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Court of Appeals  
Division III  
State of Washington  
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NO. 36567-1-III

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**COURT OF APPEALS FOR DIVISION III  
STATE OF WASHINGTON**

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JEREMY L. MATSON,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

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**REPLY OF APPELLANT, JEREMY L. MATSON**

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## I. INTRODUCTION

Mr. Matson hereby replies to the Department's response brief dated October 2, 2019. Our Washington Supreme Court long ago observed that our Industrial Insurance Act was:

“particularly framed to avoid legal terminology and the technicalities of law pleading. It was intended that the working people themselves could make and file these claims and give the notice of injury. The cost and expense of employing attorneys were to be avoided, if possible. The act was for the benefit of the working man and his family, not for the profession....***Anything filed with the Industrial Commission that challenges its attention, causes it to act, is sufficient to put in motion the process of the Industrial Commission to see that compensation is paid to injured employees.***” *Nelson v. Dep't of Labor & Indus.*, 9 Wash. 621, 629-630, 115 P.2d (1941) (emphasis added).

In this case, the Department of Labor and Industries asks this Court of Appeals to impose higher forms of technicality and legal pleading than

have ever been intended or required in Industrial Insurance Act cases. This Court should respectfully decline the Department's request.

## II. REPLY

### A. Mr. Matson's Providers Did File A Timely Protest.

The Department's response brief ("DRB") concedes that the treatment notes of both Dr. Long and Dr. Rempel "contained information about [Mr.] Matson's occupational history." (DRB at pg. 5). Moreover, the Department's brief concedes that the specific occupational history information included therein referenced facts that even after being injured, Mr. Matson was "working full time" and that he had an occupational background of working "40+" hours per week. (*Id.*). These are unambiguous references to Mr. Matson having both a pre-injury and post-injury wage earning capacity corresponding to full-time employment.

The Department also concedes that the Department's wage orders are intended to "calibrate benefits to a worker's [wage] earning capacity." (DRB at pg. 15). Accordingly, it seems plain that the Department should have recognized that its wage order in contest in this case was incorrect, because the May 7, 2012 wage order set Mr. Matson's wage earning capacity at less than half of what it would be if he were only capable of earning full-time minimum wage. In other words, there was an obvious

disconnect within the medical records charting Mr. Matson's wage earning capacity versus the amount at which the Department set his wages of injury, and that obvious disconnect should have been considered as a valid protest to the Department's May 7, 2012 wage order.

Nevertheless, the Department asserts that despite its concessions that Mr. Matson's doctors timely provided information regarding his wage earning capacity, this information from Mr. Matson's treating providers need not be recognized as a timely protest for multiple reasons. The admonition of the Supreme Court in *Nelson*, cited supra, is lost in the Department's response. The Department argues that neither doctor's treatment note can be considered a timely protest because: 1) neither doctor "mentioned [Mr.] Matson's wages at the time of the injury or his wages at any other time," (DRB at pp. 5 and 12); 2) neither doctor disputed the use of commissions as a basis for [Mr.] Matson's income," (DRB at pp. 11 and 12); 3) medical records would not be a likely place for the Department to find evidence that its prior wage order findings were incorrect (DRB at pp. 15); and 4) an injured worker's treating provider has no "standing" to submit protests on the injured worker's behalf (DRB at pp. 14-15). Each of these Department arguments fail.

First, the fact that neither doctor's note specifically mentions Mr. Matson's wages of injury is an insufficient basis to claim that neither can

be a timely protest of a wage order establishing his wage-earning capacity at the time of his injury. The Department concedes in its brief that wages are used to set wage earning capacity (DRB at pg. 15), so it follows that as long as the wage-earning capacity concept was addressed by the chart notes submitted by Mr. Matson's physicians, those notes do not need to specifically set forth Mr. Matson's wages in order to constitute a wage order protest.

Next, the fact that neither doctor disputed that Mr. Matson earned commissions in his job of injury is an insufficient basis to claim that there was no wage order protest, because wage earning capacity is a concept that goes well beyond whether or not the injured worker was receiving commissions. Commissions are but one possible form of wages. Their existence or non-existence does not fully inform the totality of Mr. Matson's wage earning capacity; so it follows that a wage order may still be protested without expressly attacking the Department's specific findings regarding receipt of commissions. Here, the Department asks this Court to render an apples equals oranges assessment, whereas each are distinct fruits bearing their own individual characters.

Next, the Department argues that a doctor's note need not be considered for purposes of evaluating a wage order. If this Court agrees, it will give Cart Blanche to the Department to commonly disregard one of the

most important sources of information that is regularly submitted to the Department's claim file. No statute says the Department can ignore doctors' comments regarding wage earning capacity; and it is utterly illogical for the courts to adopt such a rule, especially where the role of physicians is extensive in the administration and processing of every Industrial Insurance Act claim.

Meanwhile, some statutes also take a plainly opposite position than is argued by the Department. Those statutes make very clear that treating physicians must be a primary source of determining whether an injured or sick worker's wage earning capacity has been restored to what it was pre-injury. *See, e.g.*, RCW 51.32.090(3)(a) (time loss benefits cease once an injured worker's present earning power is restored to that existing at the time of injury); and RCW 51.32.090(4)(b) (treating physician assessments are critical to the determination of when to pay or cease paying time loss). RCW 51.28.020(1)(b) literally requires treating physicians to inform injured workers regarding their Industrial Insurance Act rights and to assist those injured workers to file both applications for compensation and "such proof of other matters" as might be relevant to the processing of a workers' compensation claim. Given this clear statutory framework, the Department's insistence here that it need not consider medical treatment notes is alarming.

Similarly, WAC 296-20-01002 requires Attending Provider reports to estimate return to work dates; indicate when vocational assessment will be necessary to assist an injured worker to return to work; and to estimate the injured worker's physical capacities. Under this same WAC, a doctor's chart notes are to contain such information as the injured worker's "pertinent medical history," which may very well include a discussion of their pre-injury working and earnings capacities versus their post-industrial injury capacities, just as occurred in Mr. Matson's case. A doctor's consultation examination report under this same WAC may also be expected to describe the worker's "degree of recovery from the industrial condition," which may logically be expressed in relation to pre-injury wage earning capacity; "probability of disability," (paraphrased), which may be measured by the degree to which functional capacity has been lost due to the industrial injury; and "probability of returning to work," which may therefore likely include a discussion of what the pre-industrial work capacities and pattern of employment were.

