Perez-Rodriguez, Jorge

AGGRAVATION (RCW 51.32.160)

Last closing order not final

The Department's failure to properly close a claim before denial of an application to reopen a claim is not jurisdictional; the failure is an error of law and the subsequent denial of an application to reopen that becomes final is res judicata that the claim is closed as of the date of that denial. ***….In re Jorge Perez-Rodriguez,* BIIA Dec., 06 18718 (2008)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JORGE C. PEREZ-RODRIGUEZ	**)**	**DOCKET NO. 06 18718**
	)	
CLAIM NO. N-359790	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Jorge C. Perez-Rodriguez, Pro Se

Employer, Tenino Wholesale Nursery,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
W. Martin Newman, Assistant

The claimant, Jorge C. Perez-Rodriguez, filed an appeal with the Board of Industrial Insurance Appeals on September 5, 2006, from an order of the Department of Labor and Industries dated August 21, 2006. In this order, the Department affirmed its July 13, 2006 order in which it denied the claimant's application to reopen the claim. The appeal is **DISMISSED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on August 21, 2007, in which the industrial appeals judge dismissed the appeal from the Department order dated August 21, 2006.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

We have granted review to address significant jurisdictional questions including: (1) whether the claim was ever closed in 2006; (2) whether the Department had jurisdiction to issue the April 30, 1997 and January 12, 1998 orders, purportedly denying the claimant's application to reopen the claim and keeping the claim closed; and (3) what effect, if any, does the failure of the claimant to protest or appeal the January 12, 1998 order have on these proceedings, which involve the adjudication of a later (April 2006) application to reopen the claim? We conclude: (1) that the claim had not been closed when Mr. Perez-Rodriguez filed an application to reopen it in February 1997; (2) that the Department's adjudication of that application to reopen the claim, which culminated in the issuance of its April 30, 1997 and January 12, 1998 orders, was merely an error of law and not outside the Department's subject matter jurisdiction; (3) that the January 12, 1998 order became

final and binding on the parties; and (4) no facts or circumstances have been presented that would prevent the application of the doctrine of res judicata from applying to this appeal. We further conclude that once final: (a) that January 12, 1998, is the first terminal date in this aggravation appeal; (b) the claimant did not have a permanent partial disability as of January 12, 1998, inasmuch as there is no mention in that order of a rating or award for such a disability; and (c) that the claimant did not present a prima facie case in support of aggravation of a condition or disability caused by the January 23, 1992 industrial injury between January 12, 1998 and August 21, 2006.

Application of the Doctrine of Res Judicata to Department Orders

"Res judicata" is Latin for "a thing adjudicated." *Black's Law Dictionary*, 7th ed., 1312 (1999). Courts apply the doctrine of res judicata "to prevent repetitive litigation of claims or causes of action arising out of the same facts and to 'avoid repetitive litigation, conserve judicial resources, and prevent the moral force of court judgments from being undermined.'" *Hyatt v. Department of Labor & Indus.*, 132 Wn. App. 387, 394 (2006); *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 410 (2002), *aff'd,* 151 Wn. 2d 853, 93 P.3d 108 (2004). The doctrine generally applies to final adjudications of administrative agencies such as the Department of Labor and Industries. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994); *Restatement (Second) of Judgments*, § 83.

There are three basic requirements that must be met before a judgment can be entitled to res judicata effect against a party to a subsequent action.

(1) The judgment must be valid; that is, it must have been entered by a forum, judicial or administrative, that had jurisdiction over the subject matter of the action; the parties to the action must have submitted to the jurisdiction of the court or agency; and adequate notice and opportunity to be heard must have been afforded to the party in the earlier litigation. *Marley; Restatement (Second) of Judgments*, §§ 1, et seq. When a Department order does not meet the requisites for validity, it is void and no appeal is necessary. *Marley*. In such a case the Board or the courts, on their own motion or by application of a party, may declare the order void.

