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## **I. INTRODUCTION**

This is a workers' compensation case governed by Washington's Industrial Insurance Act, RCW Title 51. The Department of Labor and Industries (Department) issued a "segregation" order denying responsibility for the arthritis in Debbie Cronn's left knee. Cronn does not dispute that she failed to protest or appeal the order and that it became final and binding. The Department later issued an order closing her claim with permanent partial disability awards for her accepted right shoulder and left knee conditions. Cronn now contends that her pre-existing left knee arthritis was aggravated by the industrial injury and she needs treatment for it.

The Board of Industrial Insurance Appeals (Board) and trial court correctly excluded evidence relating her left knee arthritis to the industrial injury because the segregation order was a final and binding segregation order that resolved whether the Department was responsible for her left knee arthritis. Both the Board and the trial court correctly held that it was res judicata that the arthritis was not related to the industrial injury.

## **II. COUNTERSTATEMENT OF THE ISSUE**

1. Res judicata applies to all matters encompassed in an unappealed Department order. Did the trial court correctly conclude that the doctrine of res judicata barred Cronn from relitigating the issue of whether her November 7, 2002 industrial injury aggravated her pre-existing left knee arthritis, when the Department issued an

order on March 30, 2005, that unambiguously denied responsibility for arthritis of the left knee, and when it is undisputed that all of the necessary parties received that order and that no party filed a timely appeal from it?

### **III. COUNTERSTATEMENT OF FACTS**

#### **A. Cronn's Long History Of Knee Problems Pre-Existed Her 2002 Industrial Injury**

Cronn has experienced problems with her knee locking up since she was about seven years old. CP 334-35. In November 1996, after more than 15 years of symptoms, she had surgery because her knee continued to lock up regularly. CP 323. When Cronn had her surgery in 1996, she was found to have a bucket-handle tear in her knee. CP 435. A bucket-handle tear is a tear that occurs from trauma. CP 435. It causes locking and severe destruction to the joint, including arthritis. CP 435.

#### **B. Cronn Reinjured Her Left Knee In November 2002 While Working As A Truck Driver**

Cronn was injured on November 7, 2002, while working as a truck driver for Northwest Steel and Pipe, Inc. CP 318-19. She was driving a flatbed tractor trailer moving steel from job site to job site. CP 318. She sustained injuries to her right shoulder, left knee, and left thumb while loading, lifting, and unloading heavy items. Finding of Fact (FF) 1.2; CP 635.

Cronn sought medical attention shortly after her November 2002 injury. CP 325. Cronn filed a workers' compensation claim and began receiving benefits, including medical treatment. CP 317.<sup>1</sup> She had shoulder surgery in the spring of 2003 and arthroscopic knee surgery in late 2003. CP 326, 433. The knee surgery was a partial meniscectomy, the removal of a small part of the lateral meniscus of the left knee. CP 433. In layman's terms, the surgeon trimmed off a small area of "fraying." CP 447.

**C. The Department Segregated Her Pre-Existing Left Knee Arthritis And The Order Was Not Protested Or Appealed**

Early in the course of her treatment, Cronn had an MRI performed on her left knee. CP 445. The August 25, 2003 MRI study of the left knee showed advanced degenerative changes of the lateral compartment indicating the presence of arthritis for years before the industrial injury. CP 445. After her 2003 partial meniscectomy, her left knee continued to be painful. CP 433. Cronn was evaluated by Dr. Frederick Thompson in September 2004 and he concluded that the ongoing knee problems were related to preexisting arthritis unrelated to the November 7, 2002 industrial injury and the industrial injury did not light up the arthritis. CP 433, 462-63.

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<sup>1</sup> Cronn also had a number of other injuries to her left knee after her industrial injury. In early 2003, Cronn slid on ice at home and twisted her left knee and went to the hospital for treatment. CP 324, 335. In March 2003, Cronn also fell and bruised her left knee following Mardi Gras festivities. CP 335. Finally, Cronn also fell out of bed onto her left knee while swatting at spiders. CP 335.

On March 30, 2005, the Department issued an order denying responsibility for Cronn's arthritis of the left knee. CP 169. It stated:

The department denies responsibility for the following condition, *arthritis of left knee*, determined by medical evidence to be unrelated to the industrial injury for which this claim was filed.

We will not pay the bills for medical treatment of this condition.

CP 169 (emphasis added). Cronn did not protest or appeal the order and it became a final and binding order. CP 36.

Cronn last had treatment for her left knee in approximately 2007 or 2008. CP 339. The Department requested an independent medical evaluation to provide impairment ratings for her accepted conditions after the conclusion of treatment. CP 430, 441-42. After the rating examination, the Department closed the claim with permanent partial disability awards for both her left knee and her right shoulder. CP 60.<sup>2</sup>

**D. Cronn Unsuccessfully Attempted To Present Testimony That Her Left Knee Arthritis Was Related To Her Knee Injury**

At the Board, Cronn sought to show that the November 7, 2002 industrial injury had "aggravated" her pre-existing left knee arthritis and was in need of further treatment. CP 62-63, 193-200. She contended that the segregation order "did not address whether the Department was

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<sup>2</sup> Cronn did not report any problems with her left thumb after the initial injury. CP 334.

responsible for any aggravation of arthritis in her knee.” CP 194. She believed that the medical evidence “indicates that industrial injury lit up or aggravated Ms. Cronn’s arthritic knee.” CP 196. The Department moved for an order to exclude testimony addressing a causal relationship between Cronn’s left knee arthritis and the industrial injury. CP 146-53. The industrial insurance appeals judge granted the Department’s motion to exclude testimony “concerning aggravation of pre-existing left knee arthritis” by the industrial injury. CP 44. However, Cronn was allowed to present any evidence on the issue in colloquy to preserve the issue for appeal. CP 44.

At the hearing, Cronn testified on her own behalf and called two lay witnesses. CP 307, 314, 404. For medical witnesses she called Saleem Khamisani, M.D., a neurologist, and Daniel Brzusek, D.O., a physiatrist. CP 355, 481.

Dr. Khamisani evaluated Cronn on one occasion, in June 2009. CP 358-59. Dr. Khamisani acknowledged that he is not a surgeon, has never performed knee meniscus surgeries, and would not normally treat a joint condition in his own practice if it does not have a neurological component. CP 378. Dr. Khamisani testified that he recommended a possible total left knee replacement surgery when he examined Cronn in 2009. CP 367. According to Dr. Khamisani, the November 2002 injury

was one of the two causes for requiring the total knee replacement. CP 370. He also testified that the subsequent development of degenerative arthritis related to the industrial injury would be one of the causes for a knee replacement. CP 371.

The Department objected to Dr. Khamisani's testimony regarding aggravation and causation of the left knee arthritis given the final and binding segregation order. CP 355. At the time of the testimony, the Board excluded the testimony based on the motion by the Department asserting *res judicata*, so those portions of the testimony addressing causation were placed in colloquy. CP 355.