WAC 296-19A-030(1) makes it an attending health care provider's duty "to respond to any request for information which is necessary to evaluate a worker's ability to work; need for vocational services; ability to participate in vocational retraining; and expedite vocational rehabilitation processes, including making an estimate of physical and mental capacities

that affect the worker's employability." (paraphrased). Under this WAC provision, the treating provider must also "maintain open communication with the worker's assigned vocational rehabilitation provider." Meanwhile, pursuant to WAC 296-19A-030(3), the employer must assist that same vocational rehabilitation provider to "collect data regarding the worker's gainful employment at the time of the injury." Given that treating doctors are duty-bound to help determine whether an injured worker can return to pre-injury employment patterns, and to discuss this freely with both the injured worker and the assigned vocational counselors who must investigate job of injury functional capacities which bear directly upon wage earning capacity, it is spurious for the Department to now assert that physician treatment and charting notes need not be considered when assessing the injured or sick worker's wage earning capacity. To make such a ruling would be to demonstrate ignorance of how the Industrial Insurance Act is now and has been historically administered.

WAC 296-20-09701 literally requires that an attending doctor must submit a request for reconsideration of any premature claim closure order or error in "other adjudication action" whenever the Department's adjudication seems "inappropriate to the doctor or injured worker." Here, the Department's own written rules underscore that an injured worker's

treating physician does have standing to protest literally any adjudication error that the Department makes. This Court should now so hold.

Finally, the Department's position that an injured worker's physician has no standing to file protests is inconsistent with the holding of *Shafer v. Dep't of Labor & Indust.*, 140 Wn.App. 1, 11, 159 P.3d 473 (2007) *aff'd*, 166 Wn.2d 710, 213 P.3d 591 (2009) (where the Department's failure to provide the worker's attending physician a copy of the closure order prevented the physician from appealing the order, claim closure could not be final and binding until 60 days after the attending physician receives a copy of the order).

Here, this Court should easily find that the role of treating and consulting physicians is critical to the proper function and administration of the liberally-interpreted Industrial Insurance Act. Therefore, the Department must consider their chart notes and other written documentation for the contents contained therein. If those written contents are contrary to a recently-issued Department order, those contents must be considered as a timely protest if timely received by the Department. This Court should further hold that the Department is never at liberty to disregard the contents of medical chart notes or other written documentation submitted by physicians who have collected information from injured workers and then submitted this to the Department (or self-insured employer) in conjunction

with an Industrial Insurance Act claim. In fact, this Court should likely go even further and restate the language of *Nelson*, provided supra in the Introduction section, using modern terms.

In other words, this Court should hold that the required liberal interpretation and application of the Industrial Insurance Act requires the Department to make responsible findings based upon whatever written information is timely made available to the Department within its claim files, regardless of the identity or purpose of the individual making the filing. In this way, the written filing of (as non-exclusive examples) a wife for her husband; an adult child for her injured mother; an uncle for his nephew; a friend; a union representative; a vocational services provider or nurse case manager who has obtained knowledge from relevant individuals as a result of field work in an L&I claim; an interpreter who has provided interpretive services; a medical consultant who has opined on relevant topics related to the claim; or the written filing of any other type from any other person deriving information from claim participants which timely challenges a Department finding, must therefore be considered.

This Court should rule that the agency of some party must generally be presumed by the Department, given that there is no other reason for anyone to ever submit legally-operative information to the Department in a

given injured or sick worker's L&I claim. A liberal administration of the Act, thus interpreted, serves the interest of justice.

**B. The Department's May 7, 2012 Wage Order is Not Entitled To Res Judicata or Collateral Estoppel.**

The Department's Order Failed to Clearly Communicate What Was Being Decided. Therefore, the Department's order is not entitled to res judicata or collateral estoppel effect. The Department's Response Brief ("DRB") concedes (at pg. 3) that RCW 51.52.050 requires the Department's order "to communicate the decision it reflects..." For the very first time, the Department has also now *finally* conceded in its response brief that the purpose of the Department's wage order is to "calibrate benefits to a worker's [wage] earning capacity." (DRB at pg. 15) (emphasis added). The Department's argument states that "while the wage order did not detail every step of the calculation, it did give 'reasonable notice' as to the issues it adjudicated." (*Id.*). The Department's position is incorrect and asks this Court to adopt a dangerous new legal standard that will both be forgiving to the Department and punishing to the injured workers' for whom our Industrial Insurance Act exists. The Department's position is also incorrect for the following reasons:

First, In no way did the Department's order communicate that it was deciding a "wage earning capacity" concept, which this Court of Appeals

should observe may or may not be the same as the actual wages earned by the injured or sick worker at the time of an industrial injury or occupational disease. This failure is clear from the face of the May 7, 2012 wage order. This Court should rule that the Department's failure to indicate the wage earning capacity concept that it was adjudicating, versus merely setting forth its resulting conclusion, is a fatal failure in the Department's admitted duty "to communicate the decision [it's wage order] reflects." Accordingly, the Department's wage order of May 7, 2012 can be entitled to no res judicata / collateral estoppel effect. *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wash.App. 84, 92, 52 P.3d 43 (2002) (res judicata does not apply to a department wage order where the wage order fails to clearly detail the basis of the department's findings).

Second, RCW 51.08.178(1) expressly provides that "where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of injury...[by a multiplier based on the number of days per week the worker was working]." For this reason, this Court should rule that a Department wage order calculated under RCW 51.08.178(1) fails on its face "to communicate the decision it reflects," pursuant to the Department-conceded requirement of RCW 51.52.050, where it fails to state and explain the Department's "daily wage" calculation or the number of days per week the

Department believes the worker was working. This is true unless the Department's wage order explains that the wages of injury were fixed by the employer in a stated monthly amount at the time of the injury or occupational disease. Here, the Department's wage order did not do so. Meanwhile, commissions by their very nature cannot be expected to be "fixed," so their inclusion in the Department's wage order of May 7, 2012 indicates an acknowledgement by the Department that Mr. Matson's wages were actually not "fixed by the month." The Department's order here is anything but clear. It is a mash of ambiguous assertions and omissions that could pickle even a capable mind, let alone some of the more brain-injured or otherwise depressed minds of vulnerable workers who must depend on Industrial Insurance Act benefits for their sustenance. If this Court sets a low competence standard for Department wage orders in this case, many tragedies and injustices will follow.

