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No. 96189-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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MICHAEL WEAVER,

Plaintiff/Respondent,

vs.

CITY OF EVERETT and  
DEPARTMENT OF LABOR AND INDUSTRIES,

Defendants/Petitioners.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the rights of claimants under the Industrial Insurance Act, Title 51 RCW (IIA or Act).

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This case presents the Court with an opportunity to clarify uncertainty regarding application of the common law doctrines of claim preclusion and issue preclusion to the unique statutory scheme of the IIA. The facts are drawn from the Court of Appeals opinion and the briefing of the parties. *See Weaver v. City of Everett*, 4 Wn. App. 2d 303, 309-12, 421 P.3d 1013, *review granted*, 192 Wn.2d 1001 (2018); City Pet. for Rev. at 1-6; Weaver Ans. to DLI Pet. for Rev. at 1-6; Employers Supp. Br. at 6-10; Weaver Supp. Br. at 1-5.

For purposes of this amicus brief, the following facts are relevant. Michael Weaver began working as a firefighter for the City of Everett in 1996. In June of 2011, Weaver discovered an irregular mole on his shoulder and was thereafter diagnosed with malignant melanoma. The melanoma was surgically removed, causing Weaver to miss approximately five weeks of work. While his medical insurance covered the expenses for his treatment, he lost approximately \$10,000 in wages.

Weaver filed a pro se application for workers' compensation, seeking temporary total disability benefits from the City, a self-insured employer. Weaver stated in his application that his disease resulted from exposure to sun and other carcinogens during his 15 years as a firefighter. The Department of Labor and Industries (DLI or Department) initially granted the application, but subsequently reconsidered and denied it.

Weaver retained counsel and appealed DLI's denial to the Board of Industrial Insurance Appeals (the Board). At the hearing before an Industrial Appeals Judge (IAJ), the City presented deposition testimony of an oncologist and a dermatologist, both of whom opined that Weaver's melanoma did not result from his employment as a firefighter. While Weaver had consulted with oncologist Dr. David Aboulafia, he did not offer Aboulafia's testimony at the hearing, instead relying on the deposition testimony of Dr. Kenneth Coleman, an M.D.<sup>1</sup> Coleman opined that Weaver's melanoma arose out of his employment as a firefighter, but acknowledged that he had no training in oncology or dermatology. After reviewing the evidence and testimony, the IAJ recommended the Board affirm the Department, and the Board adopted the IAJ's recommendation and issued a final order denying Weaver's application for benefits.

Weaver's counsel withdrew. Weaver then filed a pro se petition for review to the superior court. However, after no action was taken on the appeal for over ten months, and with the limited funds at issue, Weaver

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<sup>1</sup> In its opinion, the Court of Appeals suggests that the cost associated with Dr. Aboulafia's testimony was a likely reason that Weaver did not offer the expert's testimony at the hearing. *See Weaver*, 4 Wn. App. 2d. at 310 n.2.

eventually agreed to a stipulation and order of dismissal. The petition was dismissed in late 2013. Just months later, in January of 2014, Weaver returned to the doctor and discovered he had developed a brain tumor. He underwent surgery, and it was determined the tumor had metastasized from the malignant melanoma. Weaver retained new counsel and filed a second application for benefits, this time for permanent total disability.

The Department denied his application on the grounds that the initial denial was binding in the subsequent action. It stated that it had previously concluded his cancer did not arise out of his employment, and that his brain tumor arose out of the same malignancy. Weaver appealed the denial. The IAJ issued a proposed decision and order recommending the Board affirm the Department. The Board adopted the IAJ's proposed decision and order. Weaver appealed to the superior court, which ruled that res judicata and/or collateral estoppel barred his claim, and it affirmed the Board. The Court of Appeals, Division I, reversed, holding that neither claim nor issue preclusion barred Weaver's second claim for benefits. The City and DLI petitioned for review. This Court granted review on November 28, 2018.

### **III. ISSUE PRESENTED**

Whether and under what circumstances should the common law doctrines of claim preclusion and/or issue preclusion operate to bar a worker from initiating a claim for workers' compensation benefits that arises out of an occupational exposure related to a previously litigated claim for benefits?

### **IV. SUMMARY OF ARGUMENT**

Recognizing the unfairness and inefficiency that characterized the common law adjudication of workers' compensation claims, the Legislature

enacted the IIA as a grand compromise between employers and employees. Under this unique scheme, employees received reduced recovery, but in exchange would obtain sure and certain relief without having to fight for it.

Claim preclusion is generally a poor fit for the IIA's unique procedural system. While a "claim" at common law constituted a complete set of facts entitling a party to seek relief in court, these elements and procedures are broken down into separate inquiries under the IIA. After an application for benefits is filed, the Department determines whether it will be allowed. If it is allowed, the worker's benefits are determined. Workers may not seek relief until an occupational exposure has manifested as a workplace injury or occupational disease, and has resulted in compensable loss. Aggravation of the condition entitles a worker to re-open the claim to seek additional benefits. In contrast to the common law form of adjudication, each of these inquiries is undertaken in a separate proceeding.

Issue preclusion bars relitigation of previously litigated issues. While it may operate in the context of the IIA, application of that doctrine requires that it not work an injustice. In determining whether justice is served, courts examine whether the litigant had a full and fair opportunity to litigate the issue, which includes consideration of the disparity of relief available in the two actions. The injustice prong also considers public policy. This should include consideration of the Legislature's purpose in enacting the IIA – to eliminate the unfairness and expense of the common law system of adjudication and obtain sure and certain relief for injured workers.

## V. ARGUMENT

### A. Overview Of The Common Law Doctrines Of Claim Preclusion And Issue Preclusion, And Decisional Law Addressing Their Application To The IIA.

The general rule at common law is that a party who has had an opportunity to litigate a claim, or has actually litigated an issue, may be barred from relitigating the same claim or issue in a subsequent action. *See Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). The term “res judicata” has been used in two senses: first, as the general term that encompasses both claim preclusion and issue preclusion, and second, as the more specific doctrine of claim preclusion.<sup>2</sup> *See Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). The burden of proving that a claim or issue is barred under either doctrine falls on the party asserting its application. *Luisi Truck Lines, Inc. v. Washington Util. & Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967). “Neither the doctrine of res judicata nor collateral estoppel are intended to deny a litigant his day in court.” *Id.*, 72 Wn.2d at 894.

This Court succinctly summarized the similarities and differences between claim preclusion and issue preclusion in its opinion in *Shoemaker*:

The general term res judicata encompasses claim preclusion (often itself called res judicata) and issue preclusion, also known as collateral estoppel. Under the former a plaintiff is not allowed to recast his claim under a different theory and sue again. Where a plaintiff’s second claim clearly is a new, distinct claim, it is still possible that an individual issue will be precluded in the second action under the doctrine of collateral estoppel or issue preclusion. In an instance of claim preclusion, all issues which might have been raised and

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<sup>2</sup> For clarity, this brief refers to the general common law doctrine of preclusion, whether claim or issue preclusion, as “res judicata.” It uses the terms “claim preclusion” and “issue preclusion” to refer to the more specific categories of this general rule.

determined are precluded. In the case of issue preclusion, only those issues actually litigated and necessarily determined are precluded.

*Shoemaker*, 109 Wn.2d at 507 (citation omitted).

Res judicata may apply to administrative actions. See *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 33, 891 P.2d 29 (1995). However, “use of res judicata principles in administrative actions . . . yields to applicable statutes or ordinances.” *Id.*, 126 Wn.2d at 33 (citing *Restatement (Second) of Judgments* § 83 cmt. a (1982)). Res judicata is based on public policy and is intended to serve the interests of justice. See *Luisi Truck Lines*, 72 Wn.2d at 896.

Res judicata has at times been applied in the workers' compensation realm. See, e.g., *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997) (plurality opinion); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994). This Court has not had the opportunity, however, to examine the principles underlying these common law doctrines in relation to the unique statutory scheme set out under the IIA. Decisional law applying rules of preclusion has generally not examined whether the elements of the particular doctrine at issue are present, has sometimes not indicated which preclusive doctrine it is applying, and at times has not mentioned either doctrine by name. See, e.g., *Kingery*, 132 Wn.2d at 169 (plurality) (holding final Department orders are res judicata as to issues litigated unless the order was void when entered or certain specified equitable factors warrant setting aside the order); *Marley*, 125 Wn.2d at 537 (concluding Department order final and binding unless Department lacked personal jurisdiction over the parties or subject matter

jurisdiction over the claim); *McCarthy v. Dep't of Social and Health Services*, 110 Wn.2d 812, 759 P.2d 351 (1988) (stating unappealed orders are subject to collateral estoppel, but not discussing application of the doctrine's elements to the facts); *LeBire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 420, 128 P.2d 308 (1942) (where an issue is resolved in a final Department order, it is “res judicata of the issues [later] sought to be relitigated” (brackets added)); *Ek v. Dep't of Labor & Indus.*, 181 Wash. 91, 94, 41 P.2d 1097 (1935) (stating “a judgment is binding upon the party against whom it runs, and also against all those who claim by, through or under him, is hornbook law”).<sup>3</sup>

In light of the Court of Appeals' careful examination of the underpinnings of these doctrines and their fit to the world of workers' compensation, this case presents the Court with the opportunity to examine with some scrutiny whether and under what circumstances applying these common law doctrines will effectuate the legislative intent embodied in the IIA. At common law, application of either doctrine requires that certain specified criteria be present; whether their application is warranted in the

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<sup>3</sup> The Court may use this opportunity to clarify its plurality opinion in *Kingery*, which has itself created some confusion. See *Fields Corp. v. Dep't of Labor & Indus.*, 112 Wn. App. 450, 45 P.3d 1121 (2002) (examining the differing opinions in *Kingery* and noting confusion that has emerged). Relying on *Marley*, the lead opinion in *Kingery* concluded that courts' equitable power to relieve parties of the preclusive effect of final Department orders should be limited to “very narrow” circumstances in which two factors are present: 1) the claimant is incompetent and 2) the Department has engaged in misconduct. See *Kingery*, 132 Wn.2d at 173-74. The dissent disagreed, urging that courts' equitable power in this context must be construed in light of the public policies embodied in the IIA and should extend to “innocent victims of circumstances largely beyond their control.” 132 Wn.2d at 179 (Alexander, J., dissenting). The concurrence agreed with the lead opinion on the facts. However, it joined the dissent in its legal conclusion that “the court's equitable powers are not limited to cases where it is shown that the claimant is essentially incompetent.” 132 Wn.2d at 178 (Madsen, J., concurring). Thus, a majority of the justices agreed that courts' power to relieve claimants of the preclusive effect of final orders is not limited to the “very narrow” circumstances described by the lead opinion.

workers' compensation setting should require that there is an analog in the IIA to the elements necessary for their application under the common law.<sup>4</sup>

**B. Overview Of The IIA System For Adjudicating Workers' Compensation Claims.**

The IIA was enacted in 1911. Finding that common law adjudication had been inefficient, expensive and unfair to injured workers, the Legislature removed workers' compensation claims from the common law system, and in its place implemented a "swift, no-fault compensation system." *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995); RCW 51.04.010. In *Dennis v. Labor and Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987), this Court explained that the Act

...was the result of a compromise between employers and workers. In exchange for limited liability the employer would pay on some claims for which there had been no common law liability. The worker gave up common law remedies and would receive less, in most cases, than he would have received had he won in court in a civil action, and in exchange would be sure of receiving that lesser amount *without having to fight for it*.

109 Wn.2d at 469 (emphasis added). Under the IIA, doubts regarding coverage are resolved in favor of workers. *See* 51.04.010; 51.12.010; *see also Dennis*, 109 Wn.2d at 470 (recognizing the Act "is to be liberally construed . . . with doubts resolved in favor of the worker").

