

NO. 41831-2

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

CHARLES A. LOOMIS,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is a workers' compensation case under RCW Title 51, the Industrial Insurance Act (Act).

Under the Act, the Department of Labor and Industries (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.

Charles Loomis appealed the Department's decision to close his claim in 2006, but, rather than directly challenge that decision, he argues that the Department committed two errors over the course of adjudicating his claim (over the course of 35 years), one of which allegedly occurred in 1975 and the other of which allegedly occurred in 1982. He argues that those errors rendered all of the Department's subsequent decisions on his claim void, including the order on appeal. This argument is unsupported. Loomis has failed to show that any error occurred in 1975 or 1982, and, moreover, he has failed to support his claim that the errors he complains of would deprive the Department of subject matter jurisdiction over his claim, nor has he shown that the Board of Industrial Insurance Appeals (Board) and the courts lack jurisdiction to consider the merits of his appeal.

Loomis also argues, in the alternative, that the Director abused his¹ discretion when he found Loomis eligible only for medical treatment on his “over seven” claim in 2006. This argument is also unsupported, and should be rejected.

The Board and the superior court properly affirmed the Department’s decision in this case. The Department requests that this Court affirm as well.

II. COUNTER STATEMENT OF THE ISSUES

1. Did the Board and the superior court have jurisdiction to consider Loomis’s appeal from the Department’s 2006 order that closed Loomis’s claim, notwithstanding Loomis’s argument that the Department committed errors in managing his claim in 1975 and 1982?
2. Does res judicata prevent Loomis from arguing that the Department erred in treating his 1975 application to reopen his claim as a reopening request and that the Department erred in not treating an interoffice memorandum from a Department employee as a protest to a 1982 closing order when Loomis did not appeal the orders that were issued immediately after those alleged errors were committed?
3. Did the Director abuse his discretion when he declined to find Loomis eligible for disability benefits merely because 14 years earlier, Loomis had been granted discretionary eligibility for similar payments, where factual circumstances had changed and a different Director made the earlier decision?

¹ As of the date of the decision under appeal, Gary Weeks was the Director of the Department. (Judith Schurke is the current Director of the Department.)

III. STATEMENT OF THE CASE

A. **The Superior Court And Board Rejected Loomis's Argument That They Lacked Subject Matter Jurisdiction Over His Appeal**

Loomis appeals from the Superior Court's order that rejected his argument, contending that the Department did not have subject matter jurisdiction to issue the Department 2006 order under appeal. At Superior Court and at the Board, Loomis alleged that the Department had committed two errors over the 35-year course of managing his claim. CABR 64-74; CP 7-16.²

First, Loomis argued that the Department erred by treating an application to reopen his claim that was filed in 1975 as a reopening application request, because that application was filed within 60 days of the date that his claim had been closed. CABR 64-74; CP 11-12. Second, Loomis argued that the Department erred by failing to treat an interoffice memorandum that was generated by an employee of the Department in 1982 as a request for reconsideration of the 1982 closing order. CABR 64-74; CP 12-13. He claimed that every decision made by the Department after those errors were committed was tainted, and, thus, void. CP 7-16.

² Most of the documents in the Certified Appeal Board Record have a machine stamped number. Citations to those documents will be indicated by "CABR", followed by the appropriate page number. Citations to Board exhibits will be indicated by "CABR Ex." followed by the appropriate exhibit number.

The Department responded that it has broad and sweeping subject matter jurisdiction to adjudicate a worker's claim, and that the errors that Loomis alleges to have occurred could not, as a matter of law, deprive it of subject matter jurisdiction to continue to adjudicate his claim. CP 24-25

Furthermore, the Department noted that, with regard to the 1975 closing order, res judicata barred Loomis from raising that issue in his appeal from 2006 closing order. CP 24-25. If Loomis believed the Department erred when it reopened his claim in 1975 in response to his reopening application, he should have appealed the decision to reopen it at that time. CP 24-25. Having failed to appeal the decision to treat his reopening application as a reopening application, res judicata precludes from arguing, in the current appeal, that the Department reopened his claim in error. CP 24-25.

Finally, with regard to the 1982 closing order, the Department responded that it lacks authority to file a request for reconsideration with itself from one of its own orders. CP 29. The Department also noted that, in any event, the pharmacy consultant's note cannot be reasonably construed as a request for reconsideration from the 1982 closing order because it did not request any action that was inconsistent with that decision. CP 29.

After a bench trial, the Superior Court rejected Loomis's arguments and entered judgment for the Department. CP 35-41. This affirmed the Board's decision, which had also rejected Loomis's subject matter jurisdiction argument. CABR 18-25 (proposed decision and order which affirmed Department order under appeal); CABR 2 (order denying Loomis's petition for review, and adopting proposed decision and order as Board's decision and order). Both the Superior Court and the Board also decided that the Director did not abuse his discretion when he found Loomis eligible only for medical treatment on his "over seven" aggravation application. CP 35-41; CABR 18-25; CABR 2.

B. History Of The Department's Adjudication Of Loomis's Claim

1. General Department Procedure

During the course of managing Loomis's claim, the Department reopened and closed his claim several times.

The Department may properly close a worker's claim when there is no further medical treatment which is likely to improve a worker's condition. *See, e.g., Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 680, 94 P.2d 764 (1939). Once a worker's claim has been closed, the worker may file an application to reopen it. However, in order for a worker to reopen his or her claim, he or she must show that a condition proximately caused by the industrial injury became aggravated.

See RCW 51.32.160; *Wilber v. Dep't of Labor & Indus.*, 61 Wn.2d 439, 444, 378 P.2d 684 (1963).

Under RCW 51.32.160, a worker who files a request to reopen a claim more than seven years after the first closing order became final is generally only eligible for medical treatment, and may not receive disability benefits such as time-loss compensation, permanent partial disability awards, or total and permanent disability benefits. However, the Director may, on a purely discretionary basis, find a worker with an “over seven” claim eligible for disability benefits. *See Cascade Valley Hospital v. Stach*, 152 Wn. App. 502, 504, 215 P.3d 1043 (2009). If an appeal is filed from a decision to find a worker with an “over seven” claim eligible (or ineligible) for disability benefits, the appealing party must show that the Director abused his or her discretion. *See id.*

In 1992, the Department considered Loomis’s claim to be an “over seven” claim, but the Director found him eligible for disability benefits on a purely discretionary basis. CABR Ex. 1 at 3.³ It has remained an “over seven” claim since then.

