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NO. 96189-1

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL WEAVER,

Respondent,

v.

CITY OF EVERETT and DEPARTMENT OF LABOR & INDUSTRIES,

Petitioners.

**ANSWER TO AMICUS CURIAE WSAJ
DEPARTMENT OF LABOR & INDUSTRIES
AND CITY OF EVERETT**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE2

III. ARGUMENT4

 A. Res Judicata Bars Weaver’s Attempt to Relitigate Allowance4

 1. This Court has applied res judicata principles for decades, and they apply to bar Weaver’s claim4

 2. Whether the claim is the same cause of action is not at issue, but if it were, it is the same cause of action.....10

 B. Collateral Estoppel Bars Weaver’s Case16

 C. WSAJ’s Approach Harms Workers Because It Leaves Workers With Allowed Claims Out in the Cold.....19

IV. CONCLUSION20

TABLE OF AUTHORITIES

Cases

<i>Abraham v. Dep't of Labor & Indus.</i> , 178 Wash. 160, 34 P.2d 457 (1934)	1, 4, 6
<i>Broom v. Morgan Stanley DW Inc.</i> , 169 Wn.2d 231, 236 P.3d 182 (2010).....	4
<i>Christensen v. Grant Cty. Hosp. Dist. No. 1</i> , 152 Wn.2d 299, 96 P.3d 957 (2004).....	16
<i>De Fraine v. Dep't of Labor & Indus.</i> , 180 Wash. 504, 40 P.2d 987 (1935)	3
<i>Dellen Wood Prod., Inc. v. Dep't of Labor & Indus.</i> , 179 Wn. App. 601, 319 P.3d 847 (2014).....	18
<i>Dennis v. Dep't of Labor & Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987).....	13, 16
<i>Dep't of Labor & Indus. v. Rowley</i> , 185 Wn.2d 186, 378 P.3d 139 (2016).....	14
<i>Ek v. Dep't of Labor & Indus.</i> , 181 Wash. 91, 41 P.2d 1097 (1935)	1, 4, 6
<i>Hadley v. Maxwell</i> , 144 Wn.2d 306, 27 P.3d 600 (2001).....	17, 18
<i>Hayes v. City of Seattle</i> , 131 Wn.2d 706, 934 P.2d 1179 (1997).....	11
<i>Jacobs v. State ex rel. Wyoming Workers' Safety & Comp. Div.</i> , 216 P.3d 1128, 1132 (Wyo. 2009).....	9
<i>Kingery v. Dep't of Labor & Indus.</i> , 132 Wn.2d 162, 937 P.2d 565 (1997).....	passim

<i>Larson v. City of Bellevue</i> , 188 Wn. App. 857, 355 P.3d 331 (2015), <i>aff'd</i> , <i>Spivey v. City of Bellevue</i> , 187 Wn.2d 716, 389 P.3d 504 (2017); <i>overruled on other grounds by Clark County v. McManus</i> , 185 Wn.2d 466, 372 P.3d 764 (2016).....	16
<i>Le Bire v. Dep't of Labor & Indus.</i> , 14 Wn.2d 407, 128 P.2d 308 (1942).....	1, 4, 6
<i>Marley v. Dep't of Labor & Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994).....	passim
<i>Phillips v. Dep't of Labor & Indus.</i> , 49 Wn.2d 195, 298 P.2d 1117 (1956).....	18
<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983).....	11
<i>Ronald Spriggs</i> , No. 07 24270, 2009 WL 1504259 (Wash. Bd. Indus. Ins. Appeals Mar. 24, 2009)	3, 14, 15
<i>Shoemaker v. City of Bremerton</i> , 109 Wn.2d 504, 745 P.2d 858 (1987).....	5, 9
<i>State v. Jordan</i> , 160 Wn.2d 121, 156 P.3d 893 (2006).....	10
<i>Thompson v. Lewis Cty.</i> , 92 Wn.2d 204, 595 P.2d 541 (1979).....	9
<i>Williams v. Leone & Keeble, Inc.</i> , 171 Wn.2d 726, 254 P.3d 818 (2011).....	10

