

NO. 38527-9-II

COURT OF APPEALS  
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STATE OF WASHINGTON  
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REPLY

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**COURT OF APPEALS, DIVISION  
OF THE STATE OF WASHINGTON**

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SHARON DAVIS and BATYAH CHLIEK and JAMES BOOTH,  
individually and on behalf of all others similarly situated,

Respondent,

v.

THE WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES, an agency of the State of Washington; and JUDY  
SCHURKE, in her capacity as the Director of the Washington State  
Department of Labor & Industries,

Appellant.

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**REPLY BRIEF**

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## I. SUMMARY OF REPLY

The workers' arguments for continuing this duplicative litigation lack merit and should be rejected for five reasons.

First, *res judicata* precludes Davis and Chliek from re-litigating claims they lost at the Board. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994); *Lejeune v. Clallam County*, 64 Wn. App. 257, 265-66, 823 P.2d 1144 (1992) (for the purposes of *res judicata*, a quasi-judicial decision becomes final at the beginning, not the end, of the appellate process).

Second, the Snohomish County Superior Court has exclusive jurisdiction over Chliek's appeal from the Board order in her administrative appeal. As the Department (L&I) explained in its opening brief, the Thurston County Superior Court does not now have, nor has it ever had, subject matter jurisdiction over the issues Davis and Chliek attempted to raise in those suits. *See* discussion at Appellant's Brief (AB) 12. Division One now has exclusive subject matter jurisdiction over Davis' appeal from the Board order in her administrative appeal. Accordingly, this lawsuit should be dismissed. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 315, 76 P.3d 1183 (2003); *Young v. Clark*, 149 Wn.2d 130, 132-33, 65 P.3d 1192 (2003); *Mendoza v. Neudorfer Engineers, Inc.*, 145 Wn. App. 146, 149, 185 P.3d 1204 (2008);

*Wells v. Olsten Corp.*, 104 Wn. App. 135, 144, 15 P.3d 652 (2001).

Third, as a matter of law, Davis and Chliek cannot evade the Act's unambiguous provisions by relabeling their dispute as an "unjust enrichment" claim. RCW 51.04.010; RCW 51.32.010.

Fourth, contrary to Davis' and Chliek's unsupported contention, this matter has never been certified as a class action, nor, as the Board orders make clear, are the claims of Davis and Chliek representative of the "class" of injured workers they purport to represent. CR 23(a); *Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 695-96, 112 P.3d 552 (2005); Brief of Respondents (BR), Appendices 1-5.

Fifth, by definition, none of the putative "class" members Davis and Chliek reference in their lawsuit ever exhausted their administrative remedies, and, thus, none can seek superior court review of their third party distribution orders. RCW 51.04.010; RCW 51.32.010; RCW 51.52.060(1); *Wells*, 104 Wn. App. at 144. Furthermore, the purported class that Davis and Chliek attempt to hide behind to avoid dismissal of their lawsuit is confined to workers whose orders are not subject to legal challenge in *any* forum. BR at 14-15. Distribution orders under chapter 51.24 RCW become final if they are not appealed to the Board within sixty days. RCW 51.52.050(1) (L&I orders are final if not appealed to the Board within 60 days).

Once final, those orders cannot be collaterally attacked in any subsequent litigation. *Marley*, 125 Wn.2d at 538 (the “failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any re-argument of the same claim.”); *see also State v. Evans*, 154 Wn.2d 438, 457, 114 P.3d 627, 546 U.S. 983, 126 S. Ct. 560, 163 L. Ed. 2d 472 (2005) (new rule of constitutional law does not apply retroactively to overcome res judicata in cases that had already become final); *Lynn v. Dep’t of Labor & Indus.*, 130 Wn. App. 829, 836, 125 P.3d 202 (2005) (a subsequent judicial decision giving a new interpretation to existing law does not alter or affect the res judicata effect of an a final L&I order). Davis and Chliek cannot rely on final orders issued in other workers’ claims as a basis to pursue their own appeals from L&I orders in the wrong forum. *Id.*

The Court should reject Davis’ and Chliek’s request to judicially rewrite the Act and overturn legions of appellate court decisions, all to allow these workers to re-litigate issues they lost at the Board.