Dr. Khamisani agreed that the August 25, 2003 MRI—taken shortly after the injury—already showed advanced degenerative changes in her left knee. CP 376. Dr. Khamisani declined to express an opinion as to whether Cronn would be in need of joint replacement surgery if she had the 2003 meniscectomy, but no previous osteoarthritis or degenerative joint disease. CP 378.

Dr. Daniel Brzusek also testified at Cronn's request. CP 481. Dr. Brzusek is also not a surgeon. CP 522. Dr. Brzusek evaluated Cronn at the request of her attorney for the purposes of litigation on two occasions: February 22, 2007 and January 28, 2011. CP 484, 507. Dr. Brzusek diagnosed a moderately severe sprain/strain of the left knee as

a result of the November 7, 2002 injury and the meniscectomy done by Dr. Arroyo under the claim. CP 493, 499-500. Dr. Brzusek also diagnosed progressive arthritis of the knee. CP 499-500.

The Department objected to Dr. Brzusek's testimony regarding aggravation and causation of the left knee arthritis given the final and binding order and it was likewise placed in colloquy. CP 484-85.

According to Dr. Brzusek (testifying in colloquy), Cronn had "[p]rogressive deterioration and development of additional arthritis as a result of aggravation of left knee due to [the] injury of November 7, 2002." CP 500. He asserted that the industrial injury caused "an aggravation of a preexisting, but asymptomatic, arthritis in her left knee . . . ." CP 501. He also attributed mild posttraumatic patellofemoral pain to the industrial injury. CP 500.

According to Dr. Brzusek, the only treatment available for Cronn's left knee condition is a total knee replacement. CP 502. Dr. Brzusek attributed this need for treatment to the meniscus tear caused by the November 7, 2002 injury, the surgical treatment of the meniscus tear (i.e., removal of additional cartilage), and the arthritis. CP 504. According to Dr. Brzusek, Cronn would not need a total knee replacement if she had no arthritis. CP 505.

**E. Dr. Michael Barnard Testified That The Advanced Arthritis And Need For Total Knee Replacement Were Not Due To The November 2002 Industrial Injury**

Michael Barnard, M.D., a board certified orthopedic surgeon, performed an independent medical evaluation to provide impairment rating for Cronn's accepted conditions. CP 426, 430, 441-42. Dr. Barnard examined Cronn on April 20, 2010. CP 430. Although Dr. Barnard ceased performing surgeries in 2000, he estimates that he has performed thousands of knee surgeries over the course of his career. CP 427. Dr. Barnard testified that the 2002 industrial injury did not contribute to the advancement of Ms. Cronn's left knee arthritis caused by her 1996 surgery. CP 447. Although he agreed that she needed joint replacement surgery, it was not as a result of her November 2002 injury. CP 449.

According to Dr. Barnard, Cronn's medical records demonstrated that Cronn had previous left knee problems dating back to her teen-age years and previous arthroscopic surgery on her knee. CP 432. Due to a fifteen-year history of her left knee locking and causing her problems as well as a locked knee in October of 1996, Dr. Barronian performed left knee surgery on November 1, 1996. CP 434, 444. Dr. Barronian's surgical report indicates that he resected a bucket-handle tear of the lateral meniscus that had been the cause of her repeated locking. CP 444.

Dr. Barnard described a bucket-handle tear as a longitudinal tear of the meniscus cartilage that occurs from trauma. CP 435. It causes the central portion of the cartilage, which is shaped like the handle of a bucket, to slip into the middle of the joint while remaining attached at the front and back to the outside of the joint, which causes locking and severe destruction to the joint. CP 435. According to Dr. Barnard, the 1996 finding of a bucket-handle tear was particularly significant because of the long history of her left knee locking up. CP 435. “The locking is caused by the cartilage piece getting caught in the middle of the joint and making it impossible to move the joint.” CP 435. Dr. Barnard testified that almost a hundred percent of people with bucket-handle tears develop severe arthritic changes over a period of time. CP 435. Dr. Barnard later explained that “a bucket handle tear of a meniscus is almost always associated with a gradual deterioration of the joint because the mechanical locking of the knee by the bucket handle, especially over a period of years, causes extensive damage on a long-term basis.” CP 444.

Dr. Barnard reviewed three MRI reports taken of Cronn’s left knee: an August 25, 2003 MRI; a March 8, 2004 MRI; and, a November 27, 2007 MRI. CP 446. Dr. Barnard considered the August 25, 2003 MRI the most persuasive evidence that the industrial injury did not contribute to the advancement of Ms. Cronn’s left knee arthritis. CP 447-48. The August 25,

2003 MRI study of the left knee showed hypertrophic osteoarthritis, meaning arthritis of the joint with spur formation, demonstrating years of wear and tear on the joint. CP 445. The MRI also showed other advanced degenerative changes, including cysts. CP 445-46. Sub cortical cysts are very advanced degenerative changes indicating the presence of arthritis for years. CP 445-46. The MRI findings led Dr. Barnard to conclude that by August 25, 2003, Cronn already had clearly defined advanced degenerative changes in her left knee. CP 446. According to Dr. Barnard, none of the findings present in the August 2003 MRI study "could have possibly occurred in the time frame between her industrial incident and the MRI." CP 448. He did not believe that the industrial injury caused an exacerbation or aggravation of the long-standing underlying degenerative changes. CP 450. He also did not expect the impact from the industrial injury on her arthritis to occur years after the industrial injury: "I absolutely do not believe that [Cronn's arthritis] wouldn't have been effected immediately after the industrial injury and then go for a period of a few years and then suddenly start having more problems with the knee related to that injury. That would not occur." CP 448, 449.

Dr. Barnard explained that the scope of Cronn's two left knee surgeries differed significantly. CP 447. Dr. Barnard reviewed Dr. Arroyo's November 19, 2003 operative report of the left knee and compared it with the 1996 procedure performed. CP 447. Although Dr. Arroyo also performed an

arthroscopic procedure, Dr. Arroyo's surgery differed significantly from Dr. Barronian's 1996 arthroscopic surgery. CP 447. In November 2003, Dr. Arroyo noted a small area of damage to the lateral meniscus, which Dr. Arroyo described as "fraying," which he essentially trimmed. CP 447. In contrast to this minimal procedure, Dr. Barronian removed about *half* of the meniscus during the 1996 procedure. CP 447. Dr. Barnard further explained that fraying at the edge of the meniscus is distinguishable from a specific big tear of the meniscus such as Cronn had previously when she had the bucket-handle tear. CP 464. The fraying or tear at the edge of the meniscus is not the same as a rip like you would expect with a twisting or falling injury. CP 464.

Dr. Barnard diagnosed the following conditions that he related to Cronn's November 7, 2002 industrial injury: right shoulder strain; left knee strain; left finger sprain; and status-post left knee arthroscopic partial meniscectomy done on November 19, 2003. CP 441. In addition, Dr. Barnard diagnosed pre-existing degenerative arthritis of the left knee, unrelated to the November 2002 injury. CP 441.