³ It should also be noted that in 2004 Loomis entered into an order on agreement of parties at the Board which expressly indicated that his claim was an “over seven” claim. CABR Ex. 1 at 4.

2. Loomis's Claim History

The underlying Department order that Loomis appealed to the Board, and then to the superior court, was a decision dated May 12, 2006 that closed Loomis's claim. At the Board, the parties entered into a factual stipulation. *See* CABR Ex. 1.⁴ The stipulation addresses the history of the adjudication of Mr. Loomis's claim from the date of his injury through the date of the 2006 closing order. *See* CABR Ex. 1.

The Department accepted Loomis's claim for a 1971 low back injury. CABR Ex. 1 at 1. On April 22, 1975, the Department closed his claim with a permanent partial disability award. CABR Ex. 1 at 1. On May 5, 1975, the Department issued an order correcting and superseding the April 22, 1975 order, and closing his claim with an award of permanent partial disability equal to 84 percent of the maximum allowed for unspecified disabilities and with an additional award equal to 5 percent of the maximum allowed for unspecified disabilities. CABR Ex. 1 at 1.

On July 3, 1975, Loomis filed an application to reopen his claim. CABR Ex. 1 at 1. In response to this document, on September 22, 1975, the Department issued an order reopening Loomis's claim. CABR Ex. 1 at 1-2. Loomis did not protest or appeal this order, implicitly

⁴ Even though this was a stipulation rather than an "exhibit" that was offered at an evidentiary hearing, the Board entered the parties' stipulation as Exhibit Number 1. Therefore, it is cited throughout this brief as CABR Ex. 1.

acknowledging that the Department had taken the action he wanted it to take in response to his request. CABR Ex. 1 at 1-2.

On March 13, 1979, the Department issued an order closing Loomis's claim with a 100 percent permanent partial disability award for low back impairment, a 15 percent award for psychiatric problems, a 5 percent award for partial impotence, and an award equal to 100 percent of the maximum allowed for unspecified disabilities, less his previous permanent partial disability awards. CABR Ex. 1 at 2.

On March 23, 1979, Loomis appealed the March 13, 1979 Department order. CABR Ex. 1 at 2. On June 15, 1979, an order on agreement of parties was entered. CABR Ex. 1 at 2. Following that agreement, on November 19, 1979, the Department reopened Loomis's claim effective March 14, 1979. CABR Ex. 1 at 2. After his claim was reopened, he completed vocational retraining to be a draftsman, until October 6, 1982, when the Department issued an order closing his claim with no further award for permanent partial disability. CABR Ex. 1 at 2. Loomis did not protest or appeal this order. CABR Ex. 1 at 2.

On October 22, 1982, Bud Davidson, Pharmacy Consultant for the Department, submitted an interoffice communication stating the time had come to get Loomis off Darvocet because he had been on that drug since

1979 and it appeared he had become dependant on it. CABR Ex. 1 at 2. No action was taken by the Department in response to this memorandum.

On October 28, 1983, Loomis filed an application to reopen his claim, which was denied by the Department on November 8, 1983. CABR Ex. 1 at 2. On December 7, 1983, Loomis filed a notice of appeal to the denial of his reopening application. CABR Ex. 1 at 2. On February 5, 1986, the Department issued an order reopening Loomis's claim effective October 27, 1983. CABR Ex. 1 at 3.

On September 2, 1987, Loomis's claim was closed with no additional permanent partial disability award. CABR Ex. 1 at 3. On October 8, 1987, Loomis filed a request for reconsideration of the September 2, 1987 order. CABR Ex. 1 at 3. The Department affirmed the September 1987 order on November 30, 1987. CABR Ex. 1 at 3. Loomis did not appeal the November 30, 1987 order. CABR Ex. 1 at 3.

On November 20, 1991, Loomis filed another application to reopen his claim. CABR Ex. 1 at 3. On March 24, 1992, the Director of the Department wrote a letter determining, on a discretionary basis, that Loomis would be eligible for disability benefits despite the fact that his claim had been closed for over seven years. CABR Ex. 1 at 3. On April 9, 1992, the Department reopened Loomis's claim for disability benefits, under the Director's decision to find him eligible for those

benefits. CABR Ex. 1 at 3. Upon reopening his claim, Loomis was provided with vocational retraining services, to assist him in becoming employable. *See* CABR Ex. 1 at 3.

In August 1994, Loomis's vocational retraining plan was closed with a finding that he had completed his coursework in the computer aided drafting portion of the mechanical drafting program, and that he was able to work in this field. CABR Ex. 1 at 3. On December 13, 1994, the Department issued an order closing Loomis's claim again with no additional permanent partial disability award. CABR Ex. 1 at 3. Loomis did not protest or appeal this order. CABR Ex. 1 at 3.

On August 18, 2003, Loomis filed another application to reopen his claim. CABR Ex. 1 at 3. On December 29, 2003, the Department issued an order denying Loomis's reopening application. CABR Ex. 1 at 3. On February 12, 2004, Loomis filed a request for reconsideration of the December 29, 2003 order. CABR Ex. 1 at 3. On March 1, 2004, the Department affirmed its decision to deny the reopening application. CABR Ex. 1 at 4.

Loomis appealed the March 1, 2003 Department order. CABR Ex. 1 at 4. The Board issued an order of agreement of parties that determined that Loomis's industrially-related condition had worsened, that his claim was an "over seven" claim within the meaning of

RCW 51.32.160, and that his claim would be reopened for medical treatment only. CABR Ex. 1 at 4. The Department then reopened Loomis's claim for medical treatment only, pursuant to the order on agreement of parties. CABR Ex. 1 at 4.

The Department ultimately closed Loomis's claim on May 12, 2006. CABR Ex. 1 at 4.

Loomis appealed the May 12, 2006 order to the Board. CABR Ex. 1 at 5.

