NO. 96189-1

COA NO. 76324-5-I

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL WEAVER,

Respondent,

v.

CITY OF EVERETT,

Respondent,

DEPARTMENT OF LABOR & INDUSTRIES,

Petitioner.

PETITION FOR REVIEW
DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

The Court of Appeals' opinion breaks with decades of precedent and greatly weakens finality of agency decisions. Workers, employers, and the Department of Labor & Industries rely on the doctrines of collateral estoppel and res judicata to ensure that an unappealed decision of L&I or the Board of Industrial Insurance Appeals about industrial insurance benefits is final. Resting on a fundamental misunderstanding of L&I statutes, the Court of Appeals held that collateral estoppel and res judicata did not apply to a Board decision because the dollar amount at stake in the first case was purportedly low.

If the Court of Appeals' decision stands, claim allowance decisions are vulnerable to attack if a party later realizes that an injury turned out to be more disabling than originally anticipated. So an employer who later regrets the decision to not appeal claim allowance would get a belated chance to challenge claim allowance, and workers would have no assurance that a win at the Board could not be overturned if the financial burden on the employer increased.

This undermining of finality affects each of the 95,000 new L&I claims filed each year and the many existing claims.[1] The Court of

[1] *State of Washington Industrial Insurance Fund Statutory Financial Information Report* 5 (2016). https://www.lni.wa.gov/ClaimsIns/Files/StateFundFinancial/2016SapRpt.pdf.

Appeals' decision conflicts with decisions of this Court recognizing that res judicata and collateral estoppel preclude belated attacks on unappealed decisions. This Court should grant review to correct the Court of Appeals' decision.

II. IDENTITY OF PETITIONER AND DECISION

L&I petitions for review of the published decision of Division One of the Court of Appeals, *Weaver v. City of Everett*, filed July 16, 2018 (slip op.) (see attached).

III. ISSUES PRESENTED FOR REVIEW

> In an appeal by Michael Weaver to the Board, the Board ruled that Weaver's melanoma was not caused by workplace exposure. Weaver did not appeal. Do collateral estoppel and res judicata preclude him from rearguing the same issue and subject matter in a second case when the only difference is that Weaver's condition has significantly worsened?

IV. STATEMENT OF THE CASE

A. Overview of Applicable Workers' Compensation Principles

Workers may apply for two types of workers' compensation claims: industrial injury and occupational disease claims. RCW 51.32.010, .180. Both are treated the same. RCW 51.16.040. For a given industrial injury or occupational disease, the worker files an application for benefits to have a workers' compensation claim opened. RCW 51.28.020(1)(a), .050, .055. The worker need file only one application, which is assigned

one claim number. If allowed, the Department will pay eligible benefits on the claim. But before it addresses what benefits are due, the Department will first issue an order on the claim allowance issues, determining whether there is an industrial injury or occupational disease, whether the worker was in the course of employment when injured, whether the individual was a worker under the Industrial Insurance Act, and whether the worker was in covered employment. RCW 51.08.100, .140, .180; RCW 51.32.010, .015; RCW 51.12.020. If a worker or employer does not appeal an allowance order, it is final. RCW 51.52.050, .060; *see Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994). Under the law before the Court of Appeals' decision, if an allowed claim was closed, and then the worker sought to reopen the case if the worker's condition worsened, the employer could not reargue the allowance issues. RCW 51.52.050, .060; RCW 51.32.160; *Marley*, 125 Wn.2d at 537.

Both workers and employers can contest at the Board L&I's decision on whether the injury or occupational disease is covered by the Act. RCW 51.52.050, .060. Workers' compensation practitioners call these "allowance" cases because they typically address solely whether the claim should be allowed. Unlike other workers' compensation appeals, "allowance" cases do not involve arguments about particular benefits or amounts due to the worker. So in an allowance case, because the Board

may consider only the issue raised in L&I order (allowance), the Board may not consider what benefits to award if it decides the claim should have been allowed. *Karniss v. Dep't of Labor & Indus.*, 39 Wn.2d 898, 901-02, 239 P.2d 555 (1952) (explaining that the Board is an appellate body and may consider only what L&I does).[2]

When the Board affirms L&I's allowance of a claim, the Board returns the case to L&I to consider what benefits to award. *Ronald Spriggs*, No. 07 24270 & 07 24764, 2009 WL 1504259, at *9 (Wash. Bd. of Indus. Ins. Appeals Mar. 24, 2009) (ruling that Board could not consider issue of benefits rate date in allowance case). If L&I's decision to allow the claim becomes final, the worker becomes eligible for all possible benefits under the Industrial Insurance Act. RCW 51.32.010, .180; *see Boeing Co. v. Doss*, 183 Wn.2d 54, 57, 347 P.3d 1083 (2015); *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 674-75, 175 P.3d 1117 (2008), *aff'd on other grounds*, 169 Wn.2d 81 (2010). After the claim is allowed, L&I determines eligibility for proper and necessary treatment and wage-replacement benefits if the worker cannot work while receiving

[2] *See also Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 5656 (1997) (holding Board's appellate authority is strictly limited to reviewing the specific Department action); *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661-62, 879 P.2d 326 (1994) (holding that the Board may consider only what Department did in its order); *Orena Houle*, No. 00 11628, 2001 WL 395827, at *2 (Wash. Bd. of Indus. Ins. Appeals Feb. 22, 2001) (ruling that Board may not consider extent of benefits in allowance case).

treatment. RCW 51.36.010; RCW 51.32.090; WAC 296-20-01002 (defining "proper and necessary" and "total temporary disability").[3]

When all necessary treatment is complete and the worker's condition becomes "fixed" and stable (also known as reaching "maximum medical improvement"), L&I determines whether the worker should receive either permanent partial disability benefits or permanent total disability benefits (pension). RCW 51.32.055, .060, .080; *see Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950). It then closes the claim.

After a claim is closed, a worker can seek to reopen it if the worker's condition worsens. RCW 51.32.160; *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 432, 858 P.2d 503 (1993). To reopen, the worker need not prove claim allowance again, only that the condition that caused the occupational disease objectively worsened. *Id.*; *Lindsey v. Dep't of Labor & Indus.*, 35 Wn.2d 370, 371-72, 213 P.2d 316 (1949).

B. The Board Determined in a Final Order That Weaver's Work Did Not Cause His Melanoma

Weaver has a history of sunburns and outdoor activities. *See* AR 289, 305-06. In June 2011, a biopsy of an atypical mole on Weaver's back revealed a malignant melanoma. AR 303. This was a "high risk

[3] These are temporary total disability benefits, also called time loss compensation.

melanoma" and Weaver's treating oncologist, David Aboulafia, M.D., observed that the biopsy showed that "this is a cancer that has potential for spread[ing]" based on the cell division rate and "he had a fairly significant cancer diagnosis that could affect his longevity." AR 127. The next month, a surgeon cut out 16 square inches of skin from Weaver's back and took a lymph biopsy. AR 131.

In 2011, Weaver applied for industrial insurance benefits for his malignant melanoma. AR 250. In January 2012, L&I issued an order denying the application for benefits because the condition was not an occupational disease. AR 278. Weaver appealed to the Board. AR 252. Because L&I had not ruled on eligibility for temporary total disability or other benefits, the Board considered the issue of claim allowance only. AR 251, 253, 263-64. Thus, the sole issue at the Board was whether Weaver's condition arose proximately and naturally out of employment to constitute an occupational disease. RCW 51.08.140; AR 253, 263-64. At the Board, Weaver was represented by an attorney who has litigated several firefighter occupational disease cases, including those involving malignant melanoma. *See*, *e.g.*, *Larson v. City of Bellevue*, 188 Wn. App. 857, 355 P.3d 331 (2015), *aff'd sub nom; Spivey v. City of Bellevue*, 187 Wn.2d 716, 389 P.3d 504 (2017) (melanoma developed in 2009).

At the administrative hearing, the City presented medical evidence that Weaver's occupation did not cause his melanoma and that he developed melanoma because of his skin, hair, and eye color and history of severe sunburn. AR 258-61. Medical evidence established that sunburns cause melanoma. AR 292. Weaver countered by minimizing his sun exposure history. AR 379, 381. He also reported that he was only sunburnt once at work. AR 377-78, 381. Weaver presented medical testimony that his occupation as a firefighter exposed him to fumes, causing his malignant melanoma. AR 256-57. Kenneth Coleman, MD, testified on his behalf that this exposure caused his melanoma, citing medical journal articles. AR 195-97, 256-57, 322-57. Dr. Coleman has testified in other cases in which the worker successfully convinced the fact finder that firefighting caused malignant melanoma. *E.g.*, *Larson*, 188 Wn. App. at 863.

In its decision, the Board recognized that the sun exposure causes melanoma and found that Weaver's firefighting work exposed him to sun. AR 262-63. But the Board ruled that neither the sun exposure at work nor fumes caused Weaver's melanoma. AR 262, 264. Weaver appealed to superior court, but later dismissed his appeal. AR 247.

