respondent.

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

ROBERT M. MCKENNA
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7715

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. COUNTER STATEMENT OF THE ISSUES	2
III. STATEMENT OF THE CASE	3
A. Department And Self-Insured Employer’s Adjudication Of Singletary’s Claim	3
B. Proceedings At The Board.....	4
C. Superior Court Proceedings	7
IV. SUMMARY OF THE ARGUMENT	10
V. STANDARD OF REVIEW.....	12
VI. ARGUMENT.....	13
A. Because Singletary Failed To Present Any Evidence In Support Of Her Appeal, The Superior Court Should Have Affirmed The Board’s Dismissal Of Her Case.....	13
1. Singletary’s Appeal Was Properly Dismissed Based On Her Failure To Present A Prima Facie Case	14
2. There Is No Legal Basis To Excuse Singletary’s Failure To Present A Prima Facie Case	16
B. Because The Department Has Broad Jurisdiction To Decide All Issues Regarding A Worker’s Right To Benefits Under The Act, It Had Jurisdiction To Issue Both The 2003 Order That Reopened Singletary’s Claim, And The December 29, 2005 Order That Closed It, Regardless Of Whether Manor’s Prior Decision To Close Singletary’s Claim Was Communicated To Her.....	22
1. The Department Has Broad Subject Matter Jurisdiction To Decide All Controversies Arising Under The Industrial Insurance Act.....	24

2. The Department Had Jurisdiction To Respond To Singletary’s Application To Reopen Her Claim Even Though Manor Failed To Properly Communicate Its Prior Closing Order To Her	27
C. Because The Department Had Jurisdiction To Issue The 2003 Order That Reopened Singletary’s Claim, And Because She Did Not Appeal That Order, That Order Is Final And Binding.....	35
D. Even If The November 2003 Order Were Void The Department Would Have Jurisdiction To Issue The December 2005 Order Closing Her Claim.....	41
E. The Doctrine Of Liberal Construction Does Not Support Singletary’s Arguments	43
F. If This Court Concludes That It May Not Consider Whether The Board Properly Dismissed Singletary’s Appeal, Then It Should Affirm The Superior Court’s Decision	46
G. Although Her Arguments Lack Merit, Singletary Has Standing To Appeal	47
VII. CONCLUSION	48

TABLE OF AUTHORITIES

Cases

<i>Abraham v. Dep't of Labor & Indus.</i> , 178 Wash. 160, 34 P.2d 457 (1934).....	24
<i>Alverado v. Wash. Pub. Power Supply Sys.</i> , 111 Wn.2d 424, 759 P.2d 427 (1998).....	13, 14
<i>Austin v. Dep't of Labor & Indus.</i> , 6 Wn. App. 394, 492 P.2d 1382 (1971).....	15
<i>Aviation West Corp. v. Dep't of Labor & Indus.</i> , 138 Wn.2d 413, 980 P.2d 701 (1999).....	44
<i>Bird-Johnson v. Dana Corp.</i> , 119 Wn.2d 423, 833 P.2d 375 (1992).....	44
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	17
<i>Dep't of Labor & Indus. v. Fankhauser</i> , 121 Wn.2d 304, 849 P.2d 1209 (1993).....	19
<i>Dinnis v. Dep't of Labor & Indus.</i> , 67 Wn.2d 654, 409 P.2d 477 (1965).....	38
<i>Dougherty v. Dep't of Labor and Indus.</i> , 150 Wn.2d 310, 76 P.3d 1183 (2003).....	23, 24, 26
<i>Fuller v. Dep't of Labor & Indus.</i> , 169 Wn. 362, 13 P.2d 903 (1932).....	36
<i>Gold Star Resorts, Inc. v. Futurewise</i> , 167 Wn.2d 723, 222 P.3d 791 (2009).....	37
<i>Greengo v. Pub. Emps. Mut. Ins. Co.</i> , 135 Wn.2d 799, 959 P.2d 657 (1998).....	13
<i>In re Betty Wilson</i> , BIIA Dec. 02 21517, 2004 WL 1901021 (2004).....	33, 34, 35

<i>In re Christopher B. Preiser,</i> Dckt. No. 09 19683 2010 WL 5273010 (2010).....	36, 39, 40
<i>In re Jorge Perez-Rodriguez,</i> BIIA Dec, 06 18718, 2008 WL 1770918 (2008).....	passim
<i>In re Ronald Leibfried,</i> 1990 WL 264682, BIIA Dec. 88 2274 (1990).....	43
<i>In re Saltis,</i> 94 Wn.2d 889, 621 P.2d 716 (1980).....	18
<i>Kingery v. Dep't of Labor & Indus.,</i> 132 Wn.2d 162, 937 P.2d 565 (1997).....	passim
<i>La Vera v. Dep't of Labor & Indus.,</i> 45 Wn.2d 413, 275 P.2d 426 (1954).....	16
<i>Loveridge v. Fred Meyer,</i> 125 Wn.2d 759, 887 P.2d 898 (1995).....	36
<i>Marley v. Dep't of Labor & Indus.,</i> 125 Wn.2d 533, 886 P.2d 189 (1994).....	passim
<i>McDonald v. Dep't of Labor & Indus.,</i> 104 Wn. App. 617, 17 P.3d 1195 (2001).....	15, 17
<i>Miller v. Dep't of Labor & Indus.,</i> 200 Wash. 674, 94 P.2d 764 (1939).....	14, 42
<i>Parklane Hosiery Co. v. Shore,</i> 439 U.S. 322, 99 S. Ct. 645, 649, 58 L. Ed.2d 552 (1979).....	45
<i>Reid v. Department of Labor & Industries.,</i> 1 Wn.2d 430, 96 P.2d 492 (1939).....	31, 32, 33, 34
<i>Rhoad v. McLean Trucking, Dep't of Labor & Indus.,</i> 102 Wn.2d 422, 686 P.2d 483 (1984).....	44
<i>Rodriguez v. Dep't of Labor & Indus.,</i> 85 Wn.2d 949, 540 P.2d 1359 (1975).....	15

<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	13
<i>Romo v. Dep't of Labor & Indus.</i> , 92 Wn. App. 348, 962 P.2d 844 (1998).....	12
<i>Senate Republican Comm. v. Pub. Disclosure Comm'n</i> , 133 Wn.2d 229, 943 P.2d 1358 (1997).....	44
<i>Shafer v. Dep't of Labor & Indus.</i> , 140 Wn. App. 1, 159 P.3d 473 (2007), <i>aff'd</i> , 166 Wn.2d 710, 213 P.3d 591 (2009).....	27, 39, 43
<i>Shafer v. Dep't of Labor & Indus.</i> , 166 Wn.2d 710, 213 P.3d 591 (2009).....	16, 28
<i>Shoeman v. N.Y. Life Ins. Co.</i> , 106 Wn.2d 855, 726 P.2d 1 (1986).....	39
<i>Sprint Spectrum, LP v. Dep't of Revenue</i> , 156 Wn. App. 949, 964, 235 P.2d 849 (2010) (Becker, J., concurring), <i>review denied</i> , No. 85147-6 (Wash. January 4, 2011).....	22, 23, 25, 26
<i>Weyerhaeuser Co. v. Tri</i> , 117 Wn.2d 127, 814 P.2d 629 (1991).....	29

Statutes

RCW 34.05 (AB 21).....	12
RCW 49.17 (AB 20).....	12
RCW 51.04.010	19
RCW 51.12.010	44
RCW 51.28.040	36
RCW 51.32.055	3
RCW 51.32.160	30, 36
RCW 51.52.050(1).....	38
RCW 51.52.060	15, 16, 17, 21, 38

RCW 51.52.104	18
RCW 51.52.106	18
RCW 51.52.115	12, 16
RCW 51.52.140	12, 13
RCW 51.52.160	28

Other Authorities

Philip A. Trautman, <i>Claim and Issue Preclusion in Civil Litigation in Washington</i> , 60 Wash. L. Rev. 805, 813-14 (1985).....	36, 37
Robert J. Martineau, <i>Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse</i> , 1988 BYU L. Rev. 1, 26-27 (1988).....	23

Rules

RAP 10.3(a)(6).....	17
---------------------	----

Regulations

WAC 263-12-115.....	20
WAC 263-12-115(6).....	19, 20

I. INTRODUCTION

This is a workers' compensation case under RCW Title 51, of the Industrial Insurance Act (Act). The Department of Labor and Industries (Department) did not participate in the case when it was before the Board of Industrial Insurance Appeals (Board) or the Superior Court, but it has become involved in this case at this stage in order to respond to the novel and strained legal arguments advanced by Singletary regarding the nature and extent of the Department's jurisdiction to make decisions on injured worker's claims. However, the Department is not fully aligned with Manor, as it does not agree that Singletary lacks standing to appeal.