IV. SUMMARY OF THE ARGUMENT

Loomis argues that the Board and the superior court lacked subject matter jurisdiction over the merits of his appeal from a decision of the Department to close his claim in 2006, based on his contention that the Department committed two errors over the course of its management of his injury claim, one of which occurred over 30 years ago in 1975, and one of which occurred over twenty years ago in 1982. He suggests that these errors render every decision the Department made after 1975 (or 1982) void, including the decision which is currently under appeal; i.e., the Department's decision to close his claim in 2006. He further suggests that until the Department corrects one or both of those "errors," the Department lacks jurisdiction to issue any decisions on his claim, and that,

because those errors have not been corrected, the Board and the courts lack jurisdiction to hear an appeals from the 2006 closing order.

However, Loomis's arguments are unsupported by legal authority. Contrary to his assertions, the case law shows that the Department had subject matter jurisdiction to issue all of the orders it has issued over the course of adjudicating his claim, irrespective of whether one or more of the many orders it has issued over that time contained legal errors. This is because, regardless of whether any of those various decisions of the Department were correct, all of those decisions related to a "controversy" that is a "type" that the Department has the power to resolve, and, therefore, the Department had jurisdiction to make them. Since the Department had jurisdiction to issue the 2006 closing order, the Board and the courts had jurisdiction to consider appeals from it.

If Loomis believed that either the 1975 decision to reopen his claim or the 1986 decision to reopen his claim was erroneous, based on the idea that the 1975 and 1982 closing orders had not become final, it was incumbent on Loomis to appeal the orders that reopened his claim after those closing orders were issued. Having failed to appeal the orders that reopened his claim after it was closed at those times, *res judicata* precludes a collateral attack on the finality of the 1975 and 1982 closing orders.

Loomis also argues, in the alternative, that the Director abused his discretion when he declined to find him eligible for disability benefits on his “over seven” claim. Loomis makes the unsupported statement that his circumstances did not change between 1992 and 2006, and he argues that, therefore, the Director could not properly find him ineligible for disability benefits in 2006 after having found him eligible for such benefits in 1992.

However, there is no support in the record for Loomis’s assertion that his circumstances were identical in 1992 and 2006. On the contrary, the record indicates that Loomis’s circumstances were significantly different as of 2006 than they were in 1992, because he received vocational training from 1992 to 1994 but did not return to work after completing that retraining. Furthermore, even assuming Loomis is correct that there was no significant change in his circumstances from 1992 through 2006, it would not necessarily follow that the Director had to find him eligible for disability benefits in 2006 simply because another Director had found him eligible for them in 1992. Thus, Loomis has failed to show that the Department’s denial of disability benefits in 2006 was an abuse of discretion.

V. STANDARD OF REVIEW

Superior court review of a Board 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.

The primary questions raised by this appeal are essentially pure questions of law, which this Court reviews de novo. *Romo*, 92 Wn. App. at 353. However, one of the issues raised by this appeal is whether the Director abused his discretion in finding Loomis ineligible for disability benefits on his "over seven" reopening application. *See Stach*, 152 Wn. App. at 504 (holding that the Director's decisions regarding a worker's eligibility for disability benefits on an "over seven" claim are subject to review under the abuse of discretion standard). A special standard of review applies to a court's review of a purely discretionary decision.

Abuse of discretion is only shown if a party has demonstrated that the Director's decision was "arbitrary and capricious"; i.e., willful and unreasoning, and taken without regard to the attending facts or circumstances. *See ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 809-10, 863 P.2d 64 (1993). This standard is highly deferential to the decision-maker: "[w]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." *Id.* (Citation omitted).

Loomis, citing a case decided under the Washington Industrial Safety and Health Act (WISHA), RCW 49.17 (AB 15), appears to argue that the WISHA standard of review applies to this case. However, the WISHA standard of review does not apply in workers' compensation appeals. See 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. The Department Had Jurisdiction To Issue The Order That Is Under Appeal In This Case

Loomis argues that the Department committed two errors over the course of managing his claim, one of which occurred in 1975 and one in 1982. AB⁵ 18-20. He further suggests that, a result of those errors, the Department lost subject matter jurisdiction over his claim and that, therefore, every decision the Department made after 1975 (or 1982) is void, including the 2006 closing order, which is the order under appeal in this case. AB 18-20. Loomis contends, further, that since those errors have not yet been corrected, the Board and the courts lack jurisdiction to consider an appeal from the 2006 closing order, and that the claim must be remanded to the Department to correct one or both of those procedural errors. AB 18-20.

⁵ The Department will cite to the appellant's brief as "AB".

Loomis's argument that the 2006 closing order was void as a result of the errors that he alleges occurred in 1975 and 1982 fails for at least two reasons. First, neither of the decisions that Loomis complains of was, in reality, erroneous. Second, and more fundamentally, the Department acts within its subject matter jurisdiction whenever it makes a decision involving the kind of controversy that it has the power to resolve, regardless of whether the order is a product of legal or procedural errors. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539-44, 886 P.2d 189 (1994). Since all of the orders that the Department has issued under Loomis's claim involve one of the kinds of controversies that the Department can decide as a general matter, none of those orders was void, even if one or more of those orders contain legal or procedural errors. *See id.* Therefore, the Board and the courts had jurisdiction to hear Loomis's appeal from the 2006 closing order.

1. **Loomis has failed to show that either of the Departmental actions that he complains of were actually erroneous**
 - a. **The Department properly treated Loomis's 1975 application to reopen his claim as a request to reopen his claim**

The first alleged mistake that Loomis complains of was the Department's decision to reopen his claim in 1975 in response to a document that he filed that asked that his claim be reopened. Loomis,

citing the Board's significant decision *In re Charles Weighall*, 1970 WL 104555, BIIA Dec., 29, 863, (1970),⁶ contends that since his application to reopen his claim was filed less than 60 days after his claim was closed, it was error for the Department to treat it as a request to reopen his claim, and, instead, the Department should have processed that document as a request to reconsider its decision to close his claim. AB 18.