(2) The judgment on the merits must be final. The applicable statutory protest and/or appeal period must have run without a protest or appeal being filed by any party. *Marley*; *Restatement (Second) of Judgments*, §§ 13, et seq. Failure to communicate to a party a copy of an order that contains the protest and appeals language set forth in RCW 51.52.050 will prevent a Department order from becoming final. *Lee v. Jacobs*, 81 Wn.2d. 937 (1973). A statute may prevent a Department order from becoming final, in which case the same issues may be adjudicated in a later

proceeding. *Rhodes v. Department of Labor & Indus.*, 103 Wn.2d 895 (1985); *In re Ruth Logan*, BIIA Dec., 89 0189 (1989). An interlocutory Department order or adjudication can be valid and appealable in certain circumstances [see, for example, *In re Robert Uerling*, BIIA Dec., 99 17584 (1999), and *In re Louise Favaloro*, BIIA Dec., 90 5892 (1990)], but will not be given res judicata effect because it is only temporary—further, determinative action by the Department is required to make that order final. An order in which the Department places an earlier order in abeyance also is not a final Department order. *In re Coni Oakes*, BIIA Dec., 90 1968 (1990).

(3) The prior and present actions must have involved: (a) the same subject matter; (b) the same cause of action; (c) the same persons and parties; and (d) the same quality of persons for or against whom the claim is made. *Hyatt*, *Hisle*. Failure to conform to this latter requirement does not render the judgment void; it restricts or prevents the use of that judgment as a defense against a party in later litigation. For instance, the extent to which res judicata can be used to prevent litigation of particular issues will be restricted if the judgment is ambiguous. In our significant decision *In re Rick Yost*, BIIA Dec., 01 24199 (2003), we stated:

> However, before a party can be precluded by principles of res judicata from litigating a specific issue at a later time, the party must have had clear and unequivocal notice of issues adjudicated by the prior order, so that the party has had an opportunity to challenge the specific finding. *King v. Department of Labor & Indus.*, 12 Wn App. 1 (1974). Indeed, we have held on several occasions that an order of the Department will not be held to have a res judicata effect unless it specifically apprises the parties of the determinations being made. *See In re Lyssa Smith*, BIIA Dec., 86 1152 (1988); *In re Gary Johnson*, BIIA Dec., 86 3681 (1987).

As a general rule, when the Department issues an order in a workers' compensation matter that thereafter becomes final, RCW Title 51 does not give either the Board or the courts authority to overturn such an order. *Kingery v. Department of Labor & Indus.* 132 Wn.2d 162 (1997). But even if all of the requirements are met for application of the doctrine of res judicata to an earlier judgment, either partial or complete relief from that judgment may be available to a party to subsequent litigation. *Restatement (Second) of Judgments*, §§ 69, et seq., lists a number of these circumstances, many of which have been applied by Washington courts.

A party can be relieved from the effect of a judgment procured by fraud, duress, or corruption. *Abraham v. Department of Labor & Indus.*, 178 Wash. 160, 163 (1934). *LeBire v. Department of Labor & Indus.*, 14 Wn.2d 407 (1942); *Restatement (Second) of Judgments*, § 70.

A party can be relieved from the effect of a judgment on the ground of mistake of law or fact. *Restatement (Second) of Judgments*, § 71. Such relief is granted under only very limited circumstances, such as an error that is obvious to all the parties such as compensating the worker for the wrong extremity. *Callihan v. Department of Labor & Indus.* 10 Wn. App. 153 (1973).

A party who is incapacitated or incapable of maintaining or defending an action can be relieved of the effects of an otherwise final judgment. *Restatement (Second) of Judgments*, § 72. This section, as well as § 74, is consistent with the Supreme Court's holdings in *Ames v. Department of Labor & Indus.*, 176 Wash. 509 (1934) and *Rodriguez v. Department of Labor & Indus.*, 85 Wn.2d 949 (1975). In those cases the Supreme Court relieved the workers from the res judicata effect of final Department orders based on "equitable doctrines" because they were incapable of making a timely response to Department orders of which they had received written notice when in a state of severe mental disability or "extreme illiteracy," respectively.

Change of circumstances can justify modification or setting aside of a judgment that is subject to modification by its own terms or by applicable law when events occur subsequent to the judgment which warrant modification or if justice requires. *Restatement (Second) of Judgments*, § 73. Although this section of the *Restatement* was not mentioned in *Rhodes*, it is consistent with the holding of that case in which RCW 51.12.100 was cited as preventing a worker from relying on the finality of Department orders paying him benefits when the Department sought recoupment of those benefits after the worker subsequently filed Longshoremen's and Harbor Workers' Compensation Act claim was allowed. Other statutory provisions that have been interpreted to abrogate res judicata effect of final Department orders include RCW 51.32.240, to the extent that it permits recoupment of benefits paid pursuant to otherwise final Department orders, and RCW 51.28.040, which permits changes in compensation if a "change of circumstances" occurs (albeit with a limitation of 60 days prior to receipt of the application).