Under the Act, the Department is empowered with broad, original jurisdiction to make decisions on an injured worker's claim, which includes both decisions to close an injured worker's claim and decisions to reopen a closed claim. Singletary's argument that her employer's failure to communicate its 2002 closing order to her rendered all of the Department's subsequent decisions on her claim *void* is unsupported and should be rejected.

The superior court should have affirmed the Board's dismissal of Singletary's appeal. Although the Department and Manor did not file a cross appeal from the superior court's decision, this Court has the inherent authority to consider questions of law that must be resolved in order to

properly decide the case. Because it is necessary to reach the question of whether the Board's dismissal of Singletary's appeal was correct in order to fully and fairly decide the issues presented by this appeal, the Department respectfully requests that the Court exercise its discretion and consider those issues despite the absence of a cross appeal. In the alternative, the Department requests that the Court affirm the superior court's judgment, as Singletary's arguments against it are unpersuasive.

II. COUNTER STATEMENT OF THE ISSUES

1. Did the Board properly dismiss Singletary's appeal from the December 2005 order based on her failure to present any evidence regarding the merits of that appeal?

2. Did the Department have jurisdiction to issue the December 29, 2005 order that closed Singletary's claim, notwithstanding the fact that a prior closing order was not communicated to her?

3. Is the Department's 2003 order that reopened Singletary's claim entitled to res judicata effect based on her failure to timely appeal that decision, notwithstanding the fact that a previous closing order was not communicated to her?

4. Assuming arguendo that this Court declines to consider the Department's argument that the Board's dismissal of Singletary's appeal was correct, should the Superior Court's decision to remand the case to the

Board to allow Singletary to present evidence regarding a limited set of issues be upheld?

5 Does Singletary have standing to appeal the Superior Court's decision?

III. STATEMENT OF THE CASE

A. Department And Self-Insured Employer's Adjudication Of Singletary's Claim

Singletary was injured in the course of her employment with Manor, a self-insured employer, in 2001. CABR, Singletary, p. 6.¹ On June 26, 2002, Manor issued an order that closed Singletary's claim with no award for permanent partial disability.² See CABR, Exhibit (Ex.) 1. Although Manor attempted to send a copy of that order to Singletary, it sent the order to the wrong address and misspelled her name. See *id.* See also CABR, Singletary, at 6, 8.

On June 20, 2003, Singletary filed a request to reopen her claim with the Department. See CABR, Ex. 3. In that form, she indicated that

¹ Citations to testimony in the Board record will be indicated by "CABR" followed by the witness's name and the page and line numbers therein. Board exhibits will be indicated by "CABR Ex." followed by the appropriate exhibit number. Other documents in the Board record bear machine-stamped numbers in their lower right-hand corners; citations to such documents will be to those numbers.

² Under RCW 51.32.055, Self-Insured Employers are specifically empowered to issue orders that close injured worker's claims and that determine their entitlement to benefits as of the date of claim closure in certain circumstances. It is undisputed that Manor had the legal authority to close Singletary's claim pursuant to RCW 51.32.055. The only dispute regarding that order is whether the fact that it was not communicated to Singletary deprived the Department of jurisdiction to issue further orders on the claim.

her claim had been closed on June 27, 2002. *See id.* In response to this reopening request, the Department issued an order on September 9, 2003 that reopened Singletary's claim effective June 20, 2003. *See* CABR, Singletary, at 13. *See also* CABR at 39.

On July 29, 2005, the Department issued an order that closed Singletary's claim with time-loss compensation as paid through January 23, 2004 and without any award for permanent partial disability. *See* CABR at 78-79. Singletary filed a timely request for reconsideration from that order, and the Department affirmed it on December 29, 2005. *See* CABR at 80. Singletary timely appealed the December 29, 2005 order to the Board. *See* CABR at 81-83.

B. Proceedings At The Board

The Board granted Singletary's appeal. On August 22, 2006, the Industrial Appeals Judge (IAJ) assigned to the case, IAJ Duras, conducted a conference with Singletary and Manor to identify the issues on appeal and to set a schedule for the presentation of evidence in that appeal. *See* CABR at 109-11. At that time, hearings were scheduled to allow Singletary to present evidence on December 6, 2006 and December 7, 2006. *See id.* The interlocutory scheduling order does not indicate that an issue was raised regarding whether the June 26, 2002 order was communicated to Singletary. *See id;* *see also* AB 2 (suggesting that

Singletary first realized that this was an issue when Manor conducted a discovery deposition of her on September 25, 2006).

On October 12, 2006, Singletary filed a motion to direct the Board to remand the case to the Department in order to require it to issue a further order regarding the correctness of the self-insured employer's June 26, 2002 closing order. CABR at 160-64. She argued that the June 26, 2002 order had not been properly communicated to her, and that this rendered all of the Department's subsequent decisions void, including the December 29, 2005 order which was currently on appeal. *See id.*

In response to Singletary's motion, IAJ Duras set a hearing on November 9, 2006 for the purpose of determining whether the June 26, 2002 order had been communicated to her. *See CABR, Singletary, at 3.*

On October 24, 2006, Singletary filed a motion to strike the December 6 and December 7 hearings regarding the merits of her case, contending that such hearings should not be held until the issue of whether the Department had jurisdiction to issue the order under appeal was resolved. CABR at 184. Manor opposed the motion. CABR at 219.

The motion was denied, and Singletary filed an interlocutory appeal. *See CABR at 229.* On November 6, 2006, Assistant Chief Judge Jackson denied the interlocutory appeal. CABR at 266.

At the November 5, 2006, hearing, Singletary testified that she did not receive the June 26, 2002 order. CABR, Singletary, at 8-9. However, on November 16, 2006, IAJ Duras issued an interlocutory order that determined that the preponderance of the evidence supported the conclusion that Singletary received the June 26, 2002 order. CABR at 316-18.

On November 29, 2006, Singletary filed an interlocutory appeal from the November 16, 2006 ruling. CABR at 320. The employer opposed the interlocutory appeal. CABR at 338-39. On December 1, 2006, Assistant Chief Judge Jackson denied the interlocutory appeal, effectively upholding the November 16, 2006 ruling. CABR at 359.

On December 1, 2006, Singletary sent the Board notice that she did not intend to present *any* evidence regarding the merits of her appeal because she disputed its ability to hear it. CABR 364-68. She filed this notice *after* having been informed that her motion to strike the hearing on the merits was denied, and after IAJ Duras had decided that the Board could consider the merits of her appeal, but before receiving the Assistant Chief Judge's order denying her interlocutory appeal. *See id.*

IAJ Duras nonetheless held a hearing on December 6, 2006 to give Singletary the opportunity to present evidence. *See CABR, 12/6/06, at 2-5.* Singletary attended the hearing but presented no evidence. *See id.*

IAJ Duras issued a Proposed Decision and Order that dismissed Singletary's appeal based on her failure to present any evidence in support of it. CABR at 75-76. Singletary filed a timely Petition for Review. CABR at 49-69.