C. After the Cancer Recurred, Weaver Filed a New Workers' Compensation Claim, but L&I, the Board, and Superior Court

Agreed He Could Not Re-Litigate Whether His Occupation Caused His Melanoma

In January 2014, a medical evaluation showed that Weaver's cancer had spread to his brain. AR 318-19, 320-21. In July 2014, he filed a second application for industrial insurance benefits. AR 280.

In November 2014, L&I rejected the new claim because the new claim involved the same underlying cancer that the Board had determined was not caused by Weaver's work. AR 281. Weaver appealed to the Board, and the City moved for summary judgment, arguing that collateral estoppel and res judicata precluded the new claim because the Board had determined years earlier that Weaver's melanoma was not an occupational disease. AR 63-65, 229-45.

All medical evidence showed that the cancer in the second occupational disease claim was the same cancer as in the original claim, now metastasized: "[t]he recently diagnosed brain lesions were metastases from the original cutaneous melanoma." AR 297 (Hackett); *accord* AR 129 (Aboulafia); AR 137-38 (Brodkin), 196 (Coleman), 285 (Levenson).

Weaver argued that sunshine he was exposed to at work caused the original melanoma on his back. One of his doctors detailed the newly offered history of Weaver's sun exposure in his work and concluded that Weaver's malignant melanoma was caused by his intermittent exposure to

ultra-violet radiation from sunlight as a firefighter between 1996-1998 and the early 2000's. AR 139-44. This was the same period at issue in the previous case in which Weaver had testified he was only sunburnt once at work. AR 263, 377-78, 381.

Weaver presented no evidence that his cancer metastasized into his brain because of any additional occupational exposure that occurred after L&I had rejected his original claim. Weaver also presented no evidence that the cancer in his brain was anything other than a metastasis of the original melanoma.

The Board granted summary judgment to the City and affirmed L&I order denying the claim because it was the same cancer. AR 57-60. The superior court affirmed, concluding that the Board's decision on Weaver's first claim was a final order, and Weaver's second claim involved the same issue that factually and legally was the subject of the first claim, precluding his appeal. CP 17-18, 76-77.

The Court of Appeals reversed. *Weaver*, slip op. at 2, 32.

V. ARGUMENT

Collateral estoppel and res judicata are doctrines long applied in the workers' compensation context. They serve an important role in ensuring finality of decisions to benefit workers, employers, and L&I. Finality of decisions avoids piecemeal litigation and provides repose so

that matters need not be relitigated. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005); *Pederson v. Potter*, 103 Wn. App. 62, 71, 11 P.3d 833 (2000). "It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings." *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949).

Undermining these core principles will disrupt the administration of all industrial insurance cases. The Court of Appeals misunderstood the doctrines of collateral estoppel and res judicata in the workers' compensation context and failed to follow this Court's decisions. Abandoning finality in allowance cases will invite uncertainty and strife for all concerned: workers, employers, and L&I. This Court should grant review.

A. Workers, Employers, and L&I All Rely on the Finality of Workers' Compensation Allowance Orders

This Court has long held that workers' compensation agency orders have both issue and claim preclusive effects. *Kingery*, 132 Wn.2d at 169; *Marley*, 125 Wn.2d at 537; *McCarthy v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 812, 823, 759 P.2d 351 (1988); *Le Bire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 419-20, 128 P.2d 308 (1942); *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 163-64, 34 P.2d 457 (1934). In

McCarthy, this Court held that a Board decision about whether a given occupational exposure caused an occupational disease had preclusive effect under a theory of collateral estoppel. *McCarthy*, 110 Wn.2d at 823. The Court held that the Board's decision about a pulmonary condition could have preclusive effect in a later tort action. *Id.* at 825. "When the Board's ruling is not appealed, the parties are collaterally estopped from relitigating the Board's ruling in a subsequent action." *Id.* at 823. Similarly, in *Kingery*, the Court held that a final Department allowance order in a workers' compensation claim has preclusive effect under a theory of res judicata: "An unappealed [L & I] order is res judicata as to the issues encompassed within the terms of the order, absent fraud in the entry of the order." 132 Wn.2d at 169; *see also Marley*, 125 Wn.2d at 537; *Abraham*, 178 Wash. at 163-64. The *Kingery* Court rejected an attempt to refile an allowance claim for survivor's benefits. 132 Wn.2d at 173. And in *Le Bire*, the Court held the former board's decision has a res judicata effect. 14 Wn.2d at 419-20. The Court of Appeals' decision conflicts with these cases because it found no preclusive effect even though Weaver relitigates allowance of a claim for the same melanoma, and this Court should thus take review under RAP 13.4(b)(1).

The Court of Appeals' decision also undermines fundamental notions of finality in L&I cases. The widespread public policy

ramifications of discarding *McCarthy*, *Kingery*, *Marley*, *Le Bire*, and *Abraham* also justify review under RAP 13.4(b)(4). The Court of Appeals essentially adopted Weaver's argument that some workers' compensation claims had too little value to justify applying either collateral estoppel or res judicata—a so-called "minor" case. Appellant's Br. 15. But this theory also opens the door to L&I or an employer urging a court to not honor an unappealed decision *allowing* a workers' compensation claim because the claim appeared to be so minor when it was originally allowed yet turned out to be more disabling (and expensive) than L&I or employer originally expected. That would be unfair to the worker.

If claim rejection does not bind a worker when the injury or disease turns out worse than it originally appeared, there is no logical reason claim allowance would bind an employer when the injury or disease turns out worse than anybody expected.[4] But while an employer

[4] This is a very real threat. Eight-two percent of the 95,000 claims opened each year are for medical benefits only, with no other benefits. *Financial Information Report* 5 (2016), https://www.lni.wa.gov/ClaimsIns/Files/StateFundFinancial/2016SapRpt.pdf. Under the Court of Appeals' decision, the finality of these claims are in jeopardy. For example, a worker may have what appeared to be simple muscle strain, and received only medical benefits, with the claim closed shortly thereafter. An employer might decide not to contest the claim because medical-only claims have less impact on premium rates than claims that involve wage replacement and disability benefits. WAC 296-17-855. The worker's condition could worsen later to the point the worker needs surgery, however, and the worker would file a reopening application. *See Lindsey*, 35 Wn.2d at 371-72 (bruise in closed claim lead to stroke in reopened claim). The employer might be motivated to challenge claim allowance because the worker may be eligible for time loss compensation, permanent partial disability, or a pension stemming from the surgery. Under the Court of Appeals rationale, the employer could challenge claim allowance at that time, prejudicing the worker.

may later regret its decision not to challenge the allowance of a seemingly minor injury, bedrock principles dictate that the employer should nonetheless be bound by that decision. While Weaver's theory benefits him, it will hurt many other workers with allowed claims. Because the Legislature designed all benefits to reduce disability and eliminate economic suffering, Washington law supports no distinction between "minor" and "major" claims. *See* RCW 51.04.010; RCW 51.12.010; RCW 51.36.010. And the Legislature provided a limited window to appeal a decision if an employer or a worker disagrees with it, showing that the Legislature understood that the failure to exercise that appeal right would render the decision final. RCW 51.52.050, .060.

Animating the Court of Appeals' reasoning was its false belief that "Weaver's initial application for compensation sought only temporary total disability benefits," while the second case involved an application for permanent total disability benefits (a pension). Slip op. at 11-12.

The primary flaw to this analysis is that the Industrial Insurance Act does not provide for separate claims defined by the type of benefit, but instead provides a unitary claim for all benefits. RCW 51.28.020 ("[w]here a worker is entitled to compensation under this title he or she shall file with the department or his or her self-insured employer, as the case may be, his or her application for such . . . ."). There is no such thing

as filing an application for benefits for "a claim for treatment," "a claim for time loss compensation," or "a claim for pension." Instead, RCW 51.28.020 permits one application for either an industrial insurance claim or an occupational disease claim, leading to the threshold decision that must go in the worker's favor before the worker may claim benefits.[5]

When that unitary claim is allowed, the worker receives all benefits for which the worker is entitled based on the facts. RCW 51.32.010, .180. This includes treatment, time loss compensation, vocational services, permanent partial disability, pension benefits, and survivor's benefits. RCW 51.32.050, .060, .067, .080, .090, .095; RCW 51.36.010. All these benefits flow from claim allowance.

After a claim is closed, the worker can apply to reopen the claim and receive additional benefits if the condition worsens. RCW 51.32.160. So the Legislature contemplates a worsened condition and has provided specific procedures to address those circumstances.