Prior to enactment of the IIA, claims for workers' compensation were adjudicated in the common law system. Under the common law, plaintiffs were precluded from splitting claims and were instead required to

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<sup>4</sup> The City contends case law examining claim preclusion and issue preclusion at common law "is not instructive or persuasive." *See* City of Everett Pet. for Rev. at 14 n.13. This brief proceeds with the opposite view in mind – that it is important to ascertain the nature and proper application of these doctrines at common law in order to evaluate the propriety of their application to the unique scheme of the IIA.

allege and prove all factual bases and damages arising from the injury in a single action. *See Sprague v. Adams*, 139 Wash. 510, 515, 247 P. 960 (1926).

The IIA eschews this common law rule, creating a system that separates what at common law was a single “claim,” into distinct inquiries. After a claim for compensation is filed, the Department determines whether it will be “allowed” or “denied.” This determination rests on whether the worker has a workplace injury or occupational disease, and is fundamentally an issue of causation – whether the injury or disease arises naturally and proximately out of the occupational exposure. *See RCW 51.08.140; Dennis*, 109 Wn.2d at 477; *see also Street v. Weyerhaeuser*, 189 Wn.2d 187, 194, 399 P.3d 1156 (2017). If it is determined that the worker has an occupational disease and the claim is allowed, the Department then determines the benefits owed to the worker. The date of manifestation of the occupational disease sets the compensation schedule. *See Kilpatrick v. Dep’t of Labor & Indus.*, 125 Wn.2d 222, 228, 883 P.2d 1370 (1994); WAC 296-14-350. A claim may be re-opened, and benefits adjusted, if the condition is aggravated, diminished or terminated. *See RCW 51.32.160.*

The IIA claims-handling process is administered by the Department. *See Ch. 51.28 RCW.* The claims handling process by a self-insured employer must comport with that of the Department, and is subject to its supervision. *See RCW 51.14.030; .080; .130.* Unlike the common law system, which typically adjudicates claims to resolution without continuing oversight, the IIA system contemplates ongoing management of the claim

and cooperation between the self-insured employer and the employee. *See* RCW 51.36.010. This cooperative aspect of the IIA is intended to benefit self-insured employers, by ensuring that employees' needs are met in the most cost-effective way, and employees, by ensuring appropriate compensation without the need for litigation. *See* RCW 51.36.010(3).

Disposition of a claim by the Department is subject to review by the Board. *See* Ch. 51.52 RCW. Appeals from the Board to the superior court are governed by RCW §§ 51.52.110-.130. Ch. 51.52 sets timelines within which orders may be appealed before they become final. *See* RCW 51.52.050; RCW 51.52.060. However, Title 51 does not speak to the question of when final orders under the IIA preclude litigation in subsequent proceedings. The Court may look to the common law doctrines of claim preclusion and issue preclusion to fill in this “gap” in the statutory scheme. *See* RCW 51.52.140 (providing that “[e]xcept as otherwise provided in this chapter,” the “practice in civil cases” shall govern IIA appeals).<sup>5</sup>

**C. The Common Law Doctrine Of Claim Preclusion Is A Poor Fit For The IIA And Should Generally Not Operate To Bar Subsequent Litigation Of Workers' Compensation Claims Under That Unique Statutory Scheme.**

The doctrine of claim preclusion prevents relitigation of claims that were or could have been litigated in a prior proceeding. *See Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816 (1980). A prior judgment bars relitigation

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<sup>5</sup> The Legislature could have established claim or issue preclusion by statute, as it did, for instance, in the context of child custody determinations. *See* RCW 26.27.061. It did not do so. It is unremarkable the IIA includes finality provisions, as finality rules are generally present, and their presence does not answer the question of whether, in any given case, a “final” order precludes subsequent litigation. The court uses the common law doctrines of claim and issue preclusion to supplement rules of finality.

if it has a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and 4) the quality of the persons for or against whom the claim is made. *See City of Arlington v. Central Puget Sound Mgmt. Hearings Bd.*, 164 Wn.2d 768, 791-92, 193 P.3d 1077 (2008) (citations omitted). Weaver does not dispute that elements (3) and (4) are met in this case, but contends the actions lack identity of (1) subject matter and (2) cause of action. This brief focuses on whether the two actions share a common cause of action.<sup>6</sup>

Washington law has not adopted a singular definition of cause of action for purposes of claim preclusion. *See Eugster v. Washington State Bar Ass’n*, 198 Wn. App. 758, 788, 397 P.3d 131, *review denied*, 189 Wn.2d 1018 (2017) (observing “Washington law does not necessarily define the term cause of action for res judicata purposes”). Case law generally has defined “cause of action” in a variety of ways, including a “legal right of the plaintiff invaded by the defendant,” *Cowley v. Northern Pac. Railway Co.*, 68 Wash. 558, 563, 123 P. 998 (1912), “the fact or combination of facts which give rise to a right of action,” *Pratt v. Niagara Fire Ins. Co. of New York*, 113 Wash. 347, 349, 194 P. 411 (1920), and “the act which occasioned the injury.” *McFarling v. Evaneski*, 141 Wn. App. 400, 405, 171 P.3d 497 (2007). Black’s Law Dictionary defines the term as “a group of operative facts giving rise to one or more bases for suing; a factual situation that

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<sup>6</sup> The elements of subject matter and cause of action for claim preclusion purposes have created some confusion, and the Court has sometimes treated these elements in tandem. *See, e.g., Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997); *Burke v. Motor Co. v. Lillie*, 39 Wn.2d 918, 239 P.2d 854 (1952); *see also* Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 812-13 (1985).

entitles one person to obtain a remedy in court from another person; claim.”  
*Black’s Law Dictionary* 266 (10<sup>th</sup> ed. 2014).<sup>7</sup>

Because claim preclusion may bar relitigation of claims actually brought as well as those that could have been brought, the “claim” must have existed when the initial action was asserted. *See Johnson v. Nat’l Bank of Commerce*, 152 Wash. 47, 51, 277 P. 79 (1929) (noting that where a right to recovery did not exist when the initial judgment was entered, “that judgment cannot be res judicata as to such subsequently accruing right”); *State v. Glover*, 165 Wash. 567, 5 P.2d 1014 (1931) (same). The Court of Appeals below properly cited this Court’s opinion in *Harsin v. Oman*, 68 Wash. 281, 123 P. 1 (1912), to explain this principle:

[T]here can be but one recovery upon the same cause of action. This does not mean the subject-matter of a cause of action can be litigated but once. It may be litigated as often as an independent cause of action arises which, because of its subsequent creation, could not have been litigated in the former suit, as the right did not then exist.

*Weaver*, 4 Wn. App. 2d at 322 (quoting *Harsin*, 68 Wash. at 283).

Claim preclusion is closely-linked to the concept of claim-splitting, and is based on the general rule that a plaintiff at common law must include in a single action all relief to which he or she is entitled that arises out of the same transaction. *See Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d

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<sup>7</sup> A four-part test has at times been used to ascertain whether a new cause of action has emerged, but this Court has warned that “identity of causes of action cannot be determined precisely by mechanistic application of a simple test.” *Rains v. State*, 100 Wn.2d 660, 663-64, 674 P.2d 165 (1983) (including as considerations determining identity of cause of action as “(1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.” *Rains*, 100 Wn.2d at 664 (citations omitted)).

438, 441, 423 P.2d 624 (1967) (observing Washington law “has dismissed a subsequent action on the basis that the relief sought could have and should have been determined in a prior action. The theory on which dismissal is granted is variously referred to as res judicata or splitting causes of action”). In *Sayward v. Thayer*, 9 Wash. 22, 36 P. 966 (1894), the Court explained that claim preclusion bars relitigation of “claims” that could have been brought in a prior action:

The general doctrine is that the plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, *might have brought forward at that time.*

*Sayward*, 9 Wash. at 24 (emphasis added).

In its examination of administrative claims in the context of claim preclusion, the *Restatement (Second) of Judgments* § 83 (1982) suggests that to constitute a “claim” for purposes of claim preclusion, there must be some relief to which litigants would be entitled if they prevail:

[I]t is necessary to differentiate between claim preclusion and issue preclusion. Considered analytically, adjudication of a claim is impossible unless the matter for decision includes a legal claim, that is, an assertion by one party against another cast in terms of entitlement under substantive law to particular relief.

*Restatement (Second) of Judgments* § 83 cmt. b (brackets added). “Relief” is defined generally as “redress or benefit, esp. equitable in nature (such as an injunction or specific performance), that a party asks of a court. — Also termed *remedy*.” See Black’s Law Dictionary (10<sup>th</sup> ed. 2014).

This reflects the general principle that to constitute a “claim,” it must have accrued, *i.e.*, it must have arisen when the initial action was filed, such that the plaintiff had a right that entitled him or her to seek relief in court. *See Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 485-86, 209 P.3d 863 (2009). To the extent there is an analog in the workers’ compensation scheme to the common law concept of a “claim” or “cause of action,” it would appear to be that complete set of facts that would entitle the claimant to benefits. The “claim” or “cause of action” cannot be the isolated question determined in an allowance proceeding under the IIA, *i.e.*, whether the claimant has a workplace injury or occupational disease. This is so because determination of that question alone *could never*, on its own, create a right in the claimant entitling him to relief. Rather, for the worker to be entitled to relief -- here, workers’ compensation benefits -- the allowance determination must be *linked* to compensable loss suffered as a result of the injury or disease.

At bottom, it appears the City and DLI have mistaken a “claim” for what is actually an issue, and in so doing, have conflated the doctrines of claim and issue preclusion. This Court’s decision in *Shoemaker* is instructive. There, the plaintiff was demoted from his job as a police officer for the City of Bremerton and sought reinstatement through the civil service commission. That body determined he was demoted due to a valid reduction in work force. The plaintiff then brought a federal civil rights action, asserting constitutional claims. The City asserted res judicata, and the plaintiff responded that res judicata was inapplicable because the civil

service commission had no authority to address his constitutional claims. This Court explained the plaintiff's argument overlooked that causation (there, the cause of the discharge) is an "issue" for purposes of preclusion, and the plaintiff had confused "issue" with "claim":

[T]he issues before the Commission and the trial court – whether retaliation was a substantial motive behind Shoemaker's demotion – are identical, and collateral estoppel is appropriate. Shoemaker argues that the Commission could not have determined the same issue as that presented in the civil rights suit because the Commission had no authority to consider the constitutionality of the City's actions. As noted above, he argues that the Commission acted beyond its competence for the same reason. These arguments confuse claim and issue preclusion. While the Commission could not have adjudicated the section 1983 claim, 28 U.S.C. § 1343, it may have decided an issue of fact that is common to both Shoemaker's petition for reinstatement before the Commission and to his section 1983 claim.

*Shoemaker*, 109 Wn.2d at 512 (brackets added).

Facing a similar question regarding the application of preclusive doctrines in workers' compensation cases, the Wyoming Supreme Court observed that while courts frequently *purport* to apply claim preclusion in the administrative setting, issue preclusion is the more apt doctrine in that context and is actually the doctrine that is *in fact* usually being applied:

The doctrines of collateral estoppel and res judicata apply in the administrative context. We have explained that although the doctrines are often used interchangeably, collateral estoppel is more often appropriately used in an administrative setting. In *Salt Creek Freightways*, we noted that although many cases speak of res judicata in the administrative context, they actually apply collateral estoppel. Collateral estoppel is the appropriate doctrine since collateral estoppel bars relitigation of previously litigated *issues*. Res judicata on the other hand bars relitigation of previously litigated *claims* or causes of action. Since administrative decisions deal primarily with issues rather than causes of action or claims, collateral estoppel is the appropriate doctrine.

*Jacobs v. State ex rel. Wyoming Workers' Safety and Compensation Div.*, 216 P.3d 1128, 1132 (Wyo. 2009) (internal citations omitted).