Based on his examination, records, and history, Dr. Barnard concluded that Cronn's conditions were fixed and stable and not in need of any further curative treatment. CP 441-42. Dr. Barnard also testified that Cronn had permanent partial impairments to her right shoulder and left knee. CP 442.

Dr. Barnard further testified that if Cronn is in need of total left knee replacement surgery, it is not as a result of the November 2002 injury because Cronn's industrial injury was a minor straining injury to her knee that did not cause an exacerbation or aggravation of the long-standing underlying degenerative changes. CP 450. According to Dr. Barnard, the August 2003 MRI proved that Cronn already had end-stage arthritis when she was injured in November of 2002. CP 447-48. "[O]nce arthritis gets going, it doesn't stop; it doesn't reverse; it doesn't get better; it only gets worse." CP 448.

**F. The Board Decided That Cronn's Pre-Existing Arthritis Caused The Need For Further Treatment, Not The Industrial Injury**

After the hearing, the Board's industrial appeals judge issued a proposed decision, concluding that Cronn was not in need of further treatment. The industrial insurance appeals judge did not consider the evidence regarding Cronn's theory that her industrial injury aggravated her knee arthritis in the proposed decision and order. CP 44. The industrial appeals judge also concluded that the "2002 industrial injury is not the cause of the claimant's need for a total left knee replacement in 2011." CP 54. The industrial insurance judge reasoned that the March 30, 2005 order, which was not appealed, segregated the left knee arthritis as unrelated to the November 7, 2002 industrial injury. CP 55. Accordingly, because treatment recommendations from Dr. Khamisani and Dr. Brzusek

addressed the pre-existing condition not proximately caused by the November 7, 2002 industrial injury, the judge reasoned that the weight of the evidence supports a conclusion that Ms. Cronn's left knee, right shoulder, and left thumb complaints proximately related to the November 7, 2002 industrial injury were fixed and stable as of May 27, 2010, and no longer in need of necessary and proper treatment. CP 55. The industrial appeals judge also found that the permanent partial disability awards were correct given that Dr. Barnard's testimony supporting the awards was not refuted by Cronn's medical witnesses. CP 55-56. Accordingly, the proposed decision affirmed the Department order closing Cronn's claim. CR 43.

Cronn petitioned the three-member Board for review, arguing that although the Department issued a "valid segregation order in March 2005" that her condition became symptomatic, or lit up, sometime after the segregation order was issued. CP 36. The Board denied review, adopting the July 7, 2011 proposed decision and order as the final order. CP 3.

**G. The Superior Court Ruled That The March 2005 Segregation Order Was A Final And Binding Order That Barred Cronn From Relitigating The Arthritis Issue**

Cronn appealed to Pierce County Superior Court. Cronn filed a "motion to limit the scope of the Department order," arguing that the Department's order did not include a denial of responsibility for "a

condition not diagnosed until February 22, 2007, the future aggravation of Ms. Cronn's arthritis by the industrial injury." CP 558. The superior court denied the motion and concluded that the March 30, 2005 order was a final and binding order that barred her from relitigating the issue of whether the pre-existing left knee arthritis was "aggravated" by the industrial injury. CP 596. The matter proceeded to a trial before the bench. CP 634. Based on the res judicata effect of the Department's March 30, 2005 order, the superior court's conclusions of law similarly ruled that Cronn could not relitigate the issue of whether the industrial injury proximately caused, or aggravated, her pre-existing left knee arthritis. Conclusion of Law (CL) 2.2; CP 635-36. The superior court affirmed the Board, adopting findings of fact and conclusions of law consistent with the Board's findings of fact and conclusions of law. CP 56-57, 633-37.

The superior court found that prior to the November 7, 2002 industrial injury Cronn had undergone a lateral meniscectomy due to a large bucket handle tear in the left knee and had pre-existing advanced degenerative joint disease in the lateral compartment. FF 1.3; CP 635. The court concluded that the March 30, 2005 order denying responsibility for arthritis of the left knee became final and binding and that Cronn was barred by the doctrine of res judicata from relitigating the issue of whether

the industrial injury proximately caused, or aggravated, her pre-existing left knee arthritis. FF 2.2; CP 635-36. The court concluded that the Cronn's left knee condition that was proximately caused by the industrial injury was fixed and stable and no longer in need of further treatment. FF 2.3; CP 636. Accordingly, the court affirmed the Board order. CL 3.1; CP 636. This appeal follows. CP 638-39.

#### IV. STANDARD OF REVIEW

The Industrial Insurance Act, RCW Title 51, governs the administrative decision making and judicial review procedures in a workers' compensation case. See RCW 51.52.100, .110, .115; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-80, 210 P.3d 355 (2009). A workers' compensation case involves two state agencies: the Department and the Board. The Department is a "front-line" agency that administers claims in an ex parte manner, whereas the Board, as a "quasi-judicial" agency, conducts an evidentiary hearing when a party aggrieved by a Department decision appeals. *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 780-81, 854 P.2d 611 (1993).

A final and binding order issued by the Department is given preclusive effect that prevents a party from relitigating an issue previously encompassed in that order. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d

533, 537, 886 P.2d 189 (1994); *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 784-85, 271 P.3d 356 (2012).

Orders appealed from the Department are reviewed by the Board. RCW 51.52.050, .060. The Board's role is appellate in the sense its review "is limited to those issues which the Department previously decided." *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994).

Decisions of the Board may be appealed to superior court. RCW 51.52.110. The superior court reviews the Board's decisions de novo, but without any evidence or testimony other than that included in the Board's record. RCW 51.52.110; *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560-61, 897 P.2d 431 (1995). The findings and decisions of the Board are considered prima facie correct until the superior court, by a preponderance of the evidence, finds them incorrect. *Dep't of Labor & Indus. v. Moser*, 35 Wn. App. 204, 208, 665 P.2d 926 (1983).

This Court's review of the superior court decision is under the ordinary review standard for civil appeals. RCW 51.52.140. Review is thus limited to examination of the record to determine whether substantial evidence supports the superior court's findings of fact, made after its de novo review, and whether the superior court's conclusions of law flow from the findings. *Rogers*, 151 Wn. App. at 180-81. Here the findings of

fact are unchallenged and are verities on appeal. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000). In any event, this Court must uphold these findings if the evidence, viewed in the light most favorable to the Department (as the prevailing party at the superior court), is sufficient to persuade a fair-minded person of the truth of the declared premises. See *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 340, 725 P.2d 463 (1986).

This case ultimately turns on the question of whether the superior court was correct when it concluded that the March 30, 2005 order denying responsibility for Cronn's left knee arthritis was res judicata as to the issue of whether the Department was responsible for Cronn's left knee arthritis raised by Cronn's challenge to the closing order. Review of the superior court decision on this issue is de novo. *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005).

## V. ARGUMENT

### A. **Res Judicata Bars Cronn From Relitigating The Department's Responsibility For Her Pre-Existing Left Knee Arthritis**

Once the Department has entered a decision, the recipients of that decision have 60 days to file a protest and request for reconsideration with the Department or an appeal with the Board. RCW 51.52.050(1), .060. The Department's determination that it was not responsible for Cronn's

left knee arthritis became final and binding when Cronn failed to appeal that order.