## **II. STATEMENT OF THE CASE UPDATED TO INCLUDE RESPONDENTS’ TO-DATE UNSUCCESSFUL ALTERNATIVE ADMINISTRATIVE APPEALS**

As permitted by Washington’s Industrial Insurance Act, Title 51 RCW (Act), Sharon Davis and Batyah Chliek sued the third party

defendants<sup>1</sup> responsible for their industrial injuries. Under their respective settlement agreements, Davis and Chliek each received undifferentiated, lump sum payments. App. E: 58, 64.<sup>2</sup> As required by the Act, the Department of Labor and Industries (L&I) issued orders distributing those third party recoveries pursuant to the mandatory formula set out in RCW 51.24.060(1). App. E: 59-60, 65-66; *see also* RCW 51.24.060(6) (distribution of a third party settlement “shall be confirmed by department order”). A worker or employer aggrieved by such an order may only challenge it by filing an appeal from it with the Board of Industrial Insurance Appeals (Board). RCW 51.24.060(6) (third party distribution orders “shall be subject to chapter 51.52 RCW”); RCW 51.52.060(1) (any person aggrieved by an order issued by L&I “must” appeal to the Board “before he or she appeals to the courts”).

Davis and Chliek disagreed with the distribution orders issued by L&I on their respective claims. However, Davis and Chliek bypassed the

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<sup>1</sup> Under the Act, a “third party” is a person not in the worker’s same employ who caused the subject industrial injury. RCW 51.24.030(1).

<sup>2</sup> “App.” refers to the appendices submitted with L&I’s Motion for Discretionary Review, which, the parties agreed, is the record that should be used for this appeal. Each individual pleading and transcript contained in these appendices is assigned a letter, beginning with “A” and ending with “Y.” In addition, these appendices are consecutively numbered in the lower right hand corner of each page. Every reference to the record will identify the specific letter of the appendix cited and, where appropriate, the page number. The Brief of Respondents supplemented the agreed record with five additional appendices. Those additional appendices will be referred to as “BR, Appendices \_\_\_”.

Board and filed a suit challenging those orders with the Thurston County Superior Court. BR at 13 (“It’s true that Ms. Davis and Ms. Chliek filed the lawsuit before appealing their third party distribution orders.”). L&I moved for summary judgment, arguing the case should be dismissed because the Board was the proper forum for challenging their industrial insurance orders is the Board. App. D.

While the matter was pending in Thurston County Superior Court, Davis and Chliek, apparently recognizing that they had pursued their legal challenge in the wrong forum, appealed the same third party distribution orders to the Board. App. G: 109, 115. The substantive argument they made at the Board was the same misplaced argument that they make here: that the orders distributing their third party recoveries are incorrect under *Tobin v. Dep’t. of Labor & Indus.*, 145 Wn. App. 607, 187 P.3d 780 (2008), *affirmed*, 169 Wn.2d 396, 236 P.3d 197 (2010). *Cf.* BR at 4 and BR, Appendices 1, 3 (addressing the distinguishable *Tobin* Court of Appeals decision that the Supreme Court affirmed).

The Board granted L&I’s motions for summary judgment, holding that L&I correctly applied the statutory distribution formula to their third party settlements. BR, Appendices 2, 3, 4. The Board correctly ruled that *Tobin* did not apply because, *unlike* the worker in *Tobin*, Davis and Chliek failed to allocate any portions of their settlements to pain and suffering

damages. BR, Appendices 1-4; *see also Gersema*, 127 Wn. App. 687, 695-96 and *Mills v. Dep't of Labor & Indus.*, 72 Wn. App. 575, 865 P.2d 41 (1994).

Chliek appealed her Board order to Snohomish County Superior Court where Chliek has not yet prosecuted the appeal. BR, Appendix 5. Davis appealed her Board order to King County Superior Court. BR at 5, Appendix 5. King County affirmed Davis' Board order, concluding that *Gersema* controls her appeal. Davis appealed King County's decision to Division One, which stayed proceedings pending the Supreme Court's resolution of *Tobin*. Despite litigating and losing their appeals from the distribution orders in the correct forum—the Board—and appealing those decisions to other superior courts and Division One, Davis and Chliek refused to dismiss their Thurston County lawsuit.

### III. ARGUMENT

#### A. **There Are No Material Issues Of Fact And L&I Is Entitled To Judgment As A Matter Of Law**

The only material facts relevant to the jurisdictional issue before this Court are: (1) Davis and Chliek filed this Thurston County lawsuit before beginning, much less exhausting, their administrative remedies under the Act; (2) in their administrative appeals, the Board rejected Davis' and Chliek's substantive legal challenges and affirmed L&I's third

party distribution orders; (3) Chliek appealed her Board order to Snohomish County Superior Court and Davis appealed her Board order to King County Superior Court; (4) the King County Superior Court affirmed the order of the Board; and (5) Davis appealed the King County judgment to the Court of Appeals, Division I, where it is pending today. Davis and Chliek admit these facts. BR at 13 and Appendices 1-5.