Respectfully, this Court should now set forth a bright-line holding that if the Department's wage order does not contain hourly and daily wages and numbers of hours worked per day and days worked per month, then the Department's wage order must explain that the Department has specifically found that the worker's wages were actually "fixed by the month" by the injured worker's employment in a stated amount as of the date of injury; OR - the Department must otherwise indicate that it has decided the

worker's wage earning capacity based upon a similar worker payroll. Otherwise, the Department's order does not comport with the statutory requirements of either RCW 51.08.178 subsection (1) or subsection (4) and it does not fairly "communicate the decision it reflects," which is the admitted notice purpose of any Department order.

Next, this Court should make very clear, given the critical importance of wage orders, that *res judicata* / collateral estoppel effect must be denied to any wage order where the Department has failed to strictly-comply with the requirements of RCW 51.08.178. Because a lifetime of benefits may depend upon a proper wage calculation in this singular type of Department order, there is no proper allowance for a lax method with respect to these orders. If the duty of the Department to clearly state the basis of its decisions is allowed to devolve into a question of whether the Department has merely "substantially-complied" with the mandates of that wage order statute, two things will happen. First, the requirement for liberal construction and application of the Industrial Insurance Act will certainly be eroded. Second, this Court will have abandoned its bright-line rule articulated in *Somsak*, that the basis of a wage order must be clearly communicated. The ruling requested by the Department would inevitably invite both tyranny and injustice; whereas retaining the bright-line rule of *Somsak*, restated here with even more force, invites neither.

Finally, the Department's brief fails to argue Mr. Matson's position that the wage order of May 7, 2012 is unjust because it arbitrarily sets his wage-earning capacity below that established for minimum wage in this state. In other words, there is a manifest injustice here because the public policy of this state neither allows employers to pay less than the state's minimum wage, nor allows the Department to avoid making a proper determination of an injured worker's true wage earning capacity when issuing a wage order. This Court should therefore announce that any Industrial Insurance Act wage order establishing an hourly wage earning capacity below that correlated to the state's minimum wage must be highly scrutinized for possible injustice and public policy offense.

Very recently, on October 17, 2019, the Washington Supreme Court unanimously decided *Weaver v. City of Everett, et al.*, a copy of which is supplied herewith. In *Weaver*, the Supreme Court affirmed a Court of Appeals holding "that neither collateral estoppel nor res judicata applied" to a firefighter's case, in part because "preclusion would work an injustice." *Weaver*, Wash. Supreme Court Slip Op. 96189-1, at pg. 4 (citing *Weaver v. City of Everett*, 4 Wn. App. 2d 303, 421 P.3d 1013 (2018)). The Supreme Court further articulated that preclusion was inappropriate and would work an injustice where legitimate fears or disincentives existed to excuse the injured worker's failure to fully prosecute his claims at the time of an earlier

Department order. *Id.* at pp. 8-11 (collateral estoppel inappropriate where the circumstances created a risk that the injured worker might forgo their administrative remedies out of understandable fear or outsized financial disincentive). The Supreme Court noted that preclusion must sometimes also be denied “when its application would contravene public policy.” *Id.* at pg. 13 (citing *State v. Dupard*, 93 Wn.2d 268, 275-76, 609 P.2d 961 (1980)). The high court then reminded us that “the injustice factor ‘recognizes the significant role of public policy.’” *Id.* at pg. 14 (internal citations omitted). Finally, the Supreme Court called res judicata the “sister doctrine” of collateral estoppel and noted that it should not be applied in a rigid fashion that either defeats the ends of justice or works an injustice. *Id.* at pp. 18-19 (citing *Henderson v. Bardahl Int’l Corp.*, 72 Wn.2d 109, 119, 431 P.2d 961 (1967)). The analysis in *Weaver* also applies in this case.

On the facts of Mr. Matson’s case, where he fell from a ladder while washing windows, allowing the Department to set an injured worker’s wage earning capacity at time of injury (whether by exclusive use of “commissions” or otherwise) below that which our state’s public policy considers to be the minimum allowable wage would contravene public policy. The Industrial Insurance Act cannot be fairly administered by ignoring the language of RCW 51.08.178(4). That statutory provision requires the Department’s wage order to make a “fair” assessment of wage-

earning capacity, including by use of similar worker payrolls, as necessary. Moreover, because the Department's response brief fails to address this argument, it should now be deemed conceded.

**C. Summary Judgment Was Improperly Granted.**

The Department was not and is not entitled to summary judgement in this case. Summary judgment is only properly granted where there remains no issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991); *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). “[W]henver there is a genuine issue as to any material fact a trial is necessary.” *State Ex Rel Bond v. State*, 62 Wn.2d 487, 488, 383 P.2d 288 (1963) (internal citations omitted). Moreover, the trial court must consider the material facts and all reasonable inferences that can be drawn therefrom in the light most favorable to the nonmoving party. *State Ex Rel Bond*, 62 Wn.2d at 490. If reasonable minds might differ as to the resulting conclusion, summary judgment must be denied. *Id.* Here, a reasonable mind could easily conclude that Mr. Matson did not understand the butchered, vague and statutorily-nonsensical Department order at issue.

The Department's brief argues that Mr. Matson could have protested the May 7, 2012 order, so therefore its finality cannot be considered

“unfair.” (DRB at pp. 1 and 16). This argument fails to recognize that it is patently “unfair” for the Department to abuse or abandon statutorily-mandated algorithms for computing an injured worker’s wage earning capacity. Here, the material facts show that the Department’s May 7, 2012 order is inconsiderate of statutory requirements. The material facts show that Mr. Matson had prior-demonstrated supervisory skills and full-time earning capacity that may have compelled the Department’s use of a similar worker’s payroll had those pieces of information merely been considered. The material facts show that Mr. Matson likely didn’t understand the basis of the Department’s wage orders, because he literally stated as much in writing. The material facts show that the Department assigned a wage-earning capacity below that which could be expected for a minimum wage worker. Thus, the reasonable inference exists that the Department’s May 7, 2012 wage order was fundamentally unfair to Mr. Matson, so therefore shouldn’t be given res judicata or collateral estoppel effect. It is insufficient analysis to conclude that a worker “could have” protested.