In Weaver's case, had L&I allowed the claim, he would have been eligible for not just temporary total disability benefits, but also for

[5] The Board cannot even determine what benefits the worker may receive in the allowance litigation. This is because the Department allowance orders consider only the allowance issue. The Board has appellate jurisdiction only and may not address issues beyond what the Department decided. *Karniss*, 39 Wn.2d at 901-02; *Hanquet*, 75 Wn. App. at 661-62; *Houle*, No. 2001 WL 395827, at *2. The Board decision in the first case shows only allowance was at issue in the first case. AR 253, 263-64. So the Court of Appeals' decision conflicts with not only the appellate posture of the case, but the facts.

treatment benefits (including reimbursement for his surgery) and for permanent partial disability benefits if his surgery caused permanent disability. RCW 51.36.010; RCW 51.32.080. If his cancer recurred after his claim had closed, he could have had his claim reopened to receive more benefits and he would have been eligible for permanent total disability benefits if he could not work. RCW 51.32.160. Reopening his claim would not have required him to re-prove that his work had caused his melanoma, as that fact would have been established through the allowance order. While time loss compensation might have been Weaver's chief concern when he filed his original claim, that did not convert a unitary claim into a "time loss claim." His claim was always an occupational disease claim for a malignant melanoma.

B. The Court of Appeals Misapplied *Hadley* and Disregards *Reninger*, *Thompson*, and *Schibel*

Despite this Court's clear holding in *McCarthy* that a Board decision has preclusive effect (110 Wn.2d at 823), the Court of Appeals found that Weaver's claim was not collaterally estopped under the doctrine's fourth prong about injustice:[6]

[6] It agreed the other prongs were met, "[h]ere, the Department has established the first three elements of collateral estoppel. Both of Weaver's applications for compensation regarded the identical issue of whether the malignant melanoma diagnosed on his left shoulder was caused by his employment as a firefighter. In addition, Weaver's application for temporary total disability benefits ended in a final judgment on the merits

1. Both proceedings present identical issues;
2. The earlier proceeding ended in a judgment on the merits;
3. The party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and
4. Application of collateral estoppel works no injustice on the party against whom it is applied.

Christensen v. Grant Cty. Hosp. Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). The Court of Appeals relied on *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001), to rule there was an injustice. Slip op. at 11. But in *Hadley*, the Court found injustice because there was no incentive to litigate fully a traffic infraction with a nominal $95 maximum penalty, which differed in magnitude to a personal injury action. *Hadley*, 144 Wn.2d at 309, 315. But the stakes are vastly different in a workers' compensation claim. Allowance of a workers' compensation claim makes a worker eligible for the full panoply of benefits, including the right to reopen the claim if the condition subsequently worsens, so a worker has a strong incentive to litigate the allowance of the claim. *Hadley* involved two disparate actions: a traffic infraction and a personal injury action. Here it is the same action: a workers' compensation allowance claim.

(the dismissal of his appeal). Additionally, the Department and the City were both parties to Weaver's application for temporary total disability benefits." Slip op. at 9.

The Court of Appeals erred in scrutinizing the monetary amount available in the first proceeding.[7] Instead, it should have realized that both proceedings were about claim allowance, which is the gateway to all benefits. The Court of Appeals also erred in basing its decision on the type of expert witnesses offered. The Court quibbles with Weaver's decision not to call an oncologist—speculating that this was for monetary reasons even though a successful firefighter will recoup expert costs. Slip op. at 12; RCW 51.32.185(9).[8] And the Court of Appeals misstates the law in concluding that the inquiry involves looking at what witnesses the parties called when deciding whether collateral estoppel applies. When looking at the injustice prong, the Court looks to procedural fairness to determine if sufficient incentive existed for the concerned party to litigate vigorously in the administrative hearing. *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 453, 951 P.2d 782 (1998); *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 799, 982 P.2d 601 (1999). The "injustice element is most firmly

[7] The Court of Appeals was wrong that only about $10,000 in time loss benefits was "at stake" in his first claim. Slip op. at 12. Setting aside that the initial claim allowance would allow benefits for a worsened condition, there was also treatment benefits for the surgery. And there was the possibility of permanent partial disability.

[8] Courts have approved of Dr. Coleman. *See also Larson*, 188 Wn. App. at 880 (upholding Dr. Coleman as expert because "[h]e diagnoses skin diseases, does biopsies, recognizes changes in skin lesions, and testified to his familiarity with the causes of melanoma as part of his practice and through expert witness work on a different case."). In any event, the record does not support the Court of Appeal's belief that a different doctor would have been more or less successful. In the first case, the Board recognized that sun exposure caused melanoma, but Weaver said he had a sunburn only once on the job. AR 262, 377-78, 381. A different doctor would not have changed this testimony.

rooted in procedural unfairness. Washington courts look to whether the parties to the earlier proceeding received a full and fair hearing on the issue in question." *Schibel v. Eymann*, 189 Wn.2d 93, 102, 399 P.3d 1129 (2017) (quotations omitted). In *Schibel*, the Court rejected the idea that individual rulings in a hearing established injustice. *Id.* at 102-03. An opportunity to have the arguments considered means no injustice. *See id*.

Similarly, in *Reninger*, collateral estoppel applied because the appellants were "afforded and took advantage of numerous procedures" as in superior court trials. 134 Wn.2d at 451 (unemployment compensation case had preclusive effect on discrimination case). Experienced counsel represented Weaver and fully litigated the first case, including calling witnesses. *E.g.*, AR 252-64; RCW 51.52.140. Unlike *Hadley*, there would be no change in the process or rights at stake afforded Weaver, so his ability to litigate his claims would not change. RCW 51.52.050, .060, .110.

And any worker has notice from RCW 51.32.160's reopening statute that a benefit of claim allowance is the ability to reopen a claim if the condition worsens. So an allowed claim is not only about the present allowance decision but eligibility upon worsening.

The Court of Appeals asks L&I and the Board to engage in a lengthy evidentiary analysis to determine whether collateral estoppel

applies by examining the amount of benefit, the type of witnesses, and nature of the condition.[9] This inquiry does not provide the sure and certain relief mandated by the Industrial Insurance Act. RCW 51.04.010. It is inconsistent with reducing economic suffering because it places workers and employers in the position of having to defend allowance decisions with a heavy evidentiary burden. RCW 51.12.010 (court must interpret Industrial Insurance Act liberally to reduce economic suffering). Applying collateral estoppel in workers' compensation cases is the fair result for all.

C. The Court of Appeals Misapplied the Res Judicata Doctrine

The doctrine of res judicata precludes relitigation of a final agency order. *Marley*, 125 Wn.2d at 137. Res judicata applies when the later action involves (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons involved in the adjudications. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011). The Court of Appeals found that the subject matter element did not apply because it believed there was not an identity of relief or facts. Slip op. at 15. This is wrong. It was the same

[9] Weaver's own doctor observed that the biopsy showed that "this is a cancer that has potential for spread[ing]" based on the cell division rate and "he had a fairly significant cancer diagnosis that could affect his longevity." AR 127. The Department does not advocate for looking at this individual circumstance to determine if there was injustice because, as a matter of law, it is fair to apply collateral estoppel to workers' compensation allowance proceedings as the legal inquiry is the same in each proceeding.

subject matter: whether the firefighting proximately caused the cancer. In its analysis, the Court of Appeals repeats the same error discussed above, wrongly believing that Weaver filed a "claim for time loss benefits" in the first proceeding and "a claim for a pension" in the second. In reality, it is the same claim: whether the firefighting proximately caused the cancer.

To prove proximate cause, Weaver would need to present the same evidence about his work history (testimony about sun exposure at work) and the same medical opinions (testimony about links to sun exposure to the cancer) in both cases. And he would argue the same right: entitlement to benefits because of an occupational disease. When the City established that the two claims involved the same occupational disease (malignant melanoma that metastasized), the City established the same subject matter.

VI. CONCLUSION

The Court of Appeals' decision, if it stands, will cause workers, employers, and L&I having to relitigate allowance cases. This is fair to no one. This Court should grant review.

RESPECTFULLY SUBMITTED this 15th day of August 2018.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL WEAVER, Appellant, v. CITY of EVERETT and STATE of WASHINGTON, DEPARTMENT of LABOR AND INDUSTRIES, Respondents.	DIVISION ONE No. 76324-5-I PUBLISHED OPINION FILED: July 16, 2018

DWYER, J. — Collateral estoppel and res judicata are common law doctrines that were, for centuries, applied solely to common law claims. The twentieth century rise of the administrative state brought with it an explosion of executive branch quasi-judicial decision-making. Eventually, the urge to apply common law principles in these otherwise statutorily-created forums proved irresistible. But the apples to oranges application of common law doctrines to statutory claims litigated in executive branch forums was—by its very nature—never guaranteed universal success. Many times, such applications fit nicely and a sound and fair resolution was achieved. Other times, however, the apples

to oranges application resulted in a distasteful fruit salad of injustice. This case falls into the latter category.