Misleadingly, Davis and Chliek make vague reference to unresolved material issues of fact justifying a denial of summary judgment. BR at 4. Tellingly, however, they fail to identify *any* disputed material fact concerning their specific claims. That is because no material factual dispute exists. Because there are no material issues of fact and L&I is entitled to judgment as a matter of law, this Court should conclude that Davis' and Chliek's Thurston County lawsuit must be dismissed. CR 56; *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

**B. The Doctrine Of Res Judicata Prohibits Davis And Chliek From Litigating Claims In This Action That They Lost At The Board**

The only substantive issue in this lawsuit involves Davis' and Chliek's challenge to the L&I orders distributing their third party

settlements under the Act.<sup>3</sup> BR at 4. Davis and Chliek attempted to prove that Thurston County has jurisdiction to decide the issue by attaching copies of the Board orders issued in their administrative appeals, and of Chliek's appeal to the Snohomish County Superior Court. BR, Appendices 1-5.<sup>4</sup> Rather than help their cause, however, this new evidence establishes that Davis and Chliek raised and lost the very claims they seek to litigate again in their Thurston County lawsuit. BR, Appendices 1-5. They cannot. Res judicata precludes Davis and Chliek from re-litigating the claims they lost in their Board appeals. *Marley*, 125 Wn.2d at 538; *Columbia Rentals, Inc. v. State*, 89 Wn.2d 819, 576 P.2d 62 (1978); *Lynn*, 130 Wn. App. at 836.

The purpose of res judicata is to ensure the finality of judgments. *Columbia Rentals*, 89 Wn.2d at 821.

The doctrines of claim and issue preclusion have similar purposes. Both seek to put an end to litigation. This, in turn, limits the vexation and harassment of other parties; lessens the overcrowding of court calendars, thereby freeing courts for use by others; and by providing for

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<sup>3</sup> The trial court dismissed James Booth from this lawsuit, Davis' and Chliek's claim under 42 U.S.C. § 1983, and their claims for certiorari and mandamus. Appendix Y:364. Mr. Booth did not appeal his dismissal. Further, Davis and Chliek do not assign error to any of the claims dismissed by the trial court, and they are not at issue in this appeal.

<sup>4</sup> See footnote 2 above explaining the agreed record in this appeal. The new evidence submitted by Chliek and Davis further establishes that the Thurston County Superior Court lacks subject matter jurisdiction over their industrial insurance issue. In addition, these additional documents illustrate the competing tracks of litigation involving the exact same issues that inevitably arise when a worker decides that the Act's exclusive remedy provisions do not apply to his or her industrial insurance dispute.

finality in adjudications, encourages respect for judicial decisions.

Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 806 (1985); *see also Nielson By and Through Nielson v. Spanaway General*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998).

The doctrine bars re-litigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000). The doctrine applies with equal force to decisions issued by quasi-judicial tribunals like the Board. *Spokane & I.E.R. Co. v. Spokane County*, 75 Wash. 72, 81-82, 134 P. 699 (1913) (res judicata applies to decision of administrative agency despite appeal of that administrative decision to superior court); *Lejeune*, 64 Wn. App. at 265-66 (same); *see also Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 780-81, 854 P.2d 611 (1993) (the Board is a quasi-judicial agency). Res judicata protects everyone from duplicative litigation including workers, beneficiaries, employers, medical providers and other participants, including L&I.<sup>5</sup>

Res judicata applies where a prior judgment has a concurrence of

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<sup>5</sup> The issues of subject matter jurisdiction and exhaustion of remedies in this case similarly favor and disfavor all classes of litigants alike. For this reason, the liberal construction principle invoked by the workers (BR at 12-13) does not aid their arguments in this case.

identity with a subsequent action in (1) persons and parties, (2) the quality of the person for or against whom the claim is made, (3) the subject matter, and (4) the cause of action. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983). These elements are readily established here.