Equitable considerations can also be used to justify relief from the res judicata effect of a final Department order. *Restatement (Second) of Judgments*, § 74. This section is limited to situations in which the party seeking to be relieved of the final judgment has exercised due diligence in advancing the claim and discovering a ground for relief. Undue delay can warrant denial of equitable relief. *Kingery*. Our ability to provide this form of relief is limited because we do not have equitable powers except when a court decision permits us, under the doctrine of stare decisis, to exercise such a power. *In re Seth Jackson*, BIIA Dec., 61,088 (1982); *In re James Neff*, BIIA Dec., 92 2782 (1994). Thus, we may provide relief akin to that provided in the *Ames* and

Rodriguez cases and any other published court decisions, otherwise equitable relief would have to be provided by the courts, not the Board.

The Lack of Finality of the April 1, 1996 Department Order

On February 2, 2007, the parties entered into a jurisdictional stipulation based on the "Jurisdictional History" chart we routinely create and supply to the parties prior to hearing for use as a guide to determine the scope and extent of our jurisdiction and to serve as a basis for a jurisdictional stipulation if the parties so choose. The stipulation based on this chart indicated that the Department issued a closing order on November 29, 1995. Within the 60-day protest/appeal period for that order, Mr. Perez-Rodriguez filed an application to reopen the claim. The Department correctly construed that document to be a protest to the claim closure order and, on January 23, 1996, it issued an order in which it placed the November 29, 1995 closing order in abeyance. In that order, the Department prevented the closing order from becoming final until after it reviewed the claimant's protest and issued a further appealable order. On April 1, 1996, the Department issued an order in which it affirmed the **January 23, 1996 (abeyance) order**. No further action was taken by the Department until after Mr. Perez-Rodriguez filed two more applications to reopen the claim, 10 and 11 months, respectively, after the issuance of the April 1, 1996 order.

The irregularity described above brings our own subject matter jurisdiction and scope of review into question. We have the inherent power to determine if we have subject matter jurisdiction to hear an appeal. *Callihan*. In order to determine if we have jurisdiction over this appeal, we conducted a review of the Department file. See *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965). Our review of the Department file confirmed the entry in the jurisdictional history chart that in the April 1, 1996 order the Department specifically stated that it affirmed the January 23, 1996 (abeyance) order. It also confirmed that the Department did not issue any further orders under this claim for the period between April 1, 1996, and the filing of the applications to reopen the claim in early 1997.

If we take the contents of the April 1, 1996 order at face value, it is merely another abeyance order and does not constitute a final order binding on anyone. *Oakes*. The conclusion then would be that the claim had never closed at the time the 1997 applications to reopen were filed by Mr. Perez-Rodriguez. However, this was not the conclusion reached by our industrial appeals judge in the Proposed Decision and Order. Our industrial appeals judge stated, at page 1, and again in Finding of Fact No. 1, that the reference in the April 1, 1996 order to the January 23, 1996 abeyance order, instead of the November 29, 1995 closing order, was a typographical or clerical

error by the Department. In the Proposed Decision and Order, our industrial appeals judge concluded that the Department's April 1, 1996 order was intended to affirm the November 29, 1995 closing order, which then became final prior to the claimant's 1997 filing of the applications to reopen the claim.

We have authority to correct an "inadvertent misdescription" or a clerical error in a Department order. *Callihan*; *In re Geraldine Gallant*, BIIA Dec., 03 16903 (2004). If we were to do so in this case it would mean that the April 1, 1996 order, as corrected, would have been an appealable order of the Department that could become final and binding if it was not timely protested or appealed.