However, Loomis's argument that the Department was *required* to treat his application to reopen his claim as a request for reconsideration of the decision to close his claim lacks support. *Weighall* did not hold that a reopening application that is filed within 60 days of the date of a closing order must, as a matter of law, be treated as a request for reconsideration of that order. *See Weighall*, 1970 WL 104555 at *1. Rather, in *Weighall*, the Board stated that after carefully reviewing the application to reopen a claim, it was clear that the worker and his physician intended, through that document, to ask the Department to reconsider the decision to close the worker's claim, and had filed an application to reopen the claim instead of a request for reconsideration in error. *See id.* The Board concluded that an application to reopen a claim should not be treated as such where it is clear that the worker's intent was to request reconsideration of the closing order. *Id.* Furthermore, since the application was filed within 60 days of

⁶ The legislature has directed the Board to designate, index and make available to the public its significant decisions. RCW 51.52.160.

the closing order, it was a timely request for reconsideration and prevented that order from becoming final. *Id.* However, the Board did not broadly rule that all applications to reopen a claim that are filed within 60 days of a closing order automatically operate as requests for reconsideration of those closing orders. *See id.*

Furthermore, neither RCW 51.52.050 (which references the right to request reconsideration of a decision of the Department) nor RCW 51.32.160 (which governs applications to reopen a claim that has been closed) contains any language suggesting that an application to reopen a claim must automatically be treated as a request for reconsideration of a decision to close a claim if the application is filed within 60 days of the date that the claim was closed.

Here, the Department issued an order that closed Loomis's claim in 1975. That order plainly advised Loomis that if he disagreed with the decision to close his claim, he had 60 days to either ask the Department to reconsider that decision or to appeal that decision to the Board. Loomis, instead, filed a document with the Department that, on its face, asked the Department to reopen his claim. The Department subsequently reopened Loomis's claim, and the reopening order, like the closing order, advised Loomis of his right to either request reconsideration of or appeal the decision to reopen his claim. Loomis did not appeal the decision to reopen

his claim, and, by not appealing it, he tacitly acknowledged that it was proper to treat his application to reopen his claim as precisely what it purported to be, namely, an application to reopen his claim. Thus, Loomis has failed to show that it was erroneous to view the 1975 application to reopen his claim as anything other than an application to reopen his claim.

Significantly, Loomis does not actually argue that his intention when he filed a request to reopen his claim in 1975 was to ask the Department to reconsider the decision to close his claim. Furthermore, the parties' stipulation contains no information as to what Loomis's intent was when he filed that document. Rather, Loomis argues that this was the legal effect of the fact that he filed an application to reopen his claim before that closing order had become final (*see* AB 18), regardless of what the reopening application actually said, and regardless of what his intent was when he filed that document with the Department. However, as noted previously, no legal authority, including the *Weighall* decision, supports this notion. *Weighall*, 1970 WL 104555 at *1.

Having failed to establish that he was doing anything other than attempting to reopen his claim when he filed the application to reopen it, he has not shown that the Department erred when it reopened his claim in response to that application.

b. The 1982 interoffice memo was not a request to reconsider the 1982 closing order

The second “mistake” that Loomis alleges involves the Department’s decision to close his claim in 1982. *See* AB 19-20. Within 60 days of the date that the Department issued that closing order, a Department employee wrote an interoffice memorandum, noting that the time had come to stop providing Loomis with Darvocet, as it appeared he had become dependent on that drug. CABR Ex. 1 at 2. Since the interoffice memorandum did not purport to reverse, modify, or change the 1982 closing order, it did not prevent the closing order from becoming final. *See* RCW 51.52.060 (4).

Loomis, however, argues that the 1982 interoffice memorandum was a request for reconsideration of the 1982 closing order, and that, therefore, the Department was obliged to issue a further order that either affirmed or reversed the 1982 closing order. *See* AB 19-20. This argument fails for at least two reasons, even leaving aside the fact that Loomis complained of this error for the first time in his 2006 appeal.

First, it is well settled that the Department cannot, as a matter of law, appeal its own decisions. *See, e.g., Brakus v. Dep’t of Labor & Indus.*, 48 Wn.2d 218, 221, 292 P.2d 862 (1956). If the Department cannot appeal one of its own decisions, then, logically, it would make no

sense to conclude that the Department can file a request (with itself) that asks itself to reconsider one of its own decisions.

Instead, the legislature provided the Department with a different tool that allows it to correct one of its decisions if it determines that the order was issued in error. RCW 51.52.060(4) empowers the Department “within the time limited for appeal, or within thirty days after receiving a notice of appeal” to “modify, reverse or change” its own decision, or to hold its own order “in abeyance” pending “further investigation” of the factual circumstances.

Here, however, the 1982 interoffice memorandum did not purport to take action pursuant to RCW 51.52.060(4). That memorandum did not “modify, reverse or change” the 1982 closing order, nor did it purport to hold the 1982 order “in abeyance” pending a further investigation of the facts. Rather, the author of the memorandum simply noted that the time had come to stop providing Loomis with Darvocet. Since the Department did not take action under RCW 51.52.060(4) to prevent the 1982 closing order from becoming final, and since no party, including Loomis, filed a request for reconsideration from the 1982 closing order, the 1982 closing order became final and binding. *See Marley*, 125 Wn.2d at 539-44.

Second, even assuming the Department can file a request to reconsider one of its own decisions (an assumption supported by no legal

authority), the 1982 interoffice memorandum that was issued in this case cannot reasonably be interpreted as a request that the 1982 closing order be reconsidered. By closing his claim, the 1982 order implicitly determined that Loomis was not entitled to any further proper and necessary medical treatment to address the residuals of his injury. This is because a claim is not ready for closure until the conditions related to the injury have become fixed; namely when there is no further proper and necessary treatment that may be provided to the worker to address the residuals of the injury. *See Miller*, 200 Wash. at 680.

The 1982 interoffice memorandum indicated that it would be appropriate to stop providing Loomis with Darvocet, but it neither stated nor implied that some other sort of medical treatment should be provided to Loomis in its place, nor did it state or imply that the decision to close Loomis's claim was premature. Since the 1982 interoffice memorandum did not request that the Department take any action that would be inconsistent with the decision to close his claim in 1982, that memorandum cannot reasonably be interpreted as a request to reconsider the 1982 closing order.

Since Loomis has failed to show that the Department's actions regarding the 1975 and 1982 closing orders were erroneous, he has

necessarily failed to show that the Department committed errors that deprived it of subject matter jurisdiction over his claim.