In sum, claim preclusion is a poor fit for the unique, segmented procedural world of workers' compensation. This is not to say preclusive principles are inapplicable under the IIA, but rather, that the more correct doctrine will generally be issue preclusion. Whether *that* doctrine bars subsequent litigation of an *issue* should turn on whether justice will be done under the circumstances, an inquiry that includes consideration of both public policy and whether there was a full and fair opportunity to litigate.

**D. In Determining Whether Issue Preclusion Should Bar Litigation Of An Issue In Any Given Case, The Court Should Consider Whether Operation Of The Doctrine Undermines Public Policy Or Deprives The Litigant Of A Full And Fair Opportunity To Litigate.**

When a subsequent action asserts a different claim, but depends on issues that were resolved in a previous litigation, relitigation of those issues may be barred by collateral estoppel. *See City of Arlington*, 164 Wn.2d at 792. A party asserting application of collateral estoppel must prove:

(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

*Id.*, 164 Wn.2d at 792. An appellate court reviews de novo whether issue preclusion bars relitigation of an issue. *See Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). As the first three elements are conceded here, this argument focuses on injustice.

At common law, whether it would work an injustice to bind a party to a previous determination of an issue turns in part on whether he or she had sufficient incentive to litigate the issue in the prior action. *See Hadley v. Maxwell*, 144 Wn.2d 306, 312, 27 P.3d 600 (2001) (holding that for issue preclusion to bar subsequent litigation of an issue, justice requires that “the party against whom the estoppel is asserted had interests at stake that would call for a full litigational effort”). Whether there was sufficient incentive to litigate includes consideration of the disparity of available relief in the two actions. *See id.*, 144 Wn.2d at 312.

The Department maintains the Court should not consider substantial disparity of relief because the injustice prong of collateral estoppel is limited to consideration of procedural unfairness. It seeks support for its argument in *Reninger v. Dep’t of Corr.*, 134 Wn.2d 437, 453, 951 P.2d 782 (1998), *Thompson v. Dep’t of Licensing*, 138 Wn.2d 783, 799, 982 P.2d 601 (1999), and *Schibel v. Eymann*, 189 Wn.2d 93, 102, 399 P.3d 1129 (2017). Its effort to reduce the injustice element to a mechanical review of procedural safeguards, however, does not comport with this Court’s jurisprudence. The touchstone of injustice is whether the plaintiff had a full and fair opportunity to litigate the issue. *See Christensen*, 152 Wn.2d at 309. A party may be denied a full and fair opportunity to litigate *either* through disparities in procedure *or* in disparity of the relief that was available in the two actions:

The injustice component is generally concerned with procedural, not substantive irregularity. This is consistent with the requirement that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum. Accordingly, applying collateral estoppel may be improper where the issue is first determined after an informal, expedited hearing with

relaxed evidentiary standards. *In addition, disparity of relief 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 (emphasis added; internal citations omitted).

The authorities cited by the Department are consistent with this view. *See Reninger*, 134 Wn.2d at 453 (stating “courts look to disparity of relief to determine whether sufficient incentive existed for the concerned party to litigate vigorously”); *Thompson*, 138 Wn.2d at 799 (finding no injustice “where the parties had ample incentive and opportunity to litigate an issue”); *Schibel*, 189 Wn.2d at 102 (holding plaintiffs were collaterally estopped from relitigating legitimacy of attorneys’ withdrawal where they had a “full and fair opportunity to be heard”). Where a significant disparity in relief exists, the injustice element militates against application of issue preclusion. *See Hadley*, 144 Wn.2d at 313 (holding where the relief at stake in the initial proceeding is insubstantial in relation to the expense, there may be “too great an incentive to simply pay the fine rather than incur the time and expense to resist”). The Court in *Hadley* emphasized: “Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice.” 144 Wn.2d at 315.

Here, Weaver’s initial application sought less than \$10,000 in time loss. To combat the City’s experts and secure that amount, Weaver would have had to retain specialists in oncology and dermatology, but that likely would have far exceeded the amount he sought in the initial proceeding.<sup>8</sup>

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<sup>8</sup> Where a claimant *prevails* on an application for benefits, he or she may be entitled to reimbursement of costs. *See* RCW 51.32.185(9). As the Court of Appeals noted, however,

The IAJ specifically cited the relative expertise of the parties' proffered experts in concluding that Weaver did not suffer from an occupational disease. In light of the dramatic disparity in relief, Weaver had "too great an incentive" to forego these expenses and sacrifice the temporary time loss.

In other circumstances, where future aggravation of a workers' condition may be uncertain, they may have an incentive to forego litigating claims, as the potential preclusive effect of an adverse determination at the allowance stage could foreclose later benefits if and when the condition worsens. This perverse incentive is wholly at odds with the Legislature's goal in providing a system that ensures workers may obtain "sure and certain relief" without having to fight for it.

The Court should consider the public policies embodied in the IIA in determining whether issue preclusion operates to bar subsequent litigation of issues under the IIA. *See State v. Vasquez*, 148 Wn.2d 303, 309, 59 P.3d 648 (2002) (holding the court may "reject collateral estoppel when its application would contravene public policy"). The Legislature removed workers' compensation claims from the common law because it had been expensive and unfair to injured workers. It was intended to provide "sure and certain relief," so that workers would not have to "fight" for benefits. *Dennis*, 109 Wn.2d at 469. In determining whether justice will be done by operation of issue preclusion in any given case, the Court should consider the legislative goals underlying this unique statutory scheme.

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where the costs are prohibitive, the potential loss may be too substantial to warrant the risk. *See Weaver*, 4 Wn. App. 2d at 318.

**VI. CONCLUSION**

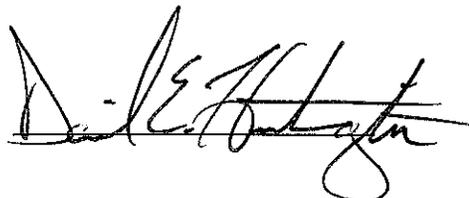
The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

DATED this 25th day of March, 2019.



for

VALERIE D. MCOMIE



DANIEL E. HUNTINGTON

On behalf of  
Washington State Association for Justice Foundation

# Appendix

West's Revised Code of Washington Annotated  
Title 51. Industrial Insurance (Refs & Annos)  
Chapter 51.04. General Provisions (Refs & Annos)

West's RCWA 51.04.010

51.04.010. Declaration of police power--Jurisdiction of courts abolished

[Currentness](#)

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

**Credits**

[1977 ex.s. c 350 § 1; 1972 ex.s. c 43 § 1; 1961 c 23 § 51.04.010. Prior: 1911 c 74 § 1; RRS § 7673.]

[Notes of Decisions \(275\)](#)

West's RCWA 51.04.010, WA ST 51.04.010

Current through Chapter 4 of the 2019 Regular Session of the Washington Legislature.

West's Revised Code of Washington Annotated  
Title 51. Industrial Insurance (Refs & Annos)  
Chapter 51.08. Definitions

West's RCWA 51.08.140

51.08.140. "Occupational disease"

[Currentness](#)

"Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

**Credits**

[1961 c 23 § 51.08.140. Prior: 1959 c 308 § 4; 1957 c 70 § 16; prior: 1951 c 236 § 1; 1941 c 235 § 1, part; 1939 c 135 § 1, part; 1937 c 212 § 1, part; Rem. Supp. 1941 § 7679-1, part.]

[Notes of Decisions \(79\)](#)

West's RCWA 51.08.140, WA ST 51.08.140

Current through Chapter 4 of the 2019 Regular Session of the Washington Legislature.

West's Revised Code of Washington Annotated  
Title 51. Industrial Insurance (Refs & Annos)  
Chapter 51.12. Employments and Occupations Covered (Refs & Annos)

West's RCWA 51.12.010

51.12.010. Employments included--Declaration of policy

[Currentness](#)

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

**Credits**

[1972 ex.s. c 43 § 6; 1971 ex.s. c 289 § 2; 1961 c 23 § 51.12.010. Prior: 1959 c 55 § 1; 1955 c 74 § 2; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1923 c 128 § 1, part; RRS § 7674a, part.]

[Notes of Decisions \(57\)](#)

West's RCWA 51.12.010, WA ST 51.12.010

Current through Chapter 4 of the 2019 Regular Session of the Washington Legislature.

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West's Revised Code of Washington Annotated  
Title 51. Industrial Insurance (Refs & Annos)  
Chapter 51.32. Compensation--Right to and Amount (Refs & Annos)

West's RCWA 51.32.160

51.32.160. Aggravation, diminution, or termination

Currentness

(1)(a) If aggravation, diminution, or termination of disability takes place, the director may, upon the application of the beneficiary, made within seven years from the date the first closing order becomes final, or at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: PROVIDED, That the director may, upon application of the worker made at any time, provide proper and necessary medical and surgical services as authorized under [RCW 51.36.010](#). The department shall promptly mail a copy of the application to the employer at the employer's last known address as shown by the records of the department.

(b) "Closing order" as used in this section means an order based on factors which include medical recommendation, advice, or examination.

(c) Applications for benefits where the claim has been closed without medical recommendation, advice, or examination are not subject to the seven year limitation of this section. The preceding sentence shall not apply to any closing order issued prior to July 1, 1981. First closing orders issued between July 1, 1981, and July 1, 1985, shall, for the purposes of this section only, be deemed issued on July 1, 1985. The time limitation of this section shall be ten years in claims involving loss of vision or function of the eyes.

(d) If an order denying an application to reopen filed on or after July 1, 1988, is not issued within ninety days of receipt of such application by the self-insured employer or the department, such application shall be deemed granted. However, for good cause, the department may extend the time for making the final determination on the application for an additional sixty days.

(2) If a worker receiving a pension for total disability returns to gainful employment for wages, the director may suspend or terminate the rate of compensation established for the disability without producing medical evidence that shows that a diminution of the disability has occurred.

(3) No act done or ordered to be done by the director, or the department prior to the signing and filing in the matter of a written order for such readjustment shall be grounds for such readjustment.

**Credits**

[1995 c 253 § 2; 1988 c 161 § 11; 1986 c 59 § 4; 1973 1st ex.s. c 192 § 1; 1961 c 23 § 51.32.160. Prior: 1957 c 70 § 38; prior: 1951 c 115 § 5; 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

West's Revised Code of Washington Annotated  
Title 51. Industrial Insurance (Refs & Annos)  
Chapter 51.36. Medical Aid (Refs & Annos)

West's RCWA 51.36.010

51.36.010. Findings--Minimum standards for providers--Health care provider network--Advisory group--Best practices treatment guidelines--Extent and duration of treatment--Centers for occupational health and education--Rules--Reports

Effective: July 28, 2013

[Currentness](#)

(1) The legislature finds that high quality medical treatment and adherence to occupational health best practices can prevent disability and reduce loss of family income for workers, and lower labor and insurance costs for employers. Injured workers deserve high quality medical care in accordance with current health care best practices. To this end, the department shall establish minimum standards for providers who treat workers from both state fund and self-insured employers. The department shall establish a health care provider network to treat injured workers, and shall accept providers into the network who meet those minimum standards. The department shall convene an advisory group made up of representatives from or designees of the workers' compensation advisory committee and the industrial insurance medical and chiropractic advisory committees to consider and advise the department related to implementation of this section, including development of best practices treatment guidelines for providers in the network. The department shall also seek the input of various health care provider groups and associations concerning the network's implementation. Network providers must be required to follow the department's evidence-based coverage decisions and treatment guidelines, policies, and must be expected to follow other national treatment guidelines appropriate for their patient. The department, in collaboration with the advisory group, shall also establish additional best practice standards for providers to qualify for a second tier within the network, based on demonstrated use of occupational health best practices. This second tier is separate from and in addition to the centers for occupational health and education established under subsection (5) of this section.

(2)(a) Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive proper and necessary medical and surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice, if conveniently located, except as provided in (b) of this subsection, and proper and necessary hospital care and services during the period of his or her disability from such injury.