We have significant concerns about reading claim closure language into the April 1, 1996 Department order. We believe that there are very few instances in which we should infer that the Department's intent when issuing an order differed from the express terms of that order. See, *Comment (a)* to *Restatement (Second) of Judgments*, § 71. Changing the terms of an order when that order is several years old is likely to be unfair to one or more of the other parties. We believe the use of the power should only occur in instances such as *Callihan* and *Geraldine Gallant*, which describe where the error and the injustice attendant to that error are apparent to all parties. In those cases, the clerical error involved a Department order that identified the wrong extremity when benefits were adjudicated. It was clear to all parties that this error would result in an injustice if it was not corrected. In each case the other parties were not significantly prejudiced by amending the final order to reflect the correct extremity.

But even if we conclude that the Proposed Decision and Order correctly applied this power and that the April 1, 1996 order should be construed as a closing order, that order could not become final because there were timely protests to that order. In our *Holzerland* review of the Department's file, we found medical documents that should have been considered as timely protests from the April 1, 1996 order, if that order had affirmed the earlier closing order. For example, one of these medical documents was a provider's industrial insurance form received by the Department on April 12, 1996. On that form, D. Ushman, M.D., indicated he had examined Mr. Perez-Rodriguez on April 4, 1996. Dr. Ushman identified this claim by number and documented clinical findings from his examination of the claimant's low back, as well as provided his diagnosis and treatment plan for the low back condition he diagnosed. The form is ambiguous in that Dr. Ushman also said the back condition was stable without any permanent partial disability, but despite the conflicting information it contained, the form should have put the Department on

notice that Dr. Ushman was requesting action inconsistent with claim closure. *In re Mike Lambert*, BIIA Dec., 91, 0107 (1991). If the April 1, 1996 order is construed to be a closing order, this is a valid protest of that order, which could not become final until the protest was addressed by the Department.

The Department's Adjudication of the Applications to Reopen the Claim were Mistakes of Law and not Jurisdictional Errors

Pursuant to our *Holzerland* review of the Department's file, we observed documents in the file from 1997 and 1998 that are relevant to our jurisdiction and the scope of review. We discuss them here to explain the determinations we have reached regarding the jurisdictional issues this appeal presents. Mr. Perez-Rodriguez filed applications to reopen the claim in February and March 1997. On April 30, 1997, the Department issued an order in which it denied the application to reopen the claim notwithstanding the lack of any prior final closing order. The dispositive text of this order read, "THE APPLICATION TO REOPEN IS DENIED AND THE CLAIM WILL REMAIN CLOSED." The claimant retained counsel, who protested the reopening denial order on his behalf. On January 12, 1998, the Department affirmed the April 30, 1997 order in which it denied reopening the claim. This order was communicated to the claimant by sending his copy to his attorney's office. The claimant's attorney then withdrew. The claimant did not protest or appeal the January 12, 1998 Department order. That order became final.

Eight years went by. On April 26, 2006, Mr. Perez-Rodriguez filed another application to reopen the claim, which was again denied by the Department by order dated July 13, 2006. The claimant timely protested, but that protest was denied by a Department order dated August 21, 2006. Thereafter the claimant timely appealed the August 21, 2006 order to us.

It is well settled that the Department may not adjudicate an application to reopen a claim pursuant to RCW 51.32.160 until there is a final closing order. In *Reid v. Department of Labor & Indus.*, 1 Wn.2d 430, 437-438 (1939), the Supreme Court stated:

> It is a condition prerequisite to the reopening of a claim for additional compensation by reason of aggravation of disability that there be a determination as to the disability and the rate of compensation to be awarded therefor, and the further condition that there be a change in the claimant's condition since that determination. That is to say, until there has been a final determination as to the amount of the award to which a claimant is entitled, there cannot be entertained a claim for aggravation; as the standard by which to determine the award for aggravation, diminution, or termination of disability (Rem. Rev. Stat., § 7679) is the difference between original award and the amount to which he would be entitled because of his condition subsequent thereto.

There are many reported court cases that include as an element of proof in an aggravation appeal an increase in disability since claim closure. See, for example, *State ex rel. Stone v. Olinger*, 6 Wn.2d 643 (1940); *Karlson v. Department of Labor & Indus.*, 26 Wn.2d 310 (1946); *Collins v. Department of Labor & Indus.*, 42 Wn.2d 903 (1953); *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426 (1993). The rationale and holding in *Reid* has been adopted by the Board in no fewer than three of our significant decisions: *In re Edwin Fiedler*, BIIA Dec., 90 1680 (1990); *In re Ronald Leibfried*, BIIA Dec., 88 2274 (1990); and *In re Greg Ackerson*, BIIA Dec., 94 1135 (1995).