Davis, Chliek and L&I were parties to the Board appeals and the present lawsuit, satisfying the first two elements of res judicata. Similarly, there is obviously an identity of subject matter and cause of action between the Board appeals and this Thurston County lawsuit.<sup>6</sup>

In this Thurston County original-action lawsuit, Davis and Chliek contend the third party distribution orders issued by L&I are inconsistent with this Court's decision in *Tobin*. BR at 4. This is the same argument that Davis and Chliek raised and lost in their administrative appeals. BR, Appendices 1, 3. The Board found that *Tobin* did not apply because neither Davis nor Chliek allocated any portion of their settlement to general damages. Thus, the Board affirmed L&I's distribution orders. BR, Appendix 1, p. 6, and Appendix 3, p. 5; *see also Gersema*, 127

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<sup>6</sup> To determine whether the causes of action are the same, courts examine the following criteria: (i) whether the second action would impair rights or interests established in the prior judgment; (ii) whether the two actions deal substantially with the same evidence; (iii) whether the two suits involve an alleged infringement of the same right; and (iv) whether the two suits arise out of the same transactional nucleus of facts. *Knuth v. Beneficial Washington, Inc.*, 107 Wn. App. 727, 732, 31 P.3d 694 (2001). As set forth herein, the administrative appeals concerns the exact same cause of action as this Thurston County lawsuit: the distribution of Davis' and Chliek's third party recoveries.

Wn. App. at 695-96 (entire amount of undifferentiated settlement is subject to distribution); *Mills*, 72 Wn. App. at 577.<sup>7</sup> The Board thus explained:

In *Mills*, the injured worker and his spouse settled a third party action, but did not allocate any portion of the settlement proceeds to the wife's claimed loss of consortium damages. On appeal, Mills argued that Labor and Industries should designate some portion of their third party recovery as compensation for loss of consortium, which would insulate that portion of the recovery from distribution. The Court rejected that argument, concluding for a number of reasons that the parties' failure to allocate subjected the entire award to distribution . . . .

Division II adopted *Mills* in *Gersema*, and extended it to pain and suffering.

. . . .

Like Mr. Mills and Mr. Gersema, Ms. Davis allocated no portion of her settlement to pain and suffering or loss of consortium. Thus, *Tobin*, with its differentiated award, does not apply, and the entire amount of Ms. Davis's settlement is subject to the third-party distribution formula.

BR, Appendix 1, p.4; *see also* Appendix 3, p. 4 (reaching the same result in Chliek's appeal).

Davis and Chliek made the same arguments in both the Board and Thurston County actions, and, in fact, Davis and Chliek attached and

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<sup>7</sup> The Supreme Court did not address unallocated third party settlements in *Tobin v. Dep't of Labor and Indus.*, 169 Wn.2d 396, 236 P.3d 197 (2010) because that issue was not before it. Nothing in *Tobin* alters *Mills* or *Gersema* or those cases application to Davis and Chliek's administrative appeals.

relied on the declarations and pleadings submitted in their Thurston County Superior Court action to defend against L&I's motions for summary judgment at the Board. BR, Appendix 1, p. 2, and Appendix 3, p. 2.

That their Board orders have been appealed to superior court and Division One does not diminish the preclusive effect those orders have in *this* Thurston County lawsuit. The Board orders in Davis' and Chliek's administrative appeals are "final for res judicata purposes at the beginning, not the end, of the appellate process[.]"

The policy underlying these rules is that res judicata should afford every party one but not more than one fair adjudication of his or her claim. A party who lost at trial should not be precluded from appealing, because if prejudicial error is found on appeal, the resultant rehearing will constitute the *first* fair adjudication of that party's claim. But absent agreement of all parties, a party who lost at trial should be precluded (1) from starting a new action at the trial level while an appeal is pending, in the hope that a contrary result can be obtained in the new action before the appeal is finished . . . [to allow otherwise] would be to sanction a second adjudication even though a first, presumptively correct one has already been made.

*Lejeune*, 64 Wn. App. at 266; *see also* RCW 51.52.115 (Board orders are presumed to be correct).<sup>8</sup>

One purpose of res judicata is to discourage the lack of respect for

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<sup>8</sup> Davis and Chliek admit, as they must, that the Board issued final determinations in both of their administrative appeals. BR at 5-6, Appendices 2, 4, and 5.

prior judicial decisions that Davis and Chliek exhibit here. BR at 13 (concluding, without legal analysis or citation to the record, that Board proceedings are “an exercise in futility and inefficiency”). Moreover, Davis and Chliek continue to force L&I to defend its industrial insurance distribution orders in two separate legal forums, needlessly increasing L&I’s litigation costs and wasting judicial resources that are already strained by budget cuts and rising caseloads. This is precisely the type of wasteful, duplicative litigation that res judicata was designed to prevent. *Nielson*, 135 Wn.2d at 262; Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 806 (1985). Davis and Chliek cannot litigate in this Thurston County action the industrial insurance claims they already lost at the Board, and this lawsuit should, therefore, be dismissed. *Marley*, 125 Wn.2d at 538; *Lynn*, 130 Wn. App. at 836.