The three-member Board granted review, but it ultimately issued a Decision and Order that dismissed Singletary's appeal. *See* CABR at 34-41. The Board concluded that the June 26, 2002 order was *not* properly communicated to Singletary, but it also concluded that Manor's failure to communicate the June 26, 2002 order to Singletary did not deprive the Department of *jurisdiction* to make further decisions on her claim, and, thus, the Board could properly consider the merits of her appeal. *See id.* Therefore, it was incumbent upon Singletary to present evidence showing that she was entitled to more benefits than the Department had granted her. *See id.* Since Singletary had chosen to present no evidence supporting a request for any additional benefits of any kind, her appeal was dismissed. *See id.*

C. Superior Court Proceedings

Singletary timely appealed the Board's Decision and Order to the Pierce County Superior Court. CP at 2-7. Manor filed a motion for summary judgment, arguing that the Board properly dismissed her appeal. CP at 14-28, 29-30. Singletary filed a cross motion for summary

judgment, arguing that the non-communication of the June 26, 2002 order rendered all of the Department's subsequent decisions void, and that the claim had to be remanded to the Department to re-mail the June 26, 2002 order. CP at 33-49.

The trial court initially ruled that Singletary was entitled to summary judgment. CP at 57-59. An order granting her summary judgment was entered on November 14, 2008. *See id.* However, Manor filed a timely motion for reconsideration. CP at 62-72. On reconsideration, the trial court apparently concluded that the Department order on appeal was not void. *See* CP at 81-84, 99-101. However, it concluded that the Board had treated Singletary as if she had received the June 26, 2002 order when it should not have done so, that she should have been presented an opportunity to present evidence regarding her potential entitlement to benefits from the date that her claim was originally closed (June 26, 2002), through the date that it was later reopened (June 20, 2003), that realistically the Board did not give her an opportunity to present evidence regarding that time period, and that, therefore, the case should be remanded to the Board to allow Singletary to present evidence regarding her eligibility for benefits for that period of time (June 26, 2002 through June 20, 2003). *See id.*

Although the trial court made this ruling in February 2009, neither Singletary nor Manor prepared a final order for the Court for entry. *See* VRP 4/23/2010, p. 2. After a year went by with no order entered, Manor filed a motion to dismiss Singletary's superior court appeal for want of prosecution, contending that Singletary had an obligation to draft an order following the Court's ruling. *See* CP at 87-89. Singletary argued that the case should not be dismissed and that it was Manor's duty to submit an order that effectuated the Court's ruling. CP at 93-94.

At the hearing on Manor's motion to dismiss the appeal, the trial court expressed frustration at the fact that neither Manor nor Singletary had drafted and presented an order for entry. *See* VRP 4/23/10 at 2-5. The trial court noted that regardless of who was technically the prevailing party under the contexts of the case, and regardless of whether either side agreed with its ruling, one side or the other should have drafted an order that effectuated the court's ruling. *See id.*

Singletary subsequently drafted an order for the court that adopted its ruling on reconsideration, and this order was entered on May 5, 2010. *See* CP at 99-101. Singletary filed a timely appeal from that order with this court, leading to the current dispute. *See* CP at 103-08, 111-13.

IV. SUMMARY OF THE ARGUMENT

Singletary argues that Manor's failure to properly communicate its June 26, 2002 order to her deprived the Department of *jurisdiction* to issue a decision regarding her request to reopen her claim until and unless the June 26, 2002 order is formally communicated to her. Therefore, she argues, the Department's decision to reopen her claim in 2003 (and, she suggests, but does not clearly state, all of the decisions it made after that) are void, and the Board and the Superior Court could not properly do anything in response to her appeal other than direct either the Department or Manor to send a copy of the June 26, 2002 order to her.

Notably, Singletary fails to clearly argue that the Department lacked jurisdiction to issue the *December 2005 order*, which is the order that is actually under appeal in this case. Rather, Singletary focuses on the issue of whether the Department had "jurisdiction" to *reopen* her claim when the 2002 closing order did not become final.

The case law shows that the Department had jurisdiction to issue *both* the November 2003 order that reopened Singletary's claim *and* the December 2005 order that closed it. This is because, regardless of whether or not either of those decisions were correct, both of those decisions related to a "controversy" that is a "type" that the Department can resolve and, therefore, the Department had jurisdiction to make them.

Furthermore, since the Department had jurisdiction to issue both of those orders, it was incumbent on Singletary to *appeal* the November 2003 order if she disagreed with it, and it was incumbent on Singletary to present evidence *in support* of her appeal from the December 2005 order if she believed she was entitled to relief pursuant to that appeal.

Additionally, even if it is assumed for the sake of argument that the Department lacked jurisdiction to issue the November 2003 order that purported to reopen her claim, the Department still had jurisdiction to issue the December 2005 order that closed it. Because Singletary failed to present any evidence in support of her appeal from the December 2005 order, and since the Department had jurisdiction to issue that order, the Board properly dismissed her appeal, and the Superior Court should have affirmed the Board's dismissal.

Although the Department and Manor did not file a cross appeal from the Superior Court's decision, this Court has the inherent authority to reach any legal issue that it must decide in order to fully and fairly decide a case. In this case, the Board properly dismissed Singletary's appeal, and the Superior Court's decision to give Singletary limited relief from the Board's decision is unsupportable and should be reversed.

In the alternative, if this Court declines to exercise its discretion to consider whether the Superior Court should have simply affirmed the

Board's dismissal of Singletary's appeal, this Court should affirm that decision rather than grant Singletary the relief she requests, since no legal authority supports any of Singletary's arguments in this case.

Manor, for its part, argues that Singletary did not have standing to appeal the trial court's decision. No legal authority supports Manor's argument, and its motion is not well taken.

V. STANDARD OF REVIEW

Superior Court review of a Board of Industrial Insurance Appeals decision is *de novo*, but must be based on the evidence presented to the Board. RCW 51.52.115; *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998). This Court's review of the superior court's decision is under the ordinary review standard for civil appeals. RCW 51.52.140. Because this case was *essentially* disposed of pursuant to summary judgment motions, and because there is no genuine dispute as to any issue of fact, the questions on appeal are pure questions of law, which this Court reviews *de novo*. *Romo*, 92 Wn. App. at 353.

Singletary, citing cases decided under the Administrative Procedure Act (APA), Ch. 34.05 RCW (AB 21), and a case decided under the Washington Industrial Safety and Health Act (WISHA), Ch. 49.17 RCW (AB 20), appears to argue that the standard of review in this case is the one that applies under the APA. Neither the APA, nor the WISHA,

standards of review apply in workers' compensation appeals. RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009).

VI. ARGUMENT

A. **Because Singletary Failed To Present Any Evidence In Support Of Her Appeal, The Superior Court Should Have Affirmed The Board's Dismissal Of Her Case**

Although the Department and Manor did not file a cross appeal from the Superior Court's decision in this manner, the Department respectfully requests that this Court exercise its inherent authority to resolve any question of law that is necessary to fully and fairly decide the issues raised by an appeal. *See Greengo v. Pub. Emps. Mut. Ins. Co.*, 135 Wn.2d 799, 813, 959 P.2d 657 (1998) (stating, "RAP 12.1 means exactly what it says: This court may raise issues sua sponte and may rest its decision thereon."); *Alverado v. Wash. Pub. Power Supply Sys.*, 111 Wn.2d 424, 429, 759 P.2d 427 (1998) (appellate court "has inherent authority to consider issues not raised by the parties if necessary to reach a proper decision") (citations omitted).

If, as the above opinions show, an appellate court may consider legal issues that were not raised by the parties at any time, an appellate court surely may decide a case based on issues that were raised for the first time by a respondent, despite the lack of a cross appeal, when doing so is

necessary to properly decide the case. For the reasons discussed below, the Board properly dismissed Singletary's appeal based on her failure to present evidence when it was due, and the superior court should have upheld this dismissal. No legal authority supports the Superior Court's decision to give Singletary even the *partial* relief from the Board's order that it provided. Because it is necessary to decide whether the Board properly dismissed Singletary's appeal in order to fully and fairly consider the issues presented in this case, this Court should reach that issue, despite the lack of a cross appeal by the Department and Manor. *Alverado*, 111 Wn.2d at 429.

1. Singletary's Appeal Was Properly Dismissed Based On Her Failure To Present A Prima Facie Case

The Department's December 29, 2005 order closed Singletary's claim and ended her time-loss compensation "as paid" through January 2004. Therefore, the issues raised by the appeal included the questions of whether her claim was ready for closure as of December 29, 2005, whether she was entitled to an award of permanent and partial or permanent and total disability, and whether she was entitled to a greater award of time-loss compensation than was granted by the Department. *See Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 680, 94 P.2d 764 (1939) (stating that Department is required to take action to close a

worker's claim once the worker's industrial injury has reached a fixed state and the worker's condition is unlikely to improve with further treatment, and that once worker has reached a fixed state Department shall assess whether there is any permanent disability).