Cronn concedes that the Department issued a final and binding order that segregated her preexisting left knee arthritis. CP 36. Nevertheless, Cronn attempts to relitigate the issue of whether her preexisting arthritis was aggravated by the industrial injury. See App. Br. 6-7. When the Department issued an order on March 30, 2005 denying responsibility for the condition of left knee arthritis, it denied *any* responsibility for her left knee arthritis. CP 169. The order stated, in pertinent part: “The department denies responsibility for the following condition, arthritis of the left knee, determined by medical evidence to be unrelated to the industrial injury for which this claim was filed.” CP 169.

The Industrial Insurance Act provides finality to decisions of the Department and an unappealed Department order is res judicata as to the issues encompassed within the terms of the order. *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997) (Talmadge, J., concurring); *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994); *Kustura v. Dep’t of Labor & Indus.*, 142 Wn. App. 655,

669, 175 P.3d 1117 (2008).<sup>3</sup> This is true even if the Department order was erroneous. *Marley*, 125 Wn.2d at 537. Res judicata “precludes the parties from rearguing the same claim.” *Id.* at 538. Cronn did not protest or appeal the segregation order. FF 1.5; CP 635. Thus, res judicata applies to the unappealed March 30, 2005 order and prevents Cronn from arguing that her industrial injury affected her pre-existing left knee arthritis. *See Le Bire v. Dep’t of Labor & Indus.*, 14 Wn.2d 407, 411-12, 419-20, 128 P.2d 308 (1942).

**1. All the Necessary Elements For The Application Of Res Judicata From The Segregation Order To The Closing Order Are Present Here**

A prior order will bar litigation of a subsequent claim if the prior order involved: 1) the same persons or parties; 2) the same subject matter; 3) the same claim or cause of action; and 4) a final judgment or order rendered by an entity with authority to do so (i.e. “the quality of the persons for or against whom the claim is made”). *See Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737-38, 222 P.3d 791 (2009); *see generally* Philip A. Trautman, *Claim and Issue Preclusion in Civil*

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<sup>3</sup> Citing *Gange Lumber Co. v. Rowley*, 326 U.S. 295 n.15, 306, 66 S. Ct. 125, 90 L. Ed. 85 (1945), Cronn argues that applying res judicata to industrial insurance matters is disfavored. App. Br. 19. But the footnote cited actually describes how RCW Title 51 provides its own remedies to “avoid the crystallizing effects of the doctrine of res judicata,” such as the ability to reopen a claim if a condition worsens. In any case, in *Marley*, the Supreme Court applied res judicata doctrine broadly to the finality of Department orders and did not indicate that the doctrine is disfavored. *Marley*, 125 Wn.2d at 533.

*Litigation in Washington*, 60 Wash. L. Rev. 805 (1985). The elements are all met for the application of res judicata to the May 27, 2010 order closing the claim. CP 98.

First, the parties, Cronn and the Department, are identical here. See *Snyder v. Munro*, 106 Wn.2d 380, 383-84, 721 P.2d 962 (1986). Cronn does not dispute this element; the parties are simply litigating different orders under the same industrial insurance claim. App. Br. 16-18; CP 73-83.

Second, the March 30, 2005 segregation order and the May 27, 2010 closing order involve the same subject matter—whether the Department is responsible for treating Cronn’s left knee arthritis. Without any elaboration, Cronn cites *Hayes v. City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997), and argues that even if two claims share some of the same facts, they can involve different subject matter. App. Br. 17. While that general proposition is true, the facts in *Hayes* are inapposite to the facts here. The *Hayes* Court was satisfied that the issues did not deal with the same subject matter because the previous action was an action for judicial review that focused “exclusively on the propriety of the decision making process of the Seattle City Council” whereas the subsequent action was for “a judgment for money to compensate Hayes for damages he allegedly suffered as a result of the Council’s actions.” *Hayes*, 131 Wn.2d

at 713; *see also Hisle v. Todd Pacific*, 151 Wn.2d 853, 866, 93 P.3d 108 (2005). Here, the same subject matter is at the heart of the dispute: Cronn argues that the Department is responsible for treatment of her left knee arthritis, while the Department asserts that it is not responsible for the treatment of her left knee arthritis. The possible treatment for the left knee arthritis is the only basis for keeping the claim open.

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

The courts have considered the following four factors in addressing whether the same cause of action element is met for the purposes of res judicata: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the

same right; and, (4) whether the two suits arise out of the same transactional nucleus of facts. *Hayes*, 131 Wn.2d at 713 (citing *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983)).

Without explanation, Cronn argues that “interests established in the original claim are not impaired by the aggravation claim, nor is substantially the same evidence presented.” App. Br. 17-18. To the contrary, the interests of the Department established by the final and binding segregation order would be significantly impaired by ignoring its denial of responsibility for the left knee arthritis. The medical witnesses all agree that if the Department is responsible for her left knee arthritis, the treatment would be a total knee replacement. CP 367, 450, 502. Attendant to that treatment, Cronn would also likely be entitled to additional benefits including total temporary disability while she is undergoing treatment, and any additional permanent partial disability associated with a total knee replacement. Thus, rights adjudicated by the segregation order would be displaced if no res judicata is applied and the Department’s closing order is found to be incorrect.

The evidence presented also would be substantially similar: lay testimony from Cronn and medical testimony from expert witnesses to address the question of whether the left knee arthritis was affected by the industrial injury based on a review of records, patient history, and

examinations. Before the segregation order, the Department had available the evaluation by Dr. Frederick Thompson, who expressed the opinion that preexisting arthritis was not related to the November 7, 2002 industrial injury and that the industrial injury had not “lit up the arthritis.” CP 433, 462-63. Although the Department presented Dr. Barnard instead of Dr. Thompson on the issue of the Department’s responsibility for the left knee condition, it also could have offered Dr. Thompson’s testimony.

In considering the similarity of evidence factor, the *Hayes* Court noted that in the action for judicial review, where Hayes sought to overturn the decision of the Seattle City Council, he only needed to meet one of five standards listed in the statutory writ of certiorari. *See* RCW 7.16.120. Thus, “[t]he evidence he needed to maintain that action is far different than the type of evidence that he needed to muster to establish that he was entitled to an award of damages.” *Hayes*, 131 Wn.2d at 713-14. Unlike the litigant in *Hayes*, Cronn is seeking exactly the same remedy here as that denied by the Department in the segregation order—coverage for her left knee condition.

Although Cronn does not allege that the third and fourth elements are not met here, the segregation order and the closing order involve the infringement of the same right and arise out of the same transactional nucleus of facts. *See Rains*, 100 Wn.2d at 664. Cronn’s entitlement to

benefits for a condition alleged to be related to the industrial injury is addressed in both orders and the claim for benefits in both cases arises out of the same industrial injury.