Statutes

RCW 51.08.140	passim
RCW 51.32.060	15
RCW 51.32.080	15

RCW 51.32.090	15
RCW 51.32.160	12, 18
RCW 51.32.180	9, 11, 12
RCW 51.32.185	9, 11, 12, 17
RCW 51.32.185(3).....	12
RCW 51.36.010	14, 15
RCW 51.52.050	1, 4, 19, 20
RCW 51.52.100	17
RCW 51.52.110	passim
RCW 51.52.115	17
RCW 51.52.140	1, 17

Rules

RAP 9.11.....	17
---------------	----

Other Authorities

<i>Comprehensive Annual Financial Report,</i> https://www.lni.wa.gov/ClaimsIns/Files/StateFundFinancial/2018CafrRpt.pdf	14, 19
Philip A. Trautman, <i>Claim and Issue Preclusion in Civil Litigation in Washington</i> , 60 Wash. L. Rev. 805 (1985).....	5
<i>Restatement (Second) of Judgments</i> § 83 cmt. b.....	16

I. INTRODUCTION

Amicus Washington State Association for Justice Foundation (WSAJ) asks this Court to abandon 80 years of precedent applying the doctrine of claim preclusion to industrial insurance cases. RCW 51.52.050 and RCW 51.52.110 provide that unappealed Department of Labor & Industries and Board of Industrial Insurance Appeals orders are final. RCW 51.52.140 provides that the civil practice applies in workers' compensation appeals. These provisions and decades of case law support this Court applying *res judicata* in the workers' compensation context.¹

L&I and the City agree with WSAJ that the Court should consider the Industrial Insurance Act's purposes. WSAJ Br. 4. The express legislative policy is that of finality, which eliminates the expense, uncertainty, and aggravation of repeated litigation of settled matters. WSAJ's arguments would work to the detriment of 84 percent of workers with allowed claims, whose claims are—in Weaver's words—merely “minor” medical-only claims. *See* Ans. to City 19. If WSAJ's arguments are accepted, employers could argue that when claim costs go up, the prior

¹ *See Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-38, 886 P.2d 189 (1994); *Le Bire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 419-20, 128 P.2d 308 (1942); *Ek v. Dep't of Labor & Indus.*, 181 Wash. 91, 94, 41 P.2d 1097 (1935); *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 163-64, 34 P.2d 457 (1934).

final and binding orders in these cases should not bind them. Likewise, workers could argue final and binding orders do not bind them either. This result is counter to sure and certain relief guaranteed by the Act. This Court should reverse the Court of Appeals' ruling to the contrary.

II. STATEMENT OF THE CASE

WSAJ claims that "Weaver's initial application sought less than \$10,000 in time loss." WSAJ Br. 18. Not so. The application form did not provide a place for Weaver to ask for specific benefits; instead, he provided information about the alleged occupational disease and personal details. AR 250. WSAJ misunderstands the process of an L&I claim, which does not involve an application for a type of benefit like time loss. Instead, it involves first establishing a work-related injury or condition. Thus, the "application" was not for a specific benefit; it was a claim that Weaver's condition was work-related, entitling him to any benefits that would follow from an accepted claim.

In reviewing Weaver's application, L&I did not consider whether Weaver was totally and temporarily disabled and entitled to time loss or any type of benefit; it decided only whether his condition proximately and naturally arose from employment, so as to allow the claim. In denying the claim, the L&I order stated only that "[Weaver's] condition is not an

occupational disease as contemplated by section 51.08.140 RCW.” AR 278.

Consistent with the terms of L&I’s order, the Board framed the case before it as involving only claim allowance:

Whether the claimant’s melanoma arose naturally and proximately out of distinctive conditions of his employment as a firefighter for the City of Everett?