Michael Weaver, a long-time Everett firefighter, applied for compensation resulting from that which he alleged—and the law presumes—to be a work-related occupational disease. Weaver's petition is serious to him and his family; he suffers from brain cancer that has made it impossible for him to work and that will ultimately claim his life. The Board of Industrial Insurance Appeals ruled that either collateral estoppel or res judicata barred his claim. The superior court unfortunately adopted the same either/or analysis and also unfortunately ruled that Weaver's application was barred. But a careful review of these two distinct common law doctrines—conducted pursuant to the analytical framework mandated by our Supreme Court—reveals that neither doctrine, properly applied, bars Weaver's entreaty. Accordingly, we reverse.

I

Michael Weaver was employed between 1996 and 2014 by the City of Everett (the City) as a firefighter. In June 2011, Weaver noticed a mole on the skin of his left shoulder. The mole was removed and the resulting biopsy revealed that it contained a malignant melanoma.

Shortly thereafter, Weaver underwent surgery to remove the melanoma. After a period of recovery, Weaver returned to his employment as a firefighter.

The treatment and surgery caused Weaver to miss nearly five weeks of work, losing the opportunity to earn just under $10,000 in wages.[1]

While in recovery, in July 2011, Weaver filed a pro se application for temporary total disability benefits from the City, a self-insured entity for workers' compensation purposes. His application alleged that the malignant melanoma on his shoulder arose from his 15 years of working as a firefighter. He requested compensation for the nearly 5 weeks of wages that he had been unable to earn due to the medical treatment.

After initially granting Weaver's application, the Department of Labor and Industries (the Department) reconsidered its decision and denied his application. Thereafter, Weaver, through counsel, appealed the Department's denial order to the Board of Industrial Insurance Appeals (the Board). A hearing before an administrative law judge (ALJ) resulted. The City presented the published deposition testimony of two medical specialists, Dr. Robert Levenson, an oncologist, and Dr. John Hackett, a dermatologist.

Weaver's counsel, presumably due to monetary considerations, chose not to present the testimony of Dr. David Aboulafia, Weaver's treating oncologist. Nor did Weaver's attorney present testimony from a medical expert in oncology or dermatology.[2] Instead, Weaver's counsel presented the published deposition

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[1] Weaver's health insurance paid for the medical costs arising from his diagnosis and treatment in 2011.

[2] Based on our collective years of judging, we can easily imagine that significant costs would attach to retaining a medical specialist in oncology or dermatology to testify on Weaver's behalf during this proceeding, costs amounting to several thousands of dollars and possibly more than the value of the temporary total disability benefits that Weaver sought from the City. Indeed, although not a part of our record and therefore not a basis for our decision, at oral argument Weaver's current attorney informed the court that Weaver's present specialist in oncology had already been paid $19,000 for his medical-legal services in this case. Wash. Court of Appeals

testimony of Dr. Kenneth Coleman, a doctor with a practice in family and emergency medicine, but with no expertise in melanoma generally or in melanoma arising from occupational exposures specifically.

The ALJ recommended that the Board affirm the Department's order denying Weaver's application.[3] In February 2013, the Board adopted the ALJ's recommendation and issued a final order denying Weaver's application.

After the Board's ruling, Weaver's counsel withdrew. Weaver filed a pro se review petition in the superior court. Ten months later, with Weaver still unrepresented and no progress being made in the appeal, the parties entered into a stipulation and agreed order of dismissal. Weaver's petition for review was dismissed in late 2013.

In January 2014, Weaver began to have difficulty with mental processing and word finding. A magnetic resonance imaging test revealed a three-centimeter mass, a tumor, in the left frontal lobe of his brain.

Weaver immediately underwent surgery and the tumor was removed. The resulting biopsy diagnosed the tumor as a metastatic malignant melanoma, a form of cancer developing out of a primary cancer site. The logical conclusion was that the brain tumor had metastasized out of the malignant melanoma that Weaver noticed on his shoulder in 2011.

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oral argument, Weaver v. City of Everett, No. 76324-5-I (June 4, 2018), at 6 min., 08 sec. (on file with court).

[3] The ALJ acknowledged that the Industrial Insurance Act, Title 51 RCW, mandates that cancer arising during a worker's employment as a firefighter is presumed to be an occupational disease. See RCW 51.32.185. However, the ALJ concluded that the City had rebutted this presumption and that Weaver had not presented additional evidence to rebut the City's evidence. Notably, the ALJ found that the opinion testimony of the City's medical specialists outweighed that of Dr. Coleman, Weaver's sole expert witness.

Weaver did not return to work as a firefighter after the surgery. He was estimated to have a 20 to 30 percent chance of survival over the next two years.

In July 2014, Weaver, now represented by counsel, submitted an application for workers' compensation from the City, seeking permanent total disability benefits. The application alleged that he suffered from a malignant melanoma located on his "upper back/scapula area, w/ cancer spreading to brain." He alleged that the condition arose from "sun exposure during outdoor firefighting and training from 1996 forward."

The Department denied Weaver's application on the basis that it had already rejected his application for compensation based on the malignant melanoma discovered on his shoulder and that the metastasized melanoma had arisen from the earlier melanoma.

Weaver sought an administrative appeal and, in the resulting proceeding, the ALJ recommended that the Board affirm the Department's rejection of Weaver's application for permanent total disability benefits. The executive branch official concluded that the common law doctrines of res judicata and collateral estoppel barred Weaver's application. The board, an executive branch agency, adopted the ALJ's proposed decision and order as its final order.[4]

[4] The Board is an executive branch agency. RCW 51.52.010. Accordingly, insofar as we review the Board's determination concerning the application of common law doctrines, we grant no deference to an assessment by an executive branch agency of the applicability of court-created doctrines of preclusion. Dana's Housekeeping, Inc. v. Dep't of Labor & Indus., 76 Wn. App. 600, 605-06, 886 P.2d 1147 (1995) ("An agency's legal interpretation in areas outside of its expertise is entitled to no deference." (citing Russell v. Dep't of Human Rights, 70 Wn. App. 408, 412, 854 P.2d 1087 (1993))). Executive branch officials do not have specific expertise in the development and applicability of the common law. Judges do.

Weaver filed a notice of appeal to the superior court. The superior court affirmed the Board's order and denied Weaver's petition, ruling that either collateral estoppel or res judicata barred his claim.

Weaver now appeals.

II

A

It is necessary for us to determine whether the superior court erred by affirming the Board's application of the doctrines of collateral estoppel and res judicata to bar Weaver from pursuing his claim for compensation under the Industrial Insurance Act, Title 51 RCW.

At the outset, we note that collateral estoppel and res judicata are equitable, court-created doctrines established at common law. See J.M. Weatherwax Lumber Co. v. Ray, 38 Wash. 545, 80 P. 775 (1905); see also Phillip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 WASH. L. REV. 805, 806, 842 (1985). We further note that the Industrial Insurance Act, as set forth below, was enacted by our legislature in 1911 with the intent to abolish the common law cause of action then-available to workers and establish in its place a distinct statutory scheme aimed at providing workers "sure and certain relief." LAWS OF 1911, ch. 74, § 1, at 345.

Accordingly, in resolving the matter before us, we proceed with due caution so as to not unduly shoehorn common law concepts into a statutory scheme wherein our legislature did not specifically call for them to apply or may not otherwise have intended for their application.

B

Collateral estoppel and res judicata are affirmative defenses. Lemond v. Dep't of Licensing, 143 Wn. App. 797, 805, 180 P.3d 829 (2008) (collateral estoppel) (quoting State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 304, 57 P.3d 300 (2002)); Davignon v. Clemmey, 322 F.3d 1, 17 (1st Cir. 2003) (res judicata). The proponent of either doctrine has the burden of proof. Lemond, 143 Wn. App. at 805 (quoting State Farm Mut. Auto. Ins. Co., 114 Wn. App. at 304); Davignon, 322 F.3d at 17.

Whether collateral estoppel or res judicata apply to preclude litigation is a question of law that we review de novo. Lemond, 143 Wn. App. at 803 (collateral estoppel) (citing State v. Vasquez, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001), aff'd, 148 Wn.2d 303, 59 P.3d 648 (2002)); Lynn v. Dep't of Labor & Indus., 130 Wn. App. 829, 837, 125 P.3d 202 (2005) (res judicata) (citing Kuhlman v. Thomas, 78 Wn. App. 115, 119-20, 897 P.2d 365 (1995)). In reviewing a superior court ruling in a workers' compensation matter, we apply a standard of review akin to our review of any other superior court trial judgment. Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009).

On appeal, both the Department and the City urge us to affirm the decision of the superior court on the basis that they established that collateral estoppel and res judicata apply to preclude litigation on Weaver's application.[5] We address each doctrine in turn.

[5] At oral argument, the Department and the City each pressed a different basis for affirmance. While the Department contended that it established that collateral estoppel bars Weaver's application for permanent total disability benefits, the City contended that it established that Weaver's application is precluded by res judicata.

III

As an initial matter, the Department and the City contend that they established that collateral estoppel bars Weaver's application for permanent total disability benefits. We disagree.