The Department argues that Mr. Matson was not unable to understand the Department order or appeals process, especially where he timely protested the Department’s prior wage order from September, 2011 (DRB at pg. 24). This argument ignores the contents of Mr. Matson’s earlier protest, as well as its perceivably-retaliatory outcome. However,

when assessing the facts of this case in favor of Mr. Matson as our summary judgement standard requires, it is clear that Mr. Matson didn't understand the Department's September, 2011 wage order; the May 7, 2012 wage order was incredibly similar in both defects and articulation; so the required reasonable inference is that Mr. Matson also didn't understand the contents of the May 7, 2012 order. Another reasonable inference exists that he couldn't be expected to appeal the Department's May 7, 2012 wage order because appeal of the earlier order from September, 2011 had already proven utterly futile (and worse). A further reasonable inference arises that the reason Mr. Matson didn't personally appeal the May 7, 2012 order is that he was unfairly penalized for even daring to ask for the Department's basis when it issued its earlier, September 2011 wage order. Under the Supreme Court's analysis in *Weaver*, the likely futility of protesting something Mr. Matson demonstrably couldn't understand and the likely penalty he faced should he elect to file an additional protest created such palpable disincentives that it is now fundamentally unjust to enforce the Department's May 7, 2012 wage order against Mr. Matson. Note, all of these inferences would be absent and unavailable had the Department's May 7, 2012 wage order merely followed the statutory prescriptions.

Finally, the Department argues that Mr. Matson's wage earning capacity for full time employment even after he was injured has "no

bearing” on what his wage order should have indicated relative to his May 5, 2011 injury. (DRB at pp. 7 and 13). However, people normally don’t gain wage earning capacity as a result of catastrophic injuries causing a need for medical care lasting for years, so the reasonable inferences properly drawn in Mr. Matson’s favor are that his post-injury, still-recovering capacities do bear on what he likely enjoyed in wage earning capacity prior to his industrial injury. The most natural inference is that Mr. Matson enjoyed a higher wage earning capacity than was found by the Department given that he still demonstrated full-time work capacity even after suffering very serious injury falling from a ladder.

**D. Clarification of the Applicable, Objective Standard is Requested if a Jury Trial is Ordered.**

Here, either Mr. Matson’s wage order appeal should have been decided in his favor in Superior Court, or in the alternative, he should have been allowed to proceed to trial on the material questions that remain. This is because RCW 51.08.178(4) requires an evaluation of whether a Department’s wage order has been “*reasonably and fairly* determined,” and that evaluation must likely be put to a jury, even if just for an advisory verdict. This is because traditionally, the words “fair” and “reasonable” as used by our Legislature invoke questions of fact, not questions of law. *See, e.g., Money Mailer, LLC v. Brewer (Wade G.)*, Wash. Supreme Court Slip

Op. No. 96304-5, at pp. 7-8 (Sept. 19, 2019). In other words, the language of RCW 51.08.178, when all subsections are read together as a unified statute, as must be done here, indicate that every Department wage order may be challenged based upon common conceptions of what is fair and what is not, including whether it is fair in a given case for the Department to set a sub-minimum wage earning capacity for the manual labor work the Department knew Mr. Matson was performing.

The settled law of this state<sup>1</sup>, which should therefore be instructed to the jury, is that when there is a putative protest, such as here the written filings of Mr. Matson's treating physicians, the jury must consider "the content of the communication itself and information relevant to it that was in the possession of the department employees or agents involved in handling the claim at the time of the communication." *Boyd v. City of Olympia*, 1 Wn. App.2d 17, 30-31, 403 P.3d 956 (2017), *review denied*, 190 Wn.2d 1004 (2018). Moreover, the jury should be instructed that whether or not a protest exists is an "objective" test that does not rely upon the sender's intentions. *Id.* at pg. 30. Moreover, the jury should be instructed that "the use of any specific words or terminology is not required in a protest." *Id.* at pg. 31. This objective test must be explained to consider

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<sup>1</sup> Cited also in the Department's Response Brief at page 12.

what “reasonable minds with the necessary knowledge and expertise” acting as Department claims adjudicators would consider to be contrary to the Department’s May 7, 2012 wage order. *Church of the Divine Earth v. City of Tacoma*, Wash. Supreme Court Slip Op. No. 96613-3, at pg. 9 (Sept. 19, 2019). Accordingly, the jury must be instructed that a wage order is meant to determine wage earning capacity, not just actual wages previously paid to an injured worker; such that an appropriately-trained Department claims adjudicator would therefore be aware of this wage order requirement. Finally, the jury should likely be asked whether an injured worker should reasonably have understood from the writing on the face of the Department’s wage order that the Department was determining the worker’s wage earning capacity, not just his prior wages.

## V. CONCLUSION

The Court of Appeals, Division III, should now hold that Mr. Matson’s medical providers did file a timely protest to the Department’s May 7, 2012 wage order. This Court should also hold that said wage order was impermissibly vague as to the wage-earning capacity concept that it was required to adjudicate; and that the Department’s wage order findings were unjust to Mr. Matson in terms of both their form and substance. This Court should clarify that physician chart notes and other writings are always

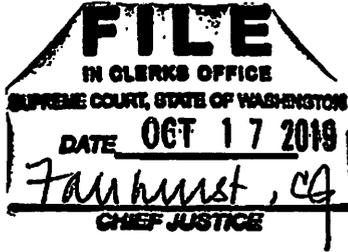
entitled to consideration as potential protests, regardless of the intent of the author. Moreover, this Court should clarify that the legally-operative contents of literally any writing initiated in any way by any party or other individual involved in an L&I claim, timely submitted to the Department's attention, must be considered by the Department if the contents of that writing should objectively be recognized by a trained Department claims adjudicator as being contrary to a recently-issued, Department determination. The ends of justice so require. Attorney fees and costs should then also be awarded.