**C. Davis And Chliek Cannot Evade The Act’s Exclusive Remedy Provisions By Relabeling Their Industrial Insurance Dispute As A Claim For “Unjust Enrichment”**

Davis and Chliek attempt to avoid dismissal of their lawsuit by renaming their industrial insurance dispute as a claim for “unjust enrichment.” BR at 9, 14, 20. Their unsupported contentions and arguments lack merit and should be rejected.

Without citation to any authority, Davis and Chliek argue that

workers can bring a superior court lawsuit for “unjust enrichment” whenever L&I issues an industrial insurance order that provides them with less money or benefits than they feel is due under the Act. BR at 9, 14, 20. This argument ignores the plain language of the Act and the broad, sweeping nature of its exclusive remedy provisions.

The Act specifically abolishes the jurisdiction of the courts of this state over “all civil actions and civil causes of action” related in any way to industrial injuries “except as in this title provided.” RCW 51.04.010.

The preemption of civil actions by the act is sweeping and comprehensive, and the act has been characterized as being of the broadest and most encompassing nature. The goal of the act is to provide sure and certain relief to injured workers and their families, not to award full tort damages.

*Tallerday v. Delong*, 68 Wn. App. 351, 356, 842 P.2d 1023 (1993); *see also* RCW 51.32.010 (the benefits and compensation provided under the Act “shall be in lieu of any and all rights of action whatsoever against any person whomsoever.”); *Cena v. State*, 121 Wn. App. 352, 356, 88 P.3d 432 (2005) (“A person receiving benefits under the [Act] has no separate remedies for his or her injuries except where the [Act] specifically authorizes a cause of action.”). See the discussion at AB 7-15.

The Act’s exclusive remedy provisions provide no exception that allows Davis, Chliek, or any other worker or any employer to bypass the Board and appeal an L&I distribution order directly to superior court.

Indeed, perhaps anticipating and specifically rejecting the argument Davis and Chliek make here, the Act subjects all worker appeals from L&I distribution orders to the exclusive remedies set out in chapter 51.52 RCW.<sup>9</sup> RCW 51.24.060(6).

Regardless of the label they apply to their industrial insurance dispute, Davis and Chliek cannot bring an original superior court action to challenge the L&I's distribution orders. Their Thurston County lawsuit must be dismissed. RCW 51.04.010; RCW 51.32.010; RCW 51.24.060(6); RCW 51.52.060(1); AB 7-15.

**D. The Thurston County Superior Court Lacks Subject Matter Jurisdiction**

As L&I demonstrated in its opening brief, the Thurston County Superior Court lacks subject matter jurisdiction to decide the industrial insurance issue raised by Davis and Chliek. AB 12-15; RCW 51.04.010;

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<sup>9</sup> Davis and Chliek also suggest that any attempt to preclude their “unjust enrichment” action constitutes an infringement on the superior court’s authority to grant equitable relief. BR at 12. Again, Davis and Chliek are mistaken. Equitable relief is only available where there is no adequate remedy at law. *Seattle Mortgage Co., Inc. v. Unknown Heirs of Gray*, 133 Wn. App. 479, 499, 136 P.3d 776 (2006). As demonstrated by the appendices attached to their brief, Davis and Chliek have an adequate remedy at law. BR, Appendices 1-5. Furthermore, neither the Act nor L&I’s argument preclude the superior court from exercising equitable powers on appeal from a decision of the Board. The court must, however, have jurisdiction under the Act before it can exercise the narrow equitable powers approved by the Supreme Court for workers’ compensation cases. See, e.g., *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 173, 937 P.2d 565 (1997) (plurality opinion); *Rodriguez v. Dep’t of Labor & Indus.*, 85 Wn.2d 949, 953-55, 540 P.2d 1359 (1975); *Ames v. Dep’t of Labor & Indus.*, 176 Wash. 509, 513-14, 30 P.2d 239 (1934). Here, Thurston County lacks subject matter jurisdiction, and, therefore, cannot grant any equitable relief to Davis, Chliek or any of the putative class members they seek to represent.

RCW 51.32.010. Without subject matter jurisdiction “dismissal is the only permissible action the court may take.” *Young*, 149 Wn.2d at 132-33; *Mendoza*, 145 Wn. App. at 149.

However, relying on the appendices attached to their brief, Davis and Chliek contend they have exhausted their administrative remedies, and are, therefore, free to pursue their Thurston County lawsuit. Again, their unsupported legal conclusion is contrary to established law and should be rejected. The doctrine of res judicata precludes Davis and Chliek from litigating in this lawsuit the claims they already lost at the Board and, in the case of Davis, in superior court. *Marley*, 125 Wn.2d at 538. Furthermore, Thurston County lacks jurisdiction over the Board orders issued in Davis’ and Chliek’s administrative appeals.