(b) Once the provider network is established in the worker's geographic area, an injured worker may receive care from a nonnetwork provider only for an initial office or emergency room visit. However, the department or self-insurer may limit reimbursement to the department's standard fee for the services. The provider must comply with all applicable billing policies and must accept the department's fee schedule as payment in full.

(c) The department, in collaboration with the advisory group, shall adopt policies for the development, credentialing, accreditation, and continued oversight of a network of health care providers approved to treat injured workers. Health care providers shall apply to the network by completing the department's provider application which shall have the force of a contract with the department to treat injured workers. The advisory group shall recommend minimum network

standards for the department to approve a provider's application, to remove a provider from the network, or to require peer review such as, but not limited to:

- (i) Current malpractice insurance coverage exceeding a dollar amount threshold, number, or seriousness of malpractice suits over a specific time frame;
- (ii) Previous malpractice judgments or settlements that do not exceed a dollar amount threshold recommended by the advisory group, or a specific number or seriousness of malpractice suits over a specific time frame;
- (iii) No licensing or disciplinary action in any jurisdiction or loss of treating or admitting privileges by any board, commission, agency, public or private health care payer, or hospital;
- (iv) For some specialties such as surgeons, privileges in at least one hospital;
- (v) Whether the provider has been credentialed by another health plan that follows national quality assurance guidelines; and
- (vi) Alternative criteria for providers that are not credentialed by another health plan.

The department shall develop alternative criteria for providers that are not credentialed by another health plan or as needed to address access to care concerns in certain regions.

(d) Network provider contracts will automatically renew at the end of the contract period unless the department provides written notice of changes in contract provisions or the department or provider provides written notice of contract termination. The industrial insurance medical advisory committee shall develop criteria for removal of a provider from the network to be presented to the department and advisory group for consideration in the development of contract terms.

(e) In order to monitor quality of care and assure efficient management of the provider network, the department shall establish additional criteria and terms for network participation including, but not limited to, requiring compliance with administrative and billing policies.

(f) The advisory group shall recommend best practices standards to the department to use in determining second tier network providers. The department shall develop and implement financial and nonfinancial incentives for network providers who qualify for the second tier. The department is authorized to certify and decertify second tier providers.

(3) The department shall work with self-insurers and the department utilization review provider to implement utilization review for the self-insured community to ensure consistent quality, cost-effective care for all injured workers and employers, and to reduce administrative burden for providers.

(4) The department for state fund claims shall pay, in accordance with the department's fee schedule, for any alleged injury for which a worker files a claim, any initial prescription drugs provided in relation to that initial visit, without regard to whether the worker's claim for benefits is allowed. In all accepted claims, treatment shall be limited in point of duration as follows:

In the case of permanent partial disability, not to extend beyond the date when compensation shall be awarded him or her, except when the worker returned to work before permanent partial disability award is made, in such case not to extend beyond the time when monthly allowances to him or her shall cease; in case of temporary disability not to extend beyond the time when monthly allowances to him or her shall cease: **PROVIDED**, That after any injured worker has returned to his or her work his or her medical and surgical treatment may be continued if, and so long as, such continuation is deemed necessary by the supervisor of industrial insurance to be necessary to his or her more complete recovery; in case of a permanent total disability not to extend beyond the date on which a lump sum settlement is made with him or her or he or she is placed upon the permanent pension roll: **PROVIDED, HOWEVER**, That the supervisor of industrial insurance, solely in his or her discretion, may authorize continued medical and surgical treatment for conditions previously accepted by the department when such medical and surgical treatment is deemed necessary by the supervisor of industrial insurance to protect such worker's life or provide for the administration of medical and therapeutic measures including payment of prescription medications, but not including those controlled substances currently scheduled by the pharmacy quality assurance commission as Schedule I, II, III, or IV substances under chapter 69.50 RCW, which are necessary to alleviate continuing pain which results from the industrial injury. In order to authorize such continued treatment the written order of the supervisor of industrial insurance issued in advance of the continuation shall be necessary.

The supervisor of industrial insurance, the supervisor's designee, or a self-insurer, in his or her sole discretion, may authorize inoculation or other immunological treatment in cases in which a work-related activity has resulted in probable exposure of the worker to a potential infectious occupational disease. Authorization of such treatment does not bind the department or self-insurer in any adjudication of a claim by the same worker or the worker's beneficiary for an occupational disease.

(5)(a) The legislature finds that the department and its business and labor partners have collaborated in establishing centers for occupational health and education to promote best practices and prevent preventable disability by focusing additional provider-based resources during the first twelve weeks following an injury. The centers for occupational health and education represent innovative accountable care systems in an early stage of development consistent with national health care reform efforts. Many Washington workers do not yet have access to these innovative health care delivery models.

(b) To expand evidence-based occupational health best practices, the department shall establish additional centers for occupational health and education, with the goal of extending access to at least fifty percent of injured and ill workers by December 2013 and to all injured workers by December 2015. The department shall also develop additional best practices and incentives that span the entire period of recovery, not only the first twelve weeks.

(c) The department shall certify and decertify centers for occupational health and education based on criteria including institutional leadership and geographic areas covered by the center for occupational health and education, occupational health leadership and education, mix of participating health care providers necessary to address the anticipated needs of injured workers, health services coordination to deliver occupational health best practices, indicators to measure the success of the center for occupational health and education, and agreement that the center's providers shall, if feasible, treat certain injured workers if referred by the department or a self-insurer.

(d) Health care delivery organizations may apply to the department for certification as a center for occupational health and education. These may include, but are not limited to, hospitals and affiliated clinics and providers, multispecialty clinics, health maintenance organizations, and organized systems of network physicians.

(e) The centers for occupational health and education shall implement benchmark quality indicators of occupational health best practices for individual providers, developed in collaboration with the department. A center for occupational health and education shall remove individual providers who do not consistently meet these quality benchmarks.

(f) The department shall develop and implement financial and nonfinancial incentives for center for occupational health and education providers that are based on progressive and measurable gains in occupational health best practices, and that are applicable throughout the duration of an injured or ill worker's episode of care.

(g) The department shall develop electronic methods of tracking evidence-based quality measures to identify and improve outcomes for injured workers at risk of developing prolonged disability. In addition, these methods must be used to provide systematic feedback to physicians regarding quality of care, to conduct appropriate objective evaluation of progress in the centers for occupational health and education, and to allow efficient coordination of services.

(6) If a provider fails to meet the minimum network standards established in subsection (2) of this section, the department is authorized to remove the provider from the network or take other appropriate action regarding a provider's participation. The department may also require remedial steps as a condition for a provider to participate in the network. The department, with input from the advisory group, shall establish waiting periods that may be imposed before a provider who has been denied or removed from the network may reapply.

(7) The department may permanently remove a provider from the network or take other appropriate action when the provider exhibits a pattern of conduct of low quality care that exposes patients to risk of physical or psychiatric harm or death. Patterns that qualify as risk of harm include, but are not limited to, poor health care outcomes evidenced by increased, chronic, or prolonged pain or decreased function due to treatments that have not been shown to be curative, safe, or effective or for which it has been shown that the risks of harm exceed the benefits that can be reasonably expected based on peer-reviewed opinion.

(8) The department may not remove a health care provider from the network for an isolated instance of poor health and recovery outcomes due to treatment by the provider.

(9) When the department terminates a provider from the network, the department or self-insurer shall assist an injured worker currently under the provider's care in identifying a new network provider or providers from whom the worker can select an attending or treating provider. In such a case, the department or self-insurer shall notify the injured worker that he or she must choose a new attending or treating provider.

(10) The department may adopt rules related to this section.

(11) The department shall report to the workers' compensation advisory committee and to the appropriate committees of the legislature on each December 1st, beginning in 2012 and ending in 2016, on the implementation of the provider

network and expansion of the centers for occupational health and education. The reports must include a summary of actions taken, progress toward long-term goals, outcomes of key initiatives, access to care issues, results of disputes or controversies related to new provisions, and whether any changes are needed to further improve the occupational health best practices care of injured workers.

#### Credits

[2013 c 19 § 48, eff. July 28, 2013; 2011 c 6 § 1, eff. July 1, 2011; 2007 c 134 § 1, eff. Jan. 1, 2008; 2004 c 65 § 11; 1986 c 58 § 6; 1977 ex.s. c 350 § 56; 1975 1st ex.s. c 234 § 1; 1971 ex.s. c 289 § 50; 1965 ex.s. c 166 § 2; 1961 c 23 § 51.36.010. Prior: 1959 c 256 § 2; prior: 1943 c 186 § 2, part; 1923 c 136 § 9, part; 1921 c 182 § 11, part; 1919 c 129 § 2, part; 1917 c 28 § 5, part; Rem. Supp. 1943 § 7714, part.]

#### OFFICIAL NOTES

**Effective date--2011 c 6:** “This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2011.” [2011 c 6 § 2.]

**Report to legislature--2007 c 134:** “By December 1, 2009, the department of labor and industries must report to the senate labor, commerce, research and development committee and the house of representatives commerce and labor committee, or successor committees, on the implementation of this act.” [2007 c 134 § 2.]

**Effective date--2007 c 134:** “This act takes effect January 1, 2008.” [2007 c 134 § 3.]

**Report to legislature-Effective date-Severability-2004 c 65:** See notes following [RCW 51.04.030](#).

**Effective dates--Severability--1971 ex.s. c 289:** See [RCW 51.98.060](#) and [51.98.070](#).

#### [Notes of Decisions \(8\)](#)

West's RCWA 51.36.010, WA ST 51.36.010

Current through Chapter 4 of the 2019 Regular Session of the Washington Legislature.



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

West's Revised Code of Washington Annotated  
Title 51. Industrial Insurance (Refs & Annos)  
Chapter 51.52. Appeals (Refs & Annos)

## West's RCWA 51.52.050

51.52.050. Service of departmental action--Demand for  
repayment--Orders amending benefits--Reconsideration or appeal

Effective: July 22, 2011

Currentness

(1) Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, or if the worker, beneficiary, employer, or other person affected thereby chooses, the department may send correspondence and other legal notices by secure electronic means except for orders communicating the closure of a claim. Persons who choose to receive correspondence and other legal notices electronically shall be provided information to assist them in ensuring all electronic documents and communications are received. Correspondence and notices must be addressed to such a person at his or her last known postal or electronic address as shown by the records of the department. Correspondence and notices sent electronically are considered received on the date sent by the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia. However, a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

(2)(a) Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.

(b) An order by the department awarding benefits shall become effective and benefits due on the date issued. Subject to (b)(i) and (ii) of this subsection, if the department order is appealed the order shall not be stayed pending a final decision on the merits unless ordered by the board. Upon issuance of the order granting the appeal, the board will provide the worker with notice concerning the potential of an overpayment of benefits paid pending the outcome of the appeal and the requirements for interest on unpaid benefits pursuant to [RCW 51.52.135](#). A worker may request that benefits cease pending appeal at any time following the employer's motion for stay or the board's order granting appeal. The request must be submitted in writing to the employer, the board, and the department. Any employer may move for a stay of the order on appeal, in whole or in part. The motion must be filed within fifteen days of the order granting appeal. The board shall conduct an expedited review of the claim file provided by the department as it existed on the date of the

department order. The board shall issue a final decision within twenty-five days of the filing of the motion for stay or the order granting appeal, whichever is later. The board's final decision may be appealed to superior court in accordance with [RCW 51.52.110](#). The board shall grant a motion to stay if the moving party demonstrates that it is more likely than not to prevail on the facts as they existed at the time of the order on appeal. The board shall not consider the likelihood of recoupment of benefits as a basis to grant or deny a motion to stay. If a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to [RCW 51.32.240](#).

(i) If upon reconsideration requested by a worker or medical provider, the department has ordered an increase in a permanent partial disability award from the amount reflected in an earlier order, the award reflected in the earlier order shall not be stayed pending a final decision on the merits. However, the increase is stayed without further action by the board pending a final decision on the merits.