A

The principles underlying the common law doctrine of collateral estoppel are well set forth in our opinion in Lemond.

> Collateral estoppel "'prevents relitigation of an issue after the party estopped has had a *full and fair opportunity* to present its case.'" Barr v. Day, 124 Wn.2d 318, 324-25, 879 P.2d 912 (1994) (quoting Hanson v. City of Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993)). Collateral estoppel, or issue preclusion, is the applicable preclusive principle when "the subsequent suit involves a different claim but the same issue." Phillip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 WASH. L. REV. 805 (1985). Thus,
>
> > [w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.
>
> RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Collateral estoppel prevents relitigation of issues in a subsequent claim or cause of action, whereas res judicata prevents a second assertion of the same claim or cause of action. Seattle-First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978). Thus, res judicata is generally referred to as claim preclusion, and collateral estoppel as issue preclusion. Trautman, supra, at 829.
>
> The purpose of the doctrine of collateral estoppel is to promote judicial economy by avoiding relitigation of the same issue, to afford the parties the assurance of finality of judicial determinations, and to prevent harassment of and inconvenience to litigants. Hanson, 121 Wn.2d at 561. These purposes are balanced against the important competing interest of not depriving a litigant

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That the Department and the City, each defending the superior court's ruling here at issue, do not agree as to the proper basis on which to affirm the superior court's decision informs our inquiry in this matter.

> of the opportunity to adequately argue the case in court. RESTATEMENT, supra, § 27 cmt. c. at 252.
>
> The proponent of the application of the doctrine has the burden of proving four elements to demonstrate the necessity of its applicability:
>
> > "(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) *application of the doctrine does not work an injustice."*
>
> Thompson v. Dep't of Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999) (quoting Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998)). Because all four elements must be proved, the proponent's failure to establish any one element is fatal to the proponent's claim.

143 Wn. App. at 803-05 (emphasis added).

Here, the Department has established the first three elements of collateral estoppel. Both of Weaver's applications for compensation regarded the identical issue of whether the malignant melanoma diagnosed on his left shoulder was caused by his employment as a firefighter. In addition, Weaver's application for temporary total disability benefits ended in a final judgment on the merits (the dismissal of his appeal). Additionally, the Department and the City were both parties to Weaver's application for temporary total disability benefits.

B

The remaining question is whether the Department and the City proved the fourth element of collateral estoppel—that application of the doctrine would not work an injustice against Weaver.

They did not.

"Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice." Hadley v. Maxwell, 144 Wn.2d 306, 315, 27 P.3d 600 (2001). Application of the doctrine works an injustice upon a party when, during an earlier proceeding, that party did not have a "'full and fair opportunity'" to litigate the contested issue. Lemond, 143 Wn. App. at 803-04 (internal quotation marks omitted) (quoting Barr, 124 Wn.2d at 324-25). Indeed, for collateral estoppel to apply, the party must have had "sufficient motivation for a full and vigorous litigation of the issue." Hadley, 144 Wn.2d at 315.

Our Supreme Court's decision in Hadley is both controlling and instructive. In Hadley, two automobiles collided with one another. One of the drivers, Helen Maxwell, was issued a $95 citation for an improper lane-travel traffic infraction. Thereafter, Maxwell, pro se, unsuccessfully contested the citation before the district court. She did not call any witnesses on her behalf nor did she elect to appeal the district court's adverse decision to the superior court. Hadley, 144 Wn.2d at 308-09. In a subsequent personal injury lawsuit arising from the collision, the trial court ruled that Maxwell was collaterally estopped from denying her violation of the lane change statute. This was so, the trial court ruled, because Maxwell failed to appeal the district court's decision that she had committed the infraction. Hadley, 144 Wn.2d at 309-10. In the resulting trial, Maxwell was found liable for $136,000 in damages. Hadley, 144 Wn.2d at 310.

Appealing to our Supreme Court, Maxwell challenged the collateral estoppel ruling on the basis that its application constituted an injustice. As the court explained:

> To determine whether an injustice will be done, respected authorities urge us to consider whether "the party against whom the estoppel is asserted [had] interests at stake that would call for a full litigational effort." 14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: TRIAL PRACTICE, CIVIL § 373, at 763 (5th ed.1996); see also Parklane [Hosiery Co. v. Shore], 439 U.S. [322,] 330[, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)] (holding incentive to vigorously contest cases with small or nominal damages at stake could be a reason not to apply collateral estoppel); Beale v. Speck, 127 Idaho 521, 903 P.2d 110, 119 (1995) (holding collateral estoppel for misdemeanor traffic offenses generally inappropriate); Rice v. Massalone, 554 N.Y.S.2d 294, 160 A.D.2d 861 (1990) (holding collateral estoppel inappropriate after an administrative determination of liability for a traffic accident).

Hadley, 144 Wn.2d at 312. The Supreme Court adopted this consideration and instructed that collateral estoppel "is not generally appropriate when there is nothing more at stake than a nominal fine." Hadley, 144 Wn.2d at 315. Turning to Maxwell's circumstance, the court determined that "the incentive to litigate was low—Maxwell was at risk $95." Hadley, 144 Wn.2d at 312. The court accordingly ruled that, in the district court proceeding, Maxwell lacked sufficient motivation to fully and vigorously litigate whether she, in fact, committed the traffic infraction. Thus, the Supreme Court held, the superior court erred by precluding her from contesting that issue at the subsequent civil trial.

Weaver's circumstances are strikingly similar to those in Hadley. As with Maxwell's nominal incentive to litigate a $95 citation before the district court, Weaver's incentive to fully and vigorously litigate during the proceeding on his application for temporary compensation was low. Indeed, Weaver's initial application for compensation sought only temporary total disability benefits, those wages equivalent to five weeks of missed work. Weaver anticipated that he would—and he did—return to his duties as a firefighter after completing his

recovery. He was not then, as he is now, confronted by a brain cancer that is alleged to have left him permanently disabled, unable to work, with significant out-of-pocket medical expenses, and with a real possibility of death arising from the cancer.

Moreover, that Weaver had less than $10,000 in benefits at stake during his application for temporary compensation further informs our inquiry. Indeed, had Weaver retained a specialist in oncology or dermatology (or both), the cost of doing so might rival—or perhaps even eclipse—the modest benefit amount that he sought and, if his efforts proved unsuccessful, he would be entirely unable to recover these costs. See RCW 51.32.185(7).[6]

We note that our legislature has, for over 30 years, recognized that civil actions in which the amount in controversy is less than $10,000 fall into a special category of "small claims." See RCW 4.84.250. The legislature thus provided that

> in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees.

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[6] RCW 51.32.185(7) reads, in pertinent part,

> (7)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals *and the final decision allows the claim for benefits*, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.
>
> (b) When a determination involving the presumption established in this section is appealed to any court *and the final decision allows the claim for benefits*, the court shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

(Emphasis added.)

> *After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.*

RCW 4.84.250 (emphasis added). This cost- and fee-shifting provision manifested a recognition by the legislature of the economic difficulties that arise in fully litigating—whether as plaintiff or defendant—small monetary claims.

In this light, that Weaver's application for temporary compensation sought less than $10,000 in benefits supports that he sought an amount that did not provide sufficient motivation for a full and vigorous litigation of the initial compensation claim.

Viewed in the totality, the prevailing circumstances underlying Weaver's application for temporary total disability benefits suggest that he did not have sufficient motivation to fully and vigorously litigate the issue of whether his employment caused his cancer during the proceeding on his temporary compensation application. Accordingly, application of collateral estoppel to preclude him from litigating that issue in his present application works an injustice.

The Department and the City did not establish that application of collateral estoppel would not work an injustice against Weaver.[7] Accordingly, the superior court erred by barring Weaver's application on the basis of collateral estoppel.

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[7] The Department contends that it established the fourth element of collateral estoppel because no procedural unfairness resulted to Weaver during the proceeding on his application for temporary compensation. The Department's argument fails. Procedural unfairness is not the only consideration material to whether application of collateral estoppel would work an injustice against a party. See, e.g., Hadley, 144 Wn.2d 306.

The Department next relies on State v. Hite, 3 Wn. App. 9, 472 P.2d 600 (1970), for the proposition that the inquiry into the fourth element of collateral estoppel includes a foreseeability component. Because Hite sets forth no such proposition, the Department's reliance is unavailing.

IV

The Department and the City next contend that they established that res judicata precludes Weaver's application for permanent total disability benefits.

We disagree.

A

Res judicata is an equitable court-created doctrine established at common law. See Weidlich v. Indep. Asphalt Paving Co., 94 Wash. 395, 406, 162 P. 541 (1917); see also J.M. Weatherwax Lumber Co., 38 Wash. at 548; United States v. 111.2 Acres of Land, 293 F. Supp. 1042, 1049 (E.D. Wash 1968), aff'd, 435 F.2d 561 (9th Cir. 1970); accord Trautman, 60 WASH. L. REV. at 806, 828-29. Generally, res judicata bars the relitigation of claims that were litigated, *might* have been litigated, or *should* have been litigated in a prior action. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

In Washington, res judicata applies "where a prior final judgment is identical to the challenged action in '(1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.'" Lynn, 130 Wn. App. at 836 (quoting Loveridge, 125 Wn.2d at 763).

