Supreme Court No. 96189-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL WEAVER,

Respondent,

v.

THE CITY OF EVERETT,

Petitioner,

THE DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Petitioner.

MEMORANDUM OF AMICI CURIAE EIGHT STATEWIDE EMPLOYER ORGANIZATIONS: WASHINGTON SELF-INSURERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, WASHINGTON FARM BUREAU, WASHINGTON FOOD INDUSTRY ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON, ASSOCIATED BUILDERS AND CONTRACTORS OF WESTERN WASHINGTON, MECHANICAL CONTRACTORS ASSOCIATION OF WASHINGTON, AND ARCHBRIGHT IN SUPPORT OF THE PETITIONS FOR REVIEW

Washington Self-Insurers Association

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I. IDENTITY AND INTEREST OF AMICI CURIAE

A. WASHINGTON SELF-INSURERS ASSOCIATION

Founded in 1972, the Washington Self-Insurers Association (WSIA) represents the interests of nearly four hundred Washington employers who self-insure for industrial insurance, as well as the interests of many companies providing such employers with related professional services.

B. NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor

enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

C. WASHINGTON FARM BUREAU

The Washington Farm Bureau ("WFB") is an independent membership federation representing more than 46,000 farm and ranch families across the state, serving as the voice of the agriculture industry at all levels of government. Washington Farm Bureau member farms and ranches include both State Fund and self-insured operations, and the Washington Farm Bureau sponsors a retrospective ratings and safety program on behalf of its State Fund members.

D. WASHINGTON FOOD INDUSTRY ASSOCIATION

Since 1899, the Washington Food Industry Association ("WFIA") has represented independent grocery operators and their suppliers in Washington, now including about 500 supermarkets, convenience stores, and coffee houses around the state. WFIA members are typically insured by the State Fund, and WFIA sponsors a retrospective ratings program to provide safety incentives to its members.

E. ASSOCIATED GENERAL CONTRACTORS

The Washington Chapter of Associated General Contractors ("AGC") is a professional association representing over 600 member companies involved in all aspects of commercial and industrial construction in the state. AGC members include large and small contractors covered by the State Fund and self-insurance. AGC also sponsors a workers' compensation retrospective ratings program as a safety incentive and service to its State Fund members.

F. ASSOCIATED BUILDERS AND CONTRACTORS

Through its Western Washington, Inland Northwest, and Pacific Northwest Chapters, Associated Builders and Contractors in Washington State represents thousands of small contractors across the state covered by the State Fund for industrial insurance. The Western Washington and Inland Northwest chapters sponsor a retrospective ratings program for their members.

G. MECHANICAL CONTRACTORS ASSOCIATION

The Mechanical Contractors Association of Western Washington ("MCAWW") represents approximately fifty of the largest mechanical contracting firms in Washington, along with several dozen associate members in the construction and professional services industry. MCAWW

provides numerous member resources in education, labor relations, and workplace safety.

H. ARCHBRIGHT

Formerly Washington Employers, Archbright is an employer-based membership organization that provides employment law solutions to its members in the areas of human resources, employee benefits, labor relations, and workers' compensation. Archbright is also a sponsor of retrospective ratings groups for its members.

II. ISSUES OF INTEREST TO AMICI CURIAE

Amici Curiae are interested in the Court of Appeals' (the CA) analysis and application of issue preclusion and claim preclusion in the context of industrial insurance.

III. REASONS TO GRANT REVIEW

A. Review Holding on Issue Preclusion

The Court of Appeals' decision not to apply issue preclusion is incoherent and will result in substantial increased costs in administering the IIA. RAP 13.4(b)(4).[1] Weaver's first II claim involved only the issue of claim allowance: Did Weaver's work as a firefighter cause his melanoma? Particular benefits were not an issue in either claim. The Department never issued an order as to benefits.

[1] If the employer prevailed on this issue, the issue of claim preclusion would be moot.

The CA concluded that the employer failed to prove the fourth element of issue preclusion--that "application of issue preclusion does not work an injustice." The CA defined "injustice" as having no "full and fair opportunity" to litigate the issue of allowance. The CA defined this phrase as something more than a procedural opportunity to litigate fully the issue. *LeBire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 419-20, 128 P.2d 308 (1942). Weaver clearly had and exercised that procedural opportunity. That something more is whether the party had "sufficient motivation for a full and vigorous litigation of the issue." That is, what indicia existed that the litigant really tried to win? In this regard, it is unclear exactly what indicia the CA endorses. There are a number of possibilities.