(ii) If any party appeals an order establishing a worker's wages or the compensation rate at which a worker will be paid temporary or permanent total disability or loss of earning power benefits, the worker shall receive payment pending a final decision on the merits based on the following:

(A) When the employer is self-insured, the wage calculation or compensation rate the employer most recently submitted to the department; or

(B) When the employer is insured through the state fund, the highest wage amount or compensation rate uncontested by the parties.

Payment of benefits or consideration of wages at a rate that is higher than that specified in (b)(ii)(A) or (B) of this subsection is stayed without further action by the board pending a final decision on the merits.

(c) In an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

#### Credits

[[2011 c 290 § 9](#), eff. July 22, 2011; [2008 c 280 § 1](#), eff. June 12, 2008; [2004 c 243 § 8](#), eff. June 10, 2004; 1987 c 151 § 1; 1986 c 200 § 10; 1985 c 315 § 9; 1982 c 109 § 4; 1977 ex.s. c 350 § 75; 1975 1st ex.s. c 58 § 1; 1961 c 23 § 51.52.050. Prior: 1957 c 70 § 55; 1951 c 225 § 5; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1947 c 247 § 1, part; 1911 c 74 § 20, part; Rem. Supp. 1947 § 7676e, part. (iii) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (iv) 1923 c 136 § 7, part; 1921 c 182 § 10, part; 1917 c 29 § 3, part; RRS § 7712, part. (v) 1917 c 29 § 11; RRS § 7720. (vi) 1939 c 50 § 1, part; 1927 c 310 § 9, part; 1921 c 182 § 12, part; 1919 c 129 § 5, part; 1917 c 28 § 15, part; RRS § 7724, part.]

#### OFFICIAL NOTES

**Application--2008 c 280:** "This act applies to orders issued on or after June 12, 2008." [2008 c 280 § 7.]

**Adoption of rules--2004 c 243:** See note following [RCW 51.08.177](#).

West's Revised Code of Washington Annotated  
Title 51. Industrial Insurance (Refs & Annos)  
Chapter 51.52. Appeals (Refs & Annos)

West's RCWA 51.52.060

51.52.060. Notice of appeal--Time--Cross-appeal--Departmental options

Currentness

(1)(a) Except as otherwise specifically provided in this section, a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board. However, a health services provider or other person aggrieved by a department order or decision making demand, whether with or without penalty, solely for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within twenty days from the day on which a copy of the order or decision was communicated to the health services provider upon whom the department order or decision was served, a notice of appeal to the board.

(b) Failure to file a notice of appeal with both the board and the department shall not be grounds for denying the appeal if the notice of appeal is filed with either the board or the department.

(2) Within ten days of the date on which an appeal has been granted by the board, the board shall notify the other interested parties to the appeal of the receipt of the appeal and shall forward a copy of the notice of appeal to the other interested parties. Within twenty days of the receipt of such notice of the board, the worker or the employer may file with the board a cross-appeal from the order of the department from which the original appeal was taken.

(3) If within the time limited for filing a notice of appeal to the board from an order, decision, or award of the department, the department directs the submission of further evidence or the investigation of any further fact, the time for filing the notice of appeal shall not commence to run until the person has been advised in writing of the final decision of the department in the matter. In the event the department directs the submission of further evidence or the investigation of any further fact, as provided in this section, the department shall render a final order, decision, or award within ninety days from the date further submission of evidence or investigation of further fact is ordered which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days.

(4) The department, either within the time limited for appeal, or within thirty days after receiving a notice of appeal, may:

(a) Modify, reverse, or change any order, decision, or award; or

(b)(i) Except as provided in (b)(ii) of this subsection, hold an order, decision, or award in abeyance for a period of ninety days which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days pending further investigation in light of the allegations of the notice of appeal; or

(ii) Hold an order, decision, or award issued under [RCW 51.32.160](#) in abeyance for a period not to exceed ninety days from the date of receipt of an application under [RCW 51.32.160](#). The department may extend the ninety-day time period for an additional sixty days for good cause.

For purposes of this subsection, good cause includes delay that results from conduct of the claimant that is subject to sanction under [RCW 51.32.110](#).

The board shall deny the appeal upon the issuance of an order under (b)(i) or (ii) of this subsection holding an earlier order, decision, or award in abeyance, without prejudice to the appellant's right to appeal from any subsequent determinative order issued by the department.

This subsection (4)(b) does not apply to applications deemed granted under [RCW 51.32.160](#).

(5) An employer shall have the right to appeal an application deemed granted under [RCW 51.32.160](#) on the same basis as any other application adjudicated pursuant to that section.

(6) A provision of this section shall not be deemed to change, alter, or modify the practice or procedure of the department for the payment of awards pending appeal.

#### Credits

[[1995 c 253 § 1](#); [1995 c 199 § 7](#); 1986 c 200 § 11; 1977 ex.s. c 350 § 76; 1975 1st ex.s. c 58 § 2; 1963 c 148 § 1; 1961 c 274 § 8; 1961 c 23 § 51.52.060. Prior: 1957 c 70 § 56; 1951 c 225 § 6; prior: 1949 c 219 §§ 1, part, 6, part; 1947 c 246 § 1, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 §§ 2, part, 6, part; 1927 c 310 §§ 4, part, 8, part; 1923 c 136 § 2, part; 1919 c 134 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 §§ 5, part, 20, part; Rem Supp. 1949 §§ 7679, part, 7697, part.]

#### OFFICIAL NOTES

**Reviser's note:** This section was amended by [1995 c 199 § 7](#) and by [1995 c 253 § 1](#), each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to [RCW 1.12.025\(2\)](#). For rule of construction, see [RCW 1.12.025\(1\)](#).

**Severability--1995 c 199:** See note following [RCW 51.12.120](#).

#### [Notes of Decisions \(60\)](#)

West's RCWA 51.52.060, WA ST 51.52.060

Current through Chapter 4 of the 2019 Regular Session of the Washington Legislature.

 KeyCite Yellow Flag - Negative Treatment  
Proposed Regulation

Washington Administrative Code  
Title 296(Ch. 1-59). Labor and Industries, Department of  
Chapter 296-14. Industrial Insurance (Refs & Annos)

#### WAC 296-14-350

296-14-350. Claim allowance and wage determination in occupational disease cases.

#### Currentness

(1) The liable insurer in occupational disease cases is the insurer on risk at the time of the last injurious exposure to the injurious substance or hazard of disease during employment within the coverage of Title 51 RCW which gave rise to the claim for compensation. Such Title 51 RCW insurer shall not be liable, however, if the worker has a claim arising from the occupational disease that is allowed for benefits under the maritime laws or Federal Employees' Compensation Act.

(2) The compensation schedules and wage base for claims shall be based on the schedule in effect on the date of disease manifestation. Compensation shall be based on the monthly wage of the worker as follows:

(a) If the worker was employed at the time the disease required medical treatment or became totally or partially disabling, whichever occurred first, compensation shall be based on the monthly wage paid on that date regardless of whether the worker is employed in the industry that gave rise to the disease or in an unrelated industry.

(b) If the worker was not employed, for causes other than voluntary retirement, at the time the disease required medical treatment or became totally or partially disabling, whichever occurred first, compensation shall be based upon the last monthly wage paid.

(3) Benefits shall be paid in accordance with the schedules in effect on the date of manifestation. Manifestation is the date the disease required medical treatment or became totally or partially disabling, whichever occurred first, without regard to the date of the contraction of the disease or the date of filing the claim.

#### Credits

Statutory Authority: Chapters 51.04, 51.08, 51.12, 51.24 and 51.32 RCW and [117 Wn.2d 122](#) and [121 Wn.2d 304](#). WSR 93-23-060, § 296-14-350, filed 11/15/93, effective 1/1/94. Statutory Authority: Chapters 51.08 and 51.32 RCW. WSR 88-14-011 (Order 88-13), § 296-14-350, filed 6/24/88.

Current with amendments adopted through the 18-24 Washington State Register, dated December 19, 2018.

WAC 296-14-350, WA ADC 296-14-350

## Restatement (Second) of Judgments § 83 (1982)

Restatement of the Law - Judgments | March 2019 Update

Restatement (Second) of Judgments

Chapter 6. Special Problems Deriving from Nature of Forum Rendering Judgment

### § 83 Adjudicative Determination by Administrative Tribunal

[Comment:](#)

[Reporter's Note](#)

[Case Citations - by Jurisdiction](#)

(1) Except as stated in Subsections (2), (3), and (4), a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

- (a) Adequate notice to persons who are to be bound by the adjudication, as stated in § 2;
- (b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;
- (c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;
- (d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and
- (e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

(3) An adjudicative determination of a claim by an administrative tribunal does not preclude relitigation in another tribunal of the same or a related claim based on the same transaction if the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim.

(4) An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that:

- (a) The determination of the tribunal adjudicating the issue is not to be accorded conclusive effect in subsequent proceedings; or
- (b) The tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question.

**Comment:**

*a. Scope.* The rule of this Section applies when a final adjudicative determination by an administrative tribunal is invoked as the basis of claim or issue preclusion in a subsequent action, whether that subsequent action is another proceeding in the same administrative tribunal or is a proceeding in some other administrative or judicial tribunal. The application of this Section is subject to statutory provisions that may, expressly or by implication, govern the res judicata effect of the determinations of a particular tribunal. If the governing statute contemplates that the determinations of a particular agency are to be conclusive only within that agency, for example, the rule stated in this Section is displaced.

The rule of this Section applies as between successive actions or proceedings. It does not apply when a determination of an administrative tribunal is being subjected to direct judicial review. Judicial review in modern administrative procedure is usually prescribed by statute and is essentially similar to an appeal from a judicial tribunal of the first instance. In older procedural systems, such review may take the form of a “collateral attack” on the administrative determination, premised on the proposition that the judgment is “invalid.” See Comment *d*. Whatever its form, such a review is a continuation of the original administrative litigation and the final outcome is still in contest. The rules of res judicata do not foreclose the appellate contest, just as they do not prevent an appellate court from reversing a lower judicial tribunal.

An administrative adjudication becomes preclusive when it has become final in accordance with the rules stated in §§ 13 and 14. It is not necessary that the administrative adjudication have been reviewed and affirmed by a court.

*b. Rationale.* Administrative agencies perform various functions, including executive or ministerial decision-making, issuing quasi-legislative rules and regulations, and deciding specific legal claims and issues. In earlier eras in the evolution of administrative procedure, all these functions were conducted by relatively informal procedures. In modern administrative agencies, however, well-defined procedures are often established. Where an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication. Decisional processes using procedures whose formality approximates those of courts may properly be accorded the conclusiveness that attaches to judicial judgments. Correlatively, the social importance of stability in the results of such decisions corresponds to the importance of stability in judicial judgments. The rules of res judicata thus generally have application not only by courts with respect to administrative adjudications but also by agencies with respect to their own adjudications.

Where an administrative forum has the essential procedural characteristics of a court, therefore, its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court. Hence, the rule of claim preclusion is properly applied to administrative adjudications of legal claims. The public economy and private repose resulting from the rule of issue preclusion generally are also as important when an issue has been determined in an administrative tribunal as when it has been determined by a court.

According legal finality to administrative adjudication recognizes the similarity between the adjudicative procedure of modern administrative agencies and modern judicial procedure. That similarity did not always exist. In an earlier era, decisions of administrative agencies even with regard to claims of legal right usually were arrived at by what may be called executive procedure, that is, unilateral decision by an official on the basis of whatever information he deemed it appropriate to take into account. Parties did not have a right to present evidence or argument, and sometimes had no rights of participation at all. Since administrative agency procedure was usually of this character, it was generally held that an administrative determination could not finally resolve legal rights. It followed that an administrative determination could not have res judicata effects on legal rights or on disputed issues upon which such rights might depend.