A superior court gains jurisdiction over a Board order only when there is compliance with all of the statutory procedural requirements set forth in RCW 51.52.110. *Wells*, 104 Wn. App. at 144.

Specifically, (1) the Board must have issued a final order or decision; (2) the appeal must be filed within 30 days of the Board’s communication of its final order or decision; and (3) the petitioner must properly perfect the appeal by filing the appeal with the court and serving a copy on the director, the Board, and the self-insurer.

*Id.*

Here, Chliek appealed her Board order to Snohomish County

Superior Court. BR, Appendix 5. Assuming that Chliek properly perfected her appeal, Snohomish County, alone, has jurisdiction to review that Board order. RCW 51.52.110; *Wells*, 104 Wn. App. at 144. Similarly, Davis appealed her Board order to the King County Superior Court, which issued an order affirming the Board. Appendix CC. Davis appealed that determination to Division One, which, alone, has jurisdiction to review that order. *Id.*; RAP 4.1(b)(1).

Realizing the procedural and jurisdictional flaws in their argument, Davis and Chliek ask this Court, without citing any authority, to consolidate Chliek's Snohomish County action and Davis' action, which is now before Division One, with this Thurston County lawsuit. BR at 13 (fn. 17). This request is unsupported and absurd.

First, Thurston County does not have and can never have subject matter jurisdiction over the industrial insurance issues raised by Davis and Chliek. RCW 51.04.010; *Wells*, 104 Wn. App. at 144. Davis and Chliek cite no authority that supports merging two lawsuits over which those superior courts have subject matter jurisdiction with this Thurston County lawsuit where the superior court does not. For this reason alone Davis' and Chliek's request for consolidation fails.<sup>10</sup>

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<sup>10</sup> *In re Dependency of Chubb*, 112 Wn.2d 719, 726, 773 P.2d 851 (1989) (unsupported argument should not be considered). Indeed, the failure of Davis and Chliek to cite

Second, even if Thurston County had subject matter jurisdiction over Davis' and Chliek's industrial insurance dispute, an appellate court's authority to consolidate matters is limited to cases currently on review. RAP 3.3(b). Here, no order or judgment has been entered in Chliek's Snohomish County action, and, thus, there is nothing for this Court to consolidate in that matter.<sup>11</sup>

Third, Davis and Chliek suffer no prejudice by the dismissal of their Thurston County lawsuit. As demonstrated by the documents attached to their brief, Davis and Chliek have remedies under the Act, which they can pursue. BR, Appendices 1-5.<sup>12</sup>

Finally, citing *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 120, 147 P.3d 1275 (2006) (Madsen, J., concurring),<sup>13</sup> Davis and Chliek argue that when the merits of a jurisdictional issue are inextricably tied to the merits of the claim itself "a court generally should either apply a summary judgment standard or permit the plaintiff to

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authority on this point shows that they have looked and could find no support. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978).

<sup>11</sup> Of course, any appeal from a Snohomish County Superior Court order must be taken to Division I of the Court of Appeals. RAP 4.1(b)(1).

<sup>12</sup> Apparently realizing their "consolidation" idea lacks merit, they suggest that, if this Court concludes that Davis and Chliek must be dismissed as individual parties, the Court should stay dismissal of the underlying action until their counsel can locate and persuade other unknown workers to come forward and serve as plaintiffs in his lawsuit. BR at 13 (fn. 17, no. 4). With due respect, they have it backwards: lawsuits can survive without the representation of an attorney, but they cannot go forward without an actual party.

<sup>13</sup> Although not disclosed in their brief, the passage Davis and Chliek rely upon comes from the concurring opinion in *Wright*, which garnered the support of only two justices.

develop the relevant jurisdictional facts at trial.” BR at 10 (paraphrasing *Wright*). Even if their paraphrasing of *Wright* accurately reflects Washington law, Davis and Chliek fail to explain how this rule possibly applies to the present case. They admit that they appealed their industrial insurance distribution orders to superior court before filing an appeal with the Board. BR at 13. This is specifically precluded by the Act. RCW 51.04.010; RCW 51.32.010; RCW 51.52.060(1). There are no “jurisdictional facts” for them to develop at trial. Thus, even applying the summary judgment standard that they encourage, their lawsuit must be dismissed as a matter of law. *Id.*; CR 56.