2. Even assuming errors were committed over the course of managing his claim, Loomis has failed to establish that those errors deprived the Department of subject matter jurisdiction over his claim

Because the Department's decision to close his claim in 2006 was a decision involving the type of controversy that the Department has the power to resolve, the Department had jurisdiction to make that decision even if its decision was erroneous in light of the procedural history of Loomis's claim. *See Marley*, 125 Wn.2d at 539. An order that is within the Department's subject matter jurisdiction is not void even if it is legally erroneous. *See id.* at 541.

As *Marley* explains, when deciding whether an administrative agency had subject matter 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 id.* at 539; *see also Cole v. Harveyland, L.L.C.*, 163 Wn. App. 199, 208, 258 P.3d 70 (2011). 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. *Williams v. Leone & Keeble*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011) (quoting *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 316, 76 P.3d 1183 (2003)).⁷ Put another way, subject matter jurisdiction is the power to decide a “general category” of controversy, such as eligibility for workers’ compensation benefits, “without regard to the facts of the particular case.” *Dougherty*, 150 Wn.2d at 316-17 (citing Martineau, 1988 BYU L. Rev. at 26-27).

The Supreme Court has 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, Loomis confuses “procedural elements” with “jurisdictional requirements” in precisely the manner that the Supreme Court has warned against.

Loomis essentially claims that if the Department made any mistakes at any point over the course of managing his claim (a claim whose management spans 35 years) then the Department lost jurisdiction over the claim once that mistake was committed, and all of its subsequent decisions are void until and unless the procedural error is corrected. Thus, under Loomis’s view, the Board and the Courts lack jurisdiction to hear

⁷ *Dougherty* quoted *Marley*, 125 Wn.2d at 539, in support of this conclusion, which, itself, cited Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, 1988 B.Y.U.L. Rev. 1, 28.

appeals from any other decisions the Department may have made until that mistake is corrected, no matter how much time has gone by, and no matter how many further orders were issued after that alleged mistake was committed. AB 12-20. However, as *Williams, Dougherty, and Marley* show, procedural errors and other such mistakes do not deprive the Department of subject matter jurisdiction to take action on a worker's claim, nor do such errors deprive the Board or the courts of jurisdiction to review an order of the Department on appeal.

Furthermore, as well-established Supreme Court precedent shows, the Department has broad jurisdiction to decide virtually any issue that may arise under workers' compensation claims, including the issue of whether an injured worker's industrial insurance claim should be closed and the issue of whether a claim should be reopened. See *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 170, 937 P.2d 565 (1997) (plurality); *Marley*, 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. RCW 51.32.090, .080, .060, .160. 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.

The Board and the courts, similarly, have broad “subject matter jurisdiction” to review, on appeal, the correctness of a decision that the Department has made. *See Dougherty*, 150 Wn.2d at 316-19; *see also Marley*, 125 Wn.2d at 539-44. A legal or procedural error by the Department at any point over the life of a claim does not deprive the Board or the courts of subject matter jurisdiction to hear an appeal from that Department order. *See Dougherty*, 150 Wn.2d at 316-19. Rather, if the Department acted in error at some point over the life of the claim, this may be a basis for reversing the Department order on appeal, assuming the legal or procedural error is relevant, and assuming that no doctrine such as *res judicata* applies. *See, e.g., 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).

And the Board and the courts would, indisputably, have subject matter jurisdiction over an appeal from the Department’s order, regardless of whether procedural errors were committed either within that order itself, or within any of the Department’s previous orders. *Dougherty*, 150 Wn.2d at 316-19. This is because a dispute as to a worker’s right to

benefits under the Act is the “type of controversy” that the Board and the courts have the power to decide on appeal, regardless of whether a procedural or legal error was committed either by the Department in issuing the order or by the Board or the courts in adjudicating the appeal. *See Dougherty*, 150 Wn.2d at 316-19; *Marley*, 125 Wn.2d at 539-44.

Indeed, Loomis does not contend that decisions to close worker’s claims (or decisions to reopen such claims) do not involve the “type of controversy” that the Department has the authority to resolve. He nonetheless argues that the Department lacked jurisdiction to adjudicate his claim as a consequence of the two errors that he contends were committed in 1975 and 1982. AB 18-20. His argument is unsupported by legal authority, and it is contrary to *Marley*’s holding that the Department acts within its jurisdiction regardless of whether its order is legally incorrect, whenever it resolves the “type of controversy” that it is empowered by the Act to decide. *Marley*, 125 Wn.2d at 539.

The Board has also repeatedly ruled in its significant decisions 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 In re Christopher Preiser*, 2010 WL 5273010, BIIA Dec., 09 19683 (2010); *In re Jorge Perez-Rodriguez*, 2008 WL 1770918, BIIA Dec., 06 18718 (2008). The Board noted in those cases that if a

claim has not been closed by a final order then it is *legally incorrect* for the Department to adjudicate the application to reopen a claim until there is a final closing order. *See id.* However, the Board held that the Department nonetheless has subject matter jurisdiction to issue an order that grants or denies the reopening application under those circumstances. *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).

None of the cases cited by Loomis supports his suggestion that the errors he complains of deprived the Department of subject matter jurisdiction over his claim. *See* AB 12-20. Even though he couches the issue on appeal as a question of subject matter jurisdiction, Loomis fails to cite to any of the case law that discusses the nature and extent of the Department (and the Board and the courts') subject matter jurisdiction. Loomis neither acknowledges the existence of, nor makes any attempt to distinguish, *Williams*, *Marley*, *Dougherty*, *Perez-Rodriguez*, or *Preiser*.

Instead, Loomis attempts to base his jurisdictional argument on four Board decisions, none of which support the conclusion that the Department's alleged errors deprived either it or the Board (or the courts) of subject matter jurisdiction over Loomis's claim under the circumstances present in this case: *Weighall*, 1970 WL 104555 at *1; *In re Santos*

Alonzo, 1981 WL 375946, BIIA Dec., 56,833 (1981); *In re Gerald Wynkoop*, 1970 WL 104558, BIIA Dec., 34,133 (1970); *In re John Robinson*, 1982 WL 591178, BIIA Dec., 59,454 (1982). *See* AB 17-18.