In the alternative, this case should be remanded to Superior Court, with appropriate instructions, to obtain an advisory verdict as to the issues remaining in contention, especially given the reasonableness and fairness standards expressly invoked within the statutory text of RCW 51.08.178(4).

RESPECTFULLY SUBMITTED this 4th day of November, 2019.



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This opinion was filed for record at 9am on Oct. 17, 2019  
*[Signature]* Deputy  
for Susan L. Carlson  
Supreme Court Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL WEAVER,	)	
	)	
Respondent,	)	No. 96189-1
	)	
v.	)	En Banc
	)	
CITY OF EVERETT and STATE OF	)	Filed <u>OCT 17 2019</u>
WASHINGTON, DEPARTMENT OF	)	
LABOR & INDUSTRIES,	)	
	)	
Petitioners.	)	

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OWENS, J. — A firefighter contracted melanoma and filed a temporary disability claim, which the Department of Labor and Industries (Department) denied, finding that the melanoma was not work related. Later, the melanoma spread to the firefighter’s brain, and he filed a permanent disability claim, which the Department denied as precluded by denial of the temporary disability claim. We are asked to decide whether the equitable doctrines of collateral estoppel and res judicata properly preclude the firefighter’s permanent disability claim. We hold that collateral estoppel does not apply because the doctrine would work an injustice in this situation, given that the firefighter did not have sufficient incentive to fully and vigorously litigate the

temporary disability claim in light of the disparity of relief between the two claims. We likewise hold that res judicata does not apply because the two claims do not share identical subject matter, given that the permanent disability claim did not exist at the time of the temporary disability claim. Accordingly, we affirm the Court of Appeals.

### FACTS

Michael Weaver worked as a firefighter paramedic for the City of Everett (City) from 1996 until 2014, when malignant metastatic melanoma halted his ability to work.

#### I. Temporary Disability Claim

Weaver was originally diagnosed with melanoma in 2011, when an irregular mole on his upper back was found to be cancerous. Weaver underwent surgery, which he thought “cured” his melanoma. Administrative Record (AR) at 47.

Believing that his melanoma was work related, Weaver filed an application with the Department for temporary disability benefits for the five weeks of work that he missed during surgery and recovery. His claim consisted solely of lost wages worth approximately \$10,000. The Department initially granted Weaver’s claim, but the City protested the order and hired two doctors specializing in cancer treatment and dermatology to perform independent medical examinations of Weaver. The Department reversed its initial order, concluding that Weaver’s “condition is not an occupational disease.” AR at 278. Weaver retained counsel to appeal the Department’s denial to the Industrial Insurance Appeals Board (Board).

Weaver's counsel purportedly did not explain the appeal process to Weaver or prepare him for the hearing before an administrative law judge (ALJ) and arrived 90 minutes late to the hearing. Weaver's sole expert witness was a family physician who had not treated, examined, or met Weaver. The physician opined in deposition to an affirmative causal correlation between firefighters' occupational chemical exposure and melanoma. Both doctors whom the City had hired to examine Weaver opined that Weaver's cancer was likely due to sun exposure as a child rather than occupational exposure as a firefighter. Weaver's treating oncologist was not called to testify.

The ALJ concluded that the City had rebutted the statutory presumption of occupational disease and affirmed the Department's denial of Weaver's claim. The Board adopted the ALJ's order and denied Weaver's petition for review. Weaver's counsel withdrew from representation, and Weaver filed a pro se appeal in superior court. Months later, lacking professional assistance or knowledge of how to pursue the appeal, Weaver signed an agreed order of dismissal prepared by the City.

## II. Permanent Disability Claim

In January 2014, Weaver began having trouble recalling words. A brain scan revealed a tumor, which was confirmed to be metastatic melanoma. Weaver does not dispute that the brain tumor was a metastasis of the same melanoma at issue in his temporary disability claim. Weaver's treating oncologist estimated in 2015 that Weaver had a 20-30 percent chance of surviving two more years and opined that the metastatic

melanoma would likely cause his death.

Unable to continue working, Weaver filed a permanent disability benefits claim. The total amount of pension benefits that Weaver sought was estimated at greater than \$2 million: more than \$5,000 per month, which his wife would continue to receive for the rest of her life to support their three minor children. The Department rejected Weaver's claim, reasoning that the "claim was filed for the same cancer that was denied previously." AR at 270. Assisted by new counsel, Weaver appealed to the Board. The City moved for summary judgment, arguing that Weaver's claim was precluded by collateral estoppel and res judicata. At a hearing before an ALJ, Weaver's counsel introduced declarations from Weaver's treating oncologist and a physician specializing in occupational medicine among firefighters: both opined that Weaver's sun exposure as a firefighter was a cause of his melanoma. The ALJ affirmed denial of Weaver's claim and granted the City's motion for summary judgment, concluding that collateral estoppel applied as a matter of law. The Board adopted the ALJ's order and denied Weaver's petition for review.

Weaver appealed to the superior court, which affirmed the Board's order. Weaver then appealed to the Court of Appeals, which reversed, holding that neither collateral estoppel nor res judicata applied because preclusion would work an injustice and the subject matter of the two claims was not identical. *Weaver v. City of Everett*, 4 Wn. App. 2d 303, 421 P.3d 1013 (2018). The City and the Department each petitioned

this court for review, which was granted. *Weaver v. City of Everett*, 192 Wn.2d 1001 (2018).

### ISSUES

- I. Does collateral estoppel preclude the issue of whether Weaver's melanoma is an occupational disease for purposes of his permanent disability claim?
- II. Does res judicata preclude Weaver's permanent disability claim?

### ANALYSIS

The Industrial Insurance Act (Act), Title 51 RCW, governs workers' compensation cases, which we review in the same manner as other civil cases. RCW 51.52.140; RCW 34.05.030(2)(a). We review summary judgment orders de novo, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

The Act provides the sole avenue for filing workers' compensation claims in Washington. RCW 51.04.010. Under the Act, an "occupational disease" is a "disease or infection [that] arises naturally and proximately out of employment." RCW 51.08.140. Firefighters are statutorily entitled to a prima facie presumption that certain conditions, including melanoma, are occupational diseases. RCW 51.32.185(1)(a), (3). The presumption may be rebutted by a preponderance of the evidence. RCW 51.32.185(1)(c). We have observed that "the guiding principle in

construing provisions of the Industrial Insurance Act is that the Act is . . . to be liberally construed . . . 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).