Finally, the prior action was concluded with a final order issued by the entity authorized to do so. Cronn has not suggested that the Department lacked subject matter jurisdiction to issue the March 30, 2005 order. In any case, the Department “has broad subject matter jurisdiction to decide all claims for workers compensation benefits.” *Marley*, 125 Wn.2d at 542; *cf. Lenk v. Dep’t of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). Here, all the res judicata elements are met and weigh heavily in favor of finding that the res judicata effect from the segregation order applies to the closing order.

**2. Res Judicata Applies To The Closing Order Because An Unappealed Department Order Is Res Judicata As to All Issues Fairly Encompassed Within the Order**

The Department expressly decided that it was not responsible for Cronn’s left knee arthritis and she would be ineligible for treatment associated with that condition. For a condition or disability to be compensable, the industrial injury must be a proximate cause. *Wendt v. Dep’t of Labor & Indus.*, 18 Wn. App. 674, 684, 571 P.2d 229 (1977). Proximate cause is determined by application of the “but for” test. *City of Bremerton v. Shreeve*, 55 Wn. App. 334, 340, 777 P.2d 568 (1989). A

“proximate cause” is one “without which” the condition or disability complained of would not have occurred. *Wendt*, 18 Wn. App. at 684; 6A *Washington Practice: Washington Pattern Jury Instructions: Civil* 155.06, at 141 (6th ed. 2012). Here, the Department concluded that Cronn’s left knee arthritis developed as part of the natural progression of her pre-existing arthritis and the Department is not responsible for the condition. *See Nagel v. Dep’t of Labor & Indus.*, 189 Wash. 631, 636-37, 639, 66 P.2d 318 (1937).<sup>4</sup>

Res judicata bars “the relitigation of claims and issues that were litigated, or *might have been litigated*, in a prior action.” *Loveridge v. Fred Meyer*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (emphasis added; internal quotation omitted); *Shoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986) (if there has been an opportunity to litigate the matter in a former action the party should not be permitted to relitigate it); *see also* *Trautman*, 60 Wash. L. Rev. at 813-14. Whether the Department was responsible for Cronn’s left knee arthritis, including whether the industrial injury lit up, aggravated, or accelerated the arthritis, “might have been litigated,” if she had exercised her right to appeal the order. *See Kingery*, 132 Wn.2d at 169 (Talmadge, J., concurring). The courts have

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<sup>4</sup> Although *Nagel* is a reopening case rather than a case addressing acceptance of new conditions, it still stands for the general proposition that a worker is not entitled to benefits if a condition develops for non-injury related reasons. *Nagel*, 189 Wash. at 636-37.

refused to allow claimants to take a narrow reading of the language of an order to allow them to avoid its *res judicata* effect. *See Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 241-42, 118 P.3d 392 (2005); *see also Farr v. Weyerhaeuser Co.*, 70 Wn. App. 759, 766, 855 P.2d 711 (1993). Without citing to any cases, Cronn argues the relevant case law suggests that if “aggravation” is not specifically mentioned in a Department order, then it is not covered by the order. App. Br. 24. *Chavez* refutes a similar argument. *See Chavez*, 129 Wn. App. at 242.

In *Chavez*, the court held that an unappealed order calculating the worker’s wage for time-loss wage replacement benefits was *res judicata* and precluded his later claim that his employer-paid healthcare benefits should also be included in the calculation. *Id.* at 241-42. The worker in *Chavez* argued *res judicata* should not apply, because the order did not expressly exclude employer-paid healthcare, so he was not adequately apprised of a need to appeal the order. *Id.* at 241. The court rejected his argument and pointed out that such an exclusion “was readily understood from the explicit statement of what *was* included in calculating” the worker’s time-loss rate. *Id.* at 242. Cronn argues that “[n]owhere in the Department order is the issue of aggravation addressed” and that “word aggravation is nowhere present, nor any synonym thereof used, nor any combination of words expounded that when read together would indicate

or even imply that aggravation is at issue.” App. Br. 23. Contrary to Cronn’s assertions, like in *Chavez*, the Department’s denial of aggravation should be “readily understood from the explicit statement” that the Department “denies responsibility for . . . arthritis of left knee, determined by medical evidence to be unrelated to the industrial injury.” *Id.* at 242; CP 169.

Likewise, the *Farr* Court precluded an injured worker from asserting that he could not have re-entered the work force in some capacity following his voluntary retirement, because the Department had issued a final and binding closing order that found him to be only *partially* disabled. *Farr*, 70 *Wn. App.* at 767. The court found that finding was res judicata as to his condition at that point and that he could not later assert that the order did not address permanent disability. *Id.* Here, the unappealed March 30, 2005 order stated unequivocally that the Department is not responsible for left knee arthritis. CP 169. Like in *Farr*, the order here did not have to say specific “magic words” to provide a preclusive effect, because by denying any responsibility, the Department necessarily denied aggravation of her preexisting left knee arthritis. *Id.* at 767.

This unappealed order necessarily encompassed the determination of any responsibility by the Department and is readily understandable

from the order and, even if erroneous, is now res judicata. *See Marley*, 125 Wn.2d at 538.

**3. The Department Order Encompassed “Aggravation” or “Lighting Up” Of Cronn’s Preexisting Condition And Therefore Is Res Judicata**

While Cronn concedes that the segregation order addresses “whether the arthritis that may have existed at the time of the industrial injury was caused by the industrial injury,” she asserts that the March 30, 2005 order does not address the alleged later “aggravation” of her left knee arthritis. App. Br. 6, 7, 23. Given the case law cited here, Cronn uses the term “aggravation” as short hand for the lighting up doctrine. App. Br. 22 (citing *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 471-72, 745 P.2d 1295 (1987) (quoting *Miller v. Dep’t of Labor & Indus.*, 200 Wash. 674, 682, 94 P.2d 764 (1939); and, citing *Harbor Plywood Corp. v. Dep’t of Labor & Indus.*, 48 Wn.2d 553, 556-57, 295 P.2d 310 (1956)); *see also* CP 501 (Dr. Brzusek asserted in colloquy that the industrial injury caused

“an aggravation of a preexisting, but asymptomatic, arthritis in her left knee. . . .”).<sup>5</sup>

Under the lighting up doctrine, if a preexisting degenerative condition is asymptomatic, the Department can be responsible for the treatment of that condition. *McDonagh v. Dep’t of Labor & Indus.*, 68 Wn. App. 749, 755, 845 P.2d 1030 (1993). If an injury lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, the resulting disability is also attributable to the injury. *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 472, 745 P.2d 1295 (1987). However, the Department is not responsible for the arthritic changes which would have appeared and progressed regardless of Cronn’s November 7, 2002 industrial injury. *See Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d, 1, 7, 977 P.2d 570 (1999); *see also*