1. How motivated did the litigant say he was to win this case? Here no evidence exists that Weaver expressly disclosed how motivated he was to win. Without that evidence, the court would need to look for surrogates for his motivation.

2. How much money was at risk? This is an *indirect* surrogate indicia of motivation. If the money at risk was small or nominal, then he may *spend* very little to win, indicating little motivation to "vigorously" litigate. *Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001). But this indicia begs the question. That is, despite a small or nominal amount at risk, he may have been highly motivated to win. His motivation

might be better assessed through more *direct* surrogates of motivation, such as the following.

3. How much money did he spend to win?[2] This is also a surrogate indicia of motivation, but a more reliable indicia than that of the money at risk. The court could assess the absolute amount he spent. That is, the more money he spent, arguably the stronger his motive to win. But a better measure is the amount he spent *relative* to the amount at risk. This could be measured with a cost-benefit ratio (CBR = cost ÷ benefit). The larger the quotient, arguably, the more motivated he is to win.[3] Yet, he could have spent a lot to win but have spent his money unwisely (if so, should that matter; would that not be an indicia of competency rather than of a motivation to win). Here the CA did not know how much money he spent. It *presumed* he spent more than $10,000. *Weaver v. City of Everett,* 4 Wn. App.2d at 310 fn. 2, 421 P.3d 1013 (2018).

4. How was that money spent? This is also a surrogate indicia of motivation. Did he spend all his money on his attorney or did he judiciously allocate that money on his attorney and his experts? Yet, this indicia does not indicate the *quality* of his efforts to win, presumably an indicia of a *vigorous* effort to win.

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[2] This cost variable is not apt to be known unless such proof is provided in second claim.
[3] What CBR quotient cut point would distinguish between "sufficient" and insufficient motivation?

5. How competently did he spend his money? Did he hire an *experienced* attorney and proffer *effective* experts? If he did not, then arguably he was not motivated to *vigorously* litigate his claim. This indicia involves an assessment of the merits of his attorney and his experts. That does not seem to be a proper role for the CA. *Weaver*, 4 Wn. App.2d at 318. In this regard, the CA appears to have *speculated* that Weaver lost because he could only afford to hire as an expert a family practice and ER physician, instead of a dermatologist or oncologist. *Weaver*, 4 Wn. App.2d at 310 fn. 2 & 318. With Dr. Coleman, he might have won in Superior Court had he not dismissed his appeal.

In the end, the CA seems to focus on item two, the money at risk (which it mischaracterized), with a slight nod to items three and five. Indeed, the CA *may* have adopted a *rule of thumb* that if the amount at risk is $10,000 or less, *as a matter of law*, the litigant is *a priori* unmotivated to vigorously litigate his claim, and so issue preclusion does not apply. This rule is bad law (the CA misreads *Hadley*) and bad policy. In a significant number of cases, it arbitrarily undermines the reasons for issue preclusion. *E.g., Barr v. Day*, 124 Wn.2d 318, 324-25, 879 P.2d 912 (1994).[4] It has no place in litigation under the IIA.

[4] If the worker filed a claim to establish claim allowance to protect against the statute of limitations without seeking any benefits, that allowance finding would not be binding in a subsequent claim involving the same issue of allowance. Amici are confident that if the

Moreover, the CA, to reach its decision, committed at least the three following serious *factual* errors.

1. *Hadley* is not analogous to *Weaver.* The CA said "Weaver's circumstances are strikingly similar to those in *Hadley.*" *Weaver,* 4 Wn. App.2d at 318. That conclusion is not even remotely accurate. Hadley had $95 at risk. Weaver, to the contrary, had much more than $10,000 at risk. (See item 2 below). Hadley did not hire an attorney. Weaver hired an experienced litigator. Hadley did not proffer any evidence. Weaver hired an experienced medical expert. Hadley did not appeal the district court's decision. Weaver filed an appeal but then slept on it for ten months without engaging another attorney and then dismissed his appeal.