In sum, Thurston County does not have subject matter jurisdiction over the industrial insurance dispute raised by Davis and Chliek. This lawsuit must, therefore, be dismissed. *Young*, 149 Wn.2d at 132-33; *Mendoza*, 145 Wn. App. at 149; *Wells*, 104 Wn. App. at 144.

**E. Davis And Chliek Cannot Avoid Dismissal Of Their Thurston County Lawsuit By Pleading Their Industrial Insurance Dispute As A Class Action**

Attempting to divert attention away from the fatal jurisdictional flaws that doom their lawsuit, Davis and Chliek devote much of their brief to alleging that a proposed “class” of workers may have suffered as a result of L&I’s application of the third party distribution formula. Importantly, Davis and Chliek limit their proposed “class” to workers with

third party distribution orders that became final *before Tobin* was decided.<sup>14</sup> BR at 5 (“Issues Pertaining To Assignments Of Error,” number 4). These meritless arguments should be rejected.

First, contrary to their suggestion, the Thurston County court did not certify a class here. Therefore, the hypothetical legal claims of other, unnamed workers have no bearing on the jurisdiction issues that compel dismissal of their Thurston County lawsuit. Moreover, as the Board orders make clear, the *Tobin* decision has no application to Davis’ or Chliek’s claims. Thus, their claims are not representative of the “class” of workers they claim were harmed by L&I. BR, Appendices 1-4; CR 23(a)(4); *Gersema*, 127 Wn. App. at 695-96; *Mills*, 72 Wn. App. at 577. This alone justifies rejection of their arguments.

Second, on a more fundamental level, Davis and Chliek cannot evade the Act’s exclusive remedy provisions by framing their lawsuit as a class action. RCW 51.04.010; RCW 51.32.010. Every worker who is aggrieved by an L&I order must exhaust their administrative remedies under the Act before seeking superior court review. *Id.*; RCW

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<sup>14</sup> As the dismissal of James Booth makes clear, the “class” proposed by Davis and Chliek does not include workers whose third party distribution orders became final *after Tobin* was decided. Although one of the original plaintiffs in this action, Mr. Booth failed to appeal his distribution order despite having time to do so after *Tobin* was decided. As a matter of law, Mr. Booth could not appeal his final distribution order. *Marley*, 125 Wn.2d at 538. Citing the finality of his unappealed third party distribution order, the trial court dismissed Booth from this lawsuit. App. Y:364. Booth did not seek discretionary review of that determination, and he is not a party to this appeal.

51.24.060(6); RCW 51.52.060(1); *Dils v. Dep't of Labor & Indus.*, 51 Wn. App. 216, 217-210, 752 P.2d 1357 (1988) (workers who fail to exhaust their administrative remedies under the Act cannot challenge an industrial insurance decision in a class action). By definition, the workers that Davis and Chliek seek to include in their proposed class did not exhaust their administrative remedies, and, therefore, cannot be included in any class action. *Id.* Davis and Chliek attempt to rely on *Hanson v. Hutt*, 83 Wn.2d 195, 517 P.2d 599 (1974) for the proposition that their class action may proceed despite the Department's objections to the superior court's subject matter jurisdiction. In *Hanson*, the court reviewed an unemployment security statute that disqualified pregnant women from receiving unemployment benefits after Hanson filed an original class action lawsuit in superior court. *Hanson*, 83 Wn.2d at 196-97. The Supreme Court held that the trial court could award relief to similarly situated women because the trial court found

the existence of a class of women who were disqualified in the past without having received an official notice of the reasons for disqualification and without having been advised by the Department of their right to claim these benefits and to appeal the Department's denial of their claims.

*Hanson*, 83 Wn.2d at 203. *Hanson* does not apply to Davis and Chliek's superior court class action. Unlike the women in *Hanson* who did not

receive official notice of their benefit disqualification or their right to appeal the Department's action, Davis and Chliek both received distribution orders that described both the action L&I took and their right to appeal those decisions to the Board. Thus *Hanson* does not apply.

Third, the "class" Davis and Chliek hope to represent is limited to workers with "final" third party distribution orders. BR at 5, 14-15. As a matter of law, those workers can never challenge the final distribution orders issued on their claims. *Marley*, 125 Wn.2d at 538.

In *Marley*, a worker was killed in the course of his employment. L&I allowed the claim, provided benefits to the deceased worker's children but denied benefits to his widow. *Id.* at 535-36. Six years later, Mrs. Marley's newly hired attorney asked L&I to reconsider the denial of widow benefits. L&I denied the request because its earlier order had not been timely appealed and, therefore, had become final. *Id.* Mrs. Marley appealed to the Board, which affirmed L&I. The King County Superior Court reversed and L&I appealed. The Court of Appeals reversed the trial court and affirmed L&I's original determination.