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<sup>5</sup> Cronn also cites to “aggravation” cases that refer to the reopening of a claim for a worsened or aggravated condition. App. Br. 15 (citing *Karniss v. Dep’t of Labor & Indus.*, 39 Wn.2d 898, 900-01, 239 P.2d 555 (1952); *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560-61, 897 P.2d 431 (1995)). Although, as discussed below, the case law on reopening (aggravation) is useful by analogy, aggravation in these cases does not relate to the lighting up or exacerbation of a condition. The courts have also used the term aggravate to describe the exacerbation or acceleration of a preexisting condition by an occupational exposure or industrial injury. *See e.g., McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 392, 828 P.2d 1138 (1992); *Romano v. Dep’t of Labor & Indus.*, 20 Wn.2d 108, 109, 146 P.2d 186 (1944). The Board often uses the term “aggravation” to refer to the temporary or permanent exacerbation of a *symptomatic* condition by an industrial injury or occupational disease. *See, e.g., In re Russell Bash*, BIIA Dckt. 10 19954, 2012 WL 1374554, \*3 (2012); *In re James Gillmore*, BIIA Dckt. 09 24347, 2011 WL 1451210, \*5 (2011); *In re Lawrence Warner*, BIIA Dckt. 04 20894, 2006 WL 1979307, \*4 (2006). However, as the Board explained in *Warner*, lighting up and aggravation are not identical concepts and it is confusing to use “lighting up” as the equivalent to “aggravation.” *Warner*, 2006 WL 1979307 at \*3.

*Nagel*, 189 Wash. at 636; see also *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657, 219 P.3d 711 (2009).

The lighting up doctrine does not displace the general rule that the Department is not responsible for the ordinary progression of a disease or a condition that existed independently of the industrial injury. See *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 624-27, 17 P.3d 1195 (2001).

Cronn's argument that the segregation order did not address "aggravation" is contradicted by the broad language of the March 30, 2005 order, which states that the Department *denies responsibility* for the condition of arthritis of the left knee, "determined by medical evidence to be *unrelated* to the industrial injury for which this claim was filed." CP 169 (emphasis added). Nothing in the language of the order limits that segregation. The plain language of the order states that the medical evidence has determined that the condition is *unrelated* to the injury. If an industrial injury lights up a pre-existing condition the industrial injury becomes the proximate cause of the lit up condition, and thus it would be *related*, not *unrelated*. See *Miller*, 200 Wash. at 682. In other words, if the injury either aggravated or lit up the pre-existing arthritis, then the arthritis would be related to the injury. But here the order specifically found that the arthritis was "unrelated to the industrial injury." CP 169.

Cronn cites to *Kelly-Hanson v. Kelly-Hanson* for the proposition that res judicata does not apply because a necessary fact concerning the “aggravation of arthritis . . . —the diagnosis of the aggravation—was not in existence at the time of the March 30, 2005 Department order.” App. Br. 18 (citing *Kelly-Hanson v. Kelly-Hanson*, 87 Wn. App. 320, 330-31, 941 P.2d 1108 (1997)).<sup>6</sup> Accordingly, Cronn’s theory appears to be that no doctor had considered whether her left knee arthritis had been aggravated or lit up by the industrial injury at the time of the segregation order. See App. Br. 18. This is simply incorrect.

Before the issuance of the segregation order, Cronn was evaluated by Dr. Frederick Thompson in September 2004 and he concluded that she had preexisting arthritis in her left knee that was not related to the November 7, 2002 industrial injury and that industrial injury had not “lit up the arthritis.” CP 433, 462-63. Moreover, experts for both the Department and Cronn agree that the August 25, 2003 MRI image taken under her industrial insurance claim showed extensive preexisting arthritis of her left knee unrelated to industrial injury. CP 376, 445. Dr. Brzusek testified that

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<sup>6</sup> *Kelly-Hanson* does not aid Cronn because the *Kelly-Hanson* Court actually found that the res judicata did apply to the plaintiff and the facts are so dramatically different that little comparison can be drawn. On the other hand, the *Kelly-Hanson* Court did note that plaintiffs, like Cronn, should be barred by res judicata when their relief sought is “merely an alternate theory of recovery, or an alternate remedy.” *Kelly-Hanson*, 87 Wn. App. at 331. Thus, the *Kelly-Hanson* Court expressed disfavor with plaintiffs simply repackaging the same claims in order to attempt to defeat res judicata, as Cronn does here.

she was symptomatic after she had her 2003 surgery. CP 433. Thus, she had symptoms after her surgery, a time period before the segregation order. CP 169.

Cronn suggests that because no doctor had specifically opined that her knee arthritis was aggravated as a result of her industrial injury until after the 2005 segregation order was issued, she would not have been able to litigate the issue of whether she had an aggravation of her knee condition that was related to her injury in 2005. *See* App. Br. 6, 18, 19, 24. Therefore, she appears to argue that it is unfair to rule that the finality of the 2005 order precludes her from arguing, based on newly acquired evidence, that her knee arthritis is related to her injury. *See* App. Br. 6, 18, 19, 24.

However, Cronn fails to support that she would not have been able to litigate the issue of whether she had knee arthritis that was related to her injury in 2005. As Cronn must concede, there was evidence of a worsening of her knee condition well before 2005. CP 515 (Dr. Brzusek testified “[w]ell, she had plenty symptoms, but no one actually connected the dots.”); *see also* CP 433. Had Cronn chosen to appeal the 2005 order, she could have consulted with one or more medical experts and litigated the issue of whether she had a knee condition that was related to her industrial injury. There is no reason why she could not

have done this in 2005, when she received the Department's segregation order. However, she declined to appeal that order or attempt to develop evidence indicating that it was incorrect. Accordingly, the order became final and binding upon her and it precludes her from attempting to relitigate those issues in the current appeal. *See Loveridge*, 125 Wn.2d at 763 (res judicata prevents relitigation of issues that "might have been litigated.").

Cronn argues that "if the Court accepts the interpretation of its order, the Court is in effect giving approval to the unprecedented concept of preemptive segregation of conditions." App. Br. 24. The March 20, 2005 order addressed the Department's responsibility including under an "aggravation" or "lighting up" theory. It applies to any assertion that the Department is responsible for her left knee arthritis—a condition that was diagnosed early in the claim. As noted above, Cronn is wrong in her assertion that the "aggravation" of the knee condition is new to her claim. In 2004, Dr. Thompson identified her preexisting left knee arthritis and concluded that her industrial injury had not affected it. CP 463. Note that under the doctrine of res judicata it does not matter what Dr. Thompson identified because the doctrine encompasses what "might have been litigated." *See Loveridge*, 125 Wn.2d at 763.

A claimant with a pre-existing, symptomatic condition may also have that condition worsened by an injury or disease. *See Allen v. Dep't of Labor & Indus.*, 48 Wn.2d 317, 318, 293 P.2d 391 (1956); *see also Voshalo v. Dep't of Labor & Indus.*, 75 Wn.2d 43, 44-46, 449 P.2d 95 (1968). In such cases, the worker's doctor must segregate out the portion of the condition that existed independent of the injury to determine permanent partial disability. RCW 51.32.080(5). The Department is only responsible for that portion of the claimant's condition that is attributable to the injury or exposure. *See Allen*, 48 Wn.2d at 319. Here the Department concluded that none of the left knee arthritis was attributable to the injury. And based on the medical evidence, the Department's order disclaimed all responsibility for the arthritis.