AR 253. And consistent with this framing, the testimony at the first hearing addressed only whether Weaver’s condition arose proximately and naturally out of his employment, not whether he was temporarily totally disabled. *See* AR 327-59 (Dr. Coleman testimony did not discuss temporary total disability); AR 375-93 (Weaver testimony did not discuss time off from work).²

The lack of evidence on temporary total disability is consistent with well-established practice at the Board that only allowance, not what benefits to grant upon allowance, is before the Board in an appeal from an order rejecting a claim. *Ronald Spriggs*, No. 07 24270, 2009 WL 1504259, at *9 (Wash. Bd. Indus. Ins. Appeals Mar. 24, 2009) (Board would not consider extent of benefits question in case about allowance of occupational disease); *see also De Fraine v. Dep’t of Labor & Indus.*, 180

² In fact, such evidence as to any type of benefit eligibility would have been irrelevant and inadmissible regardless of whether offered by the City, L&I, or Weaver.

Wash. 504, 513, 40 P.2d 987 (1935) (court could not decide time loss issue when L&I had not). As Weaver admits, neither the Board nor L&I found anything with respect to time loss or a pension, and so he presented his subjective valuation of the claims in the form of an unsubstantiated declaration. Ans. to City 13; AR 192-94.

III. ARGUMENT

A. Res Judicata Bars Weaver's Attempt to Relitigate Allowance

1. This Court has applied res judicata principles for decades, and they apply to bar Weaver's claim

WSAJ argues that the doctrine of res judicata should not apply to claim allowance decisions. WSAJ Br. 4. But WSAJ's approach would require overruling 80 years of precedent. *See Kingery*, 132 Wn.2d at 169; *Marley*, 125 Wn.2d at 537-38; *Ek*, 181 Wash. at 94; *Le Bire*, 14 Wn.2d at 419-20; *Abraham*, 178 Wash. at 163-64. And like Weaver, WSAJ does not even attempt to show that this precedent is incorrect and harmful. *See Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239, 236 P.3d 182 (2010) (stare decisis demands a showing that a ruling is incorrect and harmful to overrule it).

WSAJ's approach would also require ignoring the will of the Legislature. RCW 51.52.050 (unappealed L&I orders final); RCW

51.52.110 (unappealed Board orders final).³ As leading civil procedure scholar Professor Philip Trautman has explained, “[a] decision by an administrative agency may be binding if that was the intention of the legislature in creating the agency.” Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 825 (1985). Thus, L&I’s determinations in workers’ compensation claims are a “common example” of binding agency decisions entitled to preclusive effect. Trautman, 60 Wash. L. Rev. at 825.

Indeed, this Court has long held that the doctrine of claim preclusion applies to final workers’ compensation decisions. *Kingery*, 132 Wn.2d at 169; *Marley*, 125 Wn.2d at 537. WSAJ notes that the Court has sometimes used the term *res judicata* in a general sense to encompass both issue and claim preclusion, citing a case about a law enforcement civil service proceeding. WSAJ Br. 5 (citing *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987)). But this is not the way the Court has used the term in the workers’ compensation context.

In applying *res judicata* to enforce the finality of L&I workers’ compensation decisions, the *Marley* Court explicitly relied on the doctrine

³ WSAJ contends that these statutes about finality are “unremarkable” because finality rules are generally present for all administrative orders. WSAJ Br. 10 n.5. But the fact that the Legislature has provided in many contexts that agency orders are final does not dilute their impact. Instead, it shows that the Legislature values finality.

of claim preclusion. 125 Wn.2d at 537 (“The doctrine of claim preclusion applies to a final judgment by [L&I] as it would to an unappealed order of a trial court.”). Likewise, *Kingery* cited to *Marley* and used res judicata to mean claim preclusion. 132 Wn.2d at 170. *Abraham* and *Ek* found that final agency orders precluded duplicate litigation, and it is *Le Bire* that first used the term res judicata, again to mean claim preclusion. *Abraham*, 178 Wash. at 163-64; *Ek*, 181 Wash. at 94; *Le Bire*, 14 Wn.2d at 420. *Kingery* likewise points to *Abraham* as a case involving res judicata. 132 Wn.2d at 169.