Is it a jurisdictional requirement that there be a final closing order before the Department may adjudicate aggravation of condition? In *Ackerson*, we concluded that it is a jurisdictional requirement. In *In re Betty Wilson*, BIIA Dec., 02 21517 (2004), we concluded that it is not a jurisdictional requirement. The importance of answering this question is this: If the *Reid* requirement is a jurisdictional requirement, then each and every one of the orders in which the Department denied applications to reopen the claim in 1997, 1998, and 2006, are void. The presence of a timely protest or appeal to those orders is immaterial. We do not have jurisdiction over an appeal from a void order. We would be required to dismiss this appeal. The claim would be returned to the Department to adjudicate either the November 29, 1995 closing order that was in abeyance or the April 1, 1996 Department order that was timely protested.

We conclude that *Wilson* is the more accurate statement of the law. In *Wilson*, we held that the *Reid* requirement, that a closing order become final prior to any adjudication by the Department of an application to reopen a claim for aggravation of condition, is not jurisdictional. To the extent that *Ackerson* and other decisions we have issued have analyzed this matter as an issue of subject matter jurisdiction, they are overruled.

Our Supreme Court in *Marley*, at 539, discussed the extent of the Department's subject matter jurisdiction in workers' compensation matters. Based on *Restatement (Second) of Judgments*, § 11, the court noted a distinction between whether a court (or administrative agency) has authority to adjudicate the "type of controversy" involved in an action with its authority to enter a given order. The court stated that "a tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate." In the case before us, the issue is whether the Department should have issued a **specific order**, that being an order adjudicating an application to reopen the claim. There is no question that the "type of controversy,"

the reopening of a workers' compensation claim, is within the Department's authority to adjudicate under RCW Title 51.

In *Wilson*, we discussed the procedural history of and analysis by the court in *Reid*. We noted that the court did not analyze the dispute as a jurisdictional question. In fact, the word "jurisdiction" does not appear in the court's analysis of its disagreement with the Department's adjudication of an application to reopen a claim when no closing order exists. *Wilson*, at 4. The court in *Marley* quoted *In re Major*, 71 Wn. App. 531, 534-535 (1993), to the effect that when a court is ruling in a particular manner it does not lose subject matter jurisdiction even when it interprets the law erroneously. We conclude that the Department's actions in adjudicating the applications to reopen the claim when there was no final closing order constituted errors or mistakes of law.

The January 12, 1998 Department Order is Entitled to Res Judicata Effect

In the January 12, 1998 order, the Department denied Mr. Perez-Rodriguez's application to reopen the claim notwithstanding the fact that there was no final order closing the claim. This order was not timely protested or appealed. We decided earlier that even though issuance of the order was legally erroneous, it was within the Department's subject matter jurisdiction to issue. We perceive no issues regarding personal jurisdiction. The January 12, 1998 order was communicated to the claimant's attorney of record so the requirement of proper notice of the Department order was met. Therefore, we conclude that the January 12, 1998 order was a valid order for purposes of determining if it should be given res judicata effect in this proceeding.

The communication of the January 12, 1998 to the claimant's attorney, coupled with the lack of a timely protest or appeal therefrom, proves that the order became final. The fact that the attorney withdrew before filing a protest of appeal on behalf of Mr. Perez-Rodriguez, his client at the time the order was communicated, does not change this fact or somehow excuse the lack of filing of a timely protest or appeal by the claimant himself. *Kingery*.

We perceive no issues regarding the identity of the parties or subject matter between this appeal and the earlier litigation (in 1997-1998). Nonetheless, the res judicata effect of the adjudication by the January 12, 1998 order does not prevent maintenance of Mr. Perez-Rodriguez's appeal regarding denial of this **subsequent** application to reopen the claim. The adjudications contained within the January 12, 1998 order regarding the claimant's conditions under this claim that are entitled to res judicata effect are limited to that date. The January 12, 1998 order cannot be given any res judicata effect regarding aggravation of the claimant's conditions subsequent to its date. *White v. Department of Labor & Indus.*, 48 Wn.2d 413 (1956).