As noted earlier, *Weighall* held that an application to reopen a claim *may* operate as a request for reconsideration of a closing order if the closing order had not become final if it is clear that the worker's true intention was to request reconsideration of the closing order. *Weighall*, 1970 WL 104555 at *1. However, *Weighall* neither states nor implies that a mistaken decision by the Department to process an application to reopen a claim as a reopening request (rather than as a request for reconsideration from the closing order) would be a jurisdictional defect that would render all subsequent Department orders void. *See id.* Thus, it does not support Loomis's arguments.

The *Alonzo* case also fails to support Loomis's argument, as the procedural history of Loomis's case is readily distinguishable from that in *Alonzo*. *See Alonzo*, 1981 WL 375946 at *3. In *Alonzo*, the Department issued an order that closed a worker's claim with a permanent partial disability award. *Id.* at *1-2. The employer filed a request that the Department reconsider the closing order. *Id.* The Department failed to issue a further order in response to that request. *Id.* The employer then filed an appeal from the closing order; i.e., the very order that it had

previously asked the Department to reconsider. *Id.* The Board concluded that it lacked “jurisdiction” to hear an appeal from the closing order because the Department had failed to issue a further order in response to the employer’s request for reconsideration. *Id.* at *3. Therefore, it remanded the case to the Department with directions to issue a further order in response to the employer’s request for reconsideration. *Id.*

However, the Board did not declare in *Alonzo* that the closing order was void. *Alonzo*, 1981 WL 375946 at *3. Nor did it conclude that the Department lacked jurisdiction to take further action on the claim. *Id.* Rather, it concluded that it (the Board) could not hear an appeal from an order if a timely request for reconsideration was filed from that order. *Id.*

In this case, in contrast, Loomis did not request reconsideration of a Department order and later attempt to appeal the same Department order to the Board. The 1975 and 1982 closing orders are not the orders currently under appeal, nor did Loomis ever appeal those orders at any time. Therefore, *Alonzo* is inapplicable to this case. *See Alonzo*, 1981 WL 375946 at *3. At most, *Alonzo* supports the conclusion that *if* Loomis had appealed either the 1975 closing order or the 1982 closing order, and *if* the Board concluded that Loomis had filed a document that should be viewed as a request for reconsideration from those orders, *then* the Board

would have had to remand the case to the Department with directions to issue a further order. *See id.*⁸

Loomis's reliance on *Robinson* is similarly misplaced. *Robinson*, 1982 WL 591178 at *1-3. *Robinson* stands for the proposition that if both a timely appeal and a timely request for reconsideration are filed from the same Department order, the Board lacks jurisdiction over the appeal and must remand the claim to the Department with directions that it address the request for reconsideration, even if the request for reconsideration was filed *after* the appeal was filed. *See id.* *Robinson* does not support the conclusion that the Department loses jurisdiction over a claim if a timely request for reconsideration is filed from an order and the Department issues further orders that do not explicitly respond to the request for reconsideration.⁹ *Id.*

Finally, Loomis's reliance on *Wynkoop* is also misplaced. *Wynkoop*, 1970 WL 104558 at *1-4. In *Wynkoop*, the Department issued an order which allowed a worker's claim, the employer filed a timely request for reconsideration, the Department issued a further order that

⁸ Furthermore, *Alonzo*'s statement that the Board lacked "jurisdiction" to hear an appeal from the closing order (*Alonzo*, 1981 WL 375946 at *3) does not appear to be consistent with the Supreme Court's analysis of subject matter jurisdiction in *Williams*, *Marley* and *Dougherty*. Procedural errors and similar mistakes do not deprive tribunals of subject matter jurisdiction over a case, although such errors might make it legally correct to remand the claim to the Department in some circumstances.

⁹ As with *Alonzo*, it is doubtful that *Robinson*'s statement that the Board lacked "jurisdiction" to hear the appeal under the circumstances of that case (1981 WL 375946 at *3) is correct, in light of *Williams*, *Marley* and *Dougherty*.

affirmed its decision to allow the claim, and the employer appealed. *Id.* at *1. The worker argued that the decision to allow the claim was final, since the employer's appeal was filed more than 60 days after the Department had issued the original order that allowed the claim. *Id.* at 1, 3-4. The Board rejected this argument as meritless because the employer filed a timely request for reconsideration from that order. *Id.*

Wynkoop did not hold that the Department loses jurisdiction over a claim if a request for reconsideration is filed but not responded to. *See Wynkoop*, 1970 WL 104558 at *2-4. Rather, it recognized that the Department has the authority to issue a further order when such a request has been made. *See id.* Although it states that the Department is "required" to issue a further order when a timely request for reconsideration has been made, this simply establishes that the Department would commit legal error if it failed to issue such an order, and it does not establish that the Department would lose subject matter jurisdiction over the claim unless it responded to the request for reconsideration. *See id.*¹⁰

¹⁰ To the extent that *Wynkoop* can somehow be construed as placing limits on the Department's subject matter jurisdiction, notwithstanding that *Wynkoop* did not purport to put any such limits on the Department, that aspect of the *Wynkoop* decision would be inconsistent with *Williams*, *Marley* and *Dougherty*.

B. Res Judicata Precludes Loomis From Collaterally Attacking The Finality Of The 1975 And 1982 Closing Orders

Although the Department's decision to close Loomis's claim in 2006 is the decision that is under appeal in this case, Loomis's brief primarily focuses on errors that he claims were committed in 1975 and 1982. *See* AB 12-20. Thus, he is attempting to collaterally attack the Department's previous adjudication of his claim through his appeal from the 2006 closing order. However, res judicata prevents a party from attacking a decision of the Department unless the worker raised the issue through a timely appeal to the appropriate order. *See, e.g., Marley*, 125 Wn.2d at 539-544.

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 (plurality); *see also* Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 813-14 (1985). 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. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737-38, 222 P.3d 791 (2009).

All these elements are met for application of *res judicata* to this case. First, the parties, Loomis and the Department, are identical. Second, the prior 1975 and 1986 reopening orders and the present case involve a common subject: namely, Loomis's workers' compensation claim. Loomis received, but did not appeal, the 1975 and 1986 orders that reopened his claim. Third, the 1975 and 1986 orders were final orders 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 (plurality); *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 request for reconsideration with the Department or an appeal with the Board. RCW 51.52.050(1), .060. Loomis did not appeal the 1975 or 1986 reopening orders at any time, let alone appeal them within 60 days, nor did he ask that the Department reconsider those orders.