Cronn also argues that she was not on notice that aggravation of her preexisting left knee arthritis was addressed by the order. App. Br. 23. Cronn cites to *King v. Department of Labor & Industries* for the proposition that "[w]hen a finding does not clearly state whether or not the cause of the aggravation is an industrial injury, litigation of the claimed aggravation is allowed[.]" App. Br. 16 (quoting *King v. Dep't of Labor & Indus.*, 12 Wn. App. 1, 528 P.2d 271 (1974)). The *King* Court addressed whether there was a specific judicial finding that plaintiff's psychiatric condition was not related to his industrial injury such that res judicata would prevent plaintiff

from litigating the worsening of that psychiatric condition since the claim was previously closed. *King*, 12 Wn. App. at 2, 5. The court noted that the only finding of fact by the trial court addressing plaintiff's psychiatric condition indicated that plaintiff did not suffer any permanent partial disability from a psychiatric standpoint as a proximate result of his industrial injury. *Id.* at 2, 4. As the *King* Court explained, this finding only addressed whether plaintiff had any permanent partial disability from a psychiatric standpoint as a proximate result of his industrial injury. *Id.* at 4. Since the trial court did not address whether the psychiatric condition was caused by the injury, the court determined that the injured worker should not be precluded from litigating the causal relationship between his injury and psychiatric condition and whether that condition had worsened or become aggravated since claim closure. *Id.* at 4.

Although the *King* Court discusses the absence of a final finding that the "condition was neither caused by nor aggravated by" the industrial injury, it simply noted that the trial court failed to adopt the Board's "unequivocal language" that "the claimant suffered from conditions of psychiatric origin which were extensive but not related to his industrial injury." *Id.* The Board's language, which the Court deemed "unequivocal", does not expressly mention aggravation. *Id.* Thus, the *King* Court's decision supports the finality of the Department order here: "If there was a

valid court order entered in the prior appeal clearly segregating and rejecting the psychiatric condition, the denial of any relationship to the industrial injury would be res judicata and could not be litigated in this appeal.”  
*See King*, 12 Wn. App. at 2.

Here, the order contains the requisite statutory language regarding Cronn’s protest and appeal rights and the finality of unprotested and unappealed orders. CP 169; *see* RCW 51.52.050(1). The order broadly provided that the Department denies responsibility for the left knee arthritis as unrelated to the industrial injury giving Cronn notice that the Department was denying responsibility for the “aggravation” or lighting up of her preexisting arthritis when it issued the order. If Cronn disagreed with the Department’s conclusion that her left knee arthritis was unrelated or felt there was no medical evidence supporting the order, she had a remedy in 2005. Given the maxim ignorance of the law excuses no one, it must be assumed that Cronn knew that the Department could be responsible for the “aggravation” of her condition. *Leschner v. Dep’t of Labor & Indus.*, 127 Wn.2d 911, 926, 185 P.2d 113 (1947) (declining to allow the Department to consider an untimely worker’s compensation claim because worker did not know of the deadline). Since she chose not to protest or appeal the segregation order, it became final and binding as to any “aggravation” of the pre-existing condition. *See Kustura*, 142 Wn. App. at 669.

Cronn's attempt to circumvent the effect of the order underscores the importance of res judicata. Cronn "cannot evade her responsibility under Title 51 RCW to appeal from a Department order that aggrieved her" simply by dressing up the same claims in different clothing. See *Kingery*, 132 Wn.2d at 172 (Talmadge, J., concurring). Allowing her to do so here would reward a party who sat on her rights. The doctrine of res judicata is expressly designed to prevent such a result. See, e.g., 18 Charles A. Wright, et al., *Federal Practice & Procedure* § 4403, at 26-27 (2d ed. 2002) (res judicata provides finality and repose in litigation).

**4. The Reopening Case Law Supports The Department's Ability To Segregate Cronn's Left Knee Arthritis**

An injured worker may have an industrial insurance claim reopened if the injury worsens after the claim was closed. RCW 51.32.160. "Aggravation" in the case law cited to by Cronn refers to the *reopening* of a previously allowed and closed claim due to worsening, or "aggravation," of conditions proximately caused by the industrial injury. App. Br. 15 (citing *Karniss v. Dep't of Labor & Indus.*, 39 Wn.2d 898, 900-01, 239 P.2d 555 (1952); *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560-61, 897 P.2d 431 (1995)). While the Department does not dispute the general proposition that where a claim is closed and there is a worsening of the *accepted* condition that the closing order is not res judicata as to whether

there was a worsening of that *accepted* condition, an order segregating arthritis from a injury is res judicata even if the injured worker later attempts to reopen the claim. *Le Bire*, 14 Wn.2d at 419-20.

In a case involving facts similar to those present here, the Supreme Court upheld the application of res judicata to the language of orders denying responsibility for preexisting arthritis. *Id.* In *Le Bire*, the injured worker slipped and fell, injuring his right knee. *Id.* at 409. The claim was allowed and treatment and time loss compensation were provided. *Id.* The Department issued a closing order that paid permanent partial disability associated with the injury, but that denied “any and all responsibility and liability for treatment of the preexisting arthritis and gonorrheal infection and any disability necessitated thereby” *Id.* at 411. The worker sought to have the claim reopened eighteen months later and after an examination by a panel of physicians, the Department issued an order directing that “the claim remain closed in accordance with the preceding” closing order. *Id.* at 412.

The worker once again sought reopening, and was again denied by the Department, and he appealed the decision to superior court. *Id.* at 414. The superior court granted a directed verdict to the Department, based on res judicata. *Id.* at 413-14. Upholding the trial court, the Supreme Court reasoned that “the department determined that at the time of his injury

appellant had a preexisting disease of arthritis, that his arthritic condition was not due or related to the knee injury, and that the department would assume no responsibility whatever for the disability caused by the disease.” *See Le Bire* 14 Wn.2d at 415.. This was “the same issue now presented on this appeal, namely, whether appellant’s arthritic condition is attributable to his knee injury.” *Id.* at 415. The Court recognized the well-established case law supporting the finality of Department orders. *Id.* at 415-16. Under *Le Bire*, Cronn cannot relitigate the responsibility for her left knee arthritis, because “that very question was decided by the [Department] by its order antedating the one on which this proceeding is based, and no appeal was taken from the earlier order.” *Id.* at 420.

Cronn argues that a “[s]ubsequent aggravation of a condition causally related to an industrial injury which arises after the date of unappealed order is not considered *res judicata*” even when there is a valid segregation order that denies responsibility for that condition. *See App. Br. 15* (citing *Karniss*, 39 Wn.2d at 900-01). However, the *Karniss* Court simply reiterates the proposition that a closing order issued by the Department does not preclude a later showing of worsening of the accepted condition under the reopening provisions of the Industrial Insurance Act. *Karniss*, 39 Wn.2d at 900-02. And, here, *res judicata* establishes that the condition that Cronn contends “subsequently

worsened” is *not* “causally related” to his injury. *Karniss*, 39 Wn.2d at 900-01.