In the last half century or so, however, administrative procedure has undergone change and differentiation. Administrative agencies now are recognized as engaging in a variety of decisional functions according to a variety of procedures. These include the legislative function of considering and adopting rules and regulations, managerial and ministerial functions in the administration of government enterprises and programs, and adjudicative functions in the decision of claims based on legal rights and duties. In performing legislative and managerial functions, agencies are not necessarily required to use procedures having the formality of adjudication. In the performance of adjudicative functions, however, administrative agencies are generally required by law to employ procedures substantially similar to those used in courts. Where claims of legal right are involved, there are important constitutional requirements concerning the kind of hearing that must be provided. Indeed, unless an administrative procedure compromises the elements of adjudicatory procedure, it may be legally ineffective to determine a claim of legal right in the first instance, let alone to preclude subsequent reexamination of the claim or of the issues upon which its resolution depends.

While adjudicative procedure therefore is necessary to yield an adjudication that is binding under the rules of *res judicata*, not all proceedings involving elements of such procedure constitute adjudication. For example, the right to present evidence and to cross-examine witnesses is accorded in certain types of rule-making proceedings and licensing proceedings. So also it is generally required that some kind of public notice be given of such proceedings, notice that is essentially similar to that afforded to unidentified claimants in *in rem* proceedings. See § 2, Comment g. If such procedural rights of themselves indicated that a proceeding was adjudicative in nature, many types of rule-making hearings could be accorded *res judicata* effects. However, these procedural attributes are not of themselves sufficient to define adjudication. In this respect it is necessary to differentiate between claim preclusion and issue preclusion.

Considered analytically, adjudication of a claim is impossible unless the matter for decision includes a legal claim, that is, an assertion by one party against another cast in terms of entitlement under substantive law to particular relief, including determination of legal status. For this purpose legal claims include claims of entitlement asserted by or against the government, as when the government seeks to recover a tax obligation or when a claim based on legal right is prosecuted against the government. A petition for a benefit from the government is not a legal claim unless the agency is obliged to grant the petition upon a showing of the existence of conditions specified by law. If a legal claim is involved, however, and if the procedures to determine it are substantially similar to those used in judicial adjudication, the proceeding is adjudication. As such, the outcome of the proceeding should have the conclusive effects prescribed by the rules of *res judicata*, including conclusiveness as to issues actually litigated.

Administrative proceedings having some primary object other than the determination of a claim can have issue preclusive effects. The essential question is whether, within the context of the larger purpose of an administrative proceeding, an issue is formulated as it would be in a court and decided according to procedures similar to those of a court. An issue of law is so formulated when there is assertion and controversion of the meaning of an existing rule as applied to specific circumstances—actual, or hypothetical as in the case of a declaratory proceeding, see § 33. An issue of fact is so formulated when there is assertion and controversion of the occurrence of a legally significant event. For example, within the context of a licensing hearing it may be disputed whether or not the licensee engaged in a specified course of conduct on a particular occasion, where engaging in the conduct is relevant to the licensure question; determination of that issue can be accorded preclusive effect in later litigation even though the grant or denial of the license as such is not a matter of legal right. If an issue has thus been formulated, and if the procedure for resolving it is substantially similar to that used in judicial adjudication, the agency's determination of the issue should be given preclusive effect in accordance with the rules of *res judicata*.

*c. Elements of adjudicatory procedure.* The elements of adjudicatory procedure described in Subsection (2)(b)-(d) are found in proceedings under the Federal Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, and in the Model State Administrative Procedure Act and state statutes similar to the latter. Decisions under the Due Process Clause, coming at the same problem from a somewhat different direction, have held that if the matter in question is substantively one of legal right, then the affected party may be subjected to a conclusive determination of that right only if the procedure

has substantially the incidents specified in Subsection (2)(b) and (c). The requirement of finality stated in Subsection (2)(d) is implicit in all decisions concerning whether there had been an “adjudication” and is explicit in decisions dealing with the question of exhaustion of administrative remedies.

Additional procedural rights may be regarded as essential prerequisites of conclusiveness, depending on the nature of the matter in controversy, the legal capability and stature of the tribunal, and applicable constitutional requirements. For example, the opportunity to present evidence may not be regarded as adequate unless the parties have the right of compulsory process, i.e., subpoena, where important evidence otherwise is likely to be inaccessible. It can be relevant that the agency determination was based on evidence that would be inadmissible in judicial proceedings. The right to obtain judicial review may be regarded as of similar importance, particularly review of questions of subject matter jurisdiction, of the existence of substantial evidence to support the decision, and of the fundamental fairness of the proceeding. The fact that an agency adjudication was subjected to judicial review and was upheld is a factor that supports giving it preclusive effect.

For purposes of applying the rules of preclusion to a person on the basis of an administrative determination, the person must have the rights of a party or be represented by such a party. In some types of administrative proceedings, the victim of a statutory wrong may complain to the agency but not be given initiative or control of an enforcement proceeding. In such circumstances the agency rather than the victim is the party to whom the rules of res judicata apply. Compare §§ 34 and 39.

*d. Validity of administrative proceeding.* The requirements of §§ 1- 12 apply to administrative adjudications. Hence, a proceeding in an administrative tribunal purporting to adjudicate the rights of a party must be based on adequate notice, jurisdiction over the person, and subject matter jurisdiction, as required by those rules.

**Illustrations:**

1. M is issued a license to drive motor vehicles, a license that under substantive law is recognized as conferring a legally protectible right. The Motor Vehicle Department initiates a proceeding in which M's license may be revoked. If notice conforming to the requirement of § 2 is not given to M, an adjudication in the proceeding will not be accorded preclusive effect.
2. C performs occasional maintenance work at various premises. In the course of such work on premises owned by D, C is injured and seeks compensation before the Workers' Compensation Commission. D refuses to appear. Under applicable law, the Commission has authority to award compensation only to persons who are injured in the course of “employment,” which is construed to exclude independent contractors. The Commission has authority to award compensation according to a statutory formula that does not permit punitive damages. The Commission gives C an award that includes punitive damages. Whether the award will be given preclusive effect with regard to C's status or the inclusion of punitive damages is determined by § 12.

The concept of validity as applied to administrative adjudications is often confused, largely because of its interconnection with the development of judicial review of administrative action. Until the adoption of modern statutory administrative procedure, most administrative determinations were not judicially reviewable by ordinary procedure such as appeal. The felt need for judicial review, particularly of decisions involving matters of legal right, was fulfilled by using extraordinary writs for this purpose, notably prohibition, mandamus, certiorari, and injunction. In the beginning, the writs were held not to reach “mere error” but only instances of administrative action in “excess of jurisdiction.” It thus became necessary to say that irregularity justifying judicial intervention was jurisdictional, with the implication that the agency action in question not only was judicially reviewable but also was a nullity for all purposes. The problem paralleled that which arose in deciding whether a judicial judgment would be subject to “collateral” attack. See Introductory Note to Chapter 5.

In modern administrative procedure, it is evident that the concept of invalidity has two quite different connotations. One connotation entails that kind of irregularity which justifies judicial review through the vehicle of writ procedure employed on the model of an appeal from a trial court judgment. Irregularity of this kind justifies timely review and perhaps reversal, but in the absence of such review does not leave the administrative determination vulnerable to the subsequent attack. Moreover, in that context the agency determination is no more *res judicata* in the review proceeding than is a trial court judgment *res judicata* in an appellate court in which it is under appeal. See Comment *a*. The other connotation of invalidity entails that kind of irregularity that justifies treating an administrative determination as a nullity. The definition of the latter sort of irregularity is properly guided by the analysis of § 12, Comments *d* and *e*, and § 65.

*e. Finality of proceeding.* The requirement of finality stated in §§ 13- 16 applies to a determination by an administrative agency and is incorporated by Subsection (2)(d). To determine finality, reference must be made to the procedures of the agency that specify what official has authority to decide and the point at which the decision becomes effective. Thus, agency procedure may provide that a hearing officer's decision is the decision of the agency unless it is superseded by the agency board, or may provide that a hearing officer's decision is merely provisional.

**Illustration:**

3. The Building Commission initiates a complaint that the electrical system of a building owned by L does not conform to the governing building code provisions. Under the Commission's procedure, a hearing in a contested case is held before a referee, who makes a report and recommendation that is without effect until the Commission accepts or rejects it. The referee submits a report to the Commission, finding that L's building does not conform to the code. The finding is not a final adjudication.

It should also be observed that the existence of a rule of finality in an agency procedure does not of itself indicate that the procedure is adjudicative. There are often time limits in administrative rule-making and ministerial procedures.

*f. Claim and issue preclusion: general rules.* The rules of *res judicata* referred to in Subsection (1) include the rules of claim preclusion stated in §§ 17- 24 and the qualifications and exceptions thereto stated in §§ 20- 26, and the rules of issue

preclusion and the qualifications and exceptions thereto stated in §§ 27- 28. They also include application of claim and issue preclusion to other persons by virtue of the rules stated in Chapter 4.

**Illustrations:**

4. T is subject to income tax on earnings from a business, being allowed deductions for expenses reasonably necessary in connection with the business. O, the income tax enforcement officer, challenges certain deductions as not being reasonably necessary. A trial is held before the Tax Commission at which T and O both offer evidence and legal argument concerning the deductions. The Tax Commission determines that some of the deductions are improper and assesses a deficiency against T. The order becomes final. T may not thereafter relitigate the deficiency for that year on the basis of different evidence or a different legal theory.

5. Same facts as in Illustration 4 except that the Tax Commission determines that the deductions were proper. O may not thereafter relitigate the deficiency for that year on the basis of different evidence or a different legal theory.

Note: It does not necessarily follow that the issues determined may not be relitigated in connection with determining the tax due from C for a subsequent tax year. See § 27, Illustration 9.

6. A federal statute provides that bituminous coal shall receive a production bounty of \$1 per ton and that the bounty is free of income tax to the recipient. C, a coal company, applies to the Federal Coal Agency for a bounty on its production but is rejected on the ground that its coal is not bituminous. Pursuant to the prescribed system for review, C brings an administrative proceeding against the Coal Agency before the Coal Board to recover the bounty and obtains an award. Subsequently, the Internal Revenue Service seeks to treat the bounty as taxable income to C, on the ground that the coal is not bituminous. Since the Coal Board and the Internal Revenue Service are both agencies of the same government, the determination by the Coal Board that the coal is bituminous is conclusive upon that issue in a proceeding by the Internal Revenue Service to enforce the tax claim.

7. In a proceeding before the National Labor Relations Board involving B Corporation, it is determined that a certain practice of B is an unfair labor practice and a cease and desist order is entered against B. Subsequently, the business operated by B is sold to C Corporation. C, with knowledge of the prior Board order, resumes the practice in question. The prior determination of the issue of the unfairness of the practice is conclusive against C, unless one of the exceptions in § 28 or § 29 applies.

The array of exceptions to the rules of res judicata that may be applicable to administrative determinations is at least as broad as with respect to judicial tribunals. Examples of relevant exceptions include: § 20, Illustration 2 (dismissal for want of jurisdiction does not result in claim preclusion); § 21, Illustration 3 (no preclusion against subsequent assertion of counterclaim where tribunal in original action lacked jurisdiction to adjudicate counterclaim); § 24, Illustration 11 (tribunal has authority to modify relief previously awarded); § 26, Illustration 2 (effect of limitations on jurisdiction of

tribunal rendering original judgment); § 27, Illustration 9 (separation in time of the two proceedings affects application of issue preclusion); § 28, Illustration 3 (change in applicable legal context affects application of issue preclusion); § 29, Illustration 1 (summary character of procedure in first action affects application of issue preclusion in subsequent litigation with different adversary).