Fourth, the same claim or cause is involved in the prior orders and the current appeal. 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).

Since all of the requirements for claim preclusion are met, res judicata precludes Loomis from collaterally attacking either the 1975 or the 1982 closing orders. With regard to the 1975 closing order, the Department issued an order in 1975 that reopened Loomis's claim. Thus, Loomis was plainly advised that the Department had decided to treat his application to reopen his claim as a request to reopen his claim rather than as a request for reconsideration of the 1975 closing order. If Loomis believed that this decision was erroneous, and that his application to reopen his claim was, in reality, a request for reconsideration of the closing order, he could have appealed the decision to reopen his claim, and could have argued that his claim had never, in fact, been closed through a final order. However, Loomis did not appeal the 1975 decision to reopen his claim. His failure to appeal that order prevents him from collaterally attacking it in the current appeal from the 2006 closing order.

Similarly, Loomis's argument that the Department erred in not reconsidering the 1982 closing order is barred by res judicata. After the Department issued the 1982 closing order, Loomis filed an application to reopen his claim in 1983. The Department initially denied this request, but, following an appeal by Loomis, it ultimately decided to reopen his claim in 1986. If Loomis believed that the 1986 decision to reopen the claim was erroneous, based on the idea that the 1982 closing order had not become final, he should have appealed the 1986 reopening order and presented that argument to the Board. However, he failed to appeal the 1986 decision to reopen his claim. Res judicata bars him from arguing, in the current appeal, that the 1982 closing order did not become final.

When the Department issued the 1975 and 1986 orders that reopened Loomis's claim, it necessarily determined that his claim had been closed prior to the date of those orders. "An 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" *Kingery*, 132 Wn.2d at 169 (plurality). Loomis's failure to appeal the 1975 and 1986 orders renders it res judicata that his claim had been closed before both of those dates. 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 (plurality); *Preiser*, 2010 WL 5273010 at *2-3.

Loomis may argue that he had no duty to appeal the decision to *reopen* his claim, because it granted him relief. However, the order did not grant him the relief that he contends he should have received: it reopened his claim but it did not set aside the 1975 closing order itself. If Loomis believed this was erroneous, he should have appealed it.

Furthermore, the appellate courts have repeatedly rejected arguments by workers that they should be excused for failing to file timely appeals from Department orders because the workers didn't realize the orders were erroneous at the time they were issued. *See, e.g., VanHess v. Dep't of Labor & Indus.*, 132 Wn. App. 304, 312-13, 130 P.3d 902 (2006) (rejecting untimely appeal from wage order that was issued prior to the Supreme Court's decision in *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001), and which, contrary to *Cockle*, did not include the workers' health care benefits in the wage calculation); *Lynn v. Dep't of Labor & Indus.* 130 Wn. App. 829, 125 P.3d 202 (2005). Thus, even if Loomis only concluded, in hindsight, that it was "wrong" for the Department to reopen his claim in 1975 and 1986, this does not excuse his failure to timely appeal the Department's decision to reopen his claim. *VanHess*, 132 Wn. App. at 312-13.

The Board, similarly, concluded, in the *Preiser* decision, 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*, 2010 WL 5273010 at *2-3; *see also Perez-Rodriguez*, 2008 WL 1770918 at *6-9. Under *Preiser*, Loomis’s failure to appeal the 1975 and 1986 orders reopening his claim precludes him from arguing that the earlier 1975 and 1982 closing orders are not final. *See Preiser*, 2010 WL 5273010 at *2-3.

Finally, the Department has issued several additional orders after it reopened Loomis’s claim in 1986 and before it issued the 2006 closing order that is currently under appeal.¹¹ Upon receipt of each of those orders, Loomis either did not appeal the order, or he appealed the order but did not raise any issue with regard to the finality of the 1975 or 1982 closing orders. *See CABR Ex. 1* at 3-4. While even one unappealed order would be enough to bar Loomis from raising the issues he is attempting to raise here under the doctrine of res judicata, the fact that there are multiple unappealed orders highlights the unreasonableness of Loomis’s collateral attacks on the Department’s 1975 and 1982 closing orders.

¹¹ After his claim was reopened in 1986, the Department closed his claim in 1987, reopened it again in 1992, closed it again in 1994, and, after initially denying Loomis’s 2003 reopening request, ultimately reopened it yet again in 2004. *See CABR Ex. 1* at 3-4.

In particular, on September 29, 2004, Loomis entered into an order on agreement of parties that expressly declared that his claim was an “over seven” aggravation claim and that it would be reopened for medical benefits only. CABR Ex. 1 at 4. If Loomis believed that his claim was not an “over seven” aggravation claim he should not have entered into this agreement. The order on agreement of parties, like any other final order, is entitled to res judicata effect, and it bars Loomis from arguing in this case that his claim is not an “over seven” claim.¹² Loomis’s brief offers no cogent reason as to why the agreement that he knowingly entered into can be ignored in this appeal.

C. The Doctrine Of Liberal Construction Does Not Support Loomis’s Arguments

Loomis attempts to bolster his argument that the Department lacked jurisdiction to adjudicate his claim by relying on the doctrine of “liberal construction.” AB 12-16. The doctrine of liberal construction does not support him.

While it is true that the provisions of the Act are “liberally construed,” this rule of construction does not authorize an interpretation of

¹² The finality of the order on agreement of parties did not preclude Loomis from asking the Director to find him eligible for disability benefits on his “over seven” claim in 2006. *See Stach*, 152 Wn. App. at 504 (holding that if there is a final order that found a worker eligible for medical treatment only, this does not prevent the party from asking to be found eligible for disability benefits in the future). However, the finality of the order on agreement of parties does preclude Loomis from arguing that his claim is not an “over seven” claim.

a statute that produces strained or absurd results that defeat the plain meaning and intent of the legislature. RCW 51.12.010; *see Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992); *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n of State of Wash.*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).

Here, no provision of the Act, and no legal authority, supports Loomis's argument that the Department lacked jurisdiction to issue any of the various orders it has issued in this case, including the 2006 order which is under appeal. Because the doctrine of liberal construction cannot be used to create a rule of law out of thin air, and since no authority supports Loomis's arguments, the liberal construction doctrine is of no aid to him. *See Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 432, 980 P.2d 701, 711, 980 P.2d 701 (1999).