There are No Valid Grounds to Relieve the Claimant from the Res Judicata Effect of the January 12, 1998 Order

If Mr. Rodriguez can be excused from the res judicata effects that attach to the January 12, 1998 order, then pursuant to *Reid* we would be required to remand this claim to the Department to adjudicate claim closure before the application to reopen could be adjudicated.

We conclude that none of the exceptions to the application of res judicata exist in regard to the January 12, 1998 order in which the Department denied the application to reopen the claim. The Department had jurisdiction over the subject matter and the parties. While the Department's handling of the claim adjudication from January 1996 through January 1998 was questionable, there is no indication in the record that its actions were fraudulent or something similar. At the time the January 12, 1998 order was issued, the claimant was represented by counsel so his language difficulties are not relevant, nor could he be deemed incapacitated. RCW 51.32.160 is not a statute that explicitly contains an exception to res judicata applicable to this situation.

We do not believe that mistake of law or an argument based on fundamental fairness ("equitable considerations") is an appropriate ground to remove the res judicata effect of the January 12, 1998 order because Mr. Perez-Rodriguez was represented by counsel at the time the order was received. The attorney's failure to advance arguments that the claim had not been closed and/or failure to locate the medical protests in the Department file show a lack of due diligence that is attributable to the claimant. See *Kingery*.

January 12, 1998 is the First Terminal Date

We believe that January 12, 1998, the date selected by our industrial appeals judge during the proceedings in this appeal, is the appropriate first terminal date. That order essentially becomes a closing order by operation of law. As pointed out earlier, the order it affirmed had specifically stated that the claim was closed, so the claimant had notice of that provision of the order, even though at the time that order was issued it was legally erroneous. Had the claim first closed with issuance of one of the 1995 or 1996 orders, the first terminal date in this litigation still would be January 12, 1998, because that was the date of the final order in which the Department denied the claimant's application to reopen the claim that immediately preceded the application to reopen that was denied to start this litigation. Furthermore, there is no prejudice to the claimant **in this litigation** to select January 12, 1998 as the first terminal date because the issues, scope of the appeal, and standard of proof all remain the same.

In the January 12, 1998 order, the Department does not state any award for permanent partial disability, nor did the two orders the Department issued in 1995 and 1996, by which it attempted to close the claim. Since no permanent partial disability had been awarded by the January 12, 1998 order, in terms of proof of aggravation of condition, as of the first terminal date there was no permanent impairment. Thus, if Mr. Perez-Rodriguez had proven as of the second terminal date, August 21, 2006, any objective findings of disability related to conditions proximately caused by his industrial injury, the claim would be reopened.

Mr. Perez-Rodriguez Failed to Prove Aggravation between the Terminal Dates

Mr. Perez-Rodriguez did not present medical testimony to show that his low back condition related to this industrial injury had objectively worsened between the terminal dates. He complained that his doctors were too busy to testify. He did not attempt to confirm a doctor, have a subpoena drafted, or schedule the doctor for a phone hearing until faced with dismissal of his appeal on the day of hearing. In his Petition for Review, the claimant insists that he can only present medical information in writing. But he was exhaustively informed that the law requires the live testimony of a physician to prove the necessary elements of aggravation of condition. *Phillips v. Department of Labor & Indus.*, 49 Wn.2d 195 (1956). From his own testimony it is clear that causation of the claimant's ongoing low back problems would have been a major issue in this appeal inasmuch as he sustained two other industrial injuries to his low back (and had low back surgery after one of them) between the dates that had been identified as the terminal dates of this appeal. Causation must be proven by medical testimony. *Lewis v. ITT Continental Baking Co.*, 93 Wn.2d 1 (1979).

The appeal file reveals that the industrial appeals judges who dealt with Mr. Perez-Rodriguez, one as a mediator and the other as a hearing judge, advised him on multiple occasions of the requirement that he present medical testimony to support his request that his claim be reopened for treatment. Spanish-English interpretation was provided during the live conferences in which Mr. Perez-Rodriguez was told of this requirement. We observed nothing in the transcripts of these proceedings that indicate that the claimant had an intellectual deficit, could not understand the information interpreted to him, or did not get his questions answered. Our industrial appeals judge made sure that the claimant verbally responded to his questions so that no ambiguity existed as to what his responses were. In addition to the information provided to the claimant in Spanish during the conferences, at least one letter from our industrial appeals judge to the claimant was translated into the Spanish language. That letter also informed

Mr. Perez-Rodriguez of the requirement that he produce medical testimony at the hearing. Our review of our appeal file leads us to conclude that the industrial appeals judges took every possible precaution to ensure that the claimant understood his legal rights and responsibilities. Under the circumstances we can reach no other determination than to dismiss the claimant's appeal for failure to create a prima facie case for relief.