Under RCW 51.52.060, an injured worker who has appealed an order of the Department has the burden of proceeding with a prima facie case which establishes that the worker is entitled to additional benefits beyond what was provided by the Department. In order to make a prima facie case regarding any of the above issues, Singletary would have had to have presented at least *some* expert medical testimony. *See, e.g., McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623-25, 17 P.3d 1195 (2001); *see also Austin v. Dep't of Labor & Indus.*, 6 Wn. App. 394, 395, 492 P.2d 1382 (1971).

Singletary presented no evidence regarding the merits of her appeal, let alone any expert medical evidence. Instead, she chose to rest entirely on her argument that the Department lacked jurisdiction to issue the December 29, 2005 order, based on the fact that the June 26, 2002 order was not properly communicated to her.³ She made this decision

³ "All Department orders shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department . . . or an appeal is filed with the board of industrial insurance appeals." RCW 51.52.050(1). The term 'communicated' as used in the statute means that the order, decision, or award is received by the respective party. *Rodriguez v. Dep't*

after the IAJ who was assigned to her appeal informed her that he had concluded that the Board could properly consider the merits of her appeal, and before being told that her interlocutory appeal from that ruling had been denied.

When she made this risky tactical decision, Singletary knew, or should have known, that, in the event that her jurisdictional argument was rejected, her appeal would be dismissed. *See* RCW 51.52.060. As the Department explains below, the Board properly dismissed her appeal based on her failure to present any evidence in support of it. *See id.* Because the Board did not err when it dismissed her appeal, the Superior Court should have affirmed its dismissal. *See* RCW 51.52.115; *see also La Vera v. Dep't of Labor & Indus.*, 45 Wn.2d 413, 414-15, 275 P.2d 426 (1954).

2. There Is No Legal Basis To Excuse Singletary's Failure To Present A Prima Facie Case

Singletary contends, without citation to authority, that she should not have been required to present evidence in support of her appeal until the issue of whether the Department had jurisdiction to issue the order on appeal was conclusively "resolved". *See, e.g.*, AB 17-18. Because no authority supports this argument, it does not merit consideration.

of Labor & Indus., 85 Wn.2d 949, 952, 540 P.2d 1359 (1975)." *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 717, 213 P.3d 591 (2009).

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (an appellate court typically will not consider an argument that is unsupported by citation to relevant legal authority); *see also* RAP 10.3(a)(6). Moreover, the argument fails on its face. The plain language of RCW 51.52.060 compels the conclusion that a party who has appealed a Department order bears the burden of establishing a prima facie case that shows that the Department's decision was incorrect. *McDonald*, 104 Wn. App. at 623-25. Neither RCW 51.52.060 nor any other legal authority suggests that an injured worker who has appealed a decision of the Department has no duty to present any evidence regarding the merits of his or her appeal until the Board's jurisdiction to hear the appeal has been resolved beyond all question. Since no legal authority supports this argument, and since it is contrary to the plain language of RCW 51.52.060, this Court should reject it. *See Cowiche Canyon*, 118 Wn.2d at 809.

Furthermore, Singletary's argument, if accepted, would lead to absurd results that would increase, rather than reduce, needless and wasteful litigation. The Board only makes a "final" decision regarding whether it may properly consider an appeal when it enters a final decision that disposes of the case, since any ruling it makes prior to entering a final decision—including a ruling regarding its scope of review—may be

challenged through a Petition for Review. RCW 51.52.104; RCW 51.52.106. Therefore, it cannot, practically, allow a party to avoid presenting any evidence regarding the merits of an appeal until after a “final” decision has been made that conclusively establishes the scope of its review.

Moreover, any decision the Board makes regarding the proper scope of its review may, itself, be challenged through an appeal to the courts, as Singletary has done here. *See In re Saltis*, 94 Wn.2d 889, 893, 621 P.2d 716 (1980). Thus, as a practical matter, the Department’s jurisdiction to issue a given order, and the Board’s and any reviewing court’s proper scope of review on appeal, is not *finally* “resolved” until a final decision is made and the parties either choose not to appeal it, or all appellate rights have been exhausted. *See id.*

If a party, through the simple act of *questioning* the Department’s jurisdiction to issue the order on appeal, could thereby toll the Board’s authority to require the parties to present any evidence regarding the merits of the case, then the Board’s ability to render decisions could be routinely delayed by litigants for several years. Furthermore, an attack on the Department’s jurisdiction to issue the order on appeal would have this delaying effect even if the jurisdictional argument itself is unsupported, as, indeed, Singletary’s is here. Allowing a litigant to so easily delay the

appeals process would thwart one of the key goals of the Industrial Insurance Act, which is to ensure that parties receive swift and certain relief. *See Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 315, 849 P.2d 1209 (1993); RCW 51.04.010.

In an attempt to bolster her argument that the Board should not have required her to present any evidence regarding her appeal until its jurisdiction to hear it was “resolved,” Singletary argues that the decision of the Assistant Chief Judge—who reviewed the IAJ’s ruling that the June 26, 2002 closing order had been communicated to her—was legally insufficient. AB 30-31. She contends that the order was issued too quickly and that it did not give a sufficiently detailed explanation of the Assistant Chief Judge’s thinking process. However, Singletary cites to no legal authority supporting an argument that a decision in response to a request for interlocutory review will be insufficient as a matter of law if it is too short and was issued too quickly, and the Department is aware of none.

The Industrial Insurance Act itself does not guarantee litigants the right to *any* sort of interlocutory review of an IAJ’s preliminary rulings, let alone give them the “right” to a ruling that is explained with detailed legal analysis. Through WAC 263-12-115(6), the Board provides for a limited right to appeal an interlocutory ruling of an IAJ to an Assistant Chief

Judge. WAC 263-12-115(6) does not require the Assistant Chief Judge to ponder the decision for any particular length of time, nor does it require the Assistant Chief Judge to explain, either briefly or in detail, the particulars of the judge's legal reasoning. No statute, rule, or other legal authority supports Singletary's argument that the Assistant Chief Judge's rulings on her interlocutory appeals were inadequate.

Furthermore, in the context of this case, it was appropriate for the Assistant Chief Judge to render a decision *quickly* rather than after a lengthy deliberation, because there was only a short interim of time between the date of Singletary's interlocutory appeal and the date of the hearing regarding the merits of her case. By making the decision on her interlocutory appeal *quickly*, the Assistant Chief Judge gave Singletary as much notice as possible that she would still be required to present evidence regarding the merits of her appeal.

Singletary's argument that the Assistant Chief Judge should have explained his ruling in greater detail also fails because a more detailed explanation of his legal reasoning would not have provided her with any material benefit regarding how to proceed in her case. An Assistant Chief Judge's ruling on an interlocutory appeal is not final, and it may be challenged at the same time that a party files a Petition for Review from the Proposed Decision and Order. *See* WAC 263-12-115. Therefore, as a

practical matter, regardless of how much or how little explanation the Assistant Chief Judge provided, Singletary would have had the right to challenge that ruling to the Board in a Petition for Review. Furthermore, regardless of how much or how little detail it provided, it clearly and unambiguously informed Singletary that the IAJ's ruling that the Board had jurisdiction to appeal would stand until and unless that ruling was reversed following a Petition for Review.⁴

Because there is no legal authority that suggests that the Board erred when it dismissed her appeal, the trial court erred when it remanded Singletary's case to the Board for further hearings evidence regarding a limited set of issues. Singletary bore the burden of presenting a prima facie case, and she did not do so. *See* RCW 51.52.060. Therefore, the trial court should have affirmed the Board's dismissal of her appeal.

⁴ It should also be noted that Singletary decided to rest without presenting any evidence regarding the merits of her appeal before receiving the ruling on her interlocutory appeal. *See* CABR at 364-68. Thus, it is unlikely that a lengthier explanation from the Assistant Chief Judge would have changed either her litigation strategy or the outcome of the case.