Mrs. Marley argued to the Supreme Court that L&I misapplied the law when it denied her benefits, rendering the L&I order void and the statute of limitations inapplicable. *Id.* at 538, 541. The Supreme Court disagreed, and held that the "doctrine of claim preclusion applies to a final

judgment by [L&I] as it would to an un-appealed order of a trial court.” *Id.* at 537. A party’s order is final and not subject to further judicial review unless it is appealed to the Board within the sixty days. *Id.* at 537-38; *see also* RCW 51.52.050(1).

Like Mrs. Marley, the class of workers that Davis and Chliek seek to represent did not appeal their L&I orders within 60 days, and, as such, cannot attack those final orders in this Thurston County action.<sup>15</sup> *Id.*

Ignoring *Marley*, Davis and Chliek next contend, again without legal or logical support, that they could not have anticipated *Tobin*, and that this somehow means that *Tobin* retroactively applies to workers with final third party distribution orders. BR at 15 (“the legal error only became known after *Tobin* was decided”). Again, their argument ignores established Washington law. A subsequent judicial decision that gives a new interpretation to existing law does not undermine the finality of an unappealed distribution order issued by L&I. *Lynn*, 130 Wn. App. at 836;

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<sup>15</sup> Davis and Chliek suggest throughout their brief to this Court that workers with final orders lack a remedy under the Act. They argue that the putative class members’ inability to challenge final, unappealed L&I orders is tantamount to them having no remedy at all. BR at 9-10, 13, 14-15, 20. Their argument is both circular and absurd. Contrary to their suggestion, administrative remedies are neither futile nor inadequate simply because the affected person fails to file a timely appeal. *Jones v. State*, 140 Wn. App. 476, 497-98, 166 P.3d 1219 (2007). Furthermore, other than their conclusory statement that Board proceedings are “an exercise in futility and inefficiency,” Davis and Chliek cannot explain how or why the exhaustive due process protections afforded by the Act were insufficient to address whatever legal challenges the putative class members had with the third party distribution orders issued on their respective claims, just like Mr. Tobin did in his case.

see also *State v. Evans*, 154 Wn.2d at 446 (holding that a new rule announcing constitutionally required proceedings in death penalty sentencing hearings does not apply retroactively to afford relief to persons with final orders sentencing them to death, citing *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)). As the *Lynn* Court explained:

If prior judgments could be modified to conform with subsequent changes in judicial interpretations, we might never see the end of litigation.

*Id.* (quoting *Columbia Rentals*, 89 Wn.2d at 823).<sup>16</sup>

That well established rule of law applies here. The rule announced in *Tobin* cannot affect workers whose third party distribution orders have already become final. *Id.*

Davis and Chliek cannot avoid the Act's exclusive remedy provisions simply by characterizing their lawsuit as a class action. Furthermore, the trial court has no jurisdiction over the final orders issued to other workers. Finally, although the Supreme Court affirmed *Tobin*,

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<sup>16</sup> *Lynn* rejected the argument of a worker who contended: (1) that he could not have anticipated the interpretation of RCW 51.08.178, the workers' compensation wage computation statute, by the Supreme Court in *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 820-21, 16 P.3d 583 (2001); and (2) that therefore he should not be bound by the res judicata effect of a previously unappealed Department wage-computation order in his claim. *Id.*; see also *Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 242, 118 P.3d 392 (2005) (similar res judicata holding to *Lynn*); *Hyatt v. Dep't of Labor & Indus.*, 132 Wn. App. 387, 394-95, 132 P.3d 148 (2006) (similar res judicata holding to *Lynn*); *VanHess v. Dep't of Labor & Indus.*, 132 Wn. App. 304, 312-13, 130 P.3d 902 (2006) (similar res judicata holding to *Lynn*).

that opinion has no retroactive effect on unappealed, final third party distribution orders. The Court should dismiss Davis' and Chliek's lawsuit. RCW 51.04.010; *Marley*, 125 Wn.2d at 538; *Lynn*, 130 Wn. App. at 836; *Wells*, 104 Wn. App. at 144; *Dils*, 51 Wn. App. at 217-20.

#### IV. CONCLUSION

For each of the reasons stated in this Reply Brief and in the Department's opening brief, the Court should dismiss this lawsuit.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of November, 2010.

  
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**PROOF OF SERVICE**

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1<sup>st</sup> day of November, 2010, at Tumwater, WA.

  
JEREI BARGABUS  
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