*g. Claim preclusion: exceptions.* The qualifications and exceptions to the rule of claim preclusion have particular importance with respect to adjudications by administrative agencies. One important qualification has to do with the definition of “claim” itself. In the context of civil actions in courts, the term “claim” is broadly defined. See §§ 24 and 25. This broad definition reflects the fact that in modern practice judicial tribunals usually have comprehensive authority to adjudicate all contentions of fact and all legal theories that may arise from a transaction. Since a judicial tribunal has such comprehensive authority, a litigant may justly be required to avail himself of that authority and to assert in a single action all factual and legal contentions that might be made. See § 25, Comment *f*.

In contrast, the jurisdiction of administrative agencies is usually defined in terms of specified substantive legal provisions, for example, workers' compensation, tax obligations, regulation of a specified business, discrimination in employment, etc. Since the tribunal's authority is delimited in substantive legal terms, the tribunal ordinarily lacks authority to adjudicate claims arising out of the transaction in question but based upon other substantive legal premises. Thus, a workers' compensation commission usually lacks authority to consider claims for punitive damages for injuries intentionally inflicted on an employee in the course of employment; an employment discrimination agency may lack authority to consider claims based on breach of contract. These limitations on authority of the tribunal should carry corresponding limitations on the scope of “claim” for purposes of the rule of claim preclusion.

Furthermore, the exceptions stated in § 26(1)(c) and (d) are particularly important in considering claim preclusion with respect to an administrative agency determination. Section 26(1)(c) provides that preclusion is inapplicable to that part of a claim that is a possible basis for a second action where “the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the competency of the [tribunal] ...” Section 26(1)(d) similarly allows a subsequent action when “it is the sense of [a statutory] scheme that the plaintiff should be permitted to split his claim.”

**Illustration:**

8. W, a female employee, is required to conform to certain regulations of E, her employer, that are not imposed on male employees. W brings a proceeding against E before the State Labor Board, contending that the regulations are an unfair labor practice. The Labor Board denies W relief. W then brings a proceeding before the State Human Rights Commission, contending that the regulations violate a statute prohibiting discrimination on the basis of sex. If the statutory scheme of remedies contemplates that an employee situated as W may pursue both administrative remedies, the rejection of her claim by the Labor Board does not preclude her assertion of the claim before the Human Rights Commission. Compare § 26, Illustration 5.

However, the rule of claim preclusion may be applicable even though the administrative tribunal hearing the first claim lacked authority to consider the second claim. The question is one of statutory interpretation, specifically whether the statutes contemplate a binding election of either tribunal or remedy, rather than resort seriatim to alternative tribunals or alternative remedies. A statute may also contemplate cumulative remedies. The same problem can arise when the initiating party is a government agency as distinct from a private claimant.

**Illustrations:**

9. Same facts as Illustration 8, except that the statute establishing the Human Rights Commission is construed to create a remedy parallel but preclusive of that available before the State Labor Board. The proceeding before the State Labor Board precludes W from bringing a proceeding before the Human Rights Commission.

10. A statute authorizes the Pure Food Agency to issue cease and desist orders against food products that are impure. Another statute authorizes the Fair Trade Agency to issue cease and desist orders against products that are misleadingly labeled, but contains a provision that “proceedings of the Fair Trade Agency shall not duplicate those of the Pure Food Agency.” The Pure Food Agency brings a proceeding against M for a cease and desist order against a certain product on the ground that it is unwholesome. After a trial before an administrative hearing officer, the application for the order is rejected on the ground that the food is not unwholesome. The determination precludes a proceeding by the Fair Trade Agency based on the contention that the labeling of the product fails to disclose that it is unwholesome.

The problem of overlapping claims can also arise in situations involving interstate transactions where a similar remedy may be provided by each of two states. Again, the question is primarily one of statutory interpretation, although the matter of Full Faith and Credit may also be implicated. See [Restatement, Second, Conflict of Laws § 95](#).

**Illustration:**

11. W, a resident of State X and employed by an employer based in that state, is injured while at work in State Y. W brings a proceeding to obtain workers' compensation under the law of State X before the Compensation Board of State X. An award is made. Subsequently, W seeks an award for the same injury under the law of State Y by a proceeding before the Compensation Board of State Y, the compensation rates in State Y being greater than those of State X. The law of State X does not explicitly exclude post-award applications in sister states. Under the settled construction of the State Y statute, an award in another state does not preclude an award in State Y, but is subject to deduction of the amount of the previous award. The award in State X does not preclude an award in State Y.

*h. Issue preclusion: exceptions.* The general rule of issue preclusion stated in § 27 is subject to important exceptions stated in § 28. Furthermore, when issue preclusion is invoked by a person who was not a party to the original proceeding, § 29 provides a number of additional exceptions. Both sets of exceptions have special relevance to determinations by administrative agencies. Thus, § 28, permits relitigation of an issue of law when the claims involved are substantially unrelated or when necessary to avoid inequitable administration of the law. This exception has perhaps its most salient application in situations where issue preclusion is invoked against the government in adjudications before an administrative agency. See Illustrations 3 and 4 to § 28. So also § 29(1), (6), and (7) are specially pertinent when a government agency is the party against whom preclusion is invoked. See also § 29, Comment *i*.

**Illustration:**

12. In a controversy with T, a taxpayer, the State Revenue Commission contends that a certain transaction should be treated as yielding ordinary income rather than capital gain. The issue is one of considerable importance and is not clearly resolved one way or another by the governing legislation. In the proceeding against T, the issue is resolved against the Commission at the administrative appellate level, and the Commission undertakes no proceedings for further review. The determination of the issue is not preclusive against the Commission in another controversy on a similar matter with another taxpayer.

In addition to these exceptions, Subsection (4) of this Section recognizes that the legislation governing a particular statutory scheme may call for withholding preclusion where it would otherwise be applied. The question is one of statutory interpretation in the particular scheme and can take at least two forms. The scheme of remedies may intend that the proceedings in an administrative tribunal be determinative only for the purposes of the controversy immediately before the agency. For example, the scheme may contemplate that the agency proceedings be as expeditious as possible. One aspect of assuring expeditiousness is to confine the stakes to the matter immediately in controversy. Thus, issue preclusion may be withheld so that the parties will not be induced to dispute the administrative proceeding in anticipation of its effect in another proceeding.

**Illustration:**

13. A program of medical payments provides benefits to any person who lacks medical insurance and who suffers from “disability” as a result of injury or illness. An expedited procedure is provided for

determining whether a claimant has disability. Another program of benefits provides a lifetime pension for anyone over a specified age who suffers “disability.” The financial dimension of the average claim under the first program is \$1,000, while that under the second program is \$25,000. It may be held that a determination of the question of disability under the first benefit program is not preclusive of the question when the claimant seeks a benefit under the second program.

The second form in which the question of preclusion can arise concerns the authority of the tribunal involved in the second proceeding. The statutory scheme may contemplate that the tribunal is required to make its own determination of the issue in question, even though the issue has been previously litigated in another forum.

**Illustration:**

14. W, an employee of E, is assigned to work at a pay scale lower than that which he previously enjoyed. W brings a proceeding before the State Labor Board contending that the work assignment was a violation of his rights under the employment contract and that the assignment was the product of racial discrimination. The Board finds for E, rejecting both of W's claims. W then brings a proceeding before the Human Rights Commission, contending that the assignment was the product of racial discrimination. The statute governing the Commission provides that “the remedies provided under this statute are in addition to all other remedies available to an affected employee or prospective employee.” It may be held that the determination of the issue of racial discrimination by the Labor Board is not conclusive in the proceeding before the Commission.

*i. Relief from administrative adjudication.* The principle that a judgment is conclusive is subject to the qualifications expressed in the rules governing relief from a judgment. See generally Chapter 5. Those qualifications have application to adjudications by administrative agencies. Administrative procedure may recognize, through rule or established practice, the right of a party to obtain relief from an administrative adjudication on account of fraud, mistake, changed conditions, and other grounds for relief from judicial judgments. Where relief may be afforded by such means, a party ordinarily should pursue it in the agency rather than seeking relief by independent action in court, as stated in § 78. However, if the relief obtainable from the agency is inadequate compared with that obtainable through a judicial proceeding, the latter may be pursued. See §§ 79 and 80.

**Reporter's Note**

(§ 131, Tent. Draft No. 7.) This Section has no counterpart in the first Restatement. At the time the first Restatement was promulgated, it was still generally the rule that administrative determinations were not considered adjudications for purposes of the rules of res judicata. The older view is represented in *Pearson v. Williams*, 202 U.S. 281, 26 S.Ct. 608, 50

L.Ed. 1029 (1906), and *United States v. Stone & Downer Co.*, 274 U.S. 225, 47 S.Ct. 616, 71 L.Ed. 1013 (1927). See also, e.g., *Bridges v. United States*, 199 F.2d 811 (9th Cir.1952), rev'd on other grounds, 346 U.S. 209, 73 S.Ct. 1055, 97 L.Ed. 1557 (1953), a decision that seems even then anachronistic. For useful accounts in the transitional period, also indicating the problem of distinguishing administrative adjudication from other administrative functions, see Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, 1942 Wis.L.Rev. 5, 198; Groner and Sternstein, *Res Judicata in Federal Administrative Law*, 39 Iowa L.Rev. 300 (1954). For modern compilations and analyses, see Vestal, *Relitigation by Federal Agencies*, 55 N.C.L.Rev. 123 (1977); Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 Geo.Wash.L.Rev. 65 (1977); Comment, *Application of Res Judicata to Agencies with Parallel Jurisdiction*, 52 Denver L.J. 595 (1975); Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4475. See generally 2 Davis, *Administrative Law Treatise* §§ 18.01 et seq. (1958).

*Comment b.* For the modern rule that an administrative determination of legal rights through a procedure having the elements of adjudicatory procedure is res judicata, see *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940); *Tait v. Western Md. Ry.*, 289 U.S. 620, 53 S.Ct. 706, 77 L.Ed. 1405 (1933); cf. *Commissioner v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948); *Grossgold v. Supreme Court of Illinois*, 557 F.2d 122 (7th Cir.1977). See also, e.g., *Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir.1979); *McCulloch Interstate Gas Corp. v. FPC*, 536 F.2d 910 (10th Cir.1976); *Roberts v. American Airlines*, 526 F.2d 757 (7th Cir.1975), cert. denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976); *French v. Rishell*, 40 Cal.2d 477, 254 P.2d 26 (1953); *Umberfield v. School Dist. No. 11*, 185 Colo. 165, 522 P.2d 730 (1974); *Morin v. J.H. Valliere Co.*, 113 N.H. 431, 309 A.2d 153 (1973). For issue preclusion as to a finding in a licensing proceeding, see *Ashland Chem. Co. v. Pollution Control Board*, 57 Ill.App.3d 1052, 15 Ill.Dec. 480, 373 N.E.2d 826 (1978). For proceedings involving an adjudicatory procedure but contentions dealing with matters such as rate-making and franchises rather than claims of substantive legal right, and holding the rules of res judicata inapplicable, see e.g., *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968), reh. denied, 392 U.S. 917, 88 S.Ct. 2050, 20 L.Ed.2d 1379 (1968) (rate-making); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C.Cir.1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 2233, 29 L.Ed.2d 701 (1971), reh. denied, 404 U.S. 877, 92 S.Ct. 30, 30 L.Ed.2d 125 (1971), cert. denied, 406 U.S. 943, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972), motion denied, 463 F.2d 268 (D.C.Cir.1971) (television license); see also *FTC v. Texaco, Inc.*, 555 F.2d 862, 893 (D.C.Cir.1977), cert. denied, 431 U.S. 974, 97 S.Ct. 2939, 2940, 53 L.Ed.2d 1072 (1977), reh. denied, 434 U.S. 883, 98 S.Ct. 250, 251, 54 L.Ed.2d 168 (1977) (concurring opinion). For decisions refusing to apply res judicata to other types of administrative decision-making, see, e.g., *McMahan v. Yeilding*, 270 Ala. 504, 120 So.2d 429 (1960) (ministerial decision); *Venes v. Community School Board*, 43 N.Y.2d 520, 402 N.Y.S.2d 807, 373 N.E.2d 987 (1978) (executive powers of school board as employer); *Turner Constr. Co. v. State Tax Comm'n*, 57 A.D.2d 201, 394 N.Y.S.2d 78 (1977) (ministerial decision). That a preliminary agency finding, as distinct from a final determination, is not preclusive, see, e.g., *Thomas v. Consolidation Coal Co.*, 380 F.2d 69 (4th Cir.1967), cert. denied, 389 U.S. 1004, 88 S.Ct. 562, 19 L.Ed.2d 599 (1967), reh. denied, 389 U.S. 1059, 88 S.Ct. 768, 19 L.Ed.2d 862 (1968); *Aircraft, etc. Employees, Local 290 v. I.E. Schilling Co.*, 340 F.2d 286 (5th Cir.1965), cert. denied, 382 U.S. 972, 86 S.Ct. 528, 15 L.Ed.2d 464 (1966).