Marley is not only notable because it expressly mentions claim preclusion in the workers’ compensation context, but for its analysis. In *Marley*, L&I denied a widow’s claim for survivor benefits, and she did not appeal. 125 Wn.2d at 535-36. Several years later, she filed the same claim for benefits, asserting that L&I had failed to consider the effect of certain evidence when it denied the claim. *Id.* at 535, 542-43. She argued that because the first decision was legally incorrect, it was void, and should not prevent her from litigating her claim a second time. *Id.* at 538.

The Court rejected this argument. It first noted the longstanding applicability of claim preclusion to L&I’s final judgments, explaining that the doctrine applied “as it would to an unappealed order of a trial court.” *Marley*, 125 Wn.2d at 537. The Court then explained that even if L&I’s

first decision were incorrect, the power to decide a case includes the power to decide it wrong. *Id.* at 543. Because L&I had personal and subject matter jurisdiction over the widow's claim, its denial order was not void. *Id.* at 542. The Court explained "[t]he failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim." *Id.* at 538. By same claim, the Court meant the same workers' compensation claim.

The situation here is no different. Weaver did not maintain his appeal of the Board's denial of his occupational disease claim, and so that order became final. AR 266; RCW 51.52.110. After filing the same workers' compensation claim, as in *Marley*, Weaver's failure to appeal the first order turned the order "into a final adjudication, precluding any reargument of the same claim." *Marley*, 125 Wn.2d at 538. Weaver filed the same workers' compensation claim (same parties, exposure, condition, and statute) and presented new evidence, but just as in *Marley*, claim denial has already been decided, and that decision is now final. The claims are the same, and the Board had personal jurisdiction and subject matter jurisdiction over Weaver's occupational disease claim. Principles of finality apply. *Id.* at 537.

The Court's decision in *Kingery* requires the same result. There, L&I again denied a widow's claim for benefits, and eight years later, she

refiled it, pointing to new evidence in the case. 132 Wn.2d at 167. Once again, the Court held that “[a]n unappealed Department order is *res judicata* as to the issues encompassed within the terms of the order, absent fraud in the entry of the order.” *Id.* at 169-70. And because no ground of equity applied, the widow’s second claim was barred. *Id.* at 169-77.⁴ Nothing distinguishes this case from Weaver’s case: under *Kingery*, his attempt to refile a denied claim based on new evidence must be rejected.

Ignoring decades of case law and stare decisis, WSAJ argues that there is not really a claim subject to *res judicata*, but an issue subject to collateral estoppel. WSAJ Br. 14. It contends that “claim preclusion is a poor fit for the unique, segmented procedural world of workers’ compensation.” WSAJ Br. 16. This not only contradicts *Marley*, *Kingery*, and other cases that apply claim preclusion at the agency level, but there is no segmented decision here—L&I’s decision to allow or deny a claim is a single decision of the type recognized in *Marley* and *Kingery*.

⁴ The decision first ruled on *res judicata* grounds and then went on to discuss if there was a basis in equity to provide her relief, which a plurality decision decided there was not. *Kingery*, 132 Wn.2d at 177 (Madsen, J. concurring). WSAJ offers this case as an opportunity to clarify the plurality opinion. WSAJ Br. 7 n.3. No such need exists. First, the majority (not a plurality) affirmed the normal application of finality under the plain language of RCW Title 51 using principles of *res judicata*. *Kingery*, 132 Wn.2d at 169-73. Second, it was only the scope of the equity exception to finality that was the subject of the plurality. 132 Wn.2d at 173; 132 Wn.2d at 177 (Madsen, J. concurring). Whether one of the equity exceptions applies here has never been the focus of this case (i.e., whether Weaver could understand the order—an order that patently denied his claim—and whether L&I or the City misled him).