B. Because The Department Has Broad Jurisdiction To Decide All Issues Regarding A Worker's Right To Benefits Under The Act, It Had Jurisdiction To Issue Both The 2003 Order That Reopened Singletary's Claim, And The December 29, 2005 Order That Closed It, Regardless Of Whether Manor's Prior Decision To Close Singletary's Claim Was Communicated To Her

When deciding whether an administrative agency had *jurisdiction* to issue a given order, the proper question for the court to consider is whether the agency had the authority under the law to resolve the “*type of controversy*” that it resolved through that order, *not* whether it had the “authority” to make that particular decision based on the law and the facts in that particular case. *See Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994).

As *Marley explains*, the Department “does not lack subject matter jurisdiction solely because it may lack authority to enter a given order.” *See id.* If the type of controversy is within the authority of the deciding entity, then all other defects or errors go to something *other than* subject matter jurisdiction. *See Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 964, 235 P.2d 849 (2010) (Becker, J., concurring), *review denied*, No. 85147-6 (Wash. January 4, 2011).

Furthermore, as *Dougherty explains*, subject matter jurisdiction is the power to decide the “general category” of controversy, such as eligibility for workers' compensation benefits, “without regard to the facts

of the particular case.” *Dougherty v. Dep’t of Labor and Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003) (citing Robert J. Martineau, *Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse*, 1988 BYU L. Rev. 1, 26-27 (1988)).

Professor Martineau’s law review article on subject matter jurisdiction, repeatedly cited by our Supreme Court with approval, illustrates the distinctions between procedural errors and jurisdictional defects. *See Marley*, 125 Wn.2d at 539 (citing Martineau with approval); *Dougherty*, 150 Wn.2d at 316 (same). Professor Martineau explains that “procedural prerequisites for initiating an action” or “filing of a claim within the statute of limitations” are not matters of subject matter jurisdiction. Martineau, 1988 BYU L. Rev. at 23-25. This is because subject matter jurisdiction “goes to the type of case the court can hear, not what a party must do to invoke the court’s authority to hear the case.” *Id.* at 23; *see also Dougherty*, 150 Wn.2d at 319 (“A party cannot confer jurisdiction; all that a party does is invoke it.”); *Sprint Spectrum*, 156 Wn. App. at 964 (Becker, J., concurring) (failing to comply with the service requirement under the APA is not a jurisdictional defect). Thus, even if “a matter may be a condition precedent to the filing of a claim, it does not thereby become a limitation on the subject matter jurisdiction of the court in which the claim is filed.” Martineau, 1988 BYU L. Rev. at 23-25.

Indeed, the Supreme Court has repeatedly cautioned that “procedural elements” should not be confused with “jurisdictional requirements.” *See, e.g., Dougherty*, 150 Wn.2d at 315 (filing an appeal from a Board decision in the wrong county is a procedural, not jurisdictional, error). Here, Singletary confuses “procedural elements” with “jurisdictional requirements” in precisely the manner that the Supreme Court has warned against. This Court should not follow her lead.

1. The Department Has Broad Subject Matter Jurisdiction To Decide All Controversies Arising Under The Industrial Insurance Act

It is well-settled the Department has broad jurisdiction to decide virtually any issue that may arise under workers’ compensation claims, including the issue of whether or not an injured worker’s industrial insurance claim should be closed and the issue of whether or not a claim should be reopened. *See Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 170, 937 P.2d 565 (1997); *Marley*, 125 Wn.2d at 539; *Abraham v. Dep’t of Labor & Indus.*, 178 Wash. 160,162-63, 34 P.2d 457 (1934). The Act expressly directs the Department to make decisions regarding a worker’s eligibility for benefits, including time-loss compensation, permanent partial disability, total permanent disability, and requests to reopen a claim. Since these are the “type[s] of controvers[ies]” that the Department is empowered by the Act to resolve, the Department has

“jurisdiction” to issue orders that resolve a worker’s entitlement to such benefits regardless of whether those orders are correct from *either* a substantive *or* a procedural standpoint. *Marley*, 125 Wn.2d at 539.

To paraphrase Judge Becker in *Sprint Spectrum*: without question, determining whether a claim should “remain closed,” is a question that the Legislature empowered the Department to resolve. *Sprint Spectrum*, 156 Wn. App. at 964 (Becker, J., concurring). Therefore, any error or defect in the Department’s adjudication—*e.g.*, the error Singletary asserts here, that a claim cannot be reopened if it was never closed in the first place—goes to something other than subject matter jurisdiction. *See id.* A mere error of fact or a mere error of law on a workers’ compensation question in a Department or Board order is not a jurisdictional error; such an error makes the order voidable on direct and timely appeal, but not void such that collateral attack will succeed against the order or overcome claim preclusion. *Marley*, 125 Wn.2d at 537-41.

Singletary acknowledges that the issue of whether the Department has jurisdiction to make a decision is determined by considering whether that decision involved the “type of controversy” that the Department has the authority to resolve, rather than whether the decision, itself, was legally correct. AB 27-29. She nonetheless argues that the Department lacked jurisdiction to adjudicate her claim following her employer’s

failure to properly communicate its June 26, 2002 closing order to her, based on her apparent contention that a request to reopen a claim is not the “type of controversy” the Department may resolve unless the previously issued closing order was communicated to the injured worker. *See id.*

Singletary misses the point of the *Marley* opinion’s holding that the Department acts within its jurisdiction—regardless of whether or not its order is legally incorrect—when it resolves the “type of controversy” that it is empowered by the Act to decide. *Marley*, 125 Wn.2d at 539. The point of *Marley*’s holding is that the Department’s jurisdiction to administer workers’ compensation claims is broad and sweeping, and that a legal error in a given order, no matter how blatant, does not render that order void. *See id.* Under Singletary’s strained interpretation of *Marley*, the “type of controversy” that the Department may resolve is defined so narrowly that virtually any legal or procedural error on the Department’s part in the adjudication of a claim effectively renders a decision void. *See id.* While she cites to *Marley* in support of her arguments, Singletary seeks a result that is the opposite of what the case actually held, and she seeks a result that is contrary to the clear weight of the legal authority on this issue. *See id.*; *see also Dougherty*, 150 Wn.2d at 315; *Sprint Spectrum*, 156 Wn. App. at 964 (Becker, J., concurring).

2. The Department Had Jurisdiction To Respond To Singletary's Application To Reopen Her Claim Even Though Manor Failed To Properly Communicate Its Prior Closing Order To Her

The Department agrees that Manor's failure to properly communicate the June 26, 2002 closing order to Singletary prevented *that order* from becoming final. However, this did not deprive the Department of *jurisdiction* to act on Singletary's request to reopen her claim, nor deprive the Department of jurisdiction to issue further orders after reopening her claim. *See Shafer v. Dep't of Labor & Indus.*, 140 Wn. App. 1, 6-7, 159 P.3d 473 (2007), *aff'd*, 166 Wn.2d 710, 213 P.3d 591 (2009). Although the Court of Appeals in *Shafer* granted relief to the injured worker, it concluded that the Department has "jurisdiction" to reopen a claim regardless of whether or not a previous closing order was communicated to all of the necessary parties. *See id.*

In *Shafer*, an injured worker claimed that her attending physician did not receive a copy of the closing order, as required by the statute. *Shafer*, 140 Wn. App. at 6. The worker filed an application to reopen her claim, and the Department denied the request. *See id.* The worker filed a timely appeal from the order that denied her application to reopen her claim. *See id.* On appeal, the worker argued that because the closing order did not become final, the Department did not have "jurisdiction" to

decide whether or not to reopen the claim. *See id.* The Department agreed that the key issue on appeal was whether it had “jurisdiction” to issue the order that denied the reopening request, but it argued that it did have jurisdiction to issue the order. *See id.*

Citing *Marley*, the Court of Appeals rejected the worker’s argument that the Department and Board lacked “jurisdiction” to decide whether or not to reopen the claim, and it disagreed with both the Department and the worker’s characterization of the key issue on appeal as whether the Department had “jurisdiction” to issue its order, stating “Jurisdiction is not the issue here.” *Id.* The Court pointed out that a “determination to close a claim or to deny an application to reopen a claim falls squarely within the Department’s authority to decide claims for workers’ compensation” and the Board’s “authority to review Department actions.” *Id.* at 7.⁵

Similarly, the Board has ruled in a “significant decision”⁶ that the Department has *jurisdiction* to adjudicate an application to reopen a claim regardless of whether or not there is a final and binding closing order. *See*

⁵ In the Supreme Court’s opinion, the Court concluded that the parties had “abandoned” any argument regarding jurisdiction, so the Court did not further address the issue of whether the Department had “jurisdiction” to deny Shafer’s application to reopen her claim despite its failure to communicate its closing order to her attending physician. *Shafer*, 166 Wn.2d at 718, n. 2. Thus, the holding by the Court of Appeals on that issue remains authority because that aspect of the opinion was not overturned.