Here, there is no dispute that the Department and the City established the third element of res judicata—concurrence of identity between persons and parties—and the fourth element—concurrence of identity between quality of the persons for or against whom the claim is made.

The City and Department contend that they established the second element of res judicata—concurrence of identity of cause of action between Weaver's applications for compensation. This is so, the City and Department assert, because the Industrial Insurance Act grants workers a single cause of action for an allowance.

We accept, without analysis and for the limited purpose of resolving the matter before us, the contention that the Act sets forth a single cause of action for an allowance.

B

The Department and the City next contend that they established the first element of res judicata—concurrence of identity in subject matter between Weaver's applications for compensation under the Act. They did not.

1

In determining whether a party has established concurrence of identity of subject matter between two claims, the critical factors are "the nature of the claim or cause of action and the nature of the parties." Trautman, 60 WASH. L. REV. at 812-13 (citing Mellor v. Chamberlin, 100 Wn.2d 643, 673 P.2d 610 (1983)). As set forth in Black's Law Dictionary, "subject matter" is "[t]he issue presented for consideration; *the thing* in which a right or duty has been asserted; *the thing* in dispute." BLACK'S LAW DICTIONARY 1652 (10th ed. 2014) (emphasis added).

Our Supreme Court's decision in Mellor is instructive. There, the court addressed whether a lawsuit predicated on the same real estate transaction as an earlier lawsuit constituted litigation of the same subject matter for the purpose

of res judicata. Answering in the negative, the court ruled that, "[a]lthough both lawsuits arose out of the same transaction (sale of property), their subject matter differed. The first lawsuit disputed whether the Chamberlins misrepresented the parking lot as part of the sale. The second questioned whether Buckman's claim of encroachment breached the covenant of title."[8] Mellor, 100 Wn.2d at 646.

In support of its ruling, the Mellor court relied on its decision in Harsin v. Oman, 68 Wash. 281, 123 P. 1 (1912), wherein

> the plaintiff initially sued for a breach of a covenant against encumbrances and recovered nominal damages. A more substantial breach occurred and plaintiff sued on the same covenant. Harsin v. Oman, supra at 283. Defendants argued the second action was barred by res judicata. Holding for the plaintiff, we declared:
>
> > While it is admitted, there can be but one recovery upon the same cause of action. This does not mean the subject-matter of a cause of action can be litigated but once. *It may be litigated as often as an independent cause of action arises which, because of its subsequent creation, could not have been litigated in the former suit, as the right did not then exist.* It follows from the very nature of things that a cause of action which did not exist at the time of a former judgment could not have been the subject-matter of the action sustaining that judgment.
>
> 68 Wash. at 283-84.
>
> The law in Harsin is applicable in this present case. When the first suit for misrepresentation was filed, Mellor had neither suffered damages from the encroachment nor was he under an obligation to insist Buckman enforce her rights. Mellor v. Chamberlin, supra [34 Wn. App. 378,] 382-83 [, 661 P.2d 996 (1983)]. It was over a year after the settlement of the misrepresentation claim that Buckman decided to enforce her encroachment claim. Until that time, Mellor's lawsuit was not ripe.

[8] The misrepresentation action sought damages arising from the misleading conduct regarding the parking lot and the breach of a covenant of title action presumably sought recovery of $5,000 (the amount that the Chamberlins paid to Buckman to purchase the encroaching property), plus costs and fees. Mellor, 100 Wn.2d at 644-45.

Mellor, 100 Wn.2d at 646-47 (emphasis added). Thus, the Mellor court ruled that the second claim therein was not identical in subject matter to the prior claim because, at the time that the prior claim was filed, the subject matter underlying the second claim did not exist—and, hence, could not have been litigated.

Accordingly, pursuant to the reasoning in Mellor and Harsin, the question before us is whether the Department and the City established that the subject matter of Weaver's applications for compensation were identical—that is, whether the subject matter of his application for permanent total disability benefits could—or should—have been litigated during the proceeding on his application for temporary total disability benefits.

2

The Department and the City have not established that the subject matter of Weaver's applications pursuant to the Act is identical. Indeed, the Department and the City have not shown that Weaver's applications sought identical relief. They have not shown that his applications alleged identical facts. And, critically, they have not shown that the foregoing relief and facts set forth in his application for permanent total disability benefits could have or should have been litigated during the proceeding on his application for temporary total disability benefits.

i

The Department has not established that the relief sought by Weaver in his applications for compensation under the Act was identical.

As indicated, Weaver submitted two different applications for benefits—an application for temporary total disability benefits and an application for permanent

total disability benefits. In his application for temporary benefits, Weaver sought a one-time award of compensation arising from his total inability to work for a period of five weeks due to the treatment of the malignant melanoma on his shoulder. His application for permanent benefits, in contrast, requested recurring pension payments arising from his total inability to obtain gainful employment because of his metastasized malignant melanoma. That each of Weaver's applications requested different compensation suggests that he was not seeking identical relief in each application.

As will be addressed below, both the circumstances under which the Act was enacted and the Act's provisions reinforce this view. In addition, in reviewing the Act, we are mindful that

> [t]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be *liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.*

Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987) (emphasis added) (citing RCW 51.12.010; Sacred Heart Med. Ctr. v. Carrado, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979); Lightle v. Dep't of Labor & Indus., 68 Wn.2d 507, 510, 413 P.2d 814 (1966); Wilber v. Dep't of Labor & Indus., 61 Wn.2d 439, 446, 378 P.2d 684 (1963); State ex rel. Crabb v. Olinger, 196 Wash. 308, 311, 82 P.2d 865 (1938); Gaines v. Dep't of Labor & Indus., 1 Wn. App. 547, 552, 463 P.2d 269 (1969)).

The provisions and structure of the Act suggest that the legislature deliberately separated out the subject matter of a worker's personal injury action.

Prior to the Act's passage, workers seeking damages for injuries suffered in the course of their employment resorted to a common law personal injury action against their employers. See, e.g., McGuire v. Bryant Lumber & Shingle Mill Co., 53 Wash. 425, 102 P. 237 (1909); Ongaro v. Twohy, 49 Wash. 93, 94 P. 916 (1908). In this personal injury action, a worker had to not only allege and prove all factual bases and damages arising from the workplace injury but also prove the possibility of future damages (aggravation or death) arising from the injury, or else be precluded from doing so in a subsequent action. Sprague v. Adams, 139 Wash. 510, 520, 247 P. 960 (1926) ("[T]he decided weight of authority in this country supports the view that damages resulting from a single tort . . . are, when suffered by one person, the subject of only one suit as against the wrongdoer."); McGuire, 53 Wash. at 429. Accordingly, at common law, the cause of action then-available to workers and the subject matter underlying that cause of action were one and the same.[9]

In 1911, however, the legislature abolished the worker's personal injury action, declaring:

> *The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions.* In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends

[9] Indeed, in such a tort action, splitting a claim was forbidden. Sprague, 139 Wash. 510; White v. Miley, 137 Wash. 80, 241 P. 670 (1925); Kinsey v. Duteau, 126 Wash. 330, 218 P. 230 (1923); Collins v. Gleason, 47 Wash. 62, 91 P. 566 (1907); Kline v. Stein, 46 Wash. 546, 90 P. 1041 (1907); see also Enslev v. Pitcher, 152 Wn. App. 891, 222 P.3d 99 (2009); Landry v. Luscher, 95 Wn. App. 779, 976 P.2d 1274 (1999).

> upon its industries, and even more upon the welfare of its wage-worker. *The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy*, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end *all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided.*

LAWS OF 1911, ch. 74, § 1, at 345 (emphasis added).[10]

As explained by our Supreme Court:

> The Act is based on a quid pro quo compromise between employees and employers. The court in Stertz v. Industrial Ins. Comm'n, 91 Wash. 588, 590-91, 158 P. 256 (1916) explained the compromise: *The employer agreed to pay on some claims for which there had been no common law liability in exchange for limited liability. The employee agreed to give up available common law actions and remedies in exchange for sure and certain relief under the Act.* See Weiffenbach v. Seattle, 193 Wash. 528, 534-35, 76 P.2d 589 (1938).

McCarthy v. Dep't of Soc. & Health Servs., 110 Wn.2d 812, 816, 759 P.2d 351 (1988) (emphasis added). Accordingly, the Act provided a legal framework for relief distinct from that previously available to workers at common law.[11]

As applied to the statutory relief made available to workers, the Act's provisions suggest that the legislature split the relief obtainable by workers in a

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[10] This provision, as codified, remains identical, with the exception of its first sentence, which now reads: "The common law system governing the remedy of workers against employers *for injuries received in employment* is inconsistent with modern industrial conditions." RCW 51.04.010 (emphasis added).