To sidestep these Washington cases, WSAJ cites a Wyoming court that prefers the doctrine of collateral estoppel because “administrative decisions deal primarily with issues rather than causes of actions or claims.” WSAJ Br. 15-16 (quoting *Jacobs v. State ex rel. Wyoming Workers’ Safety & Comp. Div.*, 216 P.3d 1128, 1132 (Wyo. 2009)). This Court has often rejected using cases from foreign jurisdictions to decide Washington issues. *E.g.*, *Thompson v. Lewis Cty.*, 92 Wn.2d 204, 208-09, 595 P.2d 541 (1979). Washington courts have applied claim preclusion to workers’ compensation decisions for 80 years, and Wyoming’s opinions are not useful on this point. And in any event, the Wyoming case is inapt: it was not a claim allowance case, but a case about what conditions should be allowed in a claim after allowance. 216 P.3d at 1129.

WSAJ also cites *Shoemaker*, but this case only proves L&I and the City’s point. WSAJ Br. 14-15 (citing *Shoemaker*, 109 Wn.2d at 512). There, the first case was a civil service commission agency hearing and the second a section 1983 action in superior court. The two cases did not share a cause of action so of course res judicata did not apply. Here, in contrast, Weaver’s two actions for allowance of his occupational disease claim have the same cause of action under the same statutes: RCW 51.08.140, RCW 51.32.180, and RCW 51.32.185. Res judicata applies.

2. Whether the claim is the same cause of action is not at issue, but if it were, it is the same cause of action

Weaver's two cases are the same: same parties, same occupational exposure, same medical condition, and same statutes. So res judicata bars his second claim. "Res judicata applies where the subsequent action involves (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons"

Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 730, 254 P.3d 818 (2011).

WSAJ argues that there are two elements of res judicata at issue here: subject matter and cause of action. WSAJ Br. 11. But Weaver did not raise the element of "cause of action" before this Court, only arguing the element of "subject matter." Ans. to City 5. In fact, Weaver has emphasized that the cause of action is not at issue. Ans. to City 5, n.1. This is because the Court of Appeals ruled that the City showed the same cause of action. *Weaver v. Dep't of Labor & Indus.*, 4 Wn. App. 2d 303, 321, 421 P.3d 1013, *review granted*, 192 Wn.2d 1001 (2018). An amicus cannot raise an argument that Weaver concedes, so this Court should not consider its cause of action arguments. *See State v. Jordan*, 160 Wn.2d 121, 128 n.5, 156 P.3d 893 (2006) (court not required to consider argument raised solely by amicus).

If the Court reaches the question, courts consider the following factors in determining whether the same cause of action is involved:

1. Whether the second action's prosecution would destroy or impair the rights or interests established in the prior judgment;
2. Whether the two actions present substantially the same evidence;
3. Whether the two suits involve infringement of the same right; and
4. Whether the two suits arise out of the same transactional nucleus of facts.

Hayes v. City of Seattle, 131 Wn.2d 706, 713, 934 P.2d 1179 (1997) (citing *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983)).

The *Hayes* criteria show that both cases have the same cause of action. (1) Allowing Weaver's second case to proceed would destroy or impair rights established in the first case because it could reverse the previous claim denial, which is final. RCW 51.52.110. (2) Both matters rely on medical evidence about whether work exposure during the same period caused Weaver's cancer. (3) The second case would infringe on the same right because they are both workers' compensation allowance cases. RCW 51.08.140; RCW 51.32.180; RCW 51.32.185. And (4) both claims arise out the same transactional nucleus of facts—firefighting for the City during the 1990s and early 2000s. These criteria show that Weaver's current and previous cases are the same cause of action because the allowance of a workers' compensation claim for the same melanoma is

involved in both cases.

WSAJ's arguments to the contrary lack merit. It notes that as part of a cause of action, the party must have included all of the relief that the party seeks. WSAJ Br. 12-13. L&I and the City do not disagree with this proposition. The relief Weaver sought was allowance of his claim under RCW 51.08.140, RCW 51.32.180, and RCW 51.32.185. Weaver sought the same legal relief in both of his cases.