Here, the Board concluded that as to Weaver’s initial temporary disability claim for melanoma, the City overcame the statutory presumption of occupational disease. The City and the Department argue that Weaver’s subsequent permanent disability claim is accordingly precluded based on collateral estoppel and res judicata.

Collateral estoppel and res judicata are equitable doctrines that preclude relitigation of already determined causes. *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 395-96, 429 P.2d 207 (1967). Both doctrines share a common goal of judicial finality and are intended to curtail multiplicity of actions, prevent harassment in the courts, and promote judicial economy. *State v. Dupard*, 93 Wn.2d 268, 272, 609 P.2d 961 (1980). The two doctrines are distinguishable in scope. Collateral estoppel, or issue preclusion, bars relitigation of particular *issues* decided in a prior proceeding. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). Res judicata, or claim preclusion, bars litigation of *claims* that were brought or might have been brought in a prior proceeding. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Whether collateral estoppel or res judicata apply are questions of law that we review de novo. *Christensen*, 152 Wn.2d at 305; *Lynn v. Dep’t of Labor and Indus.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005).

I. Collateral Estoppel

We first consider if collateral estoppel properly precludes adjudication of the issue of whether Weaver's melanoma is an occupational disease for purposes of his permanent disability claim. We conclude that the substantial disparity of relief between Weaver's temporary and permanent disability claims kept Weaver from fully and vigorously litigating the issue at the temporary disability claim stage. Therefore, because applying the doctrine in this instance would work an injustice and contravene public policy, we hold that collateral estoppel does not apply.

"Collateral estoppel" "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Dupard*, 93 Wn.2d at 273 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). For collateral estoppel to apply, the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate its case in a prior proceeding. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993).

A party asserting collateral estoppel must establish four elements:

(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (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 does not work an injustice on the party against whom it is applied.

*Christensen*, 152 Wn.2d at 307. Weaver concedes that the first three elements are

met. Therefore, our analysis turns on the injustice element.

A. *Injustice*

To determine whether collateral estoppel will work an injustice, we ask whether the party against whom the doctrine is asserted had “sufficient motivation for a full and vigorous litigation of the issue” in a prior proceeding. *Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001). While the injustice element is “generally concerned with procedural, not substantive irregularity,” we have recognized that “disparity of relief [between two proceedings] may be so great that a party would be unlikely to have vigorously litigated the crucial issues in the first forum and so it would be unfair to preclude relitigation of the issues in a second forum.” *Christensen*, 152 Wn.2d at 309. Where a significant disparity of relief exists, the injustice element militates against application of collateral estoppel. *Hadley*, 144 Wn.2d at 315. “Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice.” *Id.*

In *Hadley*, we held that collateral estoppel would work an injustice when a defendant in a personal injury action was previously found to have committed a minor traffic infraction associated with the incident, concluding that the defendant’s “incentive to litigate [the traffic infraction] was low.” *Id.* at 312. In *Sprague v. Spokane Valley Fire Dep’t*, 189 Wn.2d 858, 903, 409 P.3d 160 (2018), we held that collateral estoppel would work an injustice “because of the disparity of relief”

between the plaintiff's prior employment appeal before a county administrative commission court, which he lost, and his subsequent court action: the commission had the power to order only reinstatement, whereas in the court action, the plaintiff sought injunctive relief, declaratory judgment, special damages, and punitive damages. We also observed that collateral estoppel is inappropriate where "the disparity between the reliefs available creates the risk that 'litigants [may] forgo their administrative remedies for fear of preclusion in other, more substantial claims.'" *Id.* (alteration in original) (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 513, 745 P.2d 858 (1987)).

By contrast, in *Reninger v. Department of Corrections*, 134 Wn.2d 437, 951 P.2d 782 (1998), we held that collateral estoppel would not work an injustice when the plaintiffs attempted to bring an employment action in court after losing their appeal regarding the same matter before an administrative tribunal. We concluded that "[t]here was no disparity of relief" between the two actions because the administrative tribunal had the power to order the same recovery as the superior court. *Id.* at 453 (noting that "a party may not have had an adequate opportunity to litigate when 'the amount in controversy in the first action may have been so small in relation to the amount in controversy in the second that preclusion would be plainly unfair'" (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28(5) comment j (AM. LAW INST. 1982))).

Here, the disparity of relief between Weaver's temporary disability claim and his permanent disability claim was vast: less than \$10,000 in lost wages was at stake in the former versus upwards of \$2 million in continuing pension disability in the latter. While the Board had the power to order disability benefits in both actions, the actual amounts in controversy differed by an order of magnitude. Furthermore, Weaver argues that the expense of retaining expert witnesses necessary to fully and vigorously litigate his temporary disability claim and combat the City's experts would have exceeded the amount recoverable in that action.<sup>1</sup> Though a firefighter is entitled to reimbursement of costs if he or she prevails on appeal of a disability benefits claim, RCW 51.32.185(9), the potential loss may be too substantial to warrant such risk where costs are prohibitive. Weaver's incentive to litigate the issue of whether his melanoma was an occupational disease was comparatively low in his temporary disability claim, commensurate with the relief at stake in that action.

The City and the Department characterize Weaver's temporary disability claim as a "claim allowance" proceeding, which "a worker has every incentive to fully litigate" because it operates as "the gateway to all benefits." Suppl. Br. of Dep't and City at 22. At that phase, they argue, the "threshold question of whether he had an occupational disease" was decided for purposes of that claim, as well as any potential

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<sup>1</sup> Weaver alleges that in the appeal of his permanent disability claim, the oncology expert alone was paid \$19,000, though that figure is not reflected in the record.

future claims flowing from the same ailment. *Id.* While that may be true in theory, the Act nowhere uses the term “claim allowance” and provides scant notice to workers that a temporary disability claim carries such stakes. *See e.g.*, RCW 51.32.185(9) (stating that firefighters may recover costs incurred on appeal if “the final decision allows the claim *for benefits*” (emphasis added)). In support of their proposition, the City and the Department cite RCW 51.32.160, which provides for compensation readjustment in the event of aggravation of a disability. However, Weaver testified that he believed his melanoma was “cured” after undergoing surgery to remove the cancerous tissue from his back, which further indicates that he did not have sufficient incentive to litigate the issue of whether his melanoma was an occupational disease, especially for purposes of a then-unanticipated permanent disability claim. AR at 47.