The doctrine of liberal construction is also inapplicable because the rule of law that Loomis seeks would not work to the advantage of injured workers as a whole. While Loomis would apparently prefer to have all of the Department's actions after it closed his claim in 1975 declared void, including the decisions it made after 1975, some of which gave him substantial disability benefits, many other injured workers would be harmed by a rule of law that allows unappealed decisions of the

Department to be set aside many years after the fact based on an allegation that an error was committed at some point in the early history of the claim.

Loomis'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 makes any mistake as to whether a request for reconsideration has been filed from any prior closing order, 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. Thus, an employer who felt that the Department had been overly generous to an injured worker could seize upon a procedural error that was committed in the distant past, and use that error as a basis to relitigate the worker's entitlement to all of the benefits that were paid after the alleged procedural error was committed.

Indeed, as the cases explaining the purposes of the doctrine 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). Accepting Loomis's arguments would expose both injured workers and employers to chaos and uncertainty. Such a rule of law

would thwart, rather than further, one the key goals of the Industrial Insurance Act, which is to ensure that workers receive swift and certain relief. Therefore, the liberal construction doctrine is of no aid to Loomis.

D. The Director Did Not Abuse His Discretion When He Found Loomis Ineligible For Disability Benefits On His “Over Seven” Claim

Finally, Loomis argues, in the alternative, that the Director abused his discretion when he found Loomis ineligible for disability benefits in 2006, because a different Director had previously found him eligible for disability benefits in 1992.¹³ AB 21-22. Loomis broadly contends, without support in the record, that no change in his factual circumstances occurred between 1992 and 2006, and he argues that it follows from this that if he was eligible for disability benefits in 1992, then he should have also been found eligible for them in 2006. AB 21-22.

Loomis’s argument fails for at least two reasons. First, nothing in the record supports Loomis’s assertion that his factual circumstances were identical in 1992 and 2006. The record in this case is confined to the parties’ stipulations, and the parties did not stipulate that Loomis’s

¹³ Loomis also contends that the Director “abused his discretion” by failing to acknowledge that the 1975 and 1982 closing orders did not become final and that his claim was not actually an “over seven” claim. This is, in truth, a reformulation of Loomis’s argument that the errors the Department allegedly committed at those times rendered all of its subsequent orders void, and, for the reasons explained above, that argument lacks merit.

personal circumstances were identical over that entire time frame. Nor can such a conclusion be reasonably inferred from the stipulation.

On the contrary, the parties' stipulation shows at least one important difference between Loomis's circumstances in 1992 and 2006. In 1992, Loomis was found eligible for vocational retraining. He successfully completed this training in 1994. After completing this training, Loomis did not return to work. The fact that he had successfully completed a retraining plan but did not return to work after completing it strongly supports the Director's finding that Loomis's unemployed status as of 2003 (which continued through 2006) was not the result of his industrial injury, but, instead, was due to factors unrelated to his injury.

The Director reasonably concluded that Loomis should not be found eligible for disability benefits in 2006, because, by that point, it was not the effects of the injury that were responsible for removing him from the labor market. The Director did not abuse his discretion by finding Loomis ineligible for disability benefits in 2006, despite the fact that a different Director had found Loomis eligible for disability benefits in 1992, because, as of 2006, the evidence before the Director supported the

conclusion that Loomis was not working for reasons unrelated to his injury.¹⁴

It is hardly unreasonable for the Director to decline to award disability benefits to a worker on a discretionary basis if the worker is unemployed for reasons unrelated to his industrial injury. Indeed, RCW 51.32.090 and RCW 51.32.060 expressly direct the Department to deny wage replacement benefits to workers who have voluntarily detached themselves from the labor market.

Second, even if it is assumed that Loomis's circumstances were identical in 1992 and 2006 (they were not), it still would not follow that the Director was legally obligated to make the same decision in 2006 that a different Director had made in 1992. No legal authority supports the conclusion that if a claimant was found eligible for a discretionary benefit at one time then the claimant cannot be found ineligible for that benefit at a later time absent a change of factual circumstances.

On the contrary, as the *Dalman* decision shows, where there is room for more than one reasonable opinion with regard to whether a

¹⁴ The Department had also provided Loomis with retraining before his claim was closed in 1992, and he did not return to work after completing that retraining plan, either. However, this does not prove that Loomis's circumstances were identical in 1992 and 2006. A worker who has been provided with vocational services twice, and who did not return to work after completing either of those retraining plans, is distinguishable from a worker who fails to return to work after being successfully retrained once. With each instance that a worker *successfully* completes a retraining plan but does not return to work after completing it, the inference becomes stronger that factors other than the industrial injury are responsible for the worker's unemployed status.

discretionary benefit should be provided or denied, then it would not be an abuse of discretion to either grant or deny that benefit. *Dalman*, 122 Wn.2d at 809-10. From a logical standpoint, if the Director *could have* reasonably found Loomis ineligible for disability benefits in 1992, and if Loomis's circumstances were identical in 1992 and 2006, then the Director could also have reasonably found Loomis ineligible for disability benefits in 2006.

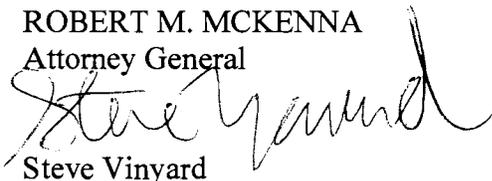
Loomis has failed to show that the Director abused his discretion when he found him ineligible for disability benefits in 2006.

VII. CONCLUSION

For the reasons discussed above, the Department respectfully requests that this Court affirm the Superior Court's decision, which affirmed the Department's order in this case.

RESPECTFULLY SUBMITTED this 2 day of November, 2011.

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NO. 41831-2-II

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

CHARLES A. LOOMIS,

Appellant,

v.

DEPARTMENT OF LABOR &
INDUSTRIES,

Respondent.

**DECLARATION OF
SERVICE**

DATED at Tumwater, Washington:

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

Tara Reck *(and via facsimile)*
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DATED this 1 day of November, 2011.


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