WSAJ also notes that the right must have "accrued," so that the party could seek relief in court. WSAJ Br. 14. Again L&I and the City do not disagree. Weaver's right had accrued when he filed his first claim. His malignant melanoma allowed him to file a claim, and he did not need to wait for the melanoma to metastasize to file it. RCW 51.32.185(3) (covering malignant melanoma). If he had prevailed in his original case, he would have been entitled to all the benefits associated with an allowed claim, including the ability to request reopening when his condition worsened. RCW 51.32.160.

Where L&I and the City diverge with WSAJ is in its characterization of the meaning of the allowance proceeding. WSAJ correctly notes that these proceedings are limited to claim allowance and that potential benefits are not at issue. WSAJ Br. 4, 9, 14. But it argues this means that the allowance proceeding entitles the worker to no legal

relief, contending this does not occur until L&I determines there is “compensable loss.” WSAJ Br. 4. Thus, it argues that a worker’s action for claim allowance does not constitute a “claim” or “cause of action” because, it asserts, the “allowance determination is not *linked to* compensable loss.” WSAJ Br. 14.⁵

WSAJ is correct that “compensable loss” is not an element of claim allowance, but is incorrect that this means that there is no relief granted by the initial allowance decision. The elements of an occupational disease claim require showing “[t]he causal connection between a claimant’s physical condition and his or her employment . . . [with] competent medical testimony which shows that the disease is probably, as opposed to possibly, caused by the employment” and whether the worker’s condition arose naturally out of the employment. *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 477, 481, 745 P.2d 1295 (1987); RCW 51.08.140. Nothing in the definition of occupational disease requires the Board to consider compensable loss when deciding if L&I should have

⁵ WSAJ and Weaver apparently disagree on this point. Weaver says there is no identity of subject matter because the compensable loss is purportedly different in both cases. Ans. to City 8. WSAJ argues that claim allowance is not linked to compensable loss. WSAJ Br. 14.

allowed the claim.⁶ In fact, were this case, which it is not, there would never be allowance orders. A worker would be required to file a new claim for each benefit sought, and would have to prove causation at each stage.

Nor does WSAJ understand litigation at the Board. After the elements of allowance are proven in an appeal to the Board or beyond, L&I will be directed to allow the claim. *See Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 213, 378 P.3d 139 (2016) (upon reversal of order denying claim, worker's claim allowed); *Spriggs*, 2009 WL 1504259, *9-10 (after finding condition arose naturally and proximately out of employment, entering order directing L&I to open occupational disease claim). So if Weaver's condition had arisen naturally and proximately out of employment, his claim would have been allowed.

Although L&I and the City agree with WSAJ that compensable loss was not an element of Weaver's claim at the Board, they disagree with WSAJ that a claim allowance decision results in no legal relief. WSAJ argues that because there is a system of first deciding claim

⁶ The vast majority of workers' compensation claims involve no compensable loss (as WSAJ appears to define it). Eighty-four percent of all allowed claims are for medical aid only, meaning no monetary benefit. *Comprehensive Annual Financial Report* 6, <https://www.lni.wa.gov/ClaimsIns/Files/StateFundFinancial/2018CafRpt.pdf>. On the other hand, treatment flows directly from claim allowance; a worker may have treatment so long as the workplace exposure or injury proximately caused the condition. *See* RCW 51.36.010. To the extent that WSAJ implies that a compensable loss means time loss or a pension, it misunderstands normal claim adjudication and Washington workers' compensation law.

allowance and then deciding whether to award benefits, this is “claim splitting,” and res judicata does not apply. WSAJ Br. 8-9. Its arguments rest on a belief that there is no relief in a Board proceeding reviewing an order denying claim allowance. WSAJ Br. 4, 9, 14. But WSAJ is wrong that there is no relief resulting from such a proceeding. The relief available here was reversal of the denial order, which would then result in an open workers’ compensation claim. *See Spriggs*, 2009 WL 1504259, at *9.