⁶ The Legislature has directed the Board to designate, index and make available to the public its “Significant Decisions.” RCW 51.52.160.

In re Jorge Perez-Rodriguez, BIIA Dec, 06 18718, 2008 WL 1770918 (2008). If a claim has not been closed by a final order then it is *legally incorrect* for the Department to adjudicate the aggravation application until the closing order becomes final. *See id.* However, the Department nonetheless has *jurisdiction* to issue the order that grants or denies the aggravation application. *See id.* The Board's interpretation of workers' compensation law, while not binding, is entitled to "great deference." *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 127, 138, 814 P.2d 629 (1991).

In *Perez-Rodriguez* the Department actually failed to issue a final closing order, but the Board nonetheless held that the Department had jurisdiction to issue an order in response to a reopening request. *See Perez-Rodriguez*, BIIA Dec. 06 18718. In that case, the Department issued an order closing the claim on November 29, 1995; Perez-Rodriguez timely protested. *See id.* In response the Department issued an order on January 23, 1996 holding the November 29, 1995 order in abeyance. *See id.* Then, on April 1, 1996 the Department issued an order affirming the January 23, 1996 abeyance order. *See id.* However, the Department *never* affirmed its November 29, 1995 closing order. *See id.* Nevertheless, Perez-Rodriguez subsequently filed applications to reopen his claim, which were denied by an April 30, 1997 order. *See id.* The Department denied reopening and declared that the claim remained closed.

See id. There was a timely protest, and the Department affirmed by order dated January 12, 1998, which order was never protested or appealed.

See id.

Some eight years later, on April 26, 2006, Perez-Rodriguez filed another application to reopen his claim. *See id.* That too was denied. *See id.* On appeal, the Board considered the issue of whether the Department is without “jurisdiction” to adjudicate an application to reopen a claim under RCW 51.32.160 until there is a final closing order. *See id.*

As it did in this case, the Board concluded in *Perez-Rodriguez* that a final closing order is not a jurisdictional prerequisite for the Department’s later adjudication of the worker’s subsequent reopening application. *Id.* Citing *Marley* and other precedent, the Board concluded that “the reopening of a workers’ compensation claim” is a “type of controversy,” over which the Department has subject matter jurisdiction. *Id.* at *7. It noted that Perez-Rodriguez had the opportunity to appeal and address the lack of a final closing order when the Department denied his first application to reopen his claim, but that he did not do so. *See id.* The Board concluded that Perez-Rodriguez’s claim was first finally closed when his application to reopen was denied. *See id.*

Singletary’s situation is analogous to that of the worker in *Perez-Rodriguez*. *Id.* In Singletary’s case, the Department *granted* her

application to reopen her claim, instead of denying it. However, if the Department has jurisdiction to *deny* a request to reopen a claim that was never actually closed, then, logically, it must also have jurisdiction to *grant* such a request under such circumstances. Regardless of whether the Department grants or denies an application to reopen a claim, it is resolving a “type of controversy” that it has the power to resolve.

Singletary attempts to rely on *Reid v. Department of Labor & Industries.*, 1 Wn.2d 430, 96 P.2d 492 (1939) to support her argument that the Department lacked “jurisdiction” to issue any further orders regarding her claim based on Manor’s failure to properly communicate its June 2002 closing order to her. AB 20. However, *Reid* does not support that argument. *Reid*, 1 Wn.2d 430.

In *Reid*, the Department issued an order that closed the worker’s claim with no award for permanent partial disability. *Id.* at 432. The worker sought reversal of this decision by the “joint board”, and it granted him a modest award for permanent partial disability. *Id.* at 433. The worker then appealed to Superior Court, but, shortly after filing that appeal, his attorney advised the Department that he had decided to dismiss it. *Id.* However, the appeal was not actually dismissed at any time. *See id.* While the appeal was in limbo, the worker hired a new attorney, who asked the Department to provide the worker with further permanent partial

disability. *See id.* at 433-34. The Department asked the attorney to clarify whether he was seeking a modification of the joint board's decision with regard to the closing order, or whether he was seeking to have the claim reopened based on an aggravation of his condition after closure. *See id.*

The worker (evidently) filed a formal request to reopen his claim, and this was denied based on the Department's finding that his condition had not worsened beyond the amount it had previously granted him. *See id.* The worker sought reversal of this decision by the joint hearing board, but the joint board rejected his argument. *See id.* at 435. The worker then appealed the joint board's decision on the aggravation application to Superior Court, where it was consolidated with the prior appeal from the closing order. *See id.* The trial court reversed both of the joint board's decisions, and the Department appealed. *See id.*

The *Reid* Court concluded that it was improper for a trial court, in one action, to simultaneously review a decision to close the worker's claim with an award of permanent partial disability and a decision to deny a request to reopen the same claim based on alleged worsening of the condition subsequent to claim closure. *See id.* at 436. The *Reid* Court reasoned that a court could not properly decide whether a condition has "worsened" as compared to the date that the claim has been closed until after the decision to close the claim has been finalized on review. *See id.*

Notably, the *Reid* Court did not discuss the issue of whether the Department had *jurisdiction* to make a decision regarding the worker's request to reopen his claim when there has not been a final decision regarding claim closure. *See id.* The *Reid* Court only discussed the propriety of a *trial court* attempting to simultaneously review both decisions in one case. *See id.* Furthermore, the *Reid* Court did not state that the trial court lacked *jurisdiction* to review both decisions: it simply concluded that trying to review both decisions simultaneously was *incorrect*. *See id.*

Thus, *Reid* does not support Singletary's argument that the Department lacks "jurisdiction" to issue an order with regard to a request to reopen a claim when the closing order has not become final. *See id.* At most, *Reid* suggests that it would be incorrect for the Department to do so. *See id.* But, as noted above, the Department has broad and sweeping *jurisdiction* to make decisions regarding a worker's claim for benefits, and it does not lose *jurisdiction* as a result of making a legal error when adjudicating a claim. *See Marley*, 125 Wn.2d at 539. *Reid* does not suggest otherwise. 1 Wn.2d at 436.

Singletary also attempts to rely on a decision of the Board, *In re Betty Wilson*, BIIA Dec. 02 21517, 2004 WL 1901021 (2004) to support her jurisdictional argument. AB 24-26. Her reliance on *Wilson* is

misplaced for at least three reasons. First, *Wilson* is distinguishable because *Wilson* did not involve any of the facts that are present here: In that case, there was no indication that an injured worker had not received one of the Department's orders, and there was no application by the worker to reopen her claim at any time. *See Wilson*, BIIA Dec. 02 21517. While *Wilson* discusses whether or not the Department has "jurisdiction" to adjudicate an aggravation application while an appeal from a closing order is pending, this discussion was dicta because no issue regarding the Department's authority to consider an aggravation application was actually present. *See id.*

Second, and perhaps more importantly, the Board's discussion of the question of the Department's "jurisdiction" to act on an aggravation application in *Wilson* is directly *contrary* to Singletary's arguments here. *See id.* The Board explained in that decision that the Department has "jurisdiction" to adjudicate an aggravation application *regardless* of whether or not there was a final closing order. *See id.* Furthermore, the Board expressly noted that the *Reid* opinion does not purport to place any *jurisdictional* limits on the Department's authority to adjudicate aggravation applications. *See id.*

Third, in the more recently decided *Perez-Rodriguez* case, the Board held that the Department has *jurisdiction* to act on an aggravation

application even if the claim has not, in fact, ever been closed. Thus, if it is assumed for the sake of argument that *Wilson* somehow implies that the Department lacks jurisdiction to act on an aggravation application when the claim has not been closed (even though that decision states that the opposite is true), *Perez-Rodriguez* effectively overruled *Wilson*, and represents the Board's current view of this issue. See *Perez-Rodriguez*, BIIA Dec. 06 18718; *Wilson*, BIIA Dec. 02 21517.