FINDINGS OF FACT

1. On February 5, 1992, the claimant, Jose Perez-Rodriguez, filed an Application for Benefits, in which he alleged he had suffered an injury to his lower back in the course of his employment with Tenino Wholesale Nursery, on January 23, 1992. The Department issued an order in which it allowed the claim on February 26, 1992. On November 29, 1995, the Department issued an order in which it closed the claim with time-loss compensation benefits as paid to June 13, 1995, and without further award for time-loss compensation benefits or permanent partial disability. On January 12, 1996, the claimant filed an application to reopen the claim that was treated by the Department as a protest from the January 12, 1996 order. On January 23, 1996, the Department issued an order in which it held the November 29, 1995 order in abeyance. On April 1, 1996, the Department issued an order in which it affirmed the January 23, 1996 Department order. Within 60 days of issuance of the April 1, 1996 order the Department received several medical records that indicated that a physician was providing treatment and recommending more treatment in the future for a back condition under this claim.

2. On February 3, 1997 and on March 12, 1997, the claimant filed applications to reopen the claim. On April 30, 1997, the Department issued an order that stated: "THE APPLICATION TO REOPEN IS DENIED AND THE CLAIM WILL REMAIN CLOSED." On June 26, 1997, an attorney filed a protest from the April 30, 1997 order on the claimant's behalf. On January 12, 1998, the Department issued an order in which it affirmed its April 30, 1997 order. This order was mailed to the claimant's attorney's address. On February 2, 1998, the Department was notified by the claimant's attorney that he no longer represented him. No person filed a protest or appeal from the January 12, 1998 Department order.

3. On April 26, 2006, the claimant filed an application to reopen the claim. On July 13, 2006, the Department issued an order in which it denied the claimant's application to reopen the claim and indicated the claim remained closed. On August 4, 2006, the claimant filed a Protest and Request for Reconsideration to the July 13, 2006 Department order. On August 21, 2006, the Department issued an order in which it affirmed the July 13, 2006 Department order. On September 5, 2006, the claimant filed a Notice of Appeal to the Department order dated

August 21, 2006. On September 29, 2006, the Board granted the appeal, assigned it Docket No. 06 18718, and directed that further proceedings be held.

4. On January 23, 1992, Jorge C. Perez-Rodriguez injured his low back in the course of his employment with Tenino Wholesale Nursery when he tripped and fell to the ground while carrying a tree with a 100-pound root ball, causing him low back pain for which he required medical treatment.

5. Between January 12, 1998 and August 21, 2006, the claimant sustained two other industrial injuries to his low back and had low back surgery.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The Department did not issue a closing order in 1996 that became final and binding on the parties.

3. The Department had jurisdiction to issue the April 30, 1997 and January 12, 1998 orders in which it denied the claimant's application to reopen the claim and stated that it remained closed. The issuance of those orders by the Department was erroneous as a matter of law because the claim had not yet been closed.

4. The failure by the claimant to timely protest or appeal the January 12, 1998 order rendered it final and binding on him. There are no facts or circumstances that justify relieving him from the res judicata effect of that order.

5. January 12, 1998, is the first terminal date of this aggravation appeal in which the claimant is seeking to have the claim reopened. As a matter of law as of that date he had no permanent disability due to the January 23, 1992 industrial injury.

6. The claimant failed to establish a prima facie case in support of reopening the claim in that he did not present any admissible medical testimony that his ongoing low back condition was proximately caused by the industrial injury, or had objectively worsened between January 12, 1998 and August 21, 2006, within the meaning of RCW 51.32.160.

7. The claimant's appeal of the August 21, 2006 Department order is dismissed because the claimant failed to establish a prima facie case for relief.

It is **ORDERED**.

Dated: February 13, 2008.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member