Contrary to WSAJ’s suggestion, an action for claim allowance does not merely decide an issue about proximate cause; rather, it leads to specific legal consequences. WSAJ Br. 9; *Spriggs*, 2009 WL 1504259, at *9. As WSAJ admits, claim allowance is the foundational decision—the gateway—from which all workers’ compensation benefits flow. *See* WSAJ Br. 9. An open claim entitles the injured worker to seek necessary and proper treatment, time loss compensation, vocational services, and partial or total disability. RCW 51.32.060, .080, .090; RCW 51.36.010. None of these benefits is available without an open claim.

Because the allowance decision fundamentally alters the worker’s legal status in relation to L&I, it does not merely resolve an issue, as WSAJ asserts. It resolves the claim. Resolving only an issue would mean that there would be some sort of legal proceeding after claim denial. There is not. Rather, an action for claim allowance is a “legal claim” where the

“entitlement under substantive law to particular relief” is an open workers’ compensation claim. *See* WSAJ Br. 13 (quoting *Restatement (Second) of Judgments* § 83 cmt. b). WSAJ is simply wrong that an action for claim allowance involves no claim or cause of action.

B. Collateral Estoppel Bars Weaver’s Case

Collateral estoppel also bars Weaver’s attempt to argue that his workplace exposure caused his cancer. Weaver only disputes the injustice prong of collateral estoppel.⁷ WSAJ argues that the touchstone of the inquiry is whether the plaintiff had a full and fair opportunity to litigate an issue. WSAJ Br. 17. L&I and the City agree with this formulation. Here, Weaver did have a full and fair opportunity to litigate his case. Weaver could and did present witnesses to support his occupational disease claim. Claim allowance requires medical expert testimony, and Weaver called a doctor who had successfully testified in other malignant melanoma litigation. *Dennis*, 109 Wn.2d at 477; *Larson v. City of Bellevue*, 188 Wn. App. 857, 355 P.3d 331 (2015), *aff’d*, *Spivey v. City of Bellevue*, 187

⁷ “For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.” *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). There is no dispute that the City and L&I proved the first three elements.

Wn.2d 716, 389 P.3d 504 (2017); *overruled on other grounds by Clark County v. McManus*, 185 Wn.2d 466, 372 P.3d 764 (2016). While the Board ruled against him, there is no indication that Weaver lacked a full and fair opportunity to litigate whether the cancer resulted from his work.

WSAJ points out that a disparity in relief may mean that a party did not fully litigate a matter. WSAJ Br. 18 (citing, among others, *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001)). It argues that “Weaver’s initial application sought less than \$10,000 in time loss” and he has spent more than that on the medical witnesses. WSAJ Br. 18.⁸ But Weaver would have received costs if he won. RCW 51.32.185.

Contrary to WSAJ’s arguments, *Hadley* does not support finding injustice here. WSAJ Br. 17-18 (citing *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001)). In *Hadley*, the Court found injustice in applying collateral estoppel because there was no incentive in the first proceeding

⁸ Weaver’s initial application did not mention time loss. AR 250. And the certified appeal board record contains no evidence about the costs of medical witnesses notwithstanding the Court of Appeals’ speculation. Only evidence in the record may be considered. RCW 51.52.115; *see* RAP 9.11. WSAJ’s real argument is that Weaver didn’t call the right witnesses, speculating on the cost. WSAJ Br. 19. But looking to whether a party fully litigated a matter should not involve second-guessing the witnesses who were called. Weaver did fully litigate the matter by any formulation. He retained an experienced workers’ compensation attorney to present his appeal, used a doctor who had won other malignant melanoma cases, called four other witnesses, cross-examined the employer’s witnesses, submitted exhibits, and provided briefing. AR 252-64, 296, 328; RCW 51.52.100, .140. Weaver says there should have been more a focus on sun exposure in the first case but Weaver testified he was sunburned only once at work and covered up at other times. AR 381. It is that evidence the Court should consider in determining whether he had a full and fair opportunity to litigate.

to fully litigate a traffic infraction with a nominal \$95 penalty. *Hadley*, 144 Wn.2d at 309, 315. The Court explained that collateral estoppel is not appropriate “when there is nothing more at stake [in a first proceeding] than a nominal fine.” *Id.* at 315. But this case was not about a nominal amount but whether to allow a claim—the gateway to all benefits.