Viewing all facts and inferences in favor of Weaver as the nonmoving party, we conclude that application of collateral estoppel would work an injustice in this case because Weaver did not have sufficient motivation to fully and vigorously litigate the issue of whether his melanoma was an occupational disease at the temporary disability claim stage. As in *Sprague*, the disparity of relief between Weaver’s two claims was dramatic, which is reason enough to conclude that preclusion would be unjust. That conclusion is reinforced by the facts that Weaver believed his melanoma was fully resolved at the time of his temporary disability

claim, the counsel he retained to assist him in appealing the order did not adequately prepare him, and the cost of fully and vigorously litigating his claim outweighed the potential risk of loss. While Weaver's temporary disability claim was worth more than the traffic infraction fine in *Hadley*, this is nonetheless a case where "the amount in controversy in the first action [was] so small in relation to the amount in controversy in the second that preclusion would be plainly unfair." *Reninger*, 134 Wn.2d at 453 (quoting RESTATEMENT § 28(5) comment j (1982)). Moreover, applying collateral estoppel in this instance would create a perverse incentive, counter to the express intent of the Act, for Weaver and workers in his position to forgo temporary disability claims "for fear of preclusion in other, more substantial claims." *Sprague*, 189 Wn.2d at 903 (quoting *Shoemaker*, 109 Wn.2d at 513).

B. *Policy Considerations*

The standard governing application of collateral estoppel to prior administrative determinations also weighs against precluding Weaver's permanent disability claim because applying collateral estoppel would contravene express public policies memorialized in the Act. We consider three factors in determining whether collateral estoppel ought to apply to decisions of administrative agencies:

"(1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations." *Dupard*, 93 Wn.2d at 275. Here, the first two factors are met because an ALJ made a factual

decision, which the Board adopted, and the Board appeal was procedurally similar to a court hearing, including the use of motions, introduction of witness testimony, and adherence to evidentiary standards. However, the third factor pertaining to policy considerations is not met.

“Policy arguments have been often the deciding factor when collateral estoppel is based upon prior administrative determination. The doctrine may be qualified or rejected when its application would contravene public policy.” *Id.* at 275-76 (internal citation omitted). In *Dupard*, we concluded that public policy considerations dictated rejection of collaterally estopping an issue previously determined by a parole board because the issue was more appropriately addressed to the criminal justice system. *Id.* at 276. Likewise in *Sprague*, we concluded that public policy considerations cut against collaterally estopping an issue previously determined by a county administrative commission because the issue implicated important constitutional questions. 189 Wn.2d at 904.

Here, the statutory presumption of occupational disease in firefighters memorializes an unequivocal public policy of erring on the side of finding that among the class of workers into which Weaver falls, melanoma is presumed to arise naturally and proximately out of employment. RCW 51.32.185(1)(a), (3). More broadly, the Act was intended to provide “sure and certain relief for workers, injured in their work, and their families and dependents . . . regardless of questions of fault.” RCW

51.04.010. Finally, the Act is to be liberally construed “with doubts resolved in favor of the worker.” *Dennis*, 109 Wn.2d at 470.

Altogether, policy considerations militate against the application of collateral estoppel to Weaver’s permanent disability claim. Though the Board found at the temporary disability claim stage that the City rebutted by a preponderance of the evidence the presumption that Weaver’s melanoma was an occupational disease, that conclusion should not automatically dictate the outcome of Weaver’s permanent disability claim. As in *Dupard* and *Sprague*, public policy indicates that the issue of whether Weaver’s melanoma is an occupational disease merits fresh adjudication notwithstanding a prior administrative determination. Moreover, as noted, applying collateral estoppel in this instance would contravene the Act’s policy of providing sure and certain relief to workers by disincentivizing them from filing initial, minor occupational disease claims due to concerns that denial of those claims would preclude potential, long-term, major claims involving the same disease. *See Sprague*, 189 Wn.2d at 903.

Notably, considerable overlap exists between the injustice element of the traditional collateral estoppel analysis and the policy factor of the collateral estoppel analysis unique to prior administrative determinations. “[T]he injustice factor ‘recognizes the significant role of public policy.’” *Christensen*, 152 Wn.2d at 309 (quoting *State v. Vasquez*, 148 Wn.2d 303, 309, 59 P.3d 648 (2002)). Therefore, here,

as in *Sprague*, “whether one considers this truly a matter of ‘injustice’ or a matter of ‘public policy,’ it supports a finding that collateral estoppel should not apply.” 189 Wn.2d at 903 n.29.

In sum, we conclude that application of collateral estoppel in this instance would work an injustice and contravene public policy. We therefore hold that the doctrine does not preclude the issue of whether Weaver’s melanoma is an occupational disease for purposes of his permanent disability claim.

## II. Res Judicata

Next we turn to the issue of whether res judicata applies to preclude Weaver’s permanent disability claim in light of the Board’s denial of his prior temporary disability claim. We conclude that because Weaver’s permanent disability claim was not available at the time of his temporary disability claim, the subject matter of the two claims is not the same. Lacking identity of subject matter, we hold that res judicata does not apply to preclude Weaver’s permanent disability claim.

Res judicata precludes relitigation of an entire claim when a prior proceeding involving the same parties and issues culminated in a judgment on the merits.

*Bordeaux*, 71 Wn.2d at 396; *Hisle*, 151 Wn.2d at 865. A party seeking to apply res judicata must establish four elements as between a prior action and a subsequent challenged action: “concurrency of identity . . . (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against

whom the claim is made.” *N. Pac. Ry. Co. v. Snohomish County*, 101 Wash. 686, 688, 172 P. 878 (1918). Here, the third and fourth elements are met because the parties are identical and identically situated in both claims. Weaver does not contest the second element, so we accept for purposes of analysis that both claims involve the single cause of action enabled under the Act: compensation for work-related illness or injury. The parties’ dispute pertaining to res judicata is thus limited to whether the claims share identity of subject matter.