*Comment c.* On the elements of adjudicatory procedure, see *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966); *Nasem v. Brown*, 595 F.2d 801 (D.C.Cir.1979); *William J. Davis, Inc. v. Young*, 412 A.2d 1187 (D.C.App.1980); *Venes v. Community School Board*, 43 N.Y.2d 520, 402 N.Y.S.2d 807, 373 N.E.2d 987 (1978); *Ohmart v. Dennis*, 188 Neb. 260, 196 N.W.2d 181 (1972). On the relation between such procedure and the claim of right, compare *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), and *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), conformed to, 124 Ga.App. 220, 183 S.E.2d 416 (1971), with *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), reh. denied, 417 U.S. 977, 94 S.Ct. 3187, 41 L.Ed.2d 1148 (1974), and *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). See also Friendly, "Some Kind of Hearing", 123 U.Pa.L.Rev. 1267 (1975); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv.L.Rev. 921, 924-25 (1965).

*Comment d.* On the requirement of notice as applied to administrative adjudications, see, e.g., [Bell v. Burson](#), 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), conformed to, 124 Ga.App. 220, 183 S.E.2d 416 (1971); [Cruz v. Lavine](#), 45 A.D.2d 720, 356 N.Y.S.2d 334 (1974) (inadequacy of statement of issues).

Using invalidity for lack of jurisdiction as a vehicle for obtaining judicial review of administrative action has deep historical roots. See Henderson, *Foundations of English Administrative Law* (1963). For an unusually explicit judicial decision recognizing the difference between “invalidity” in timely judicial review and in subsequent attack on a determination, see [Abelleira v. District Court of Appeal](#), 17 Cal.2d 280, 109 P.2d 942 (1941).

*Comment e.* On the requirement of finality, see e.g., [United States v. Dann](#), 572 F.2d 222 (9th Cir.1978); [Sterling Drug, Inc. v. Weinberger](#), 509 F.2d 1236 (2d Cir.1975).

*Comment f.* Most reported decisions involving administrative adjudication concern issue preclusion as distinct from claim preclusion. For application of claim preclusion, see, e.g., [International Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining Co.](#), 325 U.S. 335, 65 S.Ct. 1166, 89 L.Ed. 1649 (1945), motion granted, 326 U.S. 684, 66 S.Ct. 8, 90 L.Ed. 400 (1945); [Magnolia Petroleum Co. v. Hunt](#), 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149 (1943), reh. denied, 321 U.S. 801, 64 S.Ct. 483, 88 L.Ed. 1088 (1944) (full faith and credit to sister state administrative determination), with which compare [Industrial Comm'n v. McCartin](#), 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140 (1947), and [Thomas v. Washington Gas Light Co.](#), 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980); [International Tel. & Tel. Corp. v. United Tel. Co.](#), 550 F.2d 287 (5th Cir.1977), *aff'd*, 433 F.Supp. 352 (M.D.Fla.1975); [Kelly v. Trans Globe Travel Bureau, Inc.](#), 60 Cal.App.3d 195, 131 Cal.Rptr. 488 (1976); [Trigg v. Industrial Comm'n](#), 364 Ill. 581, 5 N.E.2d 394 (1936) (bar against person in privity); [Boytor v. City of Aurora](#), 70 Ill.App.3d 303, 26 Ill.Dec. 734, 388 N.E.2d 449 (1979); [Million v. State Acc. Ins. Fund](#), 45 Or.App. 1097, 610 P.2d 285 (1980). For application of issue preclusion, see e.g., [United States v. Utah Constr. & Mining Co.](#), *supra*; [Bowen v. United States](#), 570 F.2d 1311 (7th Cir.1978); [Safir v. Gibson](#), 432 F.2d 137 (2d Cir.1970), *cert. denied*, 400 U.S. 850, 91 S.Ct. 57, 27 L.Ed.2d 88 (1970), *cert. denied*, 400 U.S. 942, 91 S.Ct. 241, 27 L.Ed.2d 246 (1970); [R.E. Spriggs Co. v. Adolph Coors Co.](#), 94 Cal.App.3d 419, 156 Cal.Rptr. 738 (1979); [Pratt v. Local 683](#), 260 Cal.App.2d 545, 67 Cal.Rptr. 483 (1968); [Sanderson v. Crucible Steel Corp.](#), 3 N.J.Super. 209, 66 A.2d 188 (1949); [Lanning v. Erie R.R.](#), 291 N.Y. 688, 52 N.E.2d 587 (1943). Giving preclusive effect to a prior judicial adjudication in a subsequent administrative adjudication is, e.g., [NLRB v. Heyman](#), 541 F.2d 796 (9th Cir.1976).

*Comment g.* On statutory exceptions to the rule of claim preclusion, see, e.g., [Newport News Shipbuilding & Dry Dock Co. v. Director, Office of Workers' Compensation Programs](#), 583 F.2d 1273 (4th Cir.1978), *cert. denied*, 440 U.S. 915, 99 S.Ct. 1232, 59 L.Ed.2d 465 (1979); [United States v. Smith](#), 482 F.2d 1120 (8th Cir.1973); [Taylor v. England](#), 213 A.2d 821 (D.C.App.1965); [White v. Michigan Consol. Gas Co.](#), 352 Mich. 201, 89 N.W.2d 439 (1958).

*Comment h.* Various conditions and qualifications of the basic rules of issue preclusion were applied in the following decisions: [Nasem v. Brown](#), 595 F.2d 801 (D.C.Cir.1979) (inadequacy of procedures for developing facts in original proceeding; issue preclusion refused); [Connecticut Light & Power Co. v. FPC](#), 557 F.2d 349 (2d Cir.1977), (issue not actually litigated); [Anderson, Clayton & Co. v. United States](#), 562 F.2d 972 (5th Cir.1977), *reh. denied*, 565 F.2d 1215 (1977) (same); [Lipsky v. Commonwealth United Corp.](#), 551 F.2d 887 (2d Cir.1976) (same); [Newport News Shipbuilding & Dry Dock Co. v. Director, Office of Workers' Compensation Programs](#), 583 F.2d 1273 (4th Cir.1978), *cert. denied*, 440 U.S. 915, 99 S.Ct. 1232, 59 L.Ed.2d 465 (1979) (different standard of proof in second proceeding); [Airtrip v. Califano](#), 569 F.2d 1298 (4th Cir.1978) (government not a party to first proceeding); [Matter of Houston Lighting and Power Co.](#), 10 NRC 563 (Nuclear Reg. Comm'n 1979) (statutes involve different issues); [Werlin Corp. v. P.U.C.](#), 53 Ohio St.2d 76, 372 N.E.2d 592 (1978) (same); [Board of County Comm'rs v. Racine](#), 24 Md.App. 435, 332 A.2d 306 (1975) (compelling need for redetermination of legal issue); [Shannon v. Moffett](#), 43 Or.App. 723, 604 P.2d 407 (1979) (inadequacy of procedures for developing facts); [Stillwater Sav. & Loan Ass'n v. Oklahoma Sav. & Loan Bd.](#), 534 P.2d 9 (Okla.1975) (changed conditions).

For refusal to apply issue preclusion because doing so might impede the administrative proceeding in which the finding was made, see [Kelly v. Trans Globe Travel Bureau, Inc.](#), 60 Cal.App.3d 195, 131 Cal.Rptr. 488 (1976); cf. [Shannon v. Moffett](#), supra. For refusal to apply issue preclusion because statute contemplated that the second tribunal was to make de novo determination of issues, see, e.g., [NLRB v. Denver Bldg. & Constr. Trades Council](#), 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951); [Porter & Dietsch, Inc. v. FTC](#), 605 F.2d 294 (7th Cir.1979); [Cummins v. Parker Seal Co.](#), 516 F.2d 544 (6th Cir.1975), cert. granted, 424 U.S. 942, 96 S.Ct. 1409, 47 L.Ed.2d 347 (1976), aff'd, 429 U.S. 65, 97 S.Ct. 342, 50 L.Ed.2d 223 (1976), vac., 433 U.S. 903, 97 S.Ct. 2965, 53 L.Ed.2d 1087 (1977), on remand, 561 F.2d 658 (6th Cir.1977); [Riverton Coal Co. v. UMW](#), 453 F.2d 1035 (6th Cir.1972), cert. denied, 407 U.S. 915, 92 S.Ct. 2439, 32 L.Ed.2d 690 (1972), discussed in [Markley](#), Conflict in the Courts, NLRB Decision as Res Judicata In Section 303 Suits, 27 Ad.L.Rev. 83 (1975); [Vargas v. Municipal Court](#), 22 Cal.3d 902, 150 Cal.Rptr. 918, 587 P.2d 714 (1978). But cf. [Mitchell v. National Broadcasting Co.](#), 553 F.2d 265 (2d Cir.1977); cf. [Thomas v. Washington Gas Light Co.](#), 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980).

*Comment i.* On the power of an administrative tribunal to grant corrective relief from its decision, see, e.g., [American Trucking Ass'ns v. Frisco Transp. Co.](#), 358 U.S. 133, 79 S.Ct. 170, 3 L.Ed.2d 172 (1958); [Eagle Motor Lines, Inc. v. ICC](#), 545 F.2d 1015 (5th Cir.1977). For the problem of the permissible scope of "reconsideration," compare [Spencer v. United States](#), 102 F.Supp. 774 (Ct.Cl.1952), cert. denied, 344 U.S. 828, 73 S.Ct. 29, 97 L.Ed. 644 (1952), with [Redding v. Board of County Comm'rs](#), 263 Md. 94, 282 A.2d 136 (1971), cert. denied, 406 U.S. 923, 92 S.Ct. 1791, 32 L.Ed.2d 124 (1972). For rejection of an attempt to present newly discovered evidence through the medium of judicial review, see, e.g., [Daggs v. Personnel Comm'n of Modesto](#), 1 Cal.App.3d 925, 82 Cal.Rptr. 157 (1969). For refusals to allow relief by means of collateral attack on an administrative adjudication, see, e.g., [Campbell v. Superior Court](#), 18 Ariz.App. 287, 501 P.2d 463 (1972); [Franklin v. District of Columbia](#), 248 A.2d 677 (D.C.App.1968); [Stewart Bonded Warehouse, Inc. v. Bevis](#), 294 So.2d 315 (Fla.1974); [State v. Wenof](#), 102 N.J.Super. 370, 246 A.2d 59 (1968). See generally 2 Davis, Administrative Law Treatise § 18.09 (1958).

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 25<sup>th</sup> day of March, 2019, I served the foregoing document by email to the following persons:

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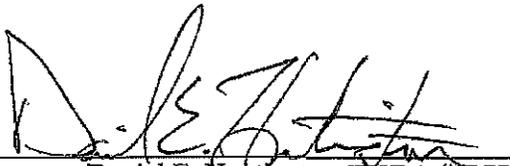
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WSAJ Foundation

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