Critically, the issue in Weaver’s first case was not about time loss, as WSAJ asserts, but whether to allow his occupational disease claim. *See* WSAJ Br. 18-19. There is no disparity in relief because it was the same relief in both cases. Because all workers’ compensation benefits flow from the allowance determination, the stakes in the first case included the availability of all benefits, including those available to Weaver if his cancer worsened. RCW 51.32.160. These stakes provide sufficient incentive for vigorous litigation and are identical in the second case.

WSAJ correctly notes that a claim denial’s preclusive effect may foreclose future benefits if the condition worsens. WSAJ Br. 19. RCW 51.52.110 puts a worker on notice that an unappealed order is final. *See Dellen Wood Prod., Inc. v. Dep’t of Labor & Indus.*, 179 Wn. App. 601, 629, 319 P.3d 847 (2014) (statutory notice apprises interested parties of procedures in statute). And it is well established that a worker may seek to reopen a claim if a condition worsens. *Phillips v. Dep’t of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956); RCW 51.32.160. To achieve

reopening for a worsening condition, the worker necessarily must have obtained an initial opening of the claim.

C. WSAJ’s Approach Harms Workers Because It Leaves Workers With Allowed Claims Out in the Cold

WSAJ apparently agrees with Weaver’s theory that so-called “minor” claims don’t deserve preclusive effect. *See* Ans. to City 19. But Weaver’s and WSAJ’s approach does not aid workers. WSAJ correctly observes that the Legislature intended the Industrial Insurance Act to provide sure and certain relief. WSAJ Br. 19. L&I and the City agree that “the Court should consider the legislative goals underlying this unique statutory scheme.” WSAJ Br. 19. One of the Legislature’s goals is to provide finality. RCW 51.52.050, .110. It benefits both workers and employers by reducing the burdens of repetitive litigation: expense, uncertainty, and aggravation.

In fact, WSAJ’s proposal to eliminate res judicata and restrict collateral estoppel would largely work to the detriment of workers. Eighty-four percent of the 95,000 claims opened in 2018 were for medical treatment only, with no other monetary benefits.⁹ With such medical-only claims, an employer often has limited financial incentive to contest claim allowance. All the same, under the doctrines of res judicata and collateral

⁹ *Comprehensive Annual Financial Report 6*, <https://www.lni.wa.gov/ClaimsIns/Files/StateFundFinancial/2018CafrRpt.pdf>.

estoppel, an unappealed allowance decision binds the employer. *Marley*, 125 Wn.2d at 537. If the worker's condition worsens (thus driving claim expenses up), the employer cannot argue that allowance be revisited because it lacked sufficient incentive to litigate the first case.

WSAJ would do away with these worker protections. If application of finality was limited to cases involving benefits beyond treatment and large financial stakes, employers will rightly assert they are not bound by allowance orders in medical-only claims. This would force workers in those cases to relitigate claim allowance decisions, sometimes many years after those decisions appeared to have become final. Such a result conflicts with the Legislature's decision that unappealed orders are final. RCW 51.52.050; RCW 51.52.110. This Court should reject WSAJ's arguments, reverse the Court of Appeals, and affirm the trial court decision.

IV. CONCLUSION

Workers, employers, and L&I should not have to relitigate allowance cases. It does not further sure and certain relief to have duplicative proceedings. This Court should affirm the trial court.

RESPECTFULLY SUBMITTED this 19th day of April 2019.

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NO. 96189-1

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL WEAVER,

Respondent,

v.

CITY OF EVERETT and
DEPARTMENT OF LABOR &
INDUSTRIES,

Petitioners.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' and the City of Everett's Answer to Amicus Curiae WSAJ and this Certificate of Service in the below described manner:

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