C. Because The Department Had Jurisdiction To Issue The 2003 Order That Reopened Singletary's Claim, And Because She Did Not Appeal That Order, That Order Is Final And Binding

When the Department issued the 2003 order that reopened Singletary's claim, it necessarily determined that her claim had been closed prior to that date. Because "[a]n unappealed Department order is res judicata as to the issues encompassed within the terms of the order absent fraud in the entry of the order" Singletary's failure to timely appeal the 2003 order renders it res judicata that her claim was closed prior to that date. *Kingery*, 132 Wn.2d at 169.

There are two reasons why it is important for this Court to recognize that the order reopening Singletary's claim is entitled to res judicata effect. First, the finality of the decision to reopen her claim renders it res judicata that her claim had been closed at some point prior to the issuance of that order. See *Perez-Rodriguez*, BIIA Dec. 06 18718; *In*

re Christopher B. Preiser, Dckt. No. 09 19683 2010 WL 5273010 (2010).⁷

The finality of that order renders moot the question of whether the *previous* closing order was communicated to Singletary or not.

Second, the finality of the Department's 2003 reopening order provides another basis for concluding that the trial court erred when it remanded Singletary's claim to the Board for the sole purpose of presenting evidence regarding whether she is entitled to benefits from June 26, 2002 through the date that the Department reopened her claim. Because it is *res judicata* that Singletary's claim was closed until it was reopened in June 2003, Singletary cannot be entitled to benefits from June 26, 2002 through June 2003 as a matter of law, since that time frame, by definition, was prior to the date that her claim was reopened for benefits. *See* RCW 51.32.160; RCW 51.28.040. *See also Fuller v. Dep't of Labor & Indus.*, 169 Wn. 362, 366-67, 13 P.2d 903 (1932).

Res judicata bars "the relitigation of claims and issues that were litigated, or *might have been litigated*, in a prior action." *Loveridge v. Fred Meyer*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (emphasis added; citation omitted); *Kingery*, 132 Wn.2d at 169. *See also* Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 813-14 (1985). The validity of initial claim closure

⁷ To date, *Preiser* has not been designated as a Board "significant" decision.

on the two claims, i.e., the issue of whether Singletary had received the initial closing order, “might have been litigated” *if* she had exercised her right to appeal the orders reopening her claim, instead of waiting to raise this issue until the Department took action to close her claim. Res judicata, or claim preclusion, “applies to a final judgment by the Department as it would to an unappealed order of a trial court.” *Marley*, 125 Wn.2d at 537.

Four elements are required for the proper invocation of res judicata: 1) identity as to parties; 2) identity as to subject matter; 3) a final judgment or order rendered by an entity with authority to do so; and 4) identity as to claim or cause of action. *See Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737-38, 222 P.3d 791 (2009) (citations omitted); *see generally* Trautman, 60 Wash. L. Rev. 805. All these elements are met for application of res judicata to the November 2003 order that reopened Singletary’s claim.

First, the parties, Singletary, Manor, and the Department, are identical. Second, the prior 2003 order and the present case involve a common subject: namely, Singletary’s worker’s compensation claim. Singletary received, but did not appeal, the November 2003 order.

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

“has broad subject matter jurisdiction to decide all claims for workers compensation benefits,” including applications to reopen a claim, and it does not lose jurisdiction to issue such orders merely because the orders are erroneous. *See Kingery*, 132 Wn.2d at 170; *Marley*, 125 Wn.2d at 542. A party has 60 days from the date the adverse ruling is “communicated” to it to file either a protest and request for reconsideration with the Department or an appeal with the Board. RCW 51.52.050(1), .060. Singletary did not appeal the November 2003 order at any time.

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

Here, the unappealed November 2003 order reopening Singletary’s claim effective June 20, 2003 (CABR at 39) necessarily encompassed the Department’s determination that her claim had been closed in the past, and

that benefits were reinstated effective June 20, 2003 and not before. That determination is readily understandable from the orders and, even if erroneous, is now res judicata. *See Marley*, 125 Wn.2d at 538; *Kingery*, 132 Wn.2d at 169; *In re Preiser*, Dckt. No. 09 19683, *3-4 (The finality of the reopening order precludes the Department from paying benefits prior to the effective date of the reopening.).

This case is distinguishable from *Shafer* in one important way. In *Shafer*, as in this case, the closing order was not communicated to a necessary party. *See Shafer*, 140 Wn. App. at 7-11. However, the worker in *Shafer* timely appealed the later issued order that denied her reopening application. *See id.* Thus, there was no final and binding order that prevented her from challenging the closing order: the order that closed her claim did not become final because it was not communicated to a necessary party, and the order that denied her reopening request was not final because it was timely appealed. *Id.* at 5.

Singletary, however, did *not* appeal the Department order reopening her claim. Thus, she is precluded from arguing that the reopening order was incorrect. BR 15; *Shoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986) (if there has been an opportunity to litigate the matter in a former action the party should not be permitted to relitigate it).

Furthermore, the Board's *Perez-Rodriguez* decision concluded that an order *denying* an aggravation application, if not appealed, is entitled to res judicata effect and operates as a closing order even if the worker's claim was never previously closed through any valid order. *Perez-Rodriguez*, BIIA Dec. 06 18718. In this case, the Department granted the worker's application to reopen her claim instead of denying it. However, a decision to "reopen" a claim necessarily involves a finding that the claim was closed in the past. Because Singletary did not appeal that order, it is res judicata. Furthermore, in an even more recently decided Decision and Order, the Board specifically concluded that an order "granting" an application to reopen a claim, if not appealed, is a binding determination that the claim was previously closed. *See Preiser*, Dckt No. 09 19683.

If Singletary had filed a timely appeal from the order that reopened her claim, and if the evidence supported her assertion that the closing order had never been communicated to her, then she would have been entitled to have the claim remanded to the Department so that it could make a further decision regarding the closing order. Since she did not appeal the order that reopened her claim, that order is final, and she may not collaterally attack it by way of the current appeal.

D. Even If The November 2003 Order Were Void The Department Would Have Jurisdiction To Issue The December 2005 Order Closing Her Claim

Singletary devotes much of her brief to contending that the Department lacked “jurisdiction” to act on her *application to reopen her claim* based on the fact that the prior decision to close her claim had not been communicated to her. AB 24-29. However, the order she actually appealed was the December 29, 2005 order that *closed* her claim. Singletary implies, but does not clearly argue, that because the Department could not properly reopen her claim, it also lacked authority to make any other decision after it “reopened” it. AB 31-33.

As the Department explained above, the case law shows that the Department had *jurisdiction* to issue the order that reopened Singletary’s claim regardless of whether or not that decision was *correct* based on her non-receipt of the prior closing order. However, even if it is assumed for the sake of argument that the Department lacked jurisdiction to issue the order that reopened her claim (it did, in fact, have jurisdiction to do so), there are at least three reasons why the Department would still have jurisdiction to issue the December 29, 2005 decision that closed her claim.