[11] See also Carrera v. Olmstead, 196 Wn. App. 240, 246, 383 P.3d 563 (2016), aff'd, 189 Wn.2d 297, 401 P.3d 304 (2017) (the Act "grant[ed] workers injured on the job 'speedy and sure relief' in the form of workers' compensation benefits, but prohibit[ed] them from bringing negligence actions against their employers").

manner that did not previously exist at common law. Initially, and most obviously, the Act both categorized the relief available to workers into compensation schedules—predicated on the scope of the worker's injury—and fixed to a specified amount the relief available to workers. See LAWS OF 1911, ch. 74, § 5(a), at 356-58 (compensation schedule for an injury causing death); LAWS OF 1911, ch. 74, § 5(b), at 358 (compensation schedule for an injury causing permanent total disability); LAWS OF 1911, ch. 74, § 5(d), at 359 (compensation schedule for an injury causing temporary total disability); LAWS OF 1911, ch. 74, § 5(f), at 360 (compensation schedule for an injury causing permanent partial disability).[12] Compensation schedules that separated out and established the relief to which a worker was entitled based on the scope of the disability did not, of course, exist at common law.

Additionally, the Act separated out the relief that the worker could obtain for an aggravation of an initial injury.

> *If aggravation*, diminution, or termination *of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated* in any case the department may, *upon the application of the beneficiary* or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments.

LAWS OF 1911, ch. 74, § 5(h) at 360-61 (emphasis added).[13] The Act thus provided a worker with the ability to obtain relief for an initial injury and—in a

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[12] See also RCW 51.32.050 (compensation schedule where injury causes death); RCW 51.32.060 (compensation schedule where injury causes permanent total disability); RCW 51.32.080(compensation schedule where injury causes permanent partial disability); RCW 51.32.090 (compensation schedule where injury causes temporary total disability).

[13] See also RCW 51.32.160.

subsequent action—obtain additional relief that had not been alleged during the initial action. Consequently, this provision also separated the relief available to a worker in a manner not existing at common law. Accordingly, these provisions support that the legislature explicitly separated out the relief available to workers into distinct subject matter, rather than the unified subject matter of the common law claim.

In this light, Weaver's applications under the Act did not seek identical relief. In fact, neither the Department nor the City dispute that his requests for temporary total disability benefits and permanent total disability benefits sought distinct compensation.

Nevertheless, the Department and the City contend that Weaver's applications sought identical relief. This is so, they assert, because the only subject of relief set forth in the Act was compensation for workplace injuries. Therefore, the Department and the City continue, Weaver's applications merely sought compensation under the Act and thus had identical subject matter.

This myopic contention is unconvincing. As analyzed, the foregoing provisions of the Act suggest that the legislature did not, in actuality, set forth a singular form of relief for compensation for workplace injuries. Indeed, a single award of compensation was the relief previously available at common law and, as indicated, the legislature specifically declared that it was abolishing the common law action and replacing it with a distinct statutory scheme. LAWS OF 1911, ch. 74, § 1, at 345.

Thus, the Department and the City have not established that Weaver's applications sought identical relief under the Act.

ii

The Department and the City have also not established that Weaver's applications involved identical facts.

As indicated, Weaver filed an application for temporary total disability benefits and another application for permanent total disability benefits. In support of his application for temporary compensation that he filed in 2011, he alleged that he suffered from a malignant melanoma on the skin of his shoulder, the treatment of which caused him to miss five weeks of work before he was able to return. He further alleged that his employment as a firefighter caused the cancer.

In support of his application for permanent compensation that he filed in 2014, he alleged that he suffered from a newly diagnosed metastatic malignant melanoma that manifested itself as a brain tumor and that he was permanently unable to obtain gainful employment.[14]

Generally speaking, although there are some commonalities between Weaver's applications, it is evident that the facts underlying his applications are not identical. The Act—and judicial construction thereof—reinforce this view.

As will be iterated below, the Act's provisions suggest that the legislature split the evidence and proofs that a worker's application could establish in a

[14] Weaver's 2014 application also alleged that he suffered from a malignant melanoma on his shoulder and that his employment as a firefighter caused the cancer.

manner that did not previously exist at common law. To begin, the Act required the following in order to request compensation:

> SEC. 5. *Schedule of Awards*
> **Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer**, or his family or dependents in case of death of the workman, **shall receive out of the accident fund compensation in accordance with the following schedule**, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsover.
>
> . . . .
>
> SEC. 12. *Filing Claim for Compensation*
> (a) **Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him,** and it shall be the duty of the physician to inform the injured workman of his rights under this act and to lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the workman.

LAWS OF 1911, ch. 74, §§ 5, 12, at 356, 364-65 (bolded emphasis added).[15] These provisions therefore require a worker to submit a certification of his attending physician in order to support his application for compensation, a factual predicate that was not specifically mandated at common law.

Moreover, establishing an attending physician's certification as a predicate for a worker's application suggests the worker was limited to only alleging the factual basis for an actual—rather than a potential—injury. Unlike at common law, these provisions do not suggest that the worker could allege facts in support

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[15] See also RCW 51.28.020(1)(a). The Act defined that "[t]he words injury or injured, as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease." LAWS OF 1911, ch. 74, § 3, at 349. The Act was later amended to add "occupational diseases"—including of the type alleged by Weaver in this matter—as compensable when "such disease or infection" "arises naturally and proximately out of extra-hazardous employment." LAWS OF 1941, ch. 235, § 1, at 772. See also RCW 51.32.160.

of the possibility of additional injury or death arising from the initial injury. Furthermore, by setting forth that a qualifying worker would receive "compensation in accordance with the following schedule," these provisions linked a workers' compensation to the specific injury alleged by the worker.

Hence, by requiring specific proof of injury and linking the specified compensation to such proof, a distinction not made at common law, these provisions support that the Act separated out the factual basis for requesting relief under the Act.

Additionally, the foregoing provision authorizing compensation for a later-discovered aggravation of a worker's initial injury supports this view. See LAWS OF 1911, ch. 74, § 5(h) at 360-61.[16] Indeed, a worker submitting an application for an aggravation of an initial injury could not rely on the factual basis that supported the worker's initial application for compensation. Rather, the worker was required "to present medical testimony of a causal connection based on 'some *objective medical evidence' that the injury 'has worsened since the initial closure of the claim.*'" Hendrickson v. Dep't of Labor & Indus., 2 Wn. App. 2d 343, 353, 409 P.3d 1162 (2018) (emphasis added) (quoting Tollycraft Yachts Corp. v. McCoy, 122 Wn.2d 426, 432, 858 P.2d 503 (1993)) (quoting Washington appellate decisional authority).[17] Hence, this provision allowed a worker to

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[16] If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments.

[17] These evidentiary requirements are no mere formality. "[I]n dealing with the Washington Industrial Insurance Act, 'persons who claim rights thereunder should be held to strict proof of their right to receive benefits provided by the [A]ct.'" Wilson v. Dep't of Labor & Indus., 6

introduce new facts related to the initial injury in a subsequent compensation proceeding that were not alleged during the initial compensation proceeding. As indicated, at common law, a worker could not, of course, split his claim for damages arising from a single injury.

The provisions setting forth the factual basis for obtaining compensation for an injury that disabled the worker and for an injury that resulted in the worker's death also support that the legislature split the factual basis of a worker's action. As indicated, § 12 of the Act regarded the filing of a claim for compensation and subsection (a) thereof set forth that, "Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him." LAWS OF 1911, ch. 74, § 12(a), at 364. Notably, in subsection (b) of that provision, the legislature set forth that,

> [w]here death results from injury the parties entitled to compensation under this act, or some one in their behalf, shall make application for the same to the department, *which application must be accompanied with proof of death and proof of relationship* showing the parties to be entitled to compensation under this act, *certificates of attending physician, if any,* and such other proof as required by the rules of the department.

Laws of 1911, ch. 74, § 12(b), at 364-65 (emphasis added).[18] Given that, an application for an injury resulting in death required proof of death and proof of relationship, a factual basis not identical to an application for an injury that results

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Wn. App. 902, 907, 496 P.2d 551 (1972) (quoting Hastings v. Dep't of Labor & Indus., 24 Wn.2d 1, 12, 163 P.2d 142 (1945)).

[18] See also RCW 51.28.030.

in a disabling condition. Again, such claim splitting was not permitted at common law.