2. In his first claim, Weaver had an amount at risk much greater than $10,000. Had he won on claim allowance, he would have won a significant "subjective expected value" of benefits.[5] His *immediate* monetary benefits would be for medical expenses and time loss and, while

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claim were allowed, that finding would binding on the employer, but if the claim were disallowed, that finding would not binding on the worker.

[5] If the CA was conjoining a specific benefit to claim allowance, it could have established more precisely the *prospect* of benefits to be the "subjective expected value" (SEV) of claim allowance. The SEV would be sum of the product of (1) the subjective probabilities of qualifying for the various industrial insurance benefits if the claim were allowed and (2) the dollar value of such benefits. SEV is the normative calculus in decision-making in risk analysis. In this case, the SEV would have greatly exceeded $10,000. *E.g.*, Keeney, R.L. & Raffa, H., DECISIONS WITH MULTIPLE OBJECTIVES: PREFERENCES AND VALUE TRADEOFFS (1976); Kahneman, D. & Tversky, A. Prospect Theory: An Analysis of Decision under Risk. *Econometrica*, 47: 263-292 (1979).

the claim remained open, *additionally* incurred medical expenses, *additionally* incurred time loss, PPD and possibly, if the conditioned worsened while the claim was open, a pension (PTD). After the claim closed, an extremely significant *additional* benefit is that the claim could be reopened for aggravations under RCW 51.32.160 and any attendant benefits, including additional medical expenses, additional time loss, PPD and a pension.

3. As a matter of fact, Weaver did *vigorously* litigate his first claim. For one, unlike Hadley, he hired an experienced litigator, Ron Meyers, with expertise in firefighter II cases generally and in firefighter cases involving melanomas specifically. See, *e.g.*, *Spivey v. City of Bellevue,* 187 Wn.2d 716, 721-722, 389 P.3d 504 (2017); *Larson v. City of Bellevue,* 185 Wn. App. 857, 879-882, 355 P.3d 331 (2015). This fact alone should have dictated issue preclusion. For another, unlike Hadley, the evidence he proffered had been sufficient to achieve victory in other melanoma cases. In *Spivey* and *Larson,* Mr. Meyers also only called Dr. Coleman as an expert witness. In both cases, Mr. Meyers' firefighter clients prevailed on the issue general causation as to melanomas. In both *Spivey* and *Larson,* in developing Dr. Coleman's testimony, Mr. Meyers followed a set protocol, with the approval of the CA and this Court, to establish "general causation." Typically, "general causation" is established

through hearsay in epidemiologic and/or animal studies using ER 803(a)(18). That protocol is to qualify Dr. Coleman as a medical expert with some experience in diagnosing melanomas. *Kelly v. Carroll,* 36 Wn.2d 482, 491, 219 P.2d 79, *cert. denied*, 340 U.S. 892 (1950); *State v. Rangitsch,* 40 Wn. App. 771, 778-79, 700 P.2d 382 (1985). Dr. Coleman would then identify the epidemiologic and/or animal studies he deemed preeminently relevant (a reliable authority) to the issue of general causation. He or Mr. Meyers would then read into evidence the portions of those studies upon which Dr. Coleman says he relied in forming his opinion on general causation. This protocol significantly reduces the cost of proving general causation and, in many instances, makes such proof possible.

B. Review Holding on Claim Preclusion

In its holding on claim preclusion, the CA erred in two significant respects. First, it misread Trautman[6] to justify collapsing "identity of subject matter" (element one of claim preclusion) into "identity of claims for relief" (element two) and then analyzed identity of claims for relief under the guise of identity of subject matter. For the most part, the Washington Supreme Court does not conflate these two elements. *E.g., Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 396-397, 429 P.2d 207

[6] Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington,* 60 Wash. L. Rev. 805, 812-813 (1985).

(1967). Here the issue was not really "identity of subject matter," but rather "identity of claims for relief." Yet, the CA said that there was identity of claims for relief. *Weaver*, 4 Wn. App.2d at 321. If the claims for relief are the same, then the subject matter is the same. If the claims for relief are different, then the subject matter may or may not be the same.[7] *See Harsin v. Oman*, 68 Wash. 281 (1912), citing *Wisconsin v. Torinus,* 28 Minn. 175, 180, 9 NW 725 (1881)("Care must be taken also to distinguish between *identity of the subject-matter of litigation* and *identity of cause of action*--a distinction often overlooked").