First, as noted above, the Department has jurisdiction to issue any order that resolves the “type of controversy” that it has the power to resolve, regardless of whether or not its decision was correct. *See Marley*,

125 Wn.2d at 539. A decision that a worker has reached maximum medical improvement is a decision that the Department has jurisdiction to make because it resolves a type of controversy that the Department is empowered by the Act to resolve. *See id.*

Second, even by Singletary's view of the history of her claim, it was proper for the Department to close her claim on December 29, 2005 if it had never been closed before that date, and if the Department believed that she was fixed and stable as of that date. When the Department determines that a worker's condition has become fixed, it is proper for the Department to take action to close the worker's claim and to decide whether the worker is entitled to any award for permanent partial and/or total permanent disability. *See, e.g., Miller*, 200 Wash. at 680. Under Singletary's view, her claim had never been closed at any time prior to December 29, 2005. If that was true, and if she was fixed and stable at that time, then it was proper for the Department to issue an order closing her claim regardless of whether or not any of the other orders it has issued over the life of her claim had been properly communicated to her. *See id.*

Third, Singletary's argument that her application to reopen her claim acted as a request for reconsideration of the June 26, 2002 closing order demonstrates yet another reason why it was proper for the Department to close her claim in 2005. Singletary argues, correctly, that

the Board held in *In re Ronald Leibfried*, 1990 WL 264682, BIIA Dec. 88 2274 (1990) that an application to reopen a claim will generally be treated as a protest from a prior decision to close the worker's claim if the closing order was not communicated to the worker.⁸ However, *Leibfried* did not hold that the Department should, in that situation, simply mail another copy of the *prior* closing order to the worker. *See id.* Rather, *Leibfried* directs the Department to issue a *further order* that determines whether the claim can be properly closed, and that determines what benefits, if any, the worker is entitled to. *See id.* That is precisely what the Department did through the December 29, 2005 order that closed her claim.

E. The Doctrine Of Liberal Construction Does Not Support Singletary's Arguments

Singletary attempts to bolster her argument that the Department lacked jurisdiction to adjudicate her claim by relying on the doctrine of "liberal construction." AB 21-22. The doctrine of liberal construction does not support her for at least two reasons.

First, while it is true that the provisions of Washington's Industrial Insurance Act are "liberally construed," this rule of construction does not authorize an interpretation of a statute that produces strained or absurd results and defeats the plain meaning and intent of the legislature. RCW

⁸ It should be noted, however, that the worker in *Leibfried*, like the worker in *Shafer*, and unlike Singletary, appealed the order that determined whether or not the claim should be reopened.

51.12.010. See *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992); *Senate Republican Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997). Furthermore, a court should not, under the guise of statutory construction, distort a statute's meaning in order to make it conform to the court's own views of sound social policy. *Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 432, 980 P.2d 701 (1999); see also *Rhoad v. McLean Trucking, Dep't of Labor & Indus.*, 102 Wn.2d 422, 427, 686 P.2d 483 (1984).

Here, no provision of the Act, and no legal authority, supports Singletary's argument that the Department lacked jurisdiction to issue the December 29, 2005 order. Because the doctrine of liberal construction cannot be used to create a rule of law out of thin air, and since no authority supports Singletary's arguments, the liberal construction doctrine is of no aid to her. See *Aviation West Corp.*, 138 Wn.2d at 432.

Second, the doctrine of liberal construction is inapplicable because a ruling that the Department lacks jurisdiction to adjudicate claims following a failure to communicate any prior decision it has made over the life of the claim would not necessarily work to the advantage of injured workers as a whole. While *in this case* Singletary's jurisdictional argument would operate to shield her from having her case dismissed based on her failure to present evidence regarding the merits of her appeal,

many other injured workers would be harmed by a rule of law that allows an unappealed decision of the Department to be set aside as void based on a failure of the Department to communicate *any* of its *previous* orders to a necessary party.

Singletary's arguments, if accepted, would render void a vast number of Department decisions, many of which *provided* injured workers with substantial benefits. If the Department loses jurisdiction to issue any additional orders once it fails to properly communicate a closing order to a worker, then a further order that granted the injured worker benefits would be just as vulnerable to being found void as a further order that denied the worker benefits.

As the cases explaining the purpose of res judicata show, it is often in the best interests of all persons for litigation to come to an end at some point, and for a party to be able to rest assured that a decision that was not timely appealed is binding. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 649, 58 L. Ed.2d 552 (1979). Singletary's arguments would expose both injured workers and employers to chaos and uncertainty, since either a worker or an employer could have a previous decision of the Department declared void merely by proving that some *other* decision, made long prior to the decision that is actually being challenged, was not properly communicated to a necessary party. Such a

rule of law would not reduce the suffering of injured workers to a minimum, nor would it further the Act's purpose of providing injured workers with swift and certain relief. As Singletary's proposed rule of law would thwart, rather than further, the goals of the Act, the liberal construction doctrine is of no aid to her here.

F. If This Court Concludes That It May Not Consider Whether The Board Properly Dismissed Singletary's Appeal, Then It Should Affirm The Superior Court's Decision

Singletary chose to follow a risky litigation strategy of presenting no evidence regarding the merits of her appeal, and, instead, relying entirely on her argument that the Department lacked jurisdiction to issue the order on appeal. The trial court, while not accepting Singletary's jurisdictional argument, apparently applied the rationale that the reopening application should be treated as a request for reconsideration of the June 26, 2002 closing order. The trial court therefore remanded the case to the Board to allow Singletary to present evidence regarding a limited set of issues: namely, whether she was entitled to benefits for the period of time from the date that the employer attempted to close Singletary's claim to the date that the Department reopened it in 2003. As the Department demonstrated above, no legal authority supports the trial court's decision to give Singletary even this, limited, relief, and, therefore, the Board's dismissal of her appeal should have been affirmed.

However, if this Court declines to consider the argument that the Board properly dismissed Singletary's appeal, then this Court should affirm the trial court's decision. Singletary's argument that the Department lacked jurisdiction to issue the Department's December 29, 2005 closing order on appeal fails, and her demand that the claim be remanded to the Department to await the employer's formal communication of the June 26, 2002 closing order to her is unsupported.

G. Although Her Arguments Lack Merit, Singletary Has Standing To Appeal

Rather than responding directly to Singletary's arguments, Manor contends that Singletary lacked standing to appeal the trial court's decision. As the Department explained above, Singletary's arguments do not have merit. However, Manor's argument that she lacks standing is unsupported.

Manor notes, correctly, that a party has standing to appeal a trial court decision if the party was "aggrieved" by it, and that a party is aggrieved by a decision that denies the party of a "personal or property right" or imposes a "burden or obligation" upon the party. *See* RB 5.

However, Manor fails to support its contention that Singletary was not "aggrieved" by the trial court's decision in this case. The trial court did not grant Singletary the relief that she sought. Therefore, she was

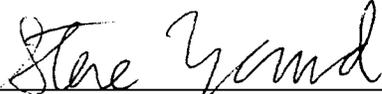
aggrieved by its decision. Manor cites no legal authority suggesting otherwise.

Manor's apparent contention that a party who drafts an order implementing the decision of a trial court *necessarily* lacks standing to appeal the trial court's decision is unsupported by any authority, and it is contrary to both common sense and sound public policy.

VII. CONCLUSION

For the reasons discussed above, the Department respectfully requests that this Court reverse the Superior Court's decision and rule that the Board properly dismissed Singletary's appeal based on her failure to present any evidence in support of it. In the alternative, the Department requests that the Court affirm the Superior Court's decision because Singletary's arguments against it are meritless.

RESPECTFULLY SUBMITTED this 18 day of January, 2011.



STEVE VINYARD, WSBA #29737
Assistant Attorney General
PO Box 40121
Olympia, Washington 98516
(360) 586-7715

No. 40808-2-II

NOV 13 11 21 AM '12
11 JUN 12 10 2:12

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

GLEND A SINGLETARY,

Appellant,

v.

MANOR HEALTHCARE CORP., ET.
AL.,

Respondent.

DECLARATION OF
MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent and this Declaration of Mailing to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail, addressed as follows:

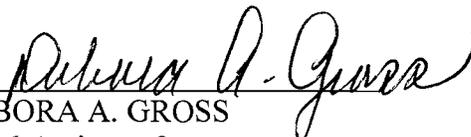
Original and Copies To:

David C. Ponzoha
Court Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Tara Reck (**& by facsimile**)
David B. Vail & Jennifer Cross-Euteneier & Assoc.
PO Box 5707
Tacoma, WA 98415-0707

Lawrence Mann **(& by facsimile)**
Wallace Klor & Mann PC
5800 Meadows Road - Suite 220
Lake Oswego, OR 97035

DATED this 18 day of January, 2011, in Spokane, WA.



DEBORA A. GROSS
Legal Assistant 3