There is limited case law defining when the subject matter of related cases differs. *Hayes v. City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997). However, we have repeatedly held that “the same subject matter is not necessarily implicated in cases involving the same facts.” *Hisle*, 151 Wn.2d at 866 (citing *Hayes*, 131 Wn.2d at 712; *Mellor v. Chamberlin*, 100 Wn.2d 643, 646, 673 P.2d 610 (1983)). Specifically, 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.” *Harsin v. Oman*, 68 Wash. 281, 284, 123 P. 1 (1912).

In *Mellor*, we held that a claim for breach of a covenant of warranty was not precluded by a prior claim for misrepresentation as between the same plaintiff-purchaser and defendant-seller over the sale of the same parcel of real property. 100 Wn.2d at 647. “Although both lawsuits arose out of the same transaction . . . , their subject matter differed” because at the time of the misrepresentation suit, the plaintiff-

purchaser had not yet been injured due to the alleged breach of covenant. *Id.* at 646. The breach of covenant claim was “not ripe” at that time, therefore res judicata did not preclude the plaintiff-purchaser from raising it in a separate, later action. *Id.* at 647.

Here, the parties essentially dispute the substantive character of Weaver’s claims. Weaver argues that because he could not have brought his permanent disability claim at the time of his temporary disability claim, the two claims cannot share the same subject matter. He points out that he “could not have obtained an award of permanent disability benefits in the first claim because the applicable statutes and case law would not have allowed him to recover for prospective disability.” Suppl. Br. of Resp’t at 12. On the other hand, the City and the Department argue that Weaver’s temporary and permanent disability claims both turned on the common subject of whether his melanoma was an occupational disease. They emphasize that the Board “ruled only on whether to allow his occupational disease claim. It did not reach what benefits to authorize.” Suppl. Br. of Dep’t and City at 14. However, unlike collateral estoppel, which precludes relitigation of specific issues, res judicata precludes entire claims when those claims either were brought or could have been brought in a prior action. Having already concluded that the issue of whether Weaver’s melanoma was an occupational disease is not collaterally estopped for purposes of his permanent disability claim, the res judicata analysis asks us to decide whether his permanent disability claim shares the same

“subject matter” as his temporary disability claim and is thus precluded as a whole.

Viewing all facts and inferences in favor of Weaver as the nonmoving party, we conclude that the subject matters of Weaver’s two claims are distinct because his permanent disability claim did not exist and could not have been brought at the time of his temporary disability claim. Weaver’s situation is like that of the plaintiff-purchaser in *Mellor*, who filed suit believing at the time that misrepresentation was the extent of injury but later discovered a breach of warranty and was able to separately maintain that claim because it was not previously ripe. Here, Weaver filed his temporary disability claim, believing at the time that he was “cured” and that \$10,000 in lost wages would be the extent of his melanoma-related claims, but he later discovered that the cancer had metastasized to his brain. AR at 47. He should be able to separately maintain the permanent disability claim because it was not previously ripe. At the time of his temporary disability claim, Weaver’s permanent disability claim “did not exist,” therefore the permanent disability claim “could not have been the subject-matter” of his temporary disability claim. *Harsin*, 68 Wash. at 284. Because the two claims do not share identity of subject matter, at least one element of res judicata is not met. Accordingly, we hold that res judicata does not apply in this instance.

We are also mindful that res judicata remains an equitable, common law doctrine. Like its sister doctrine, collateral estoppel, “res judicata . . . is not to be

applied so rigidly as to defeat the ends of justice, or to work an injustice.” *Henderson v. Bardahl Int’l Corp.*, 72 Wn.2d 109, 119, 431 P.2d 961 (1967). Here, application of res judicata would work an injustice because it would contravene clear public policy memorialized in the Act favoring relief from work-related illnesses and injuries for workers generally and firefighters in particular. Our holding thus accords with the Act, the operative case law, and the spirit of the doctrine of res judicata.

Finally, in *Spivey v. City of Bellevue*, 187 Wn.2d 716, 741, 389 P.3d 504 (2017), we observed that the Act’s cost recoupment provision pertaining to firefighters is broader than the Act’s provision governing attorney fees generally. In that case, we held that a firefighter was entitled to costs and fees incurred in litigating before the Board when the firefighter ultimately prevailed on appeal, even though he had not prevailed before the Board. *Id.* at 739-40. Here, as in *Spivey*, we hold that if Weaver prevails on remand, he would be entitled to attorney fees associated with all phases of his appeal.

## CONCLUSION

Viewing the facts in the light most favorable to Weaver, we hold that as a matter of law, collateral estoppel does not apply to preclude the issue of whether Weaver’s melanoma was an occupational disease for purposes of his permanent disability claim because application of the doctrine in this instance would work an injustice and contravene public policy. We further hold that as a matter of law, res

*Weaver v. City of Everett, et al.*  
No. 96189-1

judicata does not apply to preclude his permanent disability claim because the two claims do not share the same subject matter. While collateral estoppel and res judicata dictate that at common law, claimants are “entitled to one bite of the apple,” *Reninger*, 134 Wn.2d at 454, applying either doctrine here would be an apples-to-oranges application of common law doctrines to statutory claims, which would result in a “distasteful fruit salad of injustice.” *Weaver*, 4 Wn. App. 2d at 309. Accordingly, we affirm the Court of Appeals.



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BEFORE THE DEPARTMENT OF LABOR & INDUSTRIES APPEALS  
STATE OF WASHINGTON

Jeremy Matson	)	COA NO. 36567-1-III
	)	
Plaintiff,	)	SUPERIOR CT NO: 18-2-02164-7
	)	
vs.	)	CERTIFICATE OF SERVICE
	)	
Clean Green Spokane & Department of Labor and Industries Spokane County	)	
	)	
Defendants.	)	

I, Anna Apakova, hereby certify under penalty of perjury pursuant to Washington State Law that I served a copy of the foregoing document upon the party herein:

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