Second, the CA also held that the "claims for relief" (disguised as "the subject matter") were not identical. *Weaver*, 4 Wn. App.2d at 321. To achieve dissimilarity of "claims for relief," the CA had to interpret the IIA, and it did so incorrectly. *Weaver*, 4 Wn. App.2d at 324-328. The CA held that these two claims are not identical because the claimed benefits differ. The first claim for relief was allowance plus TTD and the second claim for relief was allowance plus PTD. In so concluding, through a misplaced analogy to the common law form of action, and without justification, the CA has interpreted the IIA as creating a series of discrete "claims for relief," each involving a determination of claim allowance. This interpretation is revolutionary.

[7] The ontology of "subject matter" is more general or abstract than the ontology of "claim for relief".

Under the CA's interpretation, if the first claim seeks benefits too meager in relationship to the cost of litigation, and the worker loses on the issue of allowance, then that adverse finding on allowance is not a bar to a second claim seeking to relitigate the issue of allowance conjoined with a claim for the same benefits as in the first claim plus a claim for additional benefits. In the second claim, if the total claimed benefits is too meager in relationship to the cost of litigation, and the worker loses on the issue of allowance, then the worker may file a third claim seeking to relitigate the issue of allowance conjoined with a claim for the same benefits as in the first and second claims plus a claim for additional benefits. And so on until the worker prevails on the issue of allowance, cannot muster substantial benefits, claims substantial benefits or runs afoul of the statute of limitations.[8]

The CA's interpretation of the IIA is unique--different from that of everyone else involved in the II system since its inception in 1911. The CA should have deferred to the Department's interpretation, the agency charged with administrating the IIA. *E.g., Waste Management of Seattle, Inc. v. Utilities & Trans. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). Under that traditional interpretation, there are two basic claims,

[8] Must each of these discrete II claims be brought within the original period of the relevant statute of limitations? RCW 51.28.050; RCW 51.28.055. If so, that will hurt workers. If not, then the CA has altered the statute of limitations contrary to its plain meaning.

one being a condition precedent to the other. The threshold claim is for claim allowance as either an industrial injury or an occupational disease. Indeed, a worker may file an allowance claim without seeking any benefits in order to protect against the statute of limitations. If the worker prevails on the first claim, then she has a claim for whatever benefits she can prove thereafter while the claim is open and then, if the claim is closed and reopened under RCW 51.32.160, for whatever additional benefits have accrued. If the worker does not prove claim allowance, the issue of entitlement to claimed benefits is moot.

That traditional interpretation is a vastly more economical process than that the CA has sanctioned. Ironically, the CA has substituted for the more efficient traditional II process, a process that is even more expensive, uncertain, slow and inadequate than the common law process, which the IIA was intended to replace. RCW 51.04.010.

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IV. CONCLUSION

The Supreme Court should grant Review under RAP 13.4(b)(1-2) & (4).

Respectfully submitted this 10th day of October 2018.

Wallace, Klor, Mann, Capener & Bishop, P.C.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL WEAVER, Appellant, v. CITY OF EVERETT and DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declare that on the below date, I caused a true and correct copy of the MEMORANDUM OF AMICI CURIAE EIGHT STATEWIDE EMPLOYER ORGANIZATIONS: WASHINGTON SELF-INSURERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, WASHINGTON FARM BUREAU, WASHINGTON FOOD INDUSTRY ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON, ASSOCIATED BUILDERS AND CONTRACTORS OF WESTERN WASHINGTON, MECHANICAL CONTRACTORS ASSOCIATION OF WASHINGTON, AND ARCHBRIGHT IN SUPPORT OF THE PETITIONS FOR REVIEW and this CERTIFICATE OF SERVICE to be served on the following in the manner indicated below:

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RESPECTFULLY SUBMITTED this 10th day of October, 2018.

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October 10, 2018 - 10:01 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96189-1
Appellate Court Case Title:	Michael Weaver v. City of Everett, et al.
Superior Court Case Number:	16-2-02373-6

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Comments:

Memorandum of Amici Curiae Eight Statewide Employer Organizations: Washington Self-Insurers Association, National Federation of Independent Business Small Business Legal Center, Washington Farm Bureau, Washington Food Industry Association, Associated General Contractors of Washington, Associated Builders and Contractors of Western Washington, Mechanical Contractors Association of Washington, and Archbright in Support of the Petitions for Review

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