Lastly, that the Act requires distinct factual bases in order to establish a worker's entitlement to a specific compensation schedule supports that the Act separated out the facts of a worker's claim. As pertinent here, the provision regarding a "temporary total disability" requires a worker to establish that the worker suffers from "a condition *temporarily* incapacitating the workman from performing any work at any gainful occupation." Bonko v. Dep't of Labor & Indus., 2 Wn. App. 22, 25, 466 P.2d 526 (1970) (emphasis added) (citing RCW 51.32.090; Nash v. Dep't of Labor & Indus., 1 Wn. App. 705, 709, 462 P.2d 988 (1969)). In contrast, a "[p]ermanent total disability is defined as a 'condition *permanently* incapacitating the workman from performing any work at any gainful occupation.'" Bonko, 2 Wn. App. at 25 (quoting RCW 51.08.160).

In this light, the foregoing provisions suggest that the Act split the factual bases of the common law cause of action when creating the workers' compensation system.

As applied to the matter herein, Weaver's applications did not allege identical facts. His application for temporary total disability benefits alleged that he had missed five weeks of work arising from the treatment of the malignant melanoma on his shoulder. In contrast, his application for permanent total disability benefits alleged that he was permanently unable to continue on in his employment after the malignant melanoma on his shoulder metastasized and manifested itself as a brain tumor. Indeed, the medical evidence that he would

need to present in order to support each application would clearly not be the same. Thus, the factual basis for Weaver's applications are not identical.

Accordingly, the Department and the City did not establish that his applications involved identical facts.

iii

Lastly, and significantly, the Department and the City did not establish that Weaver could—or should—have litigated the subject matter of his application for permanent total disability benefits at the time that he litigated his application for temporary total disability benefits.

The factual basis for Weaver's application for permanent total disability benefits—the brain tumor—was not discovered until 2014, three years after his application for temporary total disability benefits was submitted. Indeed, it is undisputed that the basis underlying Weaver's allegations of permanent disability did not accrue until 2014—when the brain tumor impaired his capacity to perform the duties of a firefighter. Therefore, the facts underlying Weaver's application for permanent total disability benefits and the relief that he sought thereunder could not have been litigated at the time of his 2011 application.

Nevertheless, the Department contends that Weaver should have litigated the subject matter set forth in the application here at issue during the 2011 proceeding on his application for temporary total disability benefits. This is so, the Department asserts, because facts regarding the potential that his cancer might metastasize were set forth in the record during the 2011 proceeding.

The Department is mistaken. The referenced evidence was subject to exclusion but came in without objection—for reasons tactical or otherwise. Nevertheless, there is no indication that this evidence was material to Weaver's application during the earlier proceeding. Indeed, the possibility that Weaver's cancer might metastasize was irrelevant to whether Weaver was entitled to lump sum compensation recoverable under the Act for his temporary inability to earn wages as a firefighter while recovering from the surgery. Weaver did not fail to litigate something that he should have litigated in the first proceeding. The Department's contention fails.[19]

C

At the time that Weaver submitted his application for temporary total disability benefits, the facts underlying his application for permanent total disability benefits had not yet occurred and the permanent relief that he sought thereunder could not plausibly have been requested. Thus, the Department and the City have not established the first element of res judicata, that the subject matter of Weaver's applications were identical.

[19] The Department and the City also have not established that the equities underlying res judicata are in their favor. As indicated, in construing the Act, we resolve doubts in favor of the worker. See Dennis, 109 Wn.2d at 470. Initially, we are generally reluctant to apply this common law doctrine given that the legislature elected to preempt the worker's common law personal injury action and institute its own statutory scheme while *not* electing to incorporate the law of preclusion into the Act's provisions. Caution in precluding Weaver's application in this matter is further warranted because it would weigh against the legislative judgment that cancer manifesting itself during a worker's employment as a firefighter is presumed to have been caused by the firefighter's employment. See RCW 51.32.185(1). Thus, the Department and the City have not established that applying res judicata to preclude Weaver's application would be equitable.

Accordingly, the superior court erred by determining that res judicata barred Weaver's application for permanent total disability benefits.[20, 21]

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[20] As indicated, we accepted, without analyzing, the Department's contention that the Act sets forth a single cause of action for an allowance. We note, however, that if the Department or the City contend in the alternative that the Act sets forth *multiple* causes of action, res judicata would not apply. Indeed, if the Act sets forth multiple causes of action and, as analyzed, the Act abolished the common law action available to workers, this reinforces the view set forth herein that the legislature split the common law cause of action into multiple components. Assuming the common law action was so split, Weaver's applications for compensation constituted separate causes of action and res judicata would not apply.

[21] After oral argument in this court, the City submitted a statement of additional authorities, citing four cases to us. One is an opinion from our court, decided six years ago. Three are Supreme Court cases decided more than 80 years ago. Needless to say, all were available to counsel when her briefing was filed.

We have previously expressed our disaffection with this approach to appellate advocacy. See O'Neill v. City of Shoreline, 183 Wn. App. 15, 23, 332 P.3d 1099 (2014). By citing this authority to us, for the first time, after oral argument, counsel has deprived her opposing counsel of the opportunity to express his views on the authority. And, needless to say, counsel deprived us of the opportunity to explore the applicability, if any, of these cases during oral argument.

Nevertheless, as dutiful messengers of our judicial reasoning, we elect to address the cases cited, as follows:

1. Magee v. Rite Aid, 167 Wn. App. 60, 277 P.3d 1 (2012). This is an opinion explaining subject matter jurisdiction in general and the board's subject matter jurisdiction in particular. It does not inform our analysis.

2. Abraham v. Dep't of Labor & Indus., 178 Wash. 160, 34 P.2d 457 (1934). This opinion nowhere uses the terms "collateral estoppel" or "res judicata." It is, instead, a decision concerning whether the Department acted properly in vacating its own decision (akin to a court vacating its own judgment). It does not inform our analysis.

3. Luton v. Dep't of Labor & Indus., 183 Wash. 105, 48 P.2d 199 (1935). A case similar to Abraham. After a compensation award became final, the Department unilaterally cancelled it. The opinion nowhere uses the terms "collateral estoppel" or "res judicata," instead discussing principles applicable to vacations of judgments. It does not inform our analysis.

4. Ek v. Dep't of Labor & Indus., 181 Wash. 91, 41 P.2d 1097 (1935). This is a case with the result the City desires The opinion is brief, and self-admittedly scant in analysis. It does not mention "collateral estoppel" or "res judicata." Nor does it apply the four-part res judicata analysis. It does, however, observe that "a judgment is binding upon the party against whom it runs." Ek, 181 Wash. at 94. Does this mean that the four-part res judicata test, for some reason, does not apply when workers' compensation is involved? We think not.

Indeed, Ek's cursory analysis is hard to square with then-existing case law, if Ek is indeed a res judicata decision.

The four-part res judicata analysis was announced as the law of Washington in 1918. N. Pac. Ry. Co. v. Snohomish County, 101 Wash. 686, 688, 172 P. 878 (1918). This was 17 years prior to the Ek decision. Soon after the Ek decision, the Supreme Court issued a decision which it explicitly announced as turning on the application of res judicata. Clubb v. Sentinel Life Ins. Co., 197 Wash. 308, 310, 85 P.2d 258 (1938). The Clubb court explicitly applied the four-part res judicata analysis. Years later, the Supreme Court applied the four-part analysis in a res judicata case involving a workers' compensation decision. Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 396, 429 P.2d 207 (1967).

It may be that Ek was not a res judicata case. It may be that Ek's analysis, as cursory as it was, was simply aberrant. What is clear is that for 100 years the four-part res judicata analysis

V

Weaver's application for permanent total disability benefits is not barred by collateral estoppel or by res judicata. In so concluding, we do not intend to suggest that an issue in a workers' compensation action can never be subject to collateral estoppel. Indeed, there may be circumstances in which a worker had an incentive to fully litigate the issue in an initial proceeding but did not.

In addition, our decision in this matter does not indicate that res judicata can never bar a subsequent petition for compensation in a workers' compensation matter. Indeed, we can easily conceive of circumstances involving the same subject matter where the worker did, could have, or should have litigated the subject matter in an earlier proceeding.

However, the laws of preclusion do not rightfully apply to Weaver's application. As elucidated by Washington's foremost scholar on civil procedure, Professor Trautman,

> [t]here is danger that in seeking to relieve the crowded dockets and backlog of litigation, courts will too readily turn to the rules of res judicata and collateral estoppel. It is critical to remember that the doctrines of claim and issue preclusion are court-created concepts. Accordingly, they can be adjusted to accommodate whatever considerations are necessary to achieve the final objective—doing justice.

Trautman, 60 WASH. L. REV. at 842.

By precluding Weaver from litigating the question of whether his employment caused his cancer, even though he lacked sufficient economic

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has been a component of the common law of Washington. It has been consistently applied by our Supreme Court for at least the past 8 decades. Accordingly, we apply it herein.

motivation to do so in the earlier proceeding, and by precluding him from litigating his application for permanent total disability benefits, when he could not possibly have brought that application in the earlier proceeding, the superior court did not grant Weaver the justice to which he was entitled under the Act.

Reversed.

Dwyer, J.

We concur:

Trickey, J

Spearman, J.

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

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