Likewise, *Grimes* does not aid Cronn. *See Grimes*, 78 Wn. App. at 564-65. In *Grimes*, the Court was not addressing “aggravation” of a preexisting condition. Instead, the *Grimes* Court was addressing whether plaintiff’s closed 1986 injury claim for his back, left hip, and knee should be reopened due to a newly contended cervical condition. *Grimes*, 78 Wn. App. at 559-60. The *Grimes* Court concluded that because plaintiff’s cervical condition *was not previously segregated*, considered, or addressed by the Department in any way, the prior Department orders closing the claim or denying prior applications to reopen the claim had no res judicata effect *as to the cervical condition*. *Grimes*, 78 Wn. App. at 564-65 (order “did not segregate the cervical condition, or address the cervical condition in any way.”). These facts are distinguishable from the present case because medical providers had specifically identified longstanding arthritis in Cronn’s left knee, and, perhaps moreover, the Department issued an order segregating that very condition.

Finally, while res judicata does not preclude the injured worker from asserting an increase in disability due to a subsequent change in a worker’s accepted conditions (that is, *additional* Department responsibility), the Department may expressly specifically deny having

any responsibility for a progressing condition that is not proximately caused by the industrial injury. See *Romano v. Dep't of Labor & Indus.*, 20 Wn.2d 108, 112, 146 P.2d 186 (1944) (“if an order, fixing no aggravation to a preexisting disease by reason of an injury, is not appealed from, it becomes res judicata, but, if the order did find an aggravation to a preexisting disease by reason of an injury, any change in the disability, occurring after the order, may be provided for either by way of increasing or decreasing the number of degrees of permanent partial disability, as the case may be.”). The *Romano* Court reasoned that “[i]n the first instance, it is established that there is *no aggravation* upon which a *change* can be predicated. In the second, there is, and it is not necessarily permanently fixed, but may be adjusted to correspond to the facts.” *Id.* Here, as in the first instance described in *Romano*, there is a valid Department order specifically segregating and rejecting Cronn’s left knee arthritis.

**B. Liberal Construction Principles Do Not Aid Cronn Because Principles Of Claim Preclusion Apply Equally To All Workers’ Compensation Litigants**

Liberal construction in favor of the injured worker applies to matters concerning the construction of an ambiguous statute under RCW Title 51. See *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993); RCW 51.12.010. There is no ambiguous statute present here.

Nevertheless, Cronn implies that this Court should liberally construe the Industrial Insurance Act to grant the relief she requests. App. Br. 22-23. Liberal construction principles do not dictate the result she advocates here, because the principles of res judicata apply equally to all parties, including the Department, in workers' compensation cases, and do not favor any particular party. *See Kingery*, 132 Wn.2d at 170 ((Talmadge, J., concurring) (unappealed decision by the Department is "final and binding on *all parties* . . .") (emphasis added). As a necessary corollary, undermining the bedrock principles of res judicata, as Cronn seeks to do here, would expose all parties – including injured workers – to chaos and uncertainty, which is anathema to the purposes underlying the Industrial Insurance Act. *See* RCW 51.04.010 (Industrial Insurance Act enacted to provide "sure and certain relief" to injured workers).

It makes no sense to apply principles of law—claim preclusion—one way in a certain procedural context to produce a result favoring Cronn and another way in an otherwise identical procedural context to avoid producing a result adverse to a different claimant. Such an inconsistent, purely result-oriented approach has no support under liberal construction principles.

Consistent with the Industrial Insurance Act's defining purpose of providing "sure and certain relief" to injured workers is the idea that an

unappealed order is final and binding on all parties, including the Department and employers. Although ignoring principles of res judicata in the present case may be beneficial to Cronn, allowing final and binding Department orders to be set aside or limited in scope as a matter of course has the potential to create a hardship for countless claimants and employers in addition to creating complicated and costly administrative burdens for the Department. Such a potential outcome further demonstrates the importance of final and binding determinations that cannot be challenged by any party many years after the fact. *See e.g., Kingery*, 132 Wn.2d 162.

Finally, the doctrine of res judicata is designed to discourage piecemeal litigation. *Spokane County v. Miorke*, 158 Wn. App. 62, 69, 240 P.3d 811 (2010). “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). These important principles apply equally to appeals under the Industrial Insurance Act.

**C. Cronn Does Not Otherwise Dispute The Trial Court’s Findings And Conclusions**

Cronn’s theory is that the testimony regarding the aggravation of the arthritis should not have been excluded and it was prejudicial to exclude the

testimony and as such the trial court's order should be reversed. App. Br. 20-21. However, Cronn does not argue in the alternative that, even assuming the trial court correctly excluded the testimony, the trial court's decision is not supported by substantial evidence, nor that its decision would otherwise be in error.<sup>7</sup> Notably Cronn did not challenge any specific findings of fact in her assignments of error. App. Br. 6. Cronn cannot now challenge these factual findings. *Allen*, 100 Wn. App. at 530 (unchallenged findings are verities on appeal).

Accordingly, if the segregation order encompasses "aggravation," it is res judicata and the testimony by Drs. Khamisani and Brzusek addressing the aggravation of Cronn's left knee arthritis is irrelevant. ER 401; ER 402. On the other hand, the testimony would be relevant if the order does not encompass "aggravation." See *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (citing *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)) ("The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.").

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<sup>7</sup> In any event, substantial evidence supports the trial court's finding that the Department correctly closed Cronn's claim with the permanent partial disability awards previously paid. Based on his examination, records, and history, Dr. Barnard concluded that Cronn's conditions were fixed and stable and not in need of any further curative treatment related to the industrial injury. CP 441-42. Dr. Barnard reasoned that the August 25, 2003 MRI proved that the industrial injury did not contribute to the advancement of Ms. Cronn's left knee arthritis. CP 447-48. Dr. Barnard also testified that Cronn had permanent partial impairments to her right shoulder and left knee. CP 442. Although Cronn's witnesses argued for further treatment, they did not provide estimates of the permanent partial disability awards in the alternative.

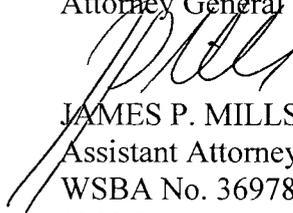
Here, Cronn requests reversal of the trial court's decision. App. Br. 21. Although the trial court was correct on its ruling regarding the testimony and res judicata and this Court should affirm the trial court's decision, should the Court reverse the trial court, the remedy would be to reverse and remand to the trial court for a new trial that considered the excluded evidence. *See Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 921, 640 P.2d 1 (1982).

## VI. CONCLUSION

The Department requests that this Court affirm the Superior Court decision affirming the decision of the Board.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